



LIABILITY RISKS SPREADING UP AND DOWN THE SUPPLY CHAIN



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Executive Summary

At the U.S. border, the federal government is deploying new tools to achieve a range of trade policy objectives, from prohibiting illegal logging to stopping the importation of products produced by forced labor. As a result, the risk of enduring disruptive investigations and incurring painful liabilities has increased dramatically for companies involved in international trade—not just importers of record (“IORs”), but all participants in the supply chain. Many of these risks are not well understood because of the rapid changes in the scope of importers’ and purchasers’ responsibilities, as well as the diverse nature of prohibited acts now enforced at the border.

This paper will explore laws and government policies that have intensified the enforcement risk in a particular area, broadened the number of supply-chain actors that face potential liability, or both. It describes the expanding risk of liability from trade-remedy actions (e.g., antidumping investigations) and the wider scope of U.S. Customs and Border Protection (“CBP”) enforcement actions under the Enforce And Protect Act (“EAPA”), a new framework that gives wide authority to CBP to investigate improper and/or illegal behavior by entities that are involved in importing products to the United States.

The paper will also discuss CBP’s increased emphasis on preventing the import of goods produced with forced labor through the Uyghur Forced Labor Protection Act and other statutes that extend beyond the Xinjiang Uyghur Autonomous Region.

New legal requirements for parties beyond IORs are also on the horizon. CBP would like to place greater data-entry responsibility on “non-traditional” parties (i.e. IORs). Through the so-called 21st Century Customs Framework, CBP seeks to obtain information regarding importations as far in advance of entry as possible, stretching back to when goods bound for importation are manufactured and shipped.

Not surprisingly, there are a number of proposals to enhance compliance with environmental objectives. The newly released Green Trade Strategy would strengthen enforcement of existing environmental laws and proposed trade provisions, particularly on imports from countries with heavy carbon emissions.

Under U.S. trade law, U.S.-based companies are responsible for monitoring actors throughout their supply chain and must be prepared in the event of an enforcement action brought against them by the U.S. government. Much of the evidence needed to demonstrate that a transaction complied with trade regulations cannot be produced after the fact. For this reason, companies must set up procedures in advance to document that the company knows who it is dealing with, and that its entire supply chain is compliant.

I. Introduction

Recent developments in U.S. law and actions taken by the U.S. Department of Commerce (“Commerce”) and CBP give rise to a host of compliance challenges for supply chain participants.

It is critical for these companies to account for the new (and growing) legal risks they face. While it is a daunting task, companies must now keep track of activity throughout their supply chains, where liability can arise from any number of sources: antidumping/countervailing duties (“AD/CVD”) investigations or the circumvention of AD/CVD duties, Enforce and Protect Act (“EAPA”) investigations to detect fraudulent entries of merchandise; violations of the Uyghur Forced Labor Prevention Act (“UFLPA”); the 21st Century Customs Framework (“21CCF”); and increased enforcement of environmental laws under the Green Trade Strategy. As a result, companies must improve their monitoring of actors throughout the supply chain and implement strict compliance regimens.

II. Supply Chain Risks

A. Liability on Actors Beyond on Importers of Record

The Tariff Act grants Commerce the ability to impose AD/CVD duties on imported products and launch circumvention investigations.¹ It also gives CBP the power to enforce AD/CVD orders that apply to a multitude of imports,² from chemical products made for curing meats to solar cells.³ Under the EAPA, CBP also has authority to launch certain investigations into companies—including investigations that they evaded AD/CVD duties or imported products made with forced labor—based on allegations made by domestic competitors.⁴ Commerce’s AD/CVD investigations and CBP’s EAPA investigations can cause numerous headaches for supply chains, as they are often launched unexpectedly and can lead to significant duties, penalties, and foreclosure from the market.⁵ EAPA investigations strike particular fear in the heart of lawyers, due to the secret nature of such investigations and the limited ability of investigated companies to even know the allegations against them until an EAPA action is initiated and CBP penalties imposed.

