**The Future of Forced Labor: Enforcing the UFLPA in the Wake of *Ninestar Corp. v. United States***

*Joshua Feldman*[[1]](#footnote-1)

\* \* \*

**Introduction**

The [Uyghur Forced Labor Prevention Act (UFLPA)](https://perma.cc/82EP-EKJK) has been [hailed](https://perma.cc/6QBU-2PBQ) as a game changer in the fight against forced labor in U.S. supply chains. Previously hampered by regulatory inaction and significant statutory loopholes for importers, [the forced labor enforcement regime was effectively toothless for most of the 20th century](https://www.congress.gov/crs-product/R46631). The UFLPA's enactment in 2021 signaled a shift. In response to allegations of human rights abuses in the Xinjiang Uyghur Autonomous Region (XUAR) of China, Representatives Jim McGovern and Chris Smith, [members of the Congressional Executive Committee on China](https://perma.cc/JR4W-FVZ3), introduced the bill that became the UFLPA in the House of Representatives in September 2020. The bipartisan legislation (passing the House by [unanimous voice vote](https://www.reuters.com/world/china/us-house-vote-compromise-version-uyghur-bill-2021-12-14/) and the Senate by [unanimous consent](https://perma.cc/H2JF-9N3Q)) resolved to “strengthen the prohibition against the importation of goods made with forced labor” and “to address gross violations of human rights in the Xinjiang Uyghur Autonomous Region.”

The UFPLA has successfully achieved those objectives. Since the UFLPA took effect in July 2022, [Customs and Border Protection (CBP) has blocked roughly 8,500 shipments of imported goods, valuing approximately $860 million in total and purportedly made with forced labor](https://perma.cc/GVR2-W6GG). In comparison, from the enactment of the [Smoot-Hawley Tariff Act of 1930](https://perma.cc/J6UV-HHTM) (the first statute banning importation of goods made with forced labor) through the 1980s, the United States Customs Service (the predecessor of CBP) only considered [60–75 possible prohibitions on imports](https://www.congress.gov/crs-product/R46631). Of those possible prohibitions, only eight resulted in goods being banned from importation. The 1990s saw a brief uptick in enforcement, only to fall back down to *zero* blocked imports from 2000–2015.

For the most part, the Forced Labor Enforcement Task Force (FLETF)—the multi-agency task force charged with coordinating forced labor prevention efforts—and its constituent agencies have had significant autonomy in enforcing the UFLPA. However, a UFLPA dispute only reached federal court for the first time in November 2023. Earlier that year, the FLETF added Ninestar Corporation, [a Chinese printer manufacturer](https://perma.cc/UX53-YRBE), and its subsidiaries to the [UFLPA Entity List](https://perma.cc/E4YD-BGC7), a list of facilities suspected of using forced Uyghur labor that are consequently prohibited from importing goods into the United States. In response, the firm sought an injunction against its inclusion on the Entity List in the Court of International Trade (CIT).

This Case Note summarizes the primary holdings in the resulting cases, including the exhaustion requirements levied on firms disputing an Entity List designation. Specifically, the CIT ruled that exhaustion is *not* required when the FLETF does not provide adequate information about an Entity List designation to a firm to allow it to challenge its designation through existing administrative channels. The Case Note focuses on the resulting predicament for the FLETF. By revealing more information to regulated firms about its Entity List determination procedures, the FLETF could force firms to seek administrative remedy before they could access the courts, thereby retaining greater control over UFLPA enforcement; yet, in doing so, it may enable firms to circumvent Entity List designation. This Case Note ultimately concludes that forced labor enforcement regime is best served by greater transparency in the Entity List designation process.

**I. Pre-UFLPA Forced Labor Enforcement Regime**

[Forced labor](https://perma.cc/2YET-YK7T) is a significant input into global supply chains. In the United States alone, [$169.6 billion](https://perma.cc/24RN-6AE9) worth of products potentially made with forced labor are imported annually. As both an economic and a humanitarian matter, the United States has attempted to curb the use of forced labor by foreign entities. One avenue—civil litigation—is plaintiff-initiated, allowing a harmed party to seek remedy through any of several statutes, including the [Alien Tort Statute](https://perma.cc/XXM4-TJRM), the [Racketeer Influenced and Corrupt Organizations Act](https://perma.cc/KJD9-SFUB), and the [Trafficking Victims Protection Act](https://perma.cc/7SRE-JZ65). Despite initial successes using each statute, over time, courts have [cabined their use](https://perma.cc/R939-YYC6) in the fight against forced labor, citing concerns about judicial overreach and extraterritorial application of U.S. law.

