

Exporters To US Should Share Importers' Compliance Burdens

By **Lawrence Friedman** (Oct. 14, 2022)

After 30 years representing importers facing increasingly complex compliance requirements and aggressive enforcement from the U.S. government, one thing is clear: The asymmetries in information and enforcement make importing unfairly risky.

The information asymmetry is between the importer on one side, and the foreign producers and exporters on the other. U.S. law requires that importers have detailed information about the materials used to make imported goods, and about the business practices of the producers.

But the truth of what is in those goods and how they were made can be maddeningly difficult to confirm.



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The most obvious of these asymmetries relates to the U.S. ban on merchandise that is the product of forced or child labor. It should be obvious that no reasonable importer wants to profit from human rights abuses. Strict enforcement of these laws is entirely appropriate, if done fairly and within the legal requirements.

My firm and I represent importers working diligently to ensure there is no forced labor used in the production of their goods. We have no interest in knowingly facilitating the importation of goods made by workers in abusive conditions.

The prohibition on importing products of forced labor is not a new requirement. It has been on the books since 1930. A 2016 change in the law closed a perceived loophole that resulted in limited enforcement. U.S. Customs and Border Protection can issue a "withhold release order" when it has reasonable evidence that merchandise is the product of forced labor.

But there is little transparency as to the nature and source of the information that Customs receives and considers credible. And it has proven difficult for importers to gather information sufficient to satisfy Customs that goods are admissible. Often, the merchandise must be exported, disrupting supply chains.

Under the new Uyghur Forced Labor Prevention Act, Congress has mandated that Customs presume that materials produced in China's Xinjiang Uyghur Autonomous Region benefit from the forced labor of Uyghurs and other Muslim minorities. Anything arriving in the U.S. that was made wholly or in part in this region is prohibited from entering the country.

That "wholly or in part" phrase is particularly troublesome. Assume you buy a pair of expensive shoes that were handcrafted in Italy. The goods arrive at the border.

Customs — performing its entirely appropriate enforcement role — asks not about the origin of the shoes, but about the origin of the leather, the sole, other metal and plastic parts, and the thread used to stitch it all together.

But many importers, particularly small and midsize enterprises, do not have access to that information. Now think about companies that make airplanes, automobiles or computers. Supply chains in those and other industries are both deep and wide.

They are deep because the first-tier supplier may be producing a complex assembly that has many parts, some of which contain parts sourced from second-tier suppliers, who in turn rely on third-tier suppliers, and so on. To enforce the laws regulating trade, Customs assumes that an importer can map the entire supply chain — from the iron mine to the coil spring to the imported mattress.

Companies with adequate knowledge and resources are working to vet suppliers and root out abusive practices, by requiring suppliers to identify sourcing in the next tier, and forcing compliance up the supply chain.

When not blocked by suppliers or local authorities, importers are performing onsite audits of suppliers, to ensure they comply with local labor laws and do not violate the importer's supplier code of conduct prohibiting forced labor and other unacceptable practices.

But information asymmetry is not just an issue relating to forced labor. International trade is newly awash in contracts that attempt to balance the burdens between buyers and sellers to ensure compliance with various environmental, social and labor standards.[1] In many cases, commercial agreements require shippers to comply with U.S. safety, labeling and other laws that regulate what merchandise can be admitted into the country.

Importers often scramble to get documentation confirming that a supplier had the legitimate right to apply a certification mark, such as an Underwriters Laboratories label or a USB logo. Other examples include compliance with health and safety requirements of the Consumer Product Safety Commission, and the prevention of stowaway agricultural pests in wood packing materials.

Technology may help. Former Customs Commissioner Alan Bersin recently wrote about the impact of the Uyghur Forced Labor Prevention Act, and how his company is helping importers mine international shipping data to map supply chains.[2] Some companies are reshoring or nearshoring supply and production, to have greater visibility and reduce the risk of noncompliance.

Here is another idea: Allow exporters to take responsibility for the information they provide to importers and to the government. The problem with this simple idea is the other asymmetry in the system: Governments have extremely limited powers to engage in enforcement in a foreign country, even when it is the exporter who is the cause of the violation.

Nations are sovereign and enforce their own laws within their own borders. The target of trade enforcement is, therefore, almost always the importer.

On the other hand, exporting to the U.S. is a privilege, not a right. That privilege can come with obligations and burdens. With that in mind, we may be able to devise tools to incentivize better behavior by exporters seeking to do business in the U.S.

One possibility is to create the status of "verified exporters" who are known to the U.S. government and have volunteered to take on the risk of doing business here. As in the existing nonresident importer program, a verified exporter would likely need to have a

registered agent in the U.S., secure its obligations with a bond and possibly maintain enough assets in the country to collateralize the bond.

The verified exporter might also agree to recordkeeping and audits by the U.S. government or approved third parties. Becoming a verified exporter would be a voluntary measure, and the bond would effectively be a contract with the government, secured by a third party, to ensure that the exporter complies with the terms of the bond.

The principal term of the bond would be that the goods are admissible. If the goods are inadmissible for a reason within the control of the exporter — including, for example, the presence of forced labor — Customs could assess liquidated damages for a breach of the bond.

This proposal is not a free pass for importers. They would remain liable for duties, taxes and fees, and subject to penalties for their own negligence or fraud. Inadmissible merchandise would remain banned from entry.

It is likely that the exporter's home nation would have to agree to an arrangement that permits onsite audits by U.S. authorities. But that happens now — for example, in free trade agreement and anti-dumping verifications.

Another tool might be to identify bad actors, and revoke their privilege to export to the U.S. at all. This is akin to the existing practice in export controls of revoking export privileges.

Yes, unscrupulous companies will engage in schemes to disguise the actual producer, and that will require additional diligence from importers. But publicly identifying unscrupulous exporters will also put the importing public on notice in a manner that is similar to the withhold release order process.

Creative thinking and international cooperation can strengthen governmental oversight of exporters. We know this from recent experience with the facility-specific rapid response mechanism built into the U.S.-Mexico-Canada Agreement.

That tool allows the U.S., after required procedures, to deny duty preferences to goods produced in Mexican facilities that do not recognize workers' rights under Mexican labor law. Similar tools with an exporter-focused enforcement mechanism could be added to future trade agreements for, among other things, environmental and intellectual property enforcement.

Again, the point is not to insulate importers from liability for their own misdeeds, or to allow them to profit from human rights abuses, risky health and safety practices, poor environmental stewardship, or the theft of intellectual property. It is the opposite.

A verified exporter or similar program that puts responsibility for compliance on producers, and requires auditable records, will allow importers to make informed, sustainable and compliant choices about who they invite into their supply chains — and create an incentive for exporters to participate.

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[1] https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/.

[2] <https://www.sandiegouniontribune.com/opinion/commentary/story/2022-08-29/opinion-outlawing-forced-labor-in-china-will-be-felt-by-all>.