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Global Forced Labor Prevention Laws: Social Responsibility Goals

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Governments worldwide are taking steps to address forced labor in the supply chain, says Damon V. Pike of BDO USA.

The pressure on companies importing goods from overseas to document that their supply chains are free from forced labor has never been greater or more essential. Forced labor risks typically arise through the global supply chains of businesses and these issues have attracted increasing scrutiny by a variety of stakeholders: governments, regulators, human rights organizations, investigative journalists, consumers, and investors.

With the escalation in the development of ESG policies throughout the corporate world, one issue seems to have become predominant in the global landscape: preventing the importation, sale, or distribution of any merchandise made in whole or in part with forced labor. Several jurisdictions have adopted policies, trade rules and/or legislation that ban products made with forced labor from crossing their borders, others require businesses to take steps and report on measures taken to mitigate the risk of forced labor in supply chains, and some rely on a "name and shame" approach. However, of all the major trading nations, the United States has taken the lead in enacting legislation "with teeth" that is widely supported by all elements of the political spectrum and that enlists a "whole of government" approach but places clear responsibility for enforcement within a single agency (U.S. Customs & Border Protection, or CBP). In all jurisdictions, however, companies face considerable reputational risks if they do not take effective action to prevent forced labor in their global supply chains.

This article looks at the history and parameters of the U.S. Uyghur Forced Labor Prevention Act (UFLPA) and examines several similar initiatives globally—both pre- and post-UFLPA—designed to address the same topic. It appears that initiatives in some other jurisdictions and regions fall short of addressing the stated goals of expunging forced labor from global supply chains of finished goods and raw materials because, for now, they focus only on requiring companies to report on their activities and processes to prevent forced labor but do not authorize any government agency to detain and, if warranted, seize offending merchandise (whether imported or produced domestically). Until these initiatives provide for robust enforcement with similar outcomes, UFLPA remains the only legislation with serious monetary and reputational consequences for global traders.

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What Is Forced Labor?

The International Labour Organization (ILO, based in Geneva, Switzerland) launched the modern debate about forced labor with its Forced Labour Convention (No. 29) adopted in 1930. The United States was the first country to graft the mandates of this agreement into domestic law (*see infra* re: the Tariff Act of 1930). Other ILO agreements preceded and followed the Convention, and a new protocol was added in 2014. This protocol was much more detailed and robust than the 1930 agreement and is now considered the "trigger point" for the wave of global developments since 2014 to prevent the use of forced labor.

Identifying forced labor practices is not always a simple exercise. The ILO has published on its website 11 indicators of forced labor, which most government agencies (including CBP) look to when examining allegations of forced labor:

1. Abuse of vulnerability;
2. Deception;
3. Restriction of movement;
4. Isolation;
5. Physical and sexual violence;
6. Intimidation and threats;
7. Retention of identity documents;
8. Withholding of wages;
9. Debt bondage;
10. Abusive working and living conditions; and
11. Excessive overtime.

According to the ILO, while the presence of a single indicator in a given situation may imply the existence of forced labor, in other cases several indicators taken together may point to a forced labor scenario. Overall, these 11 indicators cover the main possible elements of a forced labor situation and, hence, provide the basis to assess whether an individual worker is a victim of this crime. For example, we can conjure up visions of children working in garment "sweatshops" where abusive working conditions, excessive overtime, and intimidation and threats may prevail in the workplace. That's an easy case for finding forced labor. But what about adult workers who report to work in gleaming, new, clean, modern factories, but are forced to surrender their identity documents upon entering the workplace—that is also forced labor.

China—the target of the U.S. legislation—is cited in government reports to be engaged in forced labor practices. According to the U.S. Department of Labor (DOL), China has arbitrarily detained more than one million Uyghurs and other mostly Muslim minorities in China's Xinjiang Uyghur Autonomous Region (XUAR) and they may be working under forced labor conditions following detention in "re-education camps" (U.S. Dept. of Labor, *Against Their Will: The Situation in Xinjiang*). While most of the production of merchandise through forced labor takes place in XUAR, recent reports show that China is transporting Uyghurs against their will to other parts of China (mainly to the many factories in China's coastal regions for easy export of goods) (U.S. Dept. of Labor, *Against Their Will: The Situation in Xinjiang*).

As DOL further states:

"These practices exacerbate a demand for members of Muslim ethnic minority groups that the government wants placed in work assignments where they can be controlled and watched, as well as receive Mandarin Chinese training and undergo political indoctrination. Once at a work placement, workers are usually subjected to constant surveillance and isolation. Given the vast surveillance state in Xinjiang and the threat of detention, individuals have little choice but to face the difficult situations present in these work assignments." (U.S. Dept. of Labor, *Against Their Will: The Situation in Xinjiang*)

China is not the only country cited, other countries (including those in the Asia-Pacific region and in the Arab States) are reported for such practices as well (*See* Int'l Labour Organization, *Forced Labour in Asia and the Pacific* (Apr. 2, 2018); Mary Nikkel, The Exodus Road, *Human Trafficking in the Middle East* (Mar. 20, 2024)). In fact, closer to home, CBP's investigations of claims of forced labor in Mexico have significantly increased since 2023, reflecting the widespread perception of child labor use in that country. Suffice it to say that forced labor is a global issue and companies engaged in international trade of merchandise need to "know their vendors" and their labor practices throughout the entire supply chain or risk being caught up in the global initiatives to prevent the use of forced labor, especially in the United States, which has the oldest law and the most robust enforcement of any major trading nation, to weed out forced labor from the supply chain.