Alternatively, the United States has retained a separate suite of forced labor enforcement tools: its trade controls. Built into the Tariff Act of 1930 is [§ 307](https://perma.cc/7TXD-NZE8) (codified at 19 U.S.C. § 1307), a provision authorizing and directing the Secretary of the Treasury to regulate foreign goods produced with forced labor. According to § 307, such goods are not “entitled to entry at any of the ports of the United States” and “the importation thereof is [ ] prohibited.” U.S. Customs and Border Protection is the law enforcement agency generally responsible for enforcing § 307 by issuing Withhold Release Orders (WROs) to deny products entry into the United States. Section 307, therefore, provides a backstop against the importation of goods made with forced labor; even without a plaintiff bringing a civil suit, the United States can nevertheless punish firms that utilize forced labor.

Historically, [§ 307 was used sparingly](https://crsreports.congress.gov/product/pdf/IF/IF11360#:~:text=Section%20307%20of%20the%20Tariff,(CBP)%20enforces%20the%20prohibition.), in part because of the consumptive demand exception. Originally included amid [concerns that U.S. consumers would lose access to everyday products](https://perma.cc/2L5S-HF6W), the consumptive demand exception exempted products made with forced labor from being denied entry to the United States when domestic production was inadequate to meet “consumptive demand” of U.S. consumers. Even at the time of the Tariff Act’s enactment, myriad products in high demand in the U.S. were almost exclusively produced abroad [(including, for example, nearly all tropical goods)](https://perma.cc/JQ6L-55S5), thereby exempting multiple goods from § 307 actions.

The landscape started to shift in 2016, when Congress passed the [Trade Facilitation and Trade Enforcement Act (TFTEA)](https://perma.cc/8DQB-4A2E), eliminating the consumptive demand exception. Then, in 2020, Congress enacted the [U.S.-Mexico-Canada Agreement Implementation Act](https://perma.cc/M5M6-9AQF) and authorized the establishment of the [FLETF](https://perma.cc/CKM9-FRST), which was tasked with monitoring [implementation of § 307](https://perma.cc/8DC4-R57E). Finally, following the [State Department’s recognition of a genocide](https://perma.cc/UM7S-PCSA) against the Uyghurs, the United States passed the UFLPA in 2021.

**II. Innovations of the UFLPA**

The [UFLPA](https://perma.cc/6DSX-L4QB), building on § 307, aimed to “ensur[e] that the Government of the People’s Republic of China does not undermine the effective enforcement of Section 307 of the Tariff Act of 1930.” To that end, the UFLPA commissioned the FLETF to determine “how best to ensure that goods mined, produced, or manufactured wholly or in part with forced labor in the People’s Republic of China, including by Uyghurs, Kazakhs, Kyrgyz, Tibetans, and members of other persecuted groups in the People’s Republic of China, and especially in the Xinjiang Uyghur Autonomous Region, are not imported into the United States.”

Included in this mandate was the requirement to produce what became known as the Entity List, a designated group of entities fitting one of [four categories](https://perma.cc/6DSX-L4QB): (1) those in the XUAR that mine, produce, or manufacture any goods with forced labor, (2) those that work with the XUAR to import forced labor from persecuted groups into different regions, (3) those that export the resulting products into the United States, and (4) those that engage in the euphemistic “poverty alleviation” or “pairing-assistance” programs that solicit forced labor for government purposes.

The Act also established the mechanism that changed the landscape of forced labor enforcement: [the rebuttable presumption](https://perma.cc/6DSX-L4QB). For any goods (1) originating from those identified on the Entity List or (2) produced in the XUAR, the Act instructed the Commissioner of U.S. CBP to presume that the goods are banned from importation and not entitled to entry at any port of the United States.