Under existing U.S. trade law, CBP holds the importer of record (“IOR”) liable for duties.⁶ CBP, however, has increasingly attempted to hold downstream supply-chain participants liable in a manner similar to IORs.⁷ In *United States v. Trek Leather, Inc.*, a 2014 appellate opinion cited by the Court of International Trade earlier this year, the court extended liability to customers of the IOR who take part in introducing goods into the United States.⁸ The court determined that the president of a company that participated in the supply chain as a downstream user had enough control over the imported materials to be held liable for the fraudulent introduction of the materials into the United States.⁹ Other cases decided in the past five years are in accord.¹⁰

Similarly, in *United States v. Rupari Food Services*, a U.S. customer unaffiliated with the importer or exporter was held liable for aiding in fraudulently introducing merchandise into the U.S. because the customer knew that the merchandise did not come from the country that the importer had declared.¹¹ A number of other downstream customers have been held liable for fraud in situations where they knew of it.¹² IORs still have a greater liability risk in one sense; they are held to a “reasonable care” standard, and thus can be held liable for frauds that they *should have known* about.¹³ Downstream actors, instead, must have actual knowledge of the fraud.¹⁴

While the facts in *Trek Leather and Rupari* were extreme, and there was actual fraudulent intent, it does indicate where CBP could direct its efforts. Downstream users who assume a level of control in the supply chain, such as directing the transfer of merchandise, must understand the risks associated with this authority and ensure that the goods they are introducing into the U.S. are compliant with all import requirements.

B. The Uyghur Forced Labor Prevention Act and an Increased Focus on Forced Labor

U.S. law has for many years prohibited the import of goods made with forced labor.¹⁵ However, this area has received a renewed focus recently with the enactment of the Uyghur Forced Labor Prevention Act (UFPLA) and other enforcement actions taken by CBP. One statute in existence for many decades, 19 U.S.C. § 1307, prohibits the entry of any product originating in a foreign country that was made in whole or part by forced

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labor.¹⁶ Here too, domestic companies can report to the government that their competitors are violating the law, leading to potential investigations. (They can even make such allegations anonymously.)¹⁷ Any party, in fact, may make a complaint to CBP if that party has reason to believe that another party’s imports were produced with forced labor.¹⁸ In response, CBP can investigate the matter and issue a Withhold Release Order (“WRO”), which prohibits the suspected goods from entering the stream of commerce.¹⁹ Penalties include the seizure of the imported goods and additional fines.²⁰

In 2022, Congress passed the UFPLA, which builds on Section 1307 by creating a rebuttable presumption that all imports from China’s Xinjiang region are products of forced labor.²¹ Under UFPLA, importers are required to show “clear and convincing” proof that the imported product did not result from forced labor at any point in the supply chain.²² CBP must share a report of each product reviewed under UFPLA to the public within 30 days.²³ In the few months that UFPLA has been in force, no party has been able to overcome this heightened standard.²⁴ However, it appears that importers may seek customs rulings on their own supply chains prior to their shipment to U.S. ports.²⁵ The applicability of these rulings, which are still pending, is narrow. They cannot apply to importations already at U.S. ports and will not apply to supply chains, or inputs into the supply chain, that are subject to change.²⁶ The executive director of the UFPLA Implementation task force states “a ruling is good if you have a very consistent supply chain and if you’re willing to hold off on importing.”²⁷

Given the enactment of the UFPLA and increased enforcement by CBP, companies are looking harder into their supply chains, especially those that involve production in China. For any parts or components made in China, it will be especially important to gather all documentation and records necessary to demonstrate that the product or component is not made in the Xinjiang region. For any that are, it will be virtually impossible to overcome the presumption that they were produced with forced labor.

C. The 21st Century Customs Framework Task Force

There is a growing recognition among the trade community and U.S. government agencies that most of procedures currently employed to handle entries and investigate violations of the provisions discussed in this paper are outdated and ineffective. CBP introduced the 21st Century Customs Framework (21CCF) Task Force to promote what it characterizes as transparency and to “re-allocate” supply chain risks.²⁸ The idea is to spread reporting responsibilities up and down the supply chain so that there is end-to-end supply chain transparency. This, in theory, will have the additional benefits of giving CBP and other agencies the ability to make better, data-driven decisions and allocate risk to the parties best suited to preventing trade violations.²⁹

CBP wants to reach beyond the IOR to parties in the supply chain that have not been responsible for the extensive data-entry procedures in the past.³⁰ However, CBP recently stated that it would not be holding these new actors to the typical reasonable care standard and will instead apply a lowered “reasonably reliable” standard.³¹ If you are reading this and you do not understand the difference, you are not alone. We will have to see how that standard develops in practice.