But even the United States has documented instances of, e.g., child labor violations. In February 2023, one of the nation's largest food safety sanitation services providers paid USD 1.5 million in civil penalties after the U.S. DOL's Wage and Hour Division found the company employed at least 102 children, ranging from 13 to 17 years of age, in hazardous occupations working overnight shifts at 13 meat processing facilities in eight states (*See* U.S. Dept. of Labor News Release, *More Than 100 Children Illegally Employed in Hazardous Jobs, Federal Investigation Finds; Food Sanitation Contractor Pays $1.5m in Penalties* (Feb. 17, 2023)). This was just one of 955 investigations conducted by DOL in 2023 that resulting in findings of child labor violations (*See* U.S. Dept. of Labor, Wage & Hour Division, WHD By The Numbers 2023, Child Labor Enforcement: Keeping Young Workers Safe (2023)).

Smoot-Hawley Redux

Many are surprised to learn that the statute largely credited with accelerating the Great Depression of the 1930s—the Tariff Act of 1930 (otherwise known as the "Smoot-Hawley" Tariff Act)—is still valid law in the United States. The punitive tariffs associated with that law (surpassing 60% *ad valorem* for some products) have long since been repealed. However, this law included—for the first time in the history of *any* country—a prohibition on the importation of goods made with forced labor:

"All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision." (19 U.S.C. §1307)

Despite this sweeping prohibition, the law when enacted included a "consumptive demand" exception that essentially rendered the law unenforceable. Under that exception, if an importer could not source the good it needed from a domestic supplier in quantities sufficient to meet U.S. demand, it was allowed

to bring in the good *even if* the merchandise was made in whole or in part with, e.g., prison or child laborers.

This gaping hole of an exception continued for decades until 2015 when the rise of social responsibility initiatives designed to prevent human rights abuses first began to explode in the corporate arena. In part to close this loophole, Congress enacted the Trade Facilitation and Trade Enforcement Act (TFTEA) of 2015, which repealed the consumptive demand exception. Enforcement soon ramped up through pre-existing administrative procedures of CBP known as Withhold Release Orders (WROs). A special office at CBP HQ's Office of Trade was established in 2018 to centralize the agency's enforcement of WROs.

To Release or Not to Release: WROs

WROs authorize CBP's Port Directors at ports of entry—places where one may lawfully enter a country and/or import goods—to detain a shipment of merchandise. CBP can detain any shipment when it has reason to believe that the goods (or their inputs) were made with forced labor, forced child labor, or prison labor under §307 of the Tariff Act of 1930. The importer must present evidence that the targeted goods were *not* made with forced labor to obtain release of the goods. In addition, CBP can issue findings that apply to all importers of goods at all ports of entry and allow CBP to bypass the detention process and directly seize goods made in violation of §1307 (the statutory provision prohibiting the importation of goods made with forced labor). All WROs and Findings are publicly listed on CBP's website.

Once issued, CBP may revoke WROs or modify them as importers provide documentary evidence to CBP on the origin of their shipments and supply chain sources, which must demonstrate a consistent absence of forced labor as determined by CBP. These modifications are known as "exceptions." CBP currently enforces 51 active WROs and eight Findings, some dating back to the early 1950's. The DOL's Bureau of International Labor Affairs' (ILAB) List of Goods Produced by Child Labor or Forced Labor and List of Products Produced by Forced or Indentured Child Labor serve as resources for CBP and other interagency partners. While inclusion of a good on either of ILAB's two lists is not a ban on importation of those goods into the United States, the inclusion of the goods flags that CBP should pay particular attention to the listed goods in their WRO investigations. CBP also relies on ILAB's reporting to make determinations in issuing, revoking, or modifying WROs.

Notably, the "granddaddy" of all WROs (which is credited with helping prompt the passage of UFLPA) was issued in January 2021 and covered imports of "Cotton, Tomatoes and Downstream Products from XUAR," a region-wide edict that applied to *all* producers. CBP stated in its press release announcing this WRO that it had identified numerous indicators of forced labor through its investigations, including debt bondage, restriction of movement, isolation, intimidation and threats, withholding of wages, and abusive living and working conditions.

The sheer scope of this WRO dwarfed all other WROs CBP had issued to date. It encompassed enormous amounts of merchandise imported into the United States from China: any apparel made of cotton (for which China was and remains the world's largest producer), textiles, tomato seeds, canned tomatoes, tomato sauce, and other goods made with cotton and tomatoes. Many U.S. importers were "caught in the crosshairs" of this WRO and spent massive sums of money and resources trying to corral evidence to prove that their goods (or any raw materials in their imported finished goods) were *not* made with

forced labor. Many were granted relief by CBP but many others were not. If nothing else, this WRO raised awareness of the need for complete end-to-end supply chain tracing and mapping to levels never seen.

More importantly, against the backdrop of this major CBP enforcement activity, Congress was drafting the UFLPA, which effectively bans imports of all finished goods produced in XUAR unless importers produce clear and convincing evidence that no forced labor was used. Whether prominent press coverage of "bad actors" caught violating this WRO played a role or not, UFLPA *unanimously* passed the Senate in December 2021 and received only one vote against (versus 428 in favor) in the House. With literally *no* political opposition to this new law, CBP was further empowered to continue expanding its enforcement activities that fully took hold on June 21, 2022, the effective date of UFLPA.