[The rebuttable presumption differs significantly from a typical § 307 action](https://perma.cc/3G6L-5KN7), which relies on the issuance of a WRO following the CBP’s finding of evidence that “reasonably but not conclusively indicates” that the good was a product of forced labor. Instead, the presumption flips the burden of production, permitting manufacturers on the Entity List or based in the XUAR to produce “clear and convincing evidence” for the FLETF that the goods they make are not produced with forced labor; otherwise, they are forbidden from entry into the United States. In addition, the UFLPA itself contains no *de minimis* exception: it bans the entry of any good with even a minuscule component manufactured in the XUAR or by an entity on the Entity List.

The only recourse firms on the Entity List have, other than appealing each import decision on an as-applied basis to the CBP, is to petition the FLETF for removal from the Entity List. This is a daunting course of action. [The FLEFT’s only official guidance on removal](https://perma.cc/L6HP-R7EF) suggests that it will consider a written petition for removal supplemented with information demonstrating that the entity “no longer meets or does not meet the criteria described in the applicable clause [of] the UFLPA.” After receiving a petition, the FLETF Chair may contact the entity for additional information or to ask clarifying questions, whereafter the FLETF member agencies will vote on whether to remove the entity from the list. Little information is offered regarding what information is necessary or sufficient. [Notably, no entity has been removed from the Entity List by the FLETF to date.](https://perma.cc/WT9R-KRR2)

**III. The Ninestar Cases and Their Impact**

When Ninestar Corporation found itself added to the Entity List in [June 2023](https://perma.cc/E4YD-BGC7), it decided to protest its designation in an alternative way. Turning to administrative law, Ninestar argued that their inclusion on the Entity List was [“arbitrary and capricious" under the Administrative Procedure Act (APA)](https://perma.cc/33G6-YKFW) because the FLETF did not provide “any explanation for adding Plaintiffs to the UFLPA Entity List.” As a result, Ninestar submitted a complaint before the Court of International Trade (CIT) seeking a preliminary injunction against its designation on the Entity List rather than petition the FLETF directly for removal.

The resulting litigation occurred over three trials before the CIT, hereinafter called the “Ninestar Cases.” The Ninestar Cases addressed two significant hurdles to companies seeking judicial review: (1) whether the CIT has jurisdiction over UFLPA disputes and, if so, (2) what standard of administrative exhaustion must be applied for the dispute to be reviewable. The court’s ruling on both of these questions—that the CIT does indeed have subject matter jurisdiction and that it could exercise its discretion in imposing an exhaustion requirement—provides the basis for this note’s analysis.

*A. The Court of International Trade’s Jurisdiction over UFLPA Disputes*

Because the UFLPA had never before been adjudicated, CIT Judge Gary Katzmann [first](https://perma.cc/33G6-YKFW) decided whether the CIT had jurisdiction over such matters at all. Established by the [Customs Courts Act of 1980](https://perma.cc/9QEH-46SW), the CIT has exclusive jurisdiction over civil actions against the United States, its agencies, and its officers that concern certain trade disputes, including “embargo[es] or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.” Despite the Government’s argument that the Listing Decision was not itself an embargo, the court held that the effect of a Listing Decision—prohibiting any importation of goods by a listed entity—met the [Supreme Court’s definition of an embargo](https://perma.cc/2V6Z-CLDN) as “governmentally imposed quantitative restriction—of zero—on the importation of merchandise.” Qualifying for this threshold requirement opened the CIT as an avenue to adjudicate disputes about the FLETF’s enforcement of the UFLPA. However, one additional hurdle remained before the merits of Ninestar’s claim could be heard: the exhaustion requirement.

*B. Reviewability of FLETF Listing Decisions*

Often the availability of judicial review of administrative action depends in part on whether a petitioner has exhausted all possible administrative remedies. This is known as the exhaustion doctrine. Since Ninestar pursued judicial review before appealing the FLETF’s decision through administrative channels, the Government sought to dismiss Ninestar’s suit on the basis of failing to exhaust all administrative remedies. But, as the court noted, the requirements in this case were not so straightforward.

1. *The Conflicting Exhaustion Requirements*

Typically, a court might apply “statutory exhaustion”—exhaustion requirements imposed by statute—or, in the alternative, “prudential exhaustion”—exhaustion at the discretion of the court. In the Ninestar Cases, the exhaustion requirement was somewhere in between. According to [29 U.S.C. § 2637(d),](https://perma.cc/TAX2-N8VK) the CIT must “where appropriate, require the exhaustion of administrative remedies” for § 1581(i) actions like in the instant case. The words “where appropriate” suggest the application of judicial discretion, in effect prescribing prudential exhaustion.