CBP has also pledged to make the data entry process more user friendly for parties who are unfamiliar with it. Along with this new responsibility and reporting obligations, the 21CCF Task Force Report and Recommendations discusses the expansion of penalties to the parties “most culpable” in the supply chain.³² While 21CCF rules are continuing to evolve, we need to see what new rules Congress ultimately accepts. In any event, the direction toward more information supplied electronically by more participants in the supply chain is clear.³³

D. Green Trade Strategy

CBP launched its new Green Trade Strategy in June 2022 to join the global effort against climate change.³⁴ Most relevant to downstream participants in the supply chain is CBP’s stated goal to strengthen its role in environmental protection.³⁵ Doing so would align the enforcement of environmental laws and trade agreements against parties participating in environmental crimes.³⁶ Rather than entering into new rulemaking procedures, CBP plans to collaborate with international trade partners to enhance its enforcement of existing laws and provisions.³⁷

Against the backdrop of the 21CCF and the UFLPA, the Green Trade Strategy’s emphasis on “bad actors” signals to companies that CBP is willing to extend environmental liability to more participants in the supply

chain. Recently, CBP Commissioner Highsmith stated that CBP planned to “defund the unlawful trade of wildlife” through laws such as the Lacey Act, the Endangered Species Act (“ESA”), the Magnusson-Stevens Fishery Conservation and Management Act, and the Convention on International Trade in Endangered Species (“CITES”).³⁸

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For its part, the Lacey Act has the potential to hold liable any party that imports, exports, receives, sells, acquires, or purchases wildlife (including protected trees) that the party knew or should have known was acquired illegally.³⁹ In the context of the Green Trade Strategy, the Lacey Act creates a basis for parties down the supply chain to be held liable for environmental crimes committed earlier in a product’s lifetime. The same may be said for other strict environmental laws, such as the ESA or CITES. In an era that weighs environmental values heavily, downstream parties must act with care to comply with environmental legislation.

Industry-specific trade agreements have hinted at trade measures that would reward countries with low carbon emissions and punish heavy carbon emitters with higher U.S. prices.⁴⁰ The Green Trade Strategy serves as a sign that CBP will be paying greater attention to environmental adherence by all parties in the supply chain.

III. Conclusion

Today, there is much greater reliance on border measures to advance a variety of policy objectives. Moving forward, participants in the supply chain must gain greater visibility into the operation of and operators in their supply chains. Recent advances in technology offer a means to accomplish not only more effective business practices but to create a credible and verifiable “chain of custody” to disprove any allegations that the imported product is not in conformity with government laws or requirements.

This article is for informational use only and is not intended as legal advice.