Congress continues its intense focus on forced labor. The House Select Committee on the Chinese Communist Party sent letters in May 2023 to several well-known companies questioning their alleged continued use of forced laborers in XUAR. More broadly, the Senate Finance Committee launched investigations in early 2023 of the eight largest U.S. automakers and five of their largest Tier 1 suppliers for their use of forced labor.

UFLPA — A "Whole of Government" Priority

Passage of UFLPA was the culmination of a government-wide coordinated effort through the Forced Labor Enforcement Task Force (FLETF) led by the U.S. Department of Homeland Security (DHS). FLETF was established as part of the United States-Mexico-Canada Agreement Implementation Act (USMCA) in 2020 (which replaced NAFTA) to monitor the importation of goods made with forced labor and to establish timelines for CBP's Commissioner to respond to petitions alleging forced labor. With CBP (housed within DHS) acting on behalf of the "lead agency," FLETF also includes the Office of the U.S. Trade Representative (USTR) and the Departments of Labor, State, Treasury, Justice, and Commerce. Observer agencies include the U.S. Agency for International Development (USAID), the National Security Council, U.S. Immigration and Customs Enforcement (ICE), and the Departments of Agriculture and Energy. Obviously, this sweeping list of the most powerful agencies in the U.S. federal government demonstrates a commitment to eradicating forced labor practices on a scale rarely seen in the United States or elsewhere (*See* U.S. Customs & Border Protection Operational Guidance for Importers, *Uyghur Forced Labor Prevention Act*, CBP Pub. No. 1793-0522 (June 13, 2022)).

With the passage of UFLPA, Congress also did something that rarely happens in law enforcement: to preserve the limited resources of CBP and the other partner government agencies in FLETF, the legislation imposes a *legal presumption* on importers that if merchandise was detained at any port of entry based on information received by CBP, the merchandise is presumed to be made with forced laborers in Xinjiang—or by Uyghur laborers working anywhere in China—or made with forced labor anywhere in the world if even a single component/raw material were made in Xinjiang or made using Uyghur forced laborers anywhere in China. Part of this information also included a new "entity list," which UFLPA required DHS to maintain of all factories in the Xinjiang region of China and that were known to use forced labor in the mining, production, or manufacture of goods, wares, articles, and merchandise. (*See* U.S. Dept. of Homeland Security, *UFLPA Entity List* (last visited May 14, 2024). Placing the burden on *importers* to rebut the legal presumption of forced labor relieves the government of having to conduct investigations and make findings for *every single* suspected supply chain/shipment, which, as discussed below, is the case in Canada and will be in the European Union as well.

Upon detention by CBP, importers are given 30 days to "prove the negative" via two options: (1) "applicability reviews;" and (2) the "exceptions" procedure. Most reviews to date have taken place under the former procedure, which is not part of UFLPA but rather was developed by CBP to provide an "operational" option for the agency and importers to use. CBP's authority to inspect, examine, and detain imported merchandise is set forth in 19 U.S.C. §1499. Under this procedure, importers need only identify that the supply chain is identical to a previously reviewed supply chain for which the goods were found admissible. Evidence of summary reports (covering all producers at each stage of production) and business records from the manufacturer of the finished good must be provided to enable CBP to verify that the new product came from the identical supply chain. These summary reports must demonstrate that the detained goods are free from any Xinjiang production, and if CBP is satisfied that is the case, it will release the goods if they are otherwise in compliance with all other applicable laws.

Under the exceptions procedure, importers have a heavier "lift:" they must prove by clear and convincing evidence that the detained goods were *not* wholly or partly made with forced labor or at a factory on the entity list to rebut the legal presumption. Central to that evidence is proving that the *specific merchandise* held up on a *specific container* at a *specific port of entry* on a *specific day* was not produced in whole or in part with forced labor. Hence, generic reports of social responsibility programs and general strategies to remediate forced labor practices *are not acceptable*. Reports must focus on the specific goods detained by CBP for a specific shipment on a date certain and must include documentation, including certificates of origin, supplier affidavits backed up by purchase records, invoices, payment records, inventory management/production records, bills of lading, all government-related import/export documentation—and more—tracing every raw material used in the finished good throughout the supply chain from start to finish.

In addition, CBP recommends that all importers establish/maintain a vendor due diligence program; that they carefully assess XUAR and related supply chain risks; mitigate exposure to forced labor risks; be prepared to demonstrate compliance with the enforcement strategy's due diligence, supply chain tracing, and supply chain management measures; and be prepared to respond to CBP inquires and to demonstrate that the goods are not mined, produced, or manufactured wholly or in part with forced labor.

