



HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN LAW

**Before the Congressional-Executive Commission on China
Hearing: From Bait to Plate—How Forced Labor Taints America’s Seafood Supply Chain**

Statement by Robert Stumberg
Professor of Law, Georgetown University Law Center
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1. Introduction

Two-hundred and forty—that’s the number of name-brand stores and institutional suppliers that we all depend on. Through them, we all buy seafood from importers who sell what forced laborers process in Chinese factories and vessels. We do it as families, as schools, as businesses. What is not in that number are the ways we buy forced-labor seafood as governments, mostly through five federal agencies and local school food authorities.

The Outlaw Ocean team, led by Ian Urbina, made transparency happen. They aren’t the first to reveal Xinjiang supply chains.¹ But what distinguishes their seafood reporting is that they literally chased outlaw vessels across the seas, surveiled trucks at the port, and monitored internet traffic in multiple languages. James Bond would be impressed. And they didn’t stop with the report. They created power tools for tracing supply chains, purchasing seafood, and fixing policies that unwittingly enable an empire of exploitation. Now we can do this at home for products we buy every week. The International coalition to *End Uyghur Forced Labor* has added the Outlaw Ocean reporting to its online library to show the complex puzzle of affected industries—aluminum, apparel, automotive, cotton, food, polyvinyl chloride, polysilicon, solar, and more.²

I appreciate your invitation to address one piece of this puzzle—the role of governments as wholesale buyers of seafood. I will briefly respond to several procurement questions:

- Which U.S. government agencies purchase seafood?
- Is the Buy American Act an antidote to forced-labor goods?
- Does the prohibition on purchasing forced-labor goods work?
- What is on the to-do list for fixing related gaps in policy?

¹ See, e.g., the interactive tools developed by the Helena Kennedy Centre for International Justice at Sheffield Hallam University and NomoGaia, *Driving Force – Automotive Supply Chains and Forced Labor in the Uyghur Region*, which includes an interactive supply-chain map and a database of companies at every stage of the supply chain, available at <https://www.shufordcedlabour.org/drivingforce/> (viewed October 21, 2023).

² Coalition to End Forced Labour in the Uyghur Region, *Seafood Imports in More Than 20 Countries Implicated in Uyghur Forced Labour* (October 2023), <https://enduyghurforcedlabour.org/seafood-imports-in-more-than-20-countries-implicated-in-uyghur-forced-labour/> (viewed October 21, 2023). The coalition’s on-line library includes the work of this committee: <https://enduyghurforcedlabour.org/> (viewed October 21, 2023).

a. Forced labor in U.S. seafood supply chains

Outlaw Ocean reporters have linked Chinese forced labor to U.S. government suppliers who sent seafood worth \$200 million over the past five years to military bases, federal prisons, and the National School Lunch Program.³ By one estimate, half of the fish sticks served in American public schools have been processed in China.⁴

Even fish that is “locally caught” or “wild caught” can be processed by forced labor because much of the fish coming out of U.S. waters and U.S.-flagged ships is frozen, sent to China for processing, refrozen, and then shipped back to the United States.⁵ In those cases, country-of-origin labeling requires labeling as a fish from two countries, e.g., “Alaskan” and “Product of China” on the same label.⁶

The report that suppliers to U.S. agencies import seafood from China is not surprising. The rest of the U.S. market imports 75% to 80% of its seafood.⁷ China is the leading exporter to the United States,⁸ which is China’s second-leading export market (after Japan).⁹

b. Federal procurement of seafood

So how much seafood does the federal government purchase? There is no clear statistic. The overlapping search filters on USAspending.gov indicate which agencies are most likely to purchase seafood, but they are not accurate as stand-alone measures. The following are dollar amounts of federal procurement since FY2019, just over five years.

- *The industry codes* for wholesale trade in seafood and seafood preparation/packaging also show USDA in the lead: Agriculture \$1.046 billion, Justice \$2.4 million, Defense \$1.2 million,

³ See Appendix 1, Outlaw Ocean, Discussion, and Appendix 2, Outlaw Ocean, Methodology; Ian Urbina, *The Crimes Behind the Seafood You Eat*, New Yorker (October 9, 2023), available at <https://www.newyorker.com/magazine/2023/10/16/the-crimes-behind-the-seafood-you-eat> (viewed October 21, 2023); Ian Urbina, *The Uyghurs Forced to Process the World’s Fish*, New Yorker, News Desk (October 9, 2023), available at <https://www.newyorker.com/news/news-desk/the-uyghurs-forced-to-process-the-worlds-fish> (viewed October 21, 2023); Ian Urbina, *The return of an old scourge reveals a deep sickness in the global fishing industry*, Boston Globe (October 12, 2023) (\$50 billion from one NSLP supplier), available at <https://www.bostonglobe.com/2023/10/12/opinion/beriberi-fishermen-outlaw-ocean/> (viewed October 21, 2023).

⁴ Urbina, *Uyghurs Forced to Process*; see Appendix 2, Outlaw Ocean, Methodology.

⁵ Kristen Abrams, *There’s something fishy about your seafood. China uses human trafficking to harvest it*. USA Today, Opinion (October 11, 2023), available at <https://www.usatoday.com/story/opinion/2023/10/11/us-seafood-china-human-trafficking-uyghur-forced-labor/71127786007/> (viewed October 21, 2023).