End Notes

1. 19 U.S.C. §§ 1671, 1673 & 1677j.
2. 19 U.S.C. § 1517.
3. *AD/CVD Search: Public Messages*, U.S. Customs and Border Protection, <https://aceservices.cbp.dhs.gov/adcvdweb/#>.
4. 19 U.S.C. § 1517(b)(1).
5. 19 U.S.C. §§ 1517(d)-(e); *see also Trade Bureaucrats Gone Wild*, Wall Street Journal (Sept. 12, 2022).
6. 19 U.S.C. § 1484.
7. George Tuttle III, *Court Expands Liability for Third Parties in Import Transactions*, Global Training Center (Sept. 24, 2014), <https://www.globaltrainingcenter.com/court-expands-liability-for-third-parties-in-import-transactions/s> - Global Training Center.
8. *See United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1298-99 (Fed. Cir. 2014); 19 U.S.C. § 1592 (laying out penalties for those who enter, introduce, or attempt to enter/introduce products into the U.S. by fraud or omission); *see also United States v. Ho*, 582 F. Supp. 3d 1325 (Ct. Int'l Trade 2022); *United States v. Deladiep, Inc. v. United States*, 255 F. Supp. 3d 1326 (Ct. Int'l Trade 2017); *United States v. Sterling Footwear, Inc.*, 279 F. Supp. 3d 1113 (Ct. Int'l Trade 2017).
9. *Id.*
10. *Id.*
11. *United States v. Rupari Food Services*, 298 F. Supp. 3d 1347, 1353 (Ct. Int'l Trade 2018).
12. *See* Indictment at 28, *United States v. Wolff, et al.*, No. 08-00417 (N.D. Ill. 2010) ("*Wolff Indictment*"); Indictment at 7-8, 10-11, *United States v. Yuan*, No. 11-00084 (N.D. Ill. 2011).
13. *United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1337-38 (Fed. Cir. 1999).
14. *Id.*
15. 19 U.S.C. § 1307
16. CBP defines forced labor as "[a]ll work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer work or service voluntarily" *Forced Labor*, U.S. Customs and Border Protection, <https://www.cbp.gov/trade/forced-labor> (last modified Aug. 3, 2022); 19 U.S.C. § 1307.
17. *E-Allegations Frequently Asked Questions*, U.S. Customs and Border Protection, <https://www.cbp.gov/trade/e-allegations/faqs> (last modified Feb. 3, 2021).
18. 19 C.F.R. § 12.42(b).
19. Department of Homeland Security Office of Strategy, Policy, and Plans, *Forced Labor Enforcement Task Force: Establishing Timelines* (July 30, 2021).
20. 19 C.F.R. § 162, Subpart E.
21. Phred Dvorak and Katherine Blunt, *U.S. Solar Shipments are Hit by Import Ban on China's Xinjian Region*, Wall Street Journal, Aug. 9, 2022; UFPLA Public Law 117-78, 117th Congress.
22. U.S. Customs and Border Protection, Uyghur Forced Labor Prevention Act Public Law 117-78 December 23, 2021: Importer Overview, CBP Publication No. 1795-0622, at 4 (June 2022).
23. *Id.* at 9.

24. UFPLA applies to products imported on or after June 21, 2022. Tim Warren, *No Importers have Overcome UFPLA Rebuttable Presumption So Far, CBP Official Says*, (Aug. 4, 2022).
25. Id.
26. Id.
27. Id.
28. *21st Century Customs Framework*, U.S. Customs and Border Protection, <https://www.cbp.gov/trade/21CCF> (last modified May 18, 2022).
29. Id.
30. Brian Fiato, *CBP Discussing Lower Standard of Care, Optional Submission of Some Data Under 21CCF*, International Trade Today (July 19, 2022).
31. Id.
32. *Next Generation Facilitation Subcommittee 21st Century Framework Task Force Report and Recommendations*, Commercial Customs Operations Advisory Committee (June 2022) at 11-13.
33. Robert Kossick, *U.S. Customs: "Change is Coming,"* Harris Bricken (July 25, 2022), <https://harrisbricken.com/chinalawblog/u-s-customs-change-is-coming/#page=1>.
34. *CBP Green Trade Strategy*, U.S. Customs and Border Protection, <https://www.cbp.gov/trade/cbp-green-trade-strategy> (last modified Aug 16, 2022).
35. Id.
36. Id.
37. Id. FAQ.
38. Tom Temin, *Even Customs and Border Protection is Getting into the Green Movement*, Federal News Network (Aug. 9, 2022), <https://federalnewsnetwork.com/workforce/2022/08/even-customs-and-border-protection-is-getting-into-the-green-movement/> (Temin).
39. 16 U.S.C. §§ 3372-3373.
40. U.S. steel producers are pushing for a carbon-based trade agreement or a carbon border adjustment tax, which would increase the price of steel imported from countries that the United States deems as being major emitters of carbon emissions. David Lawder, *U.S. Steel Executives Favor Carbon Border Adjustment to Combat 'Dirty' Imports*, Reuters (Nov. 2, 2021) <https://www.reuters.com/business/cop/us-steel-executives-favor-carbon-border-adjustment-combat-dirty-imports-2021-11-02/>.

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