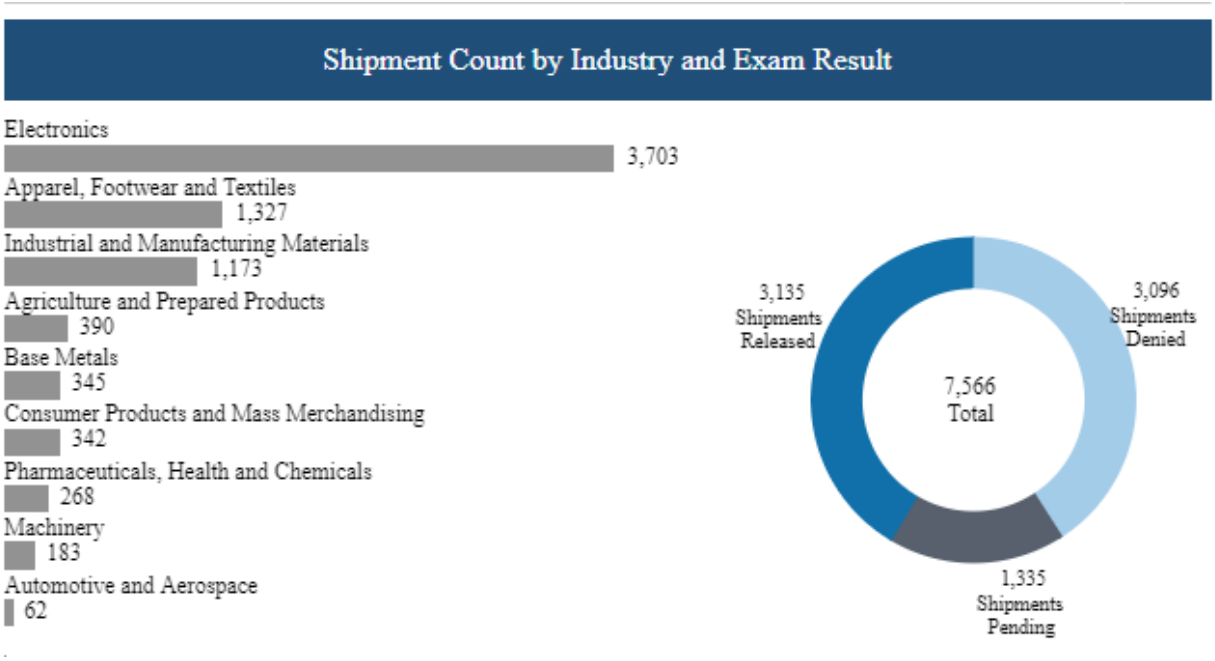
Even more challenging is providing evidence of factory visits and assessments of the 11 indicators of forced labor from the ILO website, including interviews of factory workers and management, which can be difficult as revealed by recent reports of China's raids on the offices of multiple international consulting firms and a sweeping new anti-espionage law (Aaron Glasserman, *Chinese Sanctions Enforcement Just Got Even Harder* , Foreign Policy (Aug. 15, 2023)). But again, reports of generic social compliance that do not focus on the *specific* factory producing the *specific* goods at issue are not acceptable to CBP. Factory visits and reports may also be necessary for upstream and downstream suppliers, depending on the nature of the detained merchandise.

With only 30 days to compile the necessary evidence, manual processes to pull together what typically amount to hundreds of pages of documents are not practical or feasible. For this reason, software solutions purporting to provide end-to-end supply chain mapping as support for the reports that importers must provide to CBP have proliferated over the past two years. While not the *sole* tool needed to respond to CBP's requirement of evidence of no forced labor in whole or in part, software solutions are a critical part of the process and importers should carefully consider the many options on the market (such as mesur.io, an Earthstream intelligence platform solution, etc.). In fact, CBP has allocated resources to develop scientific testing capabilities in evaluating commercially available services

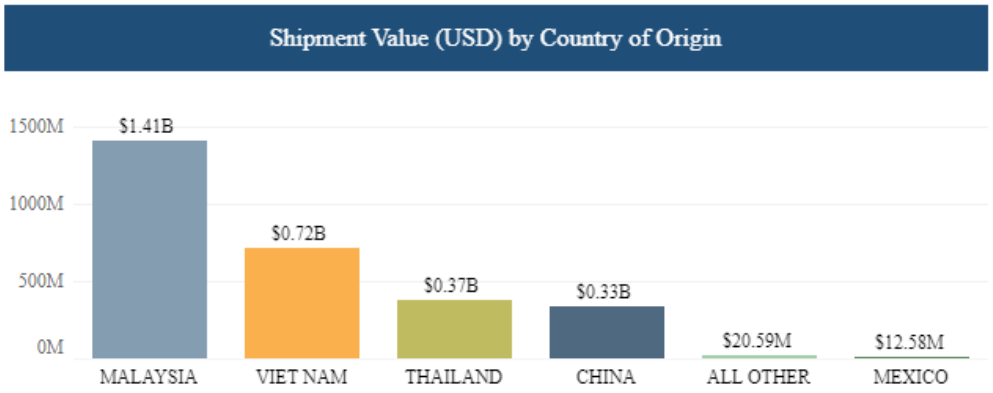
that provide insight into supply chain transactions, data holdings that detail business relationships, advanced trade analytics to identify trends in commodity flows from the XUAR, and commodity-specific isotopic testing for auditing and targeting. Overall, CBP earmarked USD 115 million in FY24 to increase staffing and enforcement measures associated with UFLPA.

If unable to overcome the rebuttable presumption, importers have to export the goods or CBP will seize the goods and destroy them. Either way, importers essentially lose the value of the targeted goods—not only for the current shipment denied entry by CBP but likely for all subsequent shipments from that vendor engaging in forced labor practices. In most cases, it is easy to estimate that the monetary loss alone will run into the millions of dollars. Although it is possible that CBP could also issue penalties to importers that attempt to introduce goods into the United States in contravention of 19 U.S.C. §1307, the agency (at least anecdotally) seems to have little appetite for pursuing such penalties given the many other trade enforcement priorities facing CBP and the fact that losing millions of dollars in merchandise value can be considered enough of a "penalty."