⁶ Craig A. Morris, *A Tale of a Fish from Two Countries*, U.S. Department of Agriculture, Blog Archives (posted December 5, 2016), <https://www.usda.gov/media/blog/2016/12/05/tale-fish-two-countries>; see also Frank Asche et al., *China’s Seafood Exports: Not for Domestic Consumption?*, Science, DOI: 10.1126/science.abl4756 (January 28, 2022).

⁷ NOAA Fisheries, US Aquaculture, Current Status of Seafood, updated September 20, 2022, <https://www.fisheries.noaa.gov/national/aquaculture/us-aquaculture> (viewed October 15, 2023).

⁸ China exported 377,3221,296 kg to the United States in 2022). NOAA Fisheries, Foreign Fishery Trade Data, Foreign Trade, 2022 (search for all species and all countries), <https://www.fisheries.noaa.gov/national/sustainable-fisheries/foreign-fishery-trade-data> (viewed October 15, 2023).

⁹ The value of China’s exports to the United States was \$1.87bn out of \$16.12bn total exports in 2021. USDA Foreign Agriculture Service, *2021 China’s Fishery Report*, Report Number: CH2021-0176, 15, Table 11. China: Exports of Seafood Products by Country of Destination (December 22, 2021), available at https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=2021%20China%27s%20Fishery%20Report_Beijing_China%20-%20People%27s%20Republic%20of_12-17-2021 (viewed October 20, 2023).

Smithsonian \$82,000, and Veterans \$57,000.¹⁰

- *The product codes* for direct purchase of meat, poultry and fish shows USDA in the lead: Agriculture \$1.046 billion, Defense, \$2.4 million, Justice \$1.2 million, and Veterans \$54,000.¹¹
- *The service code for accommodation and food* would include seafood as a very small percentage of a big absolute number. It shows Defense in the lead, \$5.9 billion, Homeland Security \$403 million, State \$394 million, Agriculture \$391 million, Veterans \$139 million, and Justice \$48,000.¹²

What is clear is that USDA dwarfs the other agencies in terms of direct purchase of seafood, in the range of \$1 billion over a five-year period.

Since July 2022, USDA has invited bids entitled Pacific Seafood Products (8/3/22), Salmon Products (6/15/23), Pollock Products (11/17/22), Shrimp Products (12/13/22), Salmon Products (12/22/22), Groundfish Products (3/2/23), Pollock Products (5/9/23) Section 32 Purchase of Salmon and Pollock Products (6/14/23), and Section 32 Purchase of Rockfish and Shrimp Products & CCC Pollock and Haddock (6/15/23), and Salmon Products (9-15-23).¹³

To illustrate one example, the June 2023 “Section 32 Purchase of Salmon Products” requested fixed-price bids for Pacific Seafood Items, Alaska Sockeye (Red) Salmon Products (Canned) and Alaska Sockeye (Red) Salmon Products (Fillets).¹⁴ The award of this procurement listed F.O.B. distribution to food assistance programs at various locations in the United States. Awards totaled 1,269 discrete delivery locations with a total procurement value of over \$70 million (estimate).¹⁵

The pre-solicitation announcement provided this notice of the Buy-American regulation:

“Pursuant to Agricultural Acquisition Regulation (AGAR) 470.103(b), commodities and the products of agricultural commodities acquired under this contract must be a product of the United States and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States.”¹⁶

¹⁰ USAspending.gov, search parameters for FY2019→24, NAICS 3117 for seafood processing/packaging and NAICS 424460 for wholesale trade in seafood (viewed October 21, 2023).

¹¹ USAspending.gov, search parameters for FY2019→24, PSC 8905 for meat, fish and poultry (viewed October 21, 2023).

¹² USAspending.gov, search parameters for FY2019→24, PSC 72 for accommodation and food service (viewed October 21, 2023).

¹³ USDA, Agricultural Marketing Service, Open Purchase Requests for Seafood, https://www.ams.usda.gov/open-purchase-request?field_term_grades_and_standards_target_id=865 (viewed October 3, 2023).

¹⁴ USDA, Solicitation – Domestic Commodity Invitation, Description: 12-3J14-23-B-0467, Bid invitation number: 2000009419, Purchasing Group: AMS-Livestock (Start date: June 15, 2023), available at <https://www.ams.usda.gov/sites/default/files/2000009419%20-%20Bid%20Invitation.pdf> (viewed July 27, 2023).

¹⁵ USDA, 2000009419 – 3, Reports :: Bid Array, Archive Date: 2024-01-12, https://usda.iaggaer.com/clearview/usda_domestic_2000009419_3_1689170424?p=reports_bid_array;menu=1318;scenario=2 (viewed July 23, 2023).

¹⁶ USDA, Agricultural Marketing Service, Pre-Solicitation Announcement for Section 32 Purchase of Salmon Products (May II, 2023), <https://www.ams.usda.gov/content/pre-solicitation-announcement-section-32-purchase-salmon-products>.

