

U.S. - China Security Review Commission Policy Paper on Prison Labor and Forced Labor in China

Background:

Many human rights groups allege that the use of forced labor is a common and established practice in China. They assert that products of this forced labor are exported to other countries and that a substantial portion is sent to the United States. Section 307 of the Tariff Act of 1930, 19 USC 1307, prohibits the importation of products of forced labor from any country. Section 1761 of Title 18 of the US Code makes it a criminal offense to knowingly import goods made by convict or prison labor. Moreover, Article XX of the GATT provides that laws prohibiting trade in such goods are GATT consistent. The problem of enforcement lies in the difficulty of proving that specific imported goods are being made by forced labor.

On August 7, 1992, the United States and China signed a Memorandum of Understanding (MOU) to safeguard against the export of prison labor products from China to the United States. According to U.S. officials, China's implementation of the MOU was "spotty" and China was slow to respond to U.S. requests for information and for requests to visit suspected facilities. On March 14, 1994, to improve the situation the U.S. and China signed a "statement of cooperation" spelling out specific guidelines for implementation of the MOU, including timetables for responding to requests for information and site visits to suspected facilities. According to the President's report to the Congress in May 1994 on renewing China's MFN status, China was living up to the commitments it made in these agreements. In 1994 U.S. Customs officials visited five facilities in China to investigate charges that goods being exported to the U.S. from such facilities had been made by prison labor.

That cooperation began to taper off in 1995. Between 1996 and 2001, Chinese authorities approved only three out of eleven requests for site visits, one in 1996, one in 1997 and the last in 2000. In each case, Customs found no evidence of prison labor. According to the Department of State's 1999 China Country Report on Human Rights, in that year the U.S. Customs was unsuccessful in securing approval from Chinese authorities to visit eight sites suspected of exporting prison labor products to the U.S. The 2001 China Country Report on Human Rights concluded that Chinese cooperation on prison visits is "sporadic, at best."

According to the Laogai Research Foundation, China's prison systems (Laogai) are an integral part of the national economy. That Foundation claims to have documented nearly 100-forced labor camps, producing \$800 million in sales, and contends that the number of such camps probably numbers well over 1,000. It further contends that goods from Laogai are being imported into the U.S.

The Commission heard testimony that prisoners in China are incarcerated for their

political views or because of their religious beliefs. Human rights groups have reported that conditions in the forced labor facilities are brutal, that medical care is poor and that workplace conditions are generally exhausting and dangerous. Some former prison inmates claim that prisoners are fed based upon production quotas and that if prisoners fail to meet their quotas they receive decreased food rations and physical punishment. The Laogai Research Foundation asserts that, in some instances, prisoners are forcibly and indefinitely retained as workers after they have completed their sentences (a practiced called *jiuye*, “forced job placement”) so that production in their facilities will not be diminished by their departure.

The Chinese government maintains that products made by forced labor are not exported from China to the United States.

Role of the U.S. Customs Service

The U.S. Customs Service has primary responsibility for enforcing the two statutes cited above that ban the importation of goods made by prison labor and make it a crime for a person to knowingly bring such goods into the United States. Between 1992 and 2000, we understand the Customs Service opened eighty-four criminal investigations regarding imports of prison labor and issued twenty detention orders barring shipments of goods from China. Only two cases resulted in criminal convictions. Customs presently has open nineteen prison labor investigations pertaining to imports from China to the United States.

Customs has promulgated regulations spelling out how persons can inform the agency about suspected prison labor imports. If such persons present sufficient evidence to create a reasonable belief among Customs officials that they are correct, the Customs Service can issue a detention order banning a particular shipment of goods.

Despite this, many human rights groups believe the current system for enforcing U.S. laws against the importation of goods made by prison and forced labor in China is not working. The Customs Service itself has told the Commission that it cannot conduct independent investigations in China. Customs investigations in China must proceed pursuant to the 1992 and 1994 bilateral agreements discussed above.

Pursuant to the procedures spelled out in those agreements, we understand that since 1996 the Customs Service has sent thirty letters to the Chinese Ministry of Justice regarding either visits or investigations of prison facilities in China that were suspected of producing goods for export to the United States. In most cases, the Chinese Ministry of Justice failed to respond to such letters.

