

Trade Compliance Flash: First Court Challenge to CBP Enforcement of Withhold Release Order

Importer Claims CBP's Decision to Exclude Merchandise is "Arbitrary and Capricious"

International Alert

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In April, an importer filed a first-of-its-kind legal challenge to U.S. Customs and Border Protection's (CBP) enforcement of U.S. law prohibiting the importation of goods produced using forced labor.¹ CBP detained the importer's shipment pursuant to a Withhold Release Order (WRO) on products containing palm oil from an entity in Malaysia. The importer submitted evidence to show that the detained products were not produced with forced labor, but CBP found the submission insufficient and excluded the merchandise from entry into the United States.

Following CBP's denial of the importer's "protest" – a non-judicial administrative remedy available to importers as a first step to challenging CBP decisions – the importer filed a complaint at the U.S. Court of International Trade (CIT) arguing that CBP's exclusion of the merchandise from entry was "without factual or legal basis . . . arbitrary and capricious, an abuse of discretion and not in accordance with law." The importer alleges that it submitted sufficient evidence to demonstrate that the products in its shipment were not produced using forced labor. The complaint further alleges that CBP's assessment of the deficiencies in the documentation submitted was "clearly incorrect."

In practice, CBP provides importers with limited information regarding the basis for its decisions to exclude merchandise. Given this context, the CIT's decision may provide much-needed guidance on the evidentiary standard that must be met to release merchandise detained pursuant to a WRO.² With such guidance, importers may soon be able to better prioritize traceability efforts and other anti-forced labor compliance initiatives.

Key Facts

- CBP detained a shipment of products containing palm oil distillate and palm stearin imported from Malaysia.
- The shipment was detained pursuant to a WRO covering palm oil and products containing palm oil produced by Sime Darby Plantation Bhd (Sime Darby), an entity based in Malaysia.³
- According to the complaint, the importer submitted evidence to show that the detained products were not made by and did not contain content from Sime Darby (or any other Malaysian palm oil producer subject to a WRO). The importer's proof of admissibility included "records concerning the growth and harvesting of palm fruit bunches, the extraction of oils from the fruit, and the refining of the oils into the [imported products]." The importer also submitted an "extensive" consignee statement confirming "the lack of Sime Darby Plantation content, or any other forced labor content, in its goods."
- After receiving the importer's evidence to demonstrate admissibility, CBP issued a notice to the importer relaying its decision to exclude the merchandise from entry into the United States pursuant to 19 U.S.C. §1307 (which prohibits the importation of merchandise mined, manufactured, or produced wholly or in part by forced labor, including convict labor, forced child labor, and indentured labor). The notice stated that the importer had provided "insufficient information to deem the merchandise admissible." CBP gave no further detail regarding the basis for its denial of the importer's submission.
- The importer protested CBP's decision to exclude the merchandise. Within a week, CBP denied the protest because the importer reportedly was "unable to trace production back to the harvesting of the palm kernel/seeds as required by the [WRO]."
- The importer filed suit at the CIT, arguing that it *did* provide the necessary documentation to prove that the imported products

contained no materials from Sime Darby or any other Malaysian palm oil producer subject to a WRO. The complaint argues that CBP's exclusion was arbitrary and capricious, an abuse of discretion, and had no basis in fact or law.

Takeaways

We will likely see additional, similar challenges to CBP decisions to exclude merchandise from entry into the United States pursuant to 19 U.S.C. §1307. This prediction is based on our recent experience assisting importers in challenging WRO-related detentions, where we have observed the following:

- **CBP's detention notices generally provide no specific reasons for the action taken, referencing only that the merchandise may be subject to a WRO.** CBP may detain merchandise pursuant to 19 U.S.C. §1307 when "information available reasonably but not conclusively indicates that merchandise [made with forced labor] is being, or is likely to be, imported" into the United States.⁴ CBP detention notices often contain no explanation regarding the basis for the detention beyond referencing the WRO at issue. Sometimes, the stated reason for detention is simply "WRO." As such, the importer must prove the absence of forced labor in its supply chain without knowing the reason(s) for CBP's suspicion. This requires companies to marshal their resources to scrutinize their supply chain in the short 90-day window during which importers may submit proof of admissibility – without any guidance as to the entities or levels of the supply chain on which to focus the company's resources.
- **The evidentiary standard to release merchandise subject to a WRO is not clear.** CBP regulations are silent on the burden of proof to release detained merchandise. CBP's website includes "helpful hints" for submitting proof of admissibility, as well as FAQs. Although detention notices generally include a paragraph that lists information requested of the importer, it's not clear what documentation would be sufficient to meet CBP's expectations to show admissibility. Detention notices may request a broad swath of documentation, including affidavits from the importer regarding the source of the raw materials, production records, commercial documents (*e.g.*, purchase orders, invoices, proof of payment), transportation documents, and a summary of the production steps. This documentation is meant to give CBP visibility into the importer's supply chain – in the case of palm oil products, going back to the palm tree grower. (As apparel importers are well-aware, CBP requests similar documentation in detention notices for the WROs on cotton products.)
- **The short timeframe to respond to CBP detention notices compounds the difficulty for importers.** Most importers have found it very difficult to collect all of the requested documentation in time to respond to a detention notice. This is especially true when the upstream suppliers are not related parties, which generally means that the importer does not have a contractual relationship with the supplier, and therefore little or no leverage to request documentation that the supplier may view as commercially sensitive or otherwise confidential. Some documents are likely beyond reach. For example, an apparel importer likely does not have ready access to the timecards and wage payment receipts of the employees that picked the raw cotton used to make a particular piece of clothing. Importers of products subject to WROs are optimistic that submitting most of the requested documents will suffice, but that is currently an open question. Savvy importers are mapping their supply chains and evaluating the type of documentation that they can obtain from their suppliers to be better positioned in the event of a detention.
- **Exclusion Letters often do not clarify the reason why the merchandise was denied entry.** For example, the exclusion letter at issue in the case before the CIT simply notes that CBP had "determined that [the] merchandise is under the purview of 19 U.S.C. 1307 resulting in a decision to exclude the shipment from entry into the United States." Without more information, the importer is left in the dark as to why its submission was deficient. Exclusions establish a basis for detentions of *future* incoming same merchandise; thus, if importers are unable to obtain further guidance from CBP, they may be motivated to challenge that decision in court.

Conclusion

This case could lead to parameters on the standard CBP must implement in determining whether an importer has provided sufficient information to determine that a product was not made using forced labor. Importers across industries are clearly struggling to understand how to meet CBP's requests for documentation in this regard. Assuming CBP has some evidence of forced labor in the supply chain, disclosing this information to importers could lead to improved compliance with anti-forced labor

laws. Greater insight into CBP's decision-making process and documentation requirements would assist ethical companies in prioritizing resources and compliance efforts to ensure that they do not have forced labor in their supply chains.

Miller & Chevalier's [Customs](#) and [Business and Human Rights](#) practices are guiding companies through these new restrictions and enforcement risks in order to ensure full compliance and avoid disruption to their business by:

- Conducting in-depth due diligence on high-risk operations
- Developing and updating anti-forced labor policies and procedures
- Risk mapping and developing assessment and product traceability processes
- Collaborating with specialized forced labor auditors on-the-ground in high-risk regions
- Remediating forced labor indicators identified in audits
- Interacting with CBP regarding WROs to secure reversals
- Developing and updating stakeholder communications regarding forced labor compliance efforts

Please contact us for further details on how Miller & Chevalier's Business and Human Rights practice is helping companies develop strategic approaches to anti-forced labor compliance.

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¹See Complaint, *Virtus Nutrition LLC v. U.S.*, No. 1:21-CV-00165-N (Ct. Intl. Trade).

²CBP has issued over 20 WROs to-date covering numerous products since 2018. [Click here for a complete list](#).

³Two WROs issued by CBP in late 2020 prohibit the import of palm oil and palm oil products made by FGV and Sime Darby Plantation and its subsidiaries, based on information that these companies use forced labor to produce their palm oil.

⁴19 CFR §12.42(e).

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