The solicitation notice also required full transparency of processing facilities at the bidding stage:

Offerors who intend to use more than one processing plant and shipping point for contracts awarded under this solicitation, other than the processing plant and shipping point entered in their bids, may submit a list of their approved processing plants and shipping points on a separate sheet of paper to be uploaded in WBSCM, and to be submitted with their bids.¹⁷

c. USDA comments on reports of forced labor

The Outlaw Ocean reporters asked USDA to comment on their evidence that some USDA suppliers were importing from processors that used forced labor in China. USDA replied that all the fish that it purchases “must be grown and processed in the United States or its territories” as required by the Federal Acquisition Regulation (FAR).¹⁸ When the reporters followed up with more specific questions, the agency replied that:

1. USDA requires that seafood products be sourced in U.S. waters by U.S. flagged vessels, which it confirms with on-site audits.
2. The audits verify that processing facilities are based in the U.S. or its territories.
3. For documentation, contractors are required to provide documents during audits that show compliance with requirements including domestic origin.¹⁹

The USDA comments imply that the Buy American Act is an antidote to forced labor goods, specifically in seafood supply chains. On a technical level, the USDA comments invite questions for a closer look:

- What is the site of an on-site audit? The contractor’s business office? A sampling of fishing vessels? A sampling of processing facilities? All facilities? In other words, are these audits any more effective than the audits that failed, as shown by Outlaw Oceans reporting (e.g., audits by the Marine Stewardship Council, Sedex, and several wholesalers).
- Does verification of processing based on a declaration of intent before performance establish “domestic origin” as performance actually happened? Does “domestic origin” include both catch of seafood in U.S. waters and processing of that seafood in U.S. territory?
- How would an auditor find out whether a contractor requested use of foreign processing based on non-availability of that processing in U.S. territory? Do USDA contract officers keep records of determination of availability?

The more substantive question is, what is the domestic-origin requirement? If a purchase is made under procurement rules that allow foreign processing of fish, then there would be no domestic processing, and thus, no audit of domestic processing.

Section 2 below looks into the “requirement” of purely domestic sourcing and the several exceptions to that rule that allow contractors to source seafood from foreign processors. Section 3 follows that with a summary of federal rules that prohibit procurement of goods produced with

¹⁷ USDA, Solicitation, Bid invitation number: 2000009419, at 1-2 (see above).

¹⁸ Appendix 1, Outlaw Ocean, Discussion, U.S. Department of Agriculture.

¹⁹ For the detailed email exchange, see id.

forced labor.

2. Exceptions to the Buy American Act

a. Federal agency procurement

The Buy American Act requires agencies to purchase only “domestic end products” for public use in the United States. The BAA is implemented through the Federal Acquisition Regulation (FAR) and additional agency rules, including the Department of Agriculture (AGAR).²⁰

USDA requires that all commodities acquired for use by the Food and Nutrition Service [USDA Marketing Service] must be a product of the United States, “*except as may otherwise be required by law*, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States”²¹

A preliminary question is whether all U.S.-caught seafood is a *domestic end product*, regardless of where it is processed. The answer is *no*, to be a domestic end product, seafood must be “processed and prepared ... exclusively in the United States.”²²

There are three exceptions to the Buy-American mandate: (1) if the supply is not adequate, (2) if domestic prices are unreasonable, and (3) if the product is for resale in stores.

(1) *Inadequate supply*

- (a) “The Buy American statute does not apply with respect to ... supplies if ... , either as end items or components, [they] are not ... produced ... in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.”²³
- (b) “The head of the contracting activity may make a determination that [a] supply is not ... produced ... in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. A determination is not required before January 1, 2030, if there is an offer for a foreign end product that exceeds 55 percent domestic content.”²⁴

Let’s interpret that language. The contract office may determine that a seafood product is not available in sufficient quantities. But a determination is not required before 2030. That latter phrase is ambiguous; it could be read two ways.

- The first is that a formal, written determination is not required before 2030. If so, then decisions about availability will not be traceable. They will become invisible decisions until 2030.
- The second is that a decision about domestic availability is not required at all before 2030, so long as the product from a foreign processor exceeds 55 percent domestic content.

²⁰ 41 U.S.C. ch. 83; FAR 25.002 Policy; Subpart 425.1 - Buy American Act – Supplies.

²¹ AGAR, 470.103(b) Exceptions.

²² AGAR 470.103(b) Use by the Food and Nutrition Service and (d) Product derived from animals.

²³ FAR 25.103(b) Nonavailability.

²⁴ FAR 25.103(b)(2); see FAR 25.106(b)(2). While *domestic content* is not explicitly defined, the FAR determines the *amount* of domestic content based on the percent of the cost of all components. FAR 25.101(a) General. (“The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components”)

The first is a blow to transparency, and the second is a loophole for foreign processors. In practice, the two meanings may be equivalent.

In the case of seafood, a contractor could assert that the U.S.-caught fish is available, but the domestic processing capacity is not. Imagine the conversation: *Domestic processing has become too expensive. So why not process the fish in China? The processing won't exceed 45% of the total cost. Besides, no one will ever know the difference.*

(a) Unreasonable prices

A reasonably priced domestic product is not available if the lowest domestic offer is more than 20 percent higher than the lowest foreign offer (or 30 percent higher for a small businessbidder). For example, if the domestic price from a large business is 21% higher than the lowest foreign offer, it is not reasonable. The agency must accept the lower foreign offer.²⁵

If there is no reasonably priced domestic offer, then a foreign offer that uses U.S.-caught seafood would enjoy a 20 percent price preference over a competing foreign product—so long as it has at least 55 percent domestic content (the value of the raw seafood).²⁶

The question here is, what is the cost advantage of processing seafood in a low-wage country like China? A more severe question is, how much more advantage can Chinese processors gain by participating in forced-labor schemes with workers from Xinjiang and North Korea? Is that advantage likely to exceed 20 percent compared to U.S. domestic processing?