Based on the voluminous statistics that CBP publishes on its website, importers' odds of overcoming that legal presumption are not encouraging. As of this writing, CBP has detained 7,566 shipments with a merchandise value of USD 2.87 billion. Of those, 3,096 were denied entry (40.1%) while 3,135 were released (41.4%), with the rest still in detention awaiting the importer's rebuttal. The most affected merchandise categories are as follows:



Surprisingly, most merchandise by value does NOT originate in China; three other Southeast Asian countries dwarf detentions from goods produced in China and as noted earlier, detention of goods from Mexico is on the rise:



With these statistics readily available and continuously updated by CBP, it is evident that enforcement of UFLPA is a top priority of the U.S. government and one that has serious financial consequences for importers in the United States, not to mention that reputational harm can befall companies "caught" trying to import goods made in whole or in part with forced labor.

With this in mind, we now turn to an examination of other countries' approaches to preventing goods made with forced labor from entering global commerce. Most of these approaches focus on self-reporting and, through public exposure to these reports, "shaming" companies into taking action to prevent the use of forced labor. Although potential detention and seizure of goods found to be made with forced labor is envisioned as part of the "ramp-up" process for these countries, they lag behind the U.S. efforts and no current enforcement mechanism exists to accomplish this goal today.

One notable exception is Germany, which enacted the "Act on Corporate Due Diligence in Supply Chains" in 2021 that became effective on January 1, 2023. This law applies to companies that have their central administration, principal place of business, administrative headquarters or statutory seat in Germany or have a branch office in Germany and have at least 1,000 employees worldwide. Thus, most foreign-owned companies with operations in Germany are excluded from the scope of this law. The law requires that mainly German companies make reasonable efforts to ensure that their business operations and supply chains do not violate human rights and environmental obligations, including protection against child labor, the right to fair wages, and environmental protection. Failure to comply includes an administrative sanction by the Federal Agency for Economic Matters and Export Controls in the amount of up to EUR 8 million or 2% of annual sales in Germany. Any sanctioned companies are excluded from bidding on government contracts for four years.

Canada

With Canada being the largest U.S. export trading partner, the enactment of Bill S 211 (S.C. 2023, c. 9, *Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff Act* (assented to May 11, 2023) has been widely discussed in U.S. corporate boardrooms. The Act, which became effective on January 1, 2024, primarily imposes new reporting obligations on certain private-sector entities and government institutions. The report to be filed with the Minister of Public Safety by May 31 of each year (with the first report due by May 31, 2024) must detail the steps taken during the previous financial year to prevent and reduce the risk that forced labor or child labor is used by them or

in their supply chains. The report must address the following (with respect to each entity subject to the report):

- Its structure, activities, and supply chains;
- Its policies and due diligence processes in relation to forced labor and child labor;
- The parts of its business and supply chains that carry a risk of forced labor or child labor being used and the steps it has taken to assess and manage that risk;
- The steps the entity has taken during its previous financial year to prevent and reduce the risk that forced labor or child labor is used at any step of the production of goods in Canada or elsewhere by the entity, or of goods imported into Canada by the entity;
- Any measures taken to remediate forced labor or child labor;
- Any measures taken to remediate the loss of income to the most vulnerable families that results from any measure taken to eliminate the use of forced labor or child labor in its activities and supply chains;
- Training provided to employees on forced labor and child labor; and
- How the entity assesses its effectiveness in ensuring that forced labor and child labor are not being used in its business and supply chains.
  Unlike the UFLPA, S 211 is not limited to importers of goods into Canada. Entities that are required to file the report include any corporation, trust, partnership, or other unincorporated organization that is listed on a stock exchange in Canada, or has a place of business in Canada, does business in Canada or has assets in Canada and meets two of the following three criteria for at least one of its two most recent financial years:
- Has CAD 20 million or more in assets;
- Earns CAD 40 million or more in revenue; and
- Employs an average of 250 or more employees.

Note that the figures apply to an entity's *global* operations given that many traders "do business" in Canada without having a physical presence there or being listed on a Canadian stock exchange. Many U.S. companies, in particular, will be subject to S 211 because they act as "nonresident" importers of record in Canada and thus clearly do business in Canada even with no office or other physical presence.

To qualify as a reporting entity (and thereby be required to file annual reports under S 211), an entity must:

- Produce, sell or distribute goods in Canada or elsewhere;
- Import into Canada goods produced outside Canada; or
- Control an entity engaged in any activity described above.

Again, S 211 is much broader than UFLPA in that it applies to *entities* and not specific shipments (imported or otherwise; goods produced in Canada for sale to domestic customers are covered if the producer falls within the parameters).

The report must be publicly available via a prominent position on the company's website and the website for Public Safety Canada (and federal corporations must provide the report to their shareholders, along with their annual financial statements). Compliant companies may view the posting requirement as a positive development given that it represents an opportunity for "free publicity" to tout each entity's efforts to advance ESG goals and priorities.