Ninestar, however, suggested that Congress could not possibly have meant to provide the CIT with limitless discretion. As Judge Katzmann noted, congressional intent is “paramount to any exhaustion inquiry,” and a statutory exhaustion requirement, even a weak one like § 2637, denotes a congressional intent that the court take exhaustion seriously.

Ninestar went one step further. According to Ninestar, because Congress set out a generalized exhaustion directive barring prudential exhaustion [under the APA’s § 10(c)](https://perma.cc/LS55-2L4M), and because the CIT had historically been guided by the APA’s standards of review in [other § 1581(i) actions](https://perma.cc/7W9J-4JCU), the court must be guided by 10(c) in UFLPA cases as well. Citing the Supreme Court’s decision in [*Darby v. Cisneros*](https://perma.cc/UV79-XXAU) (1993) that, in APA-governed cases, courts are “not free to impose prudential exhaustion” in the absence of a statutory requirement or an agency rule, Ninestar argued that 10(c) forecloses the exercise of prudential exhaustion under § 2637.

1. *Reconciling the Exhaustion Requirements*

The court, however, creatively navigated these seemingly conflicting requirements. Judge Katzmann cited Ninestar’s key precedent in *Darby* to affirm that exhaustion under the APA [“is a prerequisite to judicial review *only* when ‘expressly required by statute . . . .’”](https://perma.cc/UV79-XXAU) While exhaustion is expressly required by statute in § 1581(i) cases, exhaustion *under the APA 10(c) standard* is not. The statute requiring exhaustion, § 2637, provides its own exhaustion standard, thereby supplanting the default use of the APA’s reviewability standards in § 1581(i) cases. As a result, for all cases about the UFLPA before the CIT, exhaustion of administrative remedies is required “where appropriate.”

1. *Where Exhaustion is Appropriate*

Judge Katzmann went on to consider which circumstances may be “appropriate.” Turning to aims motivating the doctrine of exhaustion, he highlighted the role of exhaustion in ensuring judicial efficiency. To that end, the CIT has opted not to require exhaustion under four circumstances: (1) the plaintiff’s argument involves a pure question of law; (2) there is a lack of timely access to the confidential record; (3) a judicial decision rendered subsequent to the administrative determination materially affected the issue; or (4) raising the issue at the administrative level would have been futile.

The court focused its attention on circumstance (2). The court found as a factual matter that the FLETF failed to produce a sufficient rationale for Ninestar’s inclusion on the Entity List. [At the time that Ninestar filed its complaint](https://perma.cc/33G6-YKFW), two months after having been placed on the [Entity List](https://perma.cc/P4D2-T7M2), the only rationale it had received was a [“near-verbatim recitation of the statutory language,”](https://perma.cc/3LVP-JRLD) devoid of any individualized information regarding Ninestar’s own activities. Judge Katzmann held that the FLETF’s failure to produce a sufficient rationale for Ninestar’s inclusion on the Entity List constituted a lack of timely access to the confidential record. Specifically, the court noted that “exhaustion would be ‘necessarily speculative, illogical, and useless’ when the facts or argumentation supporting an agency’s conclusion [ ] did not exist at the time of the opportunity to exhaust.”

1. *The Preliminary Injunction*

Despite determining that exhaustion was inapposite given the insufficient rationale for the decision provided to Ninestar, the court nonetheless ultimately determined that [Ninestar was unlikely to succeed on the merits](https://perma.cc/3LVP-JRLD) and thus failed the preliminary injunction test. As it turns out, the FLETF did have a sufficient basis for placing Ninestar on the Entity List; it just did not produce it for Ninestar. In a later document—the Public Administrative Record—the Government revealed that it had information from an informant and corroborating sources that Ninestar collaborated with the XUAR government to recruit, transfer, and compel Uyghur laborers to work for the company involuntarily. Since the information was on the record at the time of the trial, the court ruled that the FLETF’s determination was not arbitrary and capricious; however, because it was not available to Ninestar at the time of the Listing Decision, it did not foreclose Ninestar’s argument at the “exhaustion” stage.

**IV. The FLETF’s Post-Ninestar Conundrum**

The Ninestar Cases, while ultimately not decided in favor of Ninestar, nonetheless represent a concern for future enforcement of the UFLPA, particularly regarding additions to the Entity List.