I was unable to find any recent cost comparisons of fish processing in low-wage countries. A study done in 1995 indicates that the wages can range from 6 to 18 percent of total product costs, with U.S. costs on the high end.²⁷

(b) Resale in stores

The Buy-American Act does not apply to agency procurement of seafood for resale in a commissary at military bases or other government-authorized retail stores. This is because resale to consumers is not a public use (e.g., a public feeding program).²⁸

²⁵ FAR 25.103(c) Unreasonable cost; FAR 25.106(b)(1) Determining reasonableness of cost. For Seafood Product Preparation and Packaging (NAICS 311710) the threshold for small business is 750 employees or less. FAR 2.101 Definitions, "Small business concern" incorporates 13 CFR Part 121 Small business size regulations; 13 CFR 121.201 What size standards has SBA identified by North American Industry Classification Systems codes?

²⁶ FAR 25.106(b)(2)(ii); see FAR 25.101(a) General.

²⁷ Aurora Zugarramurdi, María A. Parin, Hector M. Lupin, *Economic engineering applied to the fishery industry - 4. Production Cost*, 103, Table 4.6 (Food & Agriculture Organization, 1995), https://www.google.com/books/edition/Economic_Engineering_Applied_to_the_Fish/a4lUTm1-f9kC?hl=en&gbpv=1 (viewed October 21, 2023).

²⁸ FAR 25.003; FAR 25.102 (Buy-American policy requires "only domestic end products for public use inside the United States.") The FAR does not define "commissary," but other federal regulations refer to "Authorized resale outlets (military commissary stores, Armed Forces exchanges and like activities of other Government departments and agencies). See 41 CFR 51-6.4.

b. Grants to state and local governments

The U.S. Department of Agriculture (USDA) buys about 20 percent of fish that is served in schools. The remaining 80 percent is purchased with federal funds by local buyers who rely on many of the same importers.²⁹ There is no exception for local buyers to buy foreign seafood because there is no requirement to Buy American.

(1) *School food authorities*

When spending funds under the National School Lunch Program, local school food authorities and state distributing agencies are required to buy domestic commodities or products “to the maximum extent practicable.”³⁰

(2) *Other recipients of federal funds*

When spending federal funds generally, state and local governments “*should*, to the greatest extent practicable” provide a preference for goods produced in the United States.³¹

This “practicable” standard amounts to a recommended practice; they “*should*” rather than “*must*.”³² It is not a constraint on local purchasers that seek a price advantage from purchasing foreign-sourced fish. Local authorities are likely to purchase directly or indirectly from the same importers who sell to neighboring businesses that Outlaw Ocean reporting has linked to forced labor—the likes of Food Lion, Giant Foods, Gordon Food Service, Harris Tweeter, IGA, Kroger, Sysco, US Foods.³³

2. Forced-labor prohibition in procurement

The FAR prohibits procurement of goods made with the benefit trafficking, which includes forced labor.³⁴ Trafficking is a composite of related harms that include commercial sex, forced labor, fraud, and the worst forms of child labor.³⁵

The FAR waters down the definition of *forced labor* in comparison to the ILO’s definition. In the FAR: “Forced labor” means knowingly providing or obtaining the labor or services of a person—(1) By threats of serious harm to, or physical restraint against, that person or another person; (2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person

²⁹ Appendix 2, Outlaw Ocean, Methodology.

³⁰ 7 CFR 210.21(d)(2) Procurement. A domestic *agricultural commodity* is produced in the United States, and a domestic *food product* is processed in the United States substantially using agricultural commodities that are produced in the United States. 7 CFR 210.21(d)(1). See also 2 CFR 250.17(e) Use of funds obtained incidental to donated food distribution.

³¹ 2 CFR 200.322 Domestic preferences for procurements.

³² 2 CFR 200.101(b) Applicability to different types of Federal awards.

³³ Outlaw Ocean, Bait-to-Plate sourcing tool, <https://www.theoutlawocean.com/investigations/china-the-superpower-of-seafood/bait-to-plate/#buyers> (viewed October 21, 2023).

³⁴ FAR 22.1504 (Violations and remedies); Exec. Order No. 13,126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor (June 12, 1999), 64 Fed. Reg. 32383 (June 16, 1999).

³⁵ FAR 22.1703 (Combat human trafficking – policy); FAR 22.1704 (Violations and remedies). “Severe forms of trafficking in persons” means “(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”

did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.”³⁶

In contrast to “threats of serious harm,” the ILO requires only a “menace of penalty,” which encompasses a broader range of coercive behavior that is evidenced in treatment of Uyghurs in Chinese work environments. For example, if an employer inflicts a serious harm (like firing a worker or a worker’s relative) without a threat, that does not meet the FAR’s version of forced labor.

By implication, an employer’s threat of a penalty that is less than “serious” harm or physical restraint against an adult falls short of forced labor. It is not clear whether serious harm includes being fired or canceling a work visa if a worker refuses to work overtime. Similarly, it is not clear whether a “serious” physical restraint includes locking factory doors during working hours or other constraints on freedom of movement.

The FAR’s definition of forced labor is also inconsistent with the definition in the Tariff Act of 1930, which prohibits import of goods produced with convict, forced, or indentured labor.³⁷ The Tariff Act is the foundation for the Uyghur Forced Labor Prevention Act.

3. The fix-it list

a. Implement procurement tools

(1) ***Non-availability*** - Close the “non-availability” gap³⁸ by requiring agency contract officers to:

- (a) formally determine when domestic products are not available (prior to 2030 when they must do it anyway), and
- (b) determine availability based on both domestic content of a product and domestic processing of a product.