Although the S 211 legislation is a major first step by Canada to address the issue of forced labor in global supply chains and to hold entities accountable for their supply chain practices, the only direct "penalty" prescribed is for failure to file the annual report or to knowingly obstruct or make false statements in a report with a fine of *up to* CAD 250,000. No clear guidance exists on when Public Safety Canada can issue a fine of *less than* the maximum amount. Nevertheless, S 211 also makes clear that these fines can be levied against company directors, officers, or agents who participate in violating this law.

Finally, in an encouraging sign that Canada will follow the U.S. lead of empowering its customs authority to prohibit the importation of goods made in whole or in part with forced labor, S 211 further amended the Customs Tariff to achieve this goal that first became law in 2021 as a result of the USMCA. For now, however, no specific comprehensive actions have been taken by Canada Border Services Agency (Canada's Customs Authority) to enforce this prohibition at all ports of entry.

For post-entry verification purposes, though, the Canadian Tariff Schedule specifically includes a tariff item (9897.00.00) covering "goods manufactured or produced wholly or in part by prison labour; goods mined, manufactured or produced wholly or in part by forced labour." (ch. 98 of the global Harmonized Commodity Description & Coding System ("HS") (multipurpose international product nomenclature developed by the World Customs Organization (WCO) used by Canada and more than 200 other countries and economies as a basis for their customs tariffs and for the collection of international trade statistics) is reserved for each country to populate with specific tariff items unique to each country). CBSA will assign this tariff code for any item found to have been produced in whole or in part with forced labor, which then allows the importer to appeal this "finding" of forced labor by challenging the tariff code through the normal administrative procedures.

Mexico

With Mexico being the second largest export market for U.S. goods, American businesses are especially focused on laws and regulations that may impact their operations in Mexico. One of the more significant developments took place as part of Mexico's obligations under the USMCA when it (as did Canada) committed to addressing forced labor in the supply chain.

Mexico's Forced Labor Regulation, which prohibits the import of goods produced in whole or in part with forced labor, became effective on May 18, 2023. Unlike the United States (where UFLPA places full authority with DHS and CBP to conduct forced labor investigations and provide for enforcement), Mexico places this responsibility with its Ministry of Labor and Social Welfare. The ministry is authorized to self-initiate an investigation of specific goods or launch an investigation based on a petition submitted by Mexican citizens or legal entities (in the latter case, the petitioner must be able to provide evidence supporting the forced labor allegation).

In addition, where there is an agreement between Mexico and another country, the ministry can request the authorities of the other country and the Mexican authorities (e.g., customs) to investigate specific goods, and the ministry will accept the conclusion reached by these authorities. If no agreement is in place, the ministry will conduct the investigation, which in any case will begin with a notification to the importer of the affected goods. The importer will have 20 business days to respond with evidence that its goods were not produced with forced labor.

Once the 20-day period has elapsed, the ministry has 180 business days (which may be extended for an additional 180 days) to issue a determination (also called a "resolution") on whether the goods are produced with forced labor. If it concludes that forced labor has penetrated the supply chain, the ministry will add the goods to a list published on its website and notify the Ministry of Economy so that the goods will be banned from importation into Mexico. The ministry's determination will remain in effect until such time as the importer can provide evidence that the affected goods are *not* produced with forced labor. If the Ministry of Labor and Social Welfare does *not* issue a forced labor determination, the goods will be presumed not to be tainted and importation will be allowed.

Interestingly, the Mexican regulation does not provide any due diligence requirements on the importer (although most global traders do not need a legal requirement to prompt such due diligence—they are already engaged in various stages of comprehensive activities to map their entire supply chain and proactively gauge risk and eliminate it where found). In addition, the regulation does not contain deadlines or rules for importers to rebut a forced labor allegation, so it will be necessary to resort to the USMCA and/or Mexican law to ascertain what legal remedies are available.

European Union

The EU Charter of Fundamental Rights, which was created in 2000 and became effective in 2009, specifically addresses the issue of forced labor in article 5: "1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour." After a regulation was proposed by the European Commission in September 2022 to provide "teeth" to these policy goals, the European Parliament and EU Council took further action via a provisional agreement adopted on March 5, 2024. (Provisional agreements generally mean that regulations/legislation will be adopted without significant changes, although this is not always the case.)

The forced labor regulation targets products and complements the supply chain monitoring obligations under the EU Corporate Sustainability Due Diligence Directive (CSDDD) adopted by the EU Council on May 24, 2024. The European Parliament approved the final forced labor regulation on April 23, 2024; it now must be approved by the Council, which is expected in the near term, then be published in the Official Journal of the EU. Member states will have to apply the forced labor regulation in three years. In the interim, the Commission will issue guidelines to assist businesses, including guidance on due diligence best practices to identify forced labor, etc.

Set to take effect in 2027, the regulation will prohibit products made in whole or in part using forced labor at any point in the supply chain from being placed on the EU internal market or exported from the EU. The rules will be enforced by the competent authorities of the EU member states, along with the European Commission, which will investigate suspicious products that pose a higher and more impactful risk of forced labor, then seize and withdraw offending products from the market.

The final regulation makes some critical changes to the 2022 proposal. It rejected the initial approach under which EU companies sourcing goods from high-risk areas (such as Xinjiang) would be required to demonstrate that products they intended to place and make available on the EU market or export from the EU were not made using forced labor, similar to UFLPA's standard of "proving the negative." In essence, the new regulation will set up an investigation-based approach to identifying goods made with forced labor and allow economic operators the opportunity to prevent evidence if their goods were targeted. Each member state's "National Competent Authority" (NCA) will be empowered to investigate

allegations of forced labor arising in the EU; for allegations arising outside the EU, the European Commission will be the investigating authority.