The Customs Service has told the Commission that the difficulty in enforcing Section 307 to block the importation of goods made by prison labor in China does

not arise from the U.S. statutes. The difficulty arises because the PRC is not abiding by the 1992 and 1994 agreements it negotiated with the U.S. government. The Customs Service contends that finding ways to persuade China to live up to the agreements it has negotiated with our government on these matters would assist them in enforcing our laws.

Commission Recommendations

The Commission believes the current system can be improved by shifting the burden of proof in such cases. This can be accomplished with a two-pronged approach.

1. Certification

All importers of record of all goods entering the U.S. should be required to certify, based on good faith efforts, that such goods were not made by prison labor. This puts the obligation on the importers to take reasonable steps to ensure that the goods they import are prison labor-free. It sends a message to foreign manufacturers and their trading and distribution companies that America will not accept goods made under compulsion by prisoners and forced labor. The Certification will also provide an additional legal basis to prosecute violators for knowingly certifying to false or misleading information regarding the source of their imports.

2. Inspection

China is the only country with which the U.S. presently has negotiated a bilateral understanding, which lays out procedures for conducting inspections at suspected prison labor facilities. The Commission recommends that in regard to countries with which we have such arrangements, where credible evidence exists that prison or forced labor is being used at a specific site, facility or factory, Customs be required to make an immediate request to carry out a prompt inspection of the site, manufacturing facility or factory. A prompt inspection is an inspection that will take place within sixty days of the request for an inspection. If the inspection cannot take place in the required time frame, Customs will block the entry of goods from the factory or facility into the U.S. until such time that an inspection takes place. If Customs learns that a delay in authorizing an inspection is linked to “cleaning” a facility so that the prisoners or forced laborers are not present in a future inspection, Customs will take steps to block future imports into the U.S. from that facility. In cases where Customs finds evidence of prison or forced labor at an inspected facility, Customs will block any future imports from that facility into the U.S.

In addition to the above two core recommendations, the Commission also believes the following steps should be implemented to efficiently prohibit the importation

of goods made by prison and forced labor.

1. Suspicious Companies

In order to assist U.S. companies to avoid importing products made by forced or prison labor, the U.S. government should maintain a list of suspicious companies which are reasonably suspected of trafficking in such goods. The Commission recommends that a high standard for inclusion on the list of suspicious companies is essential to its credibility and usefulness. Companies in the country where goods are manufactured can get off the list upon successful completion of a Customs investigation. Trading and distribution companies that handle such goods can be removed from the list if they demonstrate that they are not handling goods that originate in prison or forced labor facilities and they have procedures in place to ensure they are not trafficking in such goods.

2. Bonding

The Commission recommends that importers of record of products from companies on the suspicious companies list discussed above be required to post bonds. Use of a bond procedure will accomplish two related goals. It will act as a deterrent to future misbehavior by importers that want to continue operating in the United States; it will also chase out non-reputable companies that are created only to skirt the laws of the United States, by subjecting them to considerable financial risk. The Commission believes that consideration should also be given to awarding forfeited bonds to whistleblowers who expose proven wrongdoing as an incentive for them to come forward and identify manufacturers and distribution companies acting illegally.

3. Annual Country Report on Human Rights Practices

The Department of State submits to Congress each February “a full and complete report regarding the status of internationally recognized Human Rights” in foreign countries, including China. The Commission recommends that the Annual Country Report include a detailed account of the location of Laogai and other forced labor facilities in China and the products produced by them. The Commission further recommends that the Annual Country Report include a full record of cooperation by China, including the current year, on the bilateral 1992 Memorandum of Understanding (MOU) and the 1994 Statement of Cooperation (SOC). The Department of State should conduct its investigation and reporting on this matter in coordination with the Department of Commerce and the U.S. Customs Service. The responsible agencies should receive full support from the Central Intelligence Agency and the Federal Bureau of Investigation.

4. Special Counsel in Justice

In order to ensure that our laws against importing goods made by illegal forced and prison labor are vigorously enforced, the Commission proposes that an appropriate individual in the Criminal Division of the Justice Department be designated a "Special Counsel" with specific responsibility to prosecute such cases in the U.S. District Courts. The Commission believes that designation of such a counsel will focus enforcement attention on this issue at the Justice Department and facilitate prosecutions of these cases.