(2) ***Reasonable prices*** – Enable agency contract offices to waive the rule on reasonable prices from foreign suppliers³⁹ (the 20-percent range) when there is evidence that a supply chain poses a high risk of human trafficking (including forced labor).

(3) ***Compliance with the prohibition of trafficking and forced labor***

- (a) Apply the UFLPA presumption of forced labor to bidders and suppliers of contractors in U.S. government procurement.⁴⁰
- (b) Define forced labor for procurement consistently with its definition in the Tariff Act and the ILO Convention—based on the menace of a penalty, rather than explicit threats.⁴¹
- (c) Do not recognize “social audits” as evidence of compliance if (1) the auditor is paid by the supplier, or (2) the auditor fails to conduct confidential interviews with workers using

³⁶ FAR 22.1702 Definitions.

³⁷ Section 307 of Title III, Chapter 497 (46 Stat. 689); Tariff Act of 1930, 19 U.S.C. § 1307.

³⁸ This would entail rulemaking by the FAR Council of FAR 25.103(b) Nonavailability.

³⁹ This would entail rulemaking by the FAR Council of FAR 25.103(c) Unreasonable cost; FAR 25.106(b)(1) Determining reasonableness of cost.

⁴⁰ This would entail rulemaking by the FAR Council of FAR 22.1703 Policy and FAR 11.1704 Violations and remedies.

⁴¹ This would entail rulemaking by the FAR Council of FAR 22.1702 Definitions.

strict protocols to avoid coercion by employers.⁴²

(4) *Federal Funding Accountability and Transparency Act of 2006* – Fully implement the The Federal Funding Accountability and Transparency Act of 2006 (FFATA), in which Congress mandated transparency of federal suppliers and sub-suppliers down to contracts of \$25,000. However, the Office of Management and Budget used rulemaking to exclude most supplier subcontracts.⁴³ Congress could re-assert its transparency obligation by clarifying that disclosure applies not only to prime contractors (first-tier), but also to subcontractors and their suppliers (second and third tier).

(5) *Need for a human rights strategy in procurement*

As noted above, U.S. procurement law prohibits purchase of goods made with human trafficking and forced labor.⁴⁴ The law requires contract managers to require greater transparency on high-risk contracts by writing a prevention plan and reporting any investigations. However, a GAO audit found that agencies were completely unaware of their duties under this law.⁴⁵

Contract officers do not have the time, human rights expertise, corporate-affiliation data, or trade-data they need to monitor suppliers' compliance with human rights obligations. Other countries have been more creative. For example, Swedish counties have created an inter-agency SWAT team to oversee its human rights standards.⁴⁶ And over 900 European universities and government entities have affiliated with Electronics Watch to monitor and enforce their ITC procurement codes.⁴⁷

b. Implement the UFLPA

Reforming the mechanics of the Federal Acquisition Regulation is a heavy lift, and the forum for change (OMB) is dedicated to saving money, not saving lives. It should be easier to persuade U.S. Customs and Border Protection to implement already authorized elements of the Uyghur Forced Labor Prevention Act. No "reform" is necessary. The challenge is to just do it in light of the new and compelling evidence. These proposals have been presented to the Senate Finance committee by Scott Nova, Worker Rights Consortium, and to DHS by Laura Murphy, Sheffield Hallam University), along with published reports that are posted in the online library of the End Uyghur Forced Labor coalition.⁴⁸ Here is a thumbnail sketch for two of their recommendations:⁴⁹

⁴² See testimony of Scott Nova, 13-14.

⁴³ Federal Funding Accountability and Transparency Act of 2006, Pub. L. No. 109-282, §2(b)(1)(D), 120 Stat. 1186, 1187 (2006); Reporting Executive Compensation and First-Tier Subcontract Awards, 77 Fed. Reg. at 44052-53.

⁴⁴ FAR 22.1503, 52.222-50.

⁴⁵ U.S. Government Accountability Office, DOD Should Address Weaknesses in Oversight of Contractors and Reporting of Investigations Related to Contracts (Washington: GAO-21-546, 2021), 1, 19.

⁴⁶ See Pauline Göthberg, Public Procurement and Human Rights in the Healthcare Sector: The Swedish County Councils' Collaborative Model (London: Edward Elgar 2019), 165-179.

⁴⁷ Electronics Watch, Affiliates, <https://electronicswatch.org/en> (viewed October 21, 2023); Id, What We Do; Id, Monitoring Partners; Id, Electronics Watch Contract Conditions with Guidance for Contractors (EW, June 2020).

⁴⁸ End Uyghur Forced Labor, <https://enduyghurforcedlabour.org/> (viewed October 21, 2023).

⁴⁹ For a broader overview of UFLPA reforms, see Marti Flacks, *What's Next for the Uyghur Forced Labor Prevention Act?* (CSIS, June 21, 2023), <https://www.csis.org/analysis/whats-next-uyghur-forced-labor-prevention-act> (viewed October 21, 2023).

(1) **Known entities** – The UFPLA’s presumption of forced labor is triggered by doing business with a “known entity” that sources goods or labor from Xinjiang.⁵⁰ The original list of known entities was based on CPB’s past withhold-release orders (WROs) or Commerce Department actions. The first edition in June 2022 included 20 known entities. Since then, the Forced Labor Enforcement Task Force (FLETF) has fielded evidence of Xinjiang sourcing for thousands of entities.