The new regulation will introduce criteria that may be applied by the investigating body when assessing the likelihood of violations of the ban of forced labor, which then will trigger the commencement of a formal investigation:

- Scale and severity of the suspected forced labor (including whether state-imposed forced labor may be a concern);
- Quantity or volume of products placed or made available on the EU market;
- Share of the parts of the product likely to be made with forced labor in the final product; and
- Proximity of economic operators to the suspect forced labor risks in their supply chain, as well as their leverage to address them.

Unlike UFLPA, the new regulation is not focused on a specific geographic region. In fact, the Commission would be empowered to establish a list of geographic regions anywhere in the world that may be suspected of using forced labor and a list of specific economic sectors within those regions that may be targeted. Further still, the Commission would be able to identify a list of specific products for which information on the manufacturer and *its* suppliers would need to be provided to the EU customs authorities for any imported merchandise–very similar to UFLPA's "entity list."

If the investigations result in a finding to ban specific goods from EU commerce, the ban would be applicable in *all* EU member states. Either the NCA or the Commission could also demand in its finding the:

- Withdrawal of the products from the EU market and online marketplaces;
- Ban or confiscation of the products upon importation into or export from the EU; and
- Disposal of the products by the economic operator via donation, recycling, or destruction.

With regard to the latter point, however, three limitations exist that differ markedly from UFLPA's approach that any finished good with *any* trace of forced labor (even the smallest/least costly raw material) would be denied entry into the United States and will be seized and destroyed by CBP if the importer is unable to arrange for export of the goods out of the United States. Instead, the EU would allow for the disposal of any *part* of the finished good found to be made with forced labor (to the extent it can be replaced). This is an important distinction, especially given the high risk that all EU automakers face because of the prevalence of sourcing vehicle parts from Xinjiang. Volkswagen, for instance, recently had thousands of vehicles detained at U.S. ports of entry because the vehicles were found to contain a *single small electronic component* that is a part of a part (a larger control unit) made in Xinjiang in violation of the UFLPA (*See* U.S. Customs & Border Protection Operational Guidance for Importers, *Uyghur Forced Labor Prevention Act*, CBP Pub. No. 1793-0522 (June 13, 2022)).

In addition, concerning "supply risks of critical products," the new regulation would enable the Commission or NCA to decide *not* to require disposal of offending goods but instead order the economic operator to withhold the product from the EU market until it can demonstrate that no more forced labor in their operations or respective supply chains exists. Presumably, then, the offending goods pre-dating the finding would *not* be permitted to enter EU commerce; only "clean" goods made after the use of forced labor ceased would be allowed entry.

Finally, in stark contrast to the UFLPA, the new regulation does not require the offending goods to be exported out of the EU; they can be donated, recycled, or destroyed. In contrast, if U.S. merchandise owners are unable to export the tainted goods out of the U.S., they are subject to seizure by CBP, and destruction always follows. No donation or recycling is allowed.

To assist EU economic operators in gauging the risks of forced labor in their supply chains, the new regulation also would call for the establishment of a "Forced Labor Single Portal." It is envisioned that the online database would contain "verifiable and regularly updated information about forced labor risks," including reports from international organizations such as the ILO. The portal would also set forth "guidelines, information on bans, database of risk areas and sectors, as well as publicly available evidence and a whistleblower portal." Finally, a "Union Network Against Forced Labor Products" would be introduced to enhance cooperation between NCAs and the Commission.

Finally, as with Canada, the EU regulation would subject noncompliant economic operators to fines (of unspecified amounts, for now). In addition, specific details concerning the disposal/exportation of goods found to be in violation of any ban on forced labor would not be included in the regulation.

United Kingdom

Since Brexit removed the United Kingdom from the EU in 2020, many efforts have been made to essentially replicate the EU rules for customs and trade into U.K. domestic law. However, in the area of forced labor prevention and enforcement, the United Kingdom has taken little action to follow the lead of its major trading partners such as the European Union and the United States.

The only basis in U.K. law to date on this topic is the Modern Slavery Act of 2015, which aims to encourage businesses to take action to eradicate modern slavery from their supply chains and operations. The act sets out a range of measures on how modern slavery, servitude, and forced or compulsory labor and human trafficking should be addressed by businesses operating in the United Kingdom with an annual global turnover of GBP 36 million — which obviously includes many non-U.K.-owned businesses. The thrust of the law requires companies to "produce" an annual statement during each fiscal year detailing steps it has taken with regard to identification of slavery and human trafficking in its supply chain and/or operations and what steps have been undertaken to eradicate them. Guidance published by the U.K.'s Home Office encourages the publication of this statement on companies' websites but does not require that they be filed with the U.K. government (U.K. Govt., *Statutory Guidance Transparency in Supply Chains: A Practical Guide* (Dec. 13, 2021)). Notably, the guidance states: "a failure to comply with the provision, or a statement that an organization has taken no steps, may damage the reputation of the business. It will be for consumers, investors and non-governmental organisations to engage and/or apply pressure where they believe a business has not taken sufficient steps." (U.K. Govt., *Statutory Guidance Transparency in Supply Chains: A Practical Guide* (Dec. 13, 2021)). The law does *not* require businesses to affirmatively conduct due diligence on supply chains.