On a baseline level, the resolution of questions regarding the availability of judicial review could itself incentivize more firms to challenge adverse UFLPA actions in the CIT. Prior to the Ninestar Cases, firms hoping to challenge an enforcement action in federal court faced significant uncertainty about whether their case would survive even a court’s threshold jurisdictional and reviewability requirements, making the value of their investment in litigation hard to gauge. Even firms willing to risk litigating might have originally demurred, hoping to gain better clarity about the court’s requirements from another firm suing first. The Ninestar Cases eliminated that uncertainty. Now, knowledge that (1) the CIT does have jurisdiction over UFLPA actions and (2) the court has clear and specific exhaustion requirements tilts firms’ expected value calculations further toward pursuing litigation.

Confronted with this possibility, the FLETF has a potential recourse: it could choose to provide greater detail upfront about its Listing Decisions to firms seeking removal from the Entity List. Under Judge Katzmann’s exhaustion determination, providing sufficient information for firms to challenge their designation through the FLETF’s procedures would force firms to first attempt to exhaust all administrative remedies before judicial review becomes available. Forestalling judicial review provides a number of possible benefits to the FLETF’s enforcement regime, but doing so comes with a trade-off. By providing regulated firms with information about how the FLETF determines who lands on the Entity List, the FLETF could be enabling firms to circumvent designation. However, it is clear that enforcement of the UFLPA is best served by greater disclosure.

There are a number of obvious benefits to greater disclosure, thereby compelling exhaustion of administrative remedies. First, to the extent that administrative channels can produce a satisfactory outcome for both the FLETF and the designee, funneling complaints out of the court, these channels improve regulatory efficiency, reduce judicial backlog, and prevent unnecessary expenditure on litigation costs. Even should a designee exhaust administrative remedies and want to pursue litigation, the court will not have to waste time and effort determining the propriety of requiring exhaustion; with a plaintiff’s timely access to the administrative record provided, the CIT will likely immediately require exhaustion. Second, disclosure would help domestic beneficiaries of the UFLPA. American firms hoping to render their supply chains compliant with the UFLPA have [sought greater transparency about the designation process](https://perma.cc/AB7V-FAA7); more disclosure in Listing Decisions would provide it.

More important, however, is the FLETF’s ability to retain control over UFLPA enforcement. The FLETF and its constituent agencies were endowed with significant control over the implementation of the FLETF, including not only Entity List determinations and the appeals process but also case-by-case determinations of whether the rebuttable presumption stands, where to focus investigation efforts, stakeholder engagement, etc. Within each of these efforts is a degree of discretion exercised that, especially in an era of increased judicial scrutiny of administrative agency actions, could be subjected to judicial challenge. To the extent that the FLETF can forestall judicial review by compelling designees to exhaust administrative remedies, the FLETF can avoid some of the burdensome record-keeping necessary to withstand arbitrary and capricious review or, worse, the tumult of having to change its procedures if the court overrules them.

Ultimately, the FLETF must weigh these benefits against the potential risk of firms circumventing the listing process. Given the difficulty of finding evidence of abuse of laborers by Chinese firms, the FLETF may be sensitive to the risk of defeating the limited information-gathering powers at its disposal to identify firms for inclusion on the Entity List. That said, three factors diminish these concerns. First, the information required to allow a firm to pursue administrative remedies is likely highly idiosyncratic to that firm’s Listing Decision and not generalizable enough to aid any other entity hoping to circumvent designation. Second, if the information truly is valuable, entities may attempt discovery by pursuing litigation as Ninestar did. And finally, this worry is largely speculative, unlike the more material benefits to disclosure.

In the end, the benefits appear to outweigh the potential costs of disclosure at the time of a Listing Decision. However, regardless of the FLETF’s ultimate reaction to the Ninestar Cases, further litigation of the UFLPA in the CIT is sure to continually refine the forced labor enforcement regime in years to come.

\*  \*  \*

Joshua Feldman is a J.D. candidate at The University of Chicago Law School.

1. Joshua Feldman is a J.D. candidate at The University of Chicago Law School, Class of 2026. He thanks Elizabeth Welsh, Liam Haffey, and the entire *University of Chicago Law Review Online* team for their support and feedback. [↑](#footnote-ref-1)