Since its creation, the list has expanded only by seven entities. Obviously the FLETF must triage this workload, and it needs to establish a process for expanding the known-entity list. Quality of evidence matters, and high-profile reports by Outlaw Ocean, Sheffield Hallam, and others merit additions to the known-entity list.⁵¹

(2) **High-priority sectors** – The FLETF monitors and develops an enforcement plan for high-priority sectors, which presently include apparel, cotton and cotton products, silica-based products, and tomatoes and downstream products.⁵²

The Outlaw Ocean reporting makes an urgent case that the FLETF should adopt seafood as the next priority sector. Moreover, the reporting and interactive tools provide a model for elements of the monitoring and enforcement strategy.

c. Expand the Seafood Import Monitoring Program (SIMP)

(1) **Scope of SIMP** – The SIMP requires disclosure of seafood imports for 1,100 unique species, categorized in 13 species groups, that are vulnerable to illegal fishing, seafood fraud, or both. SIMP covers about half of all seafood imports into the United States. SIMP species groups include Abalone, Atlantic cod, Blue crab (Atlantic), Dolphinfish (Mahi Mahi), Grouper, King crab (red), Pacific cod, Red snapper, Sea cucumber, Sharks, Shrimp, Swordfish, Tuna (Albacore, Bigeye, Skipjack, Yellowfin, Bluefin).⁵³

(2) **Gaps in coverage** – In light of the Outlaw Ocean reporting, it becomes clear that SIMP is not designed to cover species connected with forced labor, in part because most of these are not at risk of extinction from illegal fishing. Not covered by SIMP are squid and the species that are purchased by USDA including Haddock, Pacific Rockfish, Pacific Whiting, Pollock, Salmon, and various groundfish.

⁵⁰ U.S. Customs and Border Protection, *Operational Guidance for Importers*, 4-5 (June 13, 2022); Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1529, § 2(d)(2)(B)(ii) and § 3(a).

⁵¹ See Testimony of Scott Nova, Executive Director of the Worker Rights Consortium, Hearing of the Senate Committee on Finance: Ending Trade that Cheats American Workers By Modernizing Trade Laws and Enforcement, Fighting Forced Labor, Eliminating Counterfeits, and Leveling the Playing Field, 9-10 (February 16, 2023), <https://www.finance.senate.gov/imo/media/doc/2023.02.16%20Nova%20Testimony%20for%20Customs%20Hearing.pdf> (viewed October 21, 2023).

⁵² U.S. Customs and Border Protection, 2023 Updates to the Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China – Report to Congress 9-11 (July 26, 2023); Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1529, § 2(d)(2)(B)(viii) and (ix). See Scott Nova testimony, 11-12.

⁵³ NOAA Fisheries, Seafood Import Monitoring Program, <https://www.fisheries.noaa.gov/international/seafood-import-monitoring-program> (viewed October 21, 2023).

- (3) **NOAA proposed rule** – In December 2022, NOAA reported that “shrimp and tuna (Albacore, Bigeye, Bluefin, Skipjack and Yellowfin) are the most predominant species that are entering U.S. markets and that are vulnerable to forced labor in the supply chain.” With shrimp and tuna already on the SIMP list, NOAA proposed adding additional tuna species to the list.⁵⁴
- (4) **Need to significantly expand SIMP** – A coalition of leading civil society organizations replied to the NOAA proposal by calling for several major expansions of SIMP. They provided 19 pages of commentary and recommendations,⁵⁵ with the headlines being these:
- (a) Cover of all species of seafood imports, whether by land, air, or sea,
 - (b) Report unique vessel identifiers to enable traceability,
 - (c) Increase transparency in SIMP audit procedures, and
 - (d) Deepen supply chain reporting requirements such as the provenance of fish feed used in aquaculture.
- (5) **Need for international cooperation** – Congress directed the Departments of State and Commerce to report on human trafficking, including forced labor, in seafood supply chains. The agencies reported (December 2020) on the need for expand seafood transparency beyond traditional health and environmental concerns, both domestically and in terms of international cooperation. They identified 29 countries that pose a significant risk of forced-labor in their seafood supply chains: Bangladesh, Burma, Cambodia, Cameroon, Ecuador, Fiji, Gabon, Ghana, Guinea, Honduras, Indonesia, Ireland, Kenya, Madagascar, Mauritania, North Korea, Pakistan, Papua New Guinea, the People’s Republic of China, Philippines, Seychelles, Sierra Leone, South Africa, South Korea, Taiwan, Tanzania, Thailand, Vanuatu, and Vietnam.⁵⁶

Appendix 4 of the report includes technical recommendations to deter human trafficking and forced labor outside of U.S. waters. This committee could ask the multi-agency group focusing on seafood to comment on how the Outlaw Ocean reporting relates to their recommendations and strategy for deterrence.

⁵⁴ NOAA, Notice of Proposed Rule, Magnuson-Stevens Fishery Conservation and Management Act; Seafood Import Monitoring Program, 87 FR 79836-79848, 50 CFR 300, Agency/Docket No. 221215-0273, RIN:0648-BK85, Document No. 2022-27741, available at <https://www.federalregister.gov/documents/2022/12/28/2022-27741/magnuson-stevens-fishery-conservation-and-management-act-seafood-import-monitoring-program> (viewed October 21, 2023).