Because no financial penalties for failing to file the annual statement exist, in practice, many companies appear to be out of compliance. "… [I]t is estimated around 40 per cent of eligible companies are not complying with the legislation at all." (Presentation to Parliament by the Secretary of State for the Home Dept. by Command of Her Majesty, *Independent Review of the Modern Slavery Act of 2015: Final Report*, 14, ¶15 (May 2019)).

Indeed, the only real "penalty" comes in the form of an injunction that the Secretary of State may seek in the High Court compelling a company to comply and file the annual statement (with unlimited fines for contempt of a court order). However, there seems to be little appetite for filing these actions given that (at least as of 2019), "this [procedure] has not been used and there have been no penalties to date for non-compliance organisations." (Presentation to Parliament by the Secretary of State for the Home Dept. by Command of Her Majesty, *Independent Review of the Modern Slavery Act of 2015: Final Report*, 14, ¶15 (May 2019)).

Despite this lack of enforcement, the U.K. government has instituted internal procedures to eradicate modern slavery in government-related supply chains (such as into the NHS supply chains under the Health and Care Act 2022). Nonetheless, without any real enforcement mechanism for private industry and no signs of any further proposal to enhance or expand the Modern Slavery Act of 2015, the United Kingdom remains behind its major trading partners in addressing and regulating the issues of modern-day slavery in business operations vis-à-vis global supply chains.

Australia

Australia's law, the Modern Slavery Act of 2018, based on the U.K.'s legislation of the same name, entered into force on January 1, 2019, predating the U.S. UFLPA by three and a half years.

The Act imposes an annual reporting requirement on larger Australian companies or foreign-owned businesses with operations in Australia, i.e., those with consolidated global revenue of at least AUD 100 million. The "Modern Slavery Statement" must set out the entity's actions to assess modern slavery risks in their global supply chains and operations, as well as actions taken to address those risks in the reporting year. Specifically, the reporting criteria are:

- The identity of the reporting entity;
- The structure, operations, and supply chains of the reporting entity;
- The risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls;
- The actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks;
- How the reporting entity assesses the effectiveness of such actions;
- The process of consultation with any entities the reporting entity owns or controls or is issuing a joint modern slavery statement with; and
- Any other information that the reporting entity, or the entity giving the statement, considers relevant.

These statements must be submitted to the government within six months of the end of the reporting company's year-end and are published by the Australian government via an online central register. As with the United Kingdom, there are no penalties for failure to file.

In preparation for the effective date of this law, the Australian Attorney General published an overview of the law and included the following language: "[m]odern slavery is a term used to describe serious exploitation. It does not include practices like substandard working conditions or underpayment of workers. These practices are also harmful and may be present in some situations of modern slavery."

(*See* Australian Attorney-General's Dept., *Modern Family* (last visited June 5, 2024)). Practices that fall within the scope of modern slavery can include the following:

- Human trafficking;
- Servitude;
- Forced labor;
- Exploitative work practices;
- Debt bondage;
- Forced marriage; and
- The worst forms of child labor.

The Attorney General's description highlights why the Australian (and, by extension, the United Kingdom) laws focus more on criminal sanctions and are not especially analogous to UFLPA in the United States and S 211 in Canada: they do not specifically focus on forced labor conditions, which *can* include the withholding of or underpayment of workers who toil in substandard or unacceptable working conditions based on the 11 indicators of forced labor published by the ILO.

Also similar to the United Kingdom, no real enforcement mechanisms are available to the Australian government with respect to this law and no efforts appear to be underway to upgrade or modify the Modern Slavery Act of 2018. However, similar to the U.K.'s efforts to "self-police" government procurement actions, the Australian government is required to submit its own "Commonwealth Modern Slavery Statement" detailing its own efforts to cleanse modern slavery from government contracts, especially in high-risk areas such as procurement of textiles, computer hardware, and in all Commonwealth investments.

Conclusion

As more countries adopt laws and regulations addressing the prevention of forced labor in global supply chains, governments that engage in or permit these practices may find fewer buyers for goods and materials produced through forced labor. Moreover, efforts are expanding to provide compensation for these workers who are victimized through forced labor practices.

Companies may be tainted by any affiliation with forced labor of any kind—not only for the reputational harm that results (i.e., loss of sales and revenue) but also because of the ability of customs authorities (especially in the United States) to detain, seize, and destroy goods found to be in violation of local laws. This trend will only increase as the EU steps up its efforts over the next several years. However, the region of the world that accounts for most global trade (Asia-Pacific) is absent from the world stage when it comes to laws and regulations addressing forced labor. A notable bright spot has been Japan, which in 2023 agreed to the establishment of the U.S.-Japan Task Force to Promote Human Rights and International Labor Standards in Supply Chains following enactment of the U.S.-Japan Trade Partnership in 2021. With China's efforts to prevent investigations of its own state-sanctioned forced labor programs (especially in Xinjiang, which have been documented by many university and non-governmental organizations), a change in attitude on the part of governments in this region is unlikely.

In time, governments worldwide will undoubtedly continue to acknowledge the existence and impact of exploitative labor practices and change their policies and practices—or create them in the first instance—along with the imposition of meaningful penalties for circumventing the rules.