⁵⁵ Comment on NOAA-NMFS-2022-0119, RIN: 0648-BK85, submitted by World Wildlife Fund, Oceana, Greenpeace, International Corporate Accountability Roundtable, Azul, Conservation International, and Global Labor Justice/International Labor Rights Fund (March 28, 2023), <https://www.regulations.gov/comment/NOAA-NMFS-2022-0119-2163> (viewed October 21, 2023).

⁵⁶ Report to Congress Human Trafficking in the Seafood Supply Chain Section 3563 of the National Defense Authorization Act for Fiscal Year 2020 (P.L. 116-92), available at <https://www.fisheries.noaa.gov/international/international-affairs/forced-labor-and-seafood-supply-chain> (viewed October 21, 2023).

Appendix 1 The Outlaw Ocean Project Discussion

U.S. Department of Agriculture⁵⁷

July 10, 2023

Email sent to the U.S. Department of Agriculture's Acting Deputy Director of Communications, Ed Curlett. The email outlined procurement contracts awarded by the USDA to five seafood companies whose supply chains are linked to Uyghur forced labor, and that the U.S. has prohibited the import of goods produced by forced labor. The email also asked for comment.

July 13, 2023

Paige at the U.S. Department of Agriculture press office replied: "Thank you for reaching out. I'm looping you with Allan Rodriguez, USDA's Press Secretary." July 13, 2023: Allan Rodriguez emailed: "'USDA is committed to preventing forced labor and human trafficking. All agricultural products, including fish, purchased by USDA for use in food assistance programs are procured in accordance with the Federal Acquisition Regulation (FAR) System, and must be grown and processed in the United States or its territories. The FAR implements procurement-related aspects of various statutes and Executive Orders, including those addressing forced or indentured child labor and the trafficking of persons. Thanks, Allan [Quoted text hidden] [Quoted text hidden] USDA includes FAR-prescribed contract terms regarding combatting human trafficking which outlines required notifications, contractual remedies, and contractor compliance with U.S. Government policy.'"

July 19, 2023

Email sent to USDA Press Secretary Allan Rodriguez for further clarification on the USDA's statement. The email asked: 1. As we have identified five companies in the U.S. that are major providers of seafood to the USDA and these companies rely heavily, if not exclusively, on processing in China, how does the USDA ensure that all the seafood they're providing through these contracts is processed in U.S.-based processing facilities? 2. Does the USDA verify this independently or do you rely on the contracted company to provide the verification? 3. If the latter, what types of information or documentation are required from the contractor to verify the country of origin and location of processing of the seafood provided under USDA contract?

July 20, 2023

The Outlaw Ocean Project replied to say yes, that was fine.

July 21, 2023

Allan Rodriguez replied with the following answers:

1. USDA requires that our seafood products be sourced in U.S. waters by U.S. flagged vessels and produced in U.S. establishments approved by the U.S. Department of Commerce's Seafood Inspection Program. USDA ensures this requirement is met by conducting pre- and post-production, on site audits.

⁵⁷ The Outlaw Ocean Project, Discussion, U.S. Department of Agriculture, <https://www.theoutlawocean.com/investigations/china-the-superpower-of-seafood/discussion/#us-department-of-agriculture>, viewed October 20, 2023.

2. USDA and the Department of Commerce verify requirements are being followed by conducting on site pre-production and post-production audits to ensure that contractual, technical, and operational requirements of each Department are met. In addition to verifying compliance with requirements, these on-site audits verify that processing facilities are based in the U.S. or its territories.
3. Each contractor must declare the production facilities and shipping points they intend to use to produce products for USDA. In addition to on-site verification, contractors are required to provide documents during audits that show compliance with contractual, technical, and operational requirements including domestic origin. Contractors that source seafood from both U.S. and international waters or flagged vessels must have a segregation plan in place that ensures only seafood sourced from U.S. waters and flagged vessels is provided to USDA's food purchase program.

U.S. Department of Defense⁵⁸

July 12, 2023

Email sent to the U.S. Department of Defense regarding procurement contracts awarded to Sysco. The email said that Sysco sells Ruggiero and High Liner seafood; Ruggiero and High Liner have imported seafood from Chinese processors connected to Uyghur forced labor. The email also asked for comment.

U.S. Department of Justice⁵⁹

July 10, 2023

Query sent to the U.S. Department of Justice via the online form required for media queries. The email outlined procurement contracts awarded by the Bureau of Prisons to a seafood company whose supply chain is linked to Uyghur forced labor, Channel Fish Processing, and that the U.S. has prohibited the import of goods produced by forced labor. The email also asked for comment.

⁵⁸ The Outlaw Ocean Project, Discussion, U.S. Department of Defense, <https://www.theoutlawocean.com/investigations/china-the-superpower-of-seafood/discussion/#us-department-of-defense> (viewed October 20, 2023).

⁵⁹ The Outlaw Ocean Project, Discussion, U.S. Department of Justice, <https://www.theoutlawocean.com/investigations/china-the-superpower-of-seafood/discussion/#us-department-of-justice> (viewed October 20, 2023).

Appendix 2
The Outlaw Ocean Project
Methodology⁶⁰

How did the investigation calculate the total number of seafood plants connected to Xinjiang forced labor?

We found user-generated content posted in the last 12 months showing Xinjiang minorities working at ten seafood enterprises, for which we also had state media and/or company statements describing Xinjiang labor transfers. The ten plants are operated by five corporate entities, and each group owns two facilities:

Company name	Corporate group
Qingdao Lian Yang Aquatic Products Co. Ltd.	Tianyuan
Qingdao Tianyuan Aquatic Products Co. Ltd.	Tianyuan
Rizhao Jiayuan Foodstuff Co. Ltd.	Shandong Meijia
Rizhao Meijia Keyuan Foods Co. Ltd.	Shandong Meijia
Rizhao Rirong Aquatic Products Co. Ltd.	Rongsense
Rizhao Rongxing Food Co. Ltd.	Rongsense
Rongcheng Haibo Ocean Food Co. Ltd.	Chishan
Shandong Haidu Ocean Food Co. Ltd.	Chishan
Yantai Longwin Foods Co. Ltd.	Sanko
Yantai Sanko Fisheries Co. Ltd.	Sanko

How did the investigation find out about social audits conducted at Shandong seafood-processing plants using Xinjiang labor?

We communicated our findings to hundreds of North American and European companies buying seafood from Shandong plants using workers from Xinjiang. In many cases, companies pointed to social-audit reports to assert there was no evidence of forced labor at the implicated factories. We asked importers and their customers to tell us when and what types of social audits had been conducted, who had conducted them, and what they had found with respect to Xinjiang workers. Although in most cases, companies declined to answer our enquiries, usually referring to commercial confidentiality, some buyers confirmed audit dates, auditor identities, and the standard used (Sedex Members Ethical Trade Audit, or SMETA). A few even shared audit reports. In order to further ascertain whether Xinjiang workers were being detected by social audits, we spoke to the auditors, and standards and certification bodies, about our findings.

How did the investigation identify companies importing seafood from Chinese processors connected to abuses at sea and on land?

Trade data allowed us to track exports from processing plants to stores and restaurants outside of China. We obtained data from a variety of sources, including Chinese customs and private aggregators of import

⁶⁰ The Outlaw Ocean Project, Methodology, <https://www.theoutlawocean.com/investigations/china-the-superpower-of-seafood/methodology/#method-discussion> (viewed October 20, 2023).

data from North American and European countries. We also searched company websites for information about customers and export approvals. Footage posted to Douyin by workers in seafood plants often featured seafood packaging showing useful details like vessel names or brand labels. We also used optical character-recognition searches to look for examples of packaging and documentation featuring the unique export codes of Chinese processing plants (export approval codes and health marks issued by government authorities, certification codes issued by the Marine Stewardship Council and the Aquaculture Stewardship Council).

How did the investigation connect companies importing seafood tainted or associated with crimes or other concerns to consumers?

Trade data told us which companies were importing seafood from Chinese suppliers of interest, but in most cases, we needed to look at the next link in the chain: the customer of the importer. We searched through importers' websites, product catalogs, and social-media profiles in order to ascertain who they were supplying. We used OpenCorporates, an open database of companies, to identify the ownership and corporate structures of companies in the U.S., Canada, Europe, and elsewhere. We also used a U.S. government trademark database and a global brand database to expand our list of brands owned by companies importing seafood tainted by forced labor or illegal fishing to search across catalogs and online stores for major grocery chains and food service groups.

We identified unique codes for importers—health marks issued by market state authorities, certification codes issued by the Marine Stewardship Council and the Aquaculture Stewardship Council—and conducted optical-character recognition searches for those codes on product packaging and commercial documents. We visited dozens of stores in 12 states (Alabama, Arkansas, California, the District of Columbia, Florida, Georgia, Hawaii, Massachusetts, New York, South Carolina, Texas, and Virginia) and several countries (Australia, France, Ireland, and the United Kingdom) to obtain images of seafood packaging in order to establish, using those unique codes, the origin of the seafood. We reviewed product listings on major retailer and foodservice distributor websites to identify seafood products that were produced or sold by target importers and that matched the types of seafood sourced from Chinese processors of interest.

Finally, communications with seafood importers and their customers—and, in some cases, the next tier of buyers—helped clarify our findings on the connections among fishing vessels, processing plants, and global consumers.

How did the investigation connect companies importing seafood tainted by or associated with potential crimes or other concerns to public procurement chains in North America and Europe?

We looked at government-contract databases, such as the European Union's tender database, which contains detailed records of tenders and contracts for all European Union countries and European agencies, and USASpending.gov, which provides federal spending data, to identify the main companies supplying frozen seafood to government agencies. We used trade data to identify any companies that received procurement contracts and also imported from Chinese companies tied to seafood associated with potential crimes, including those using Uyghur labor. We also investigated major government suppliers' product lists and catalogs to ascertain if they were supplied by companies that imported seafood associated with potential crimes and risk indicators.

In the UK, whitefish is supplied by companies associated with our investigation to public institutions such as schools and hospitals. The supply is typically through intermediaries, working under what are known as "framework agreements" that identify government-approved vendors. Implicated seafood suppliers were

identified through reference to brand names and the use of unique Marine Stewardship Council (MSC) codes on primary school menus for 2023 and other documentation.

U.S. public procurement rules have various exemptions that allow local-level buyers for school-lunch or other federally supported programs to purchase food and other products if they are looking for better options in terms of price, quality, quantity ,or availability. **In the U.S., half of the fish sticks served in public schools have been processed in China, according to the Genuine Alaska Pollock Producers, an industry group.** They said their research was derived from a review of purchasing records of their members. States and large school districts have historically used USDA grants to buy seafood directly from commercial vendors, much of which is sourced through China, the organization said. Foods purchased by the USDA have only accounted for about 20 percent of what is served in schools, according to the organization, which means the remaining 80 percent is purchased mostly by local buyers.