

State Bar of Texas International Law Section

# INTERNATIONAL NEWSLETTER

Summer/Fall, Volume 3, No. 2

[ilstexas.org](http://ilstexas.org)



The Texas Bar International Law Section  
Recognizes the Tenth Anniversary of the adoption  
of the United Nations Guiding Principles on  
Business and Human Rights.



# U.S. Government Takes a Hard Line to Stop Human Rights Abuses with Clear Signals to Industry

OLGA TORRES  
Managing Member, Torres Law, PLLC

MARIA ALONSO  
Associate, Torres Law, PLLC

In recent years, the U.S. Government (“USG”) has taken numerous actions to target forced labor and other human rights violations, with a significant increase in 2020 and early 2021. These include the issuance of trade-related restrictions, such as import and export laws, economic sanctions, and civil monetary penalties, that target companies involved in forced labor and human rights violations and abuses. Consequently, U.S. companies should carefully review global supply chains to ensure they are not involved in forced labor/human rights violations. This article will provide an overview of the main U.S. legal authorities for imposing such restrictions and a summary of the key measures the USG took in 2020 as well as ongoing actions in 2021 that focus on forced labor and human rights abuses.



## USG Actions Targeting Human Rights Concerns

The actions taken by the USG range from advisories to economic sanctions and visa restrictions. Below we discuss the main categories of actions and examine certain regulatory restrictions imposed in the recent past, most of which have involved parties from the People’s Republic of China (“China”).

### Xinjiang Supply Chain Business Advisory

On July 1, 2020, the U.S. Departments of State, the Treasury, Commerce, and Homeland Security jointly issued an advisory, “Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and Other Human Rights Abuses in Xinjiang.”<sup>1</sup> This advisory details the risk of exposure for businesses with supply chain entities

that engage in forced labor and other human rights abuses in China’s Xinjiang Uyghur Autonomous Region (“XUAR”), with specific attention to abuses that target Uyghurs, Kazakhs, and other members of Muslim minority groups. It urges businesses with supply chain connections to XUAR to implement appropriate human rights due-diligence policies and procedures to mitigate reputational, economic, and legal risks.

## Import Restrictions

### *The Tariff Act of 1930 and the Trade Facilitation and Trade Enforcement Act of 2015*

In the import regime, there are two main legislations targeting forced labor: section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) (“the Tariff Act”) and the Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”) (Pub. L. No. 114-125 § 910). Generally, both section 307 of the Tariff Act and TFTEA prohibit the importation of goods mined, produced, or manufactured, wholly or in part, in any foreign country by forced labor, including convict labor, forced child labor, and indentured labor.

Prior to TFTEA, there was a loophole in the law that allowed some imports of forced labor goods if such goods were not sufficiently produced in the United States to meet U.S. consumer demands. TFTEA repealed the “consumptive demand” exception, and imports into the United States of goods made with forced labor are now prohibited.

### *Enforcement on Imports*

The repeal of the “consumptive demand” exception significantly enhanced the U.S. Department of Homeland Security (“DHS”) agencies’ ability to prevent forced labored goods from being imported into the United States. The DHS agencies, U.S. Customs and Border Protection (“CBP”) and U.S. Immigration and Customs Enforcement, enforce prohibitions against importing and benefitting from supply chain-related use of forced labor goods through civil and criminal enforcement actions, respectively. CBP has the authority to deny entry of such goods, potentially resulting in the goods being seized and forfeited, and even issue civil penalties against the importer and other parties. Recently, and as discussed below, there has been an increase in CBP’s issuance of Withhold Release Orders (“WROs”) to detain goods at the port of entry until

a finding regarding the forced labor concerns is reached.

### *CBP WROs*

To enforce section 307 of the Tariff Act, CBP can issue WROs to prohibit the import of products when there is evidence that “reasonably but not conclusively” indicates that the products were made with forced labor.



WRO activity significantly increased in 2020, and this has continued in 2021, with a focus on Chinese-origin products. On January 13, 2021, CBP issued a region-wide WRO<sup>2</sup> on all cotton and tomato products produced in XUAR; it follows the November 30, 2020 WRO issued on all cotton products made by Xinjiang Production and Construction Corps (“XPCC”).

On May 10, 2021, CBP issued ruling HQ H318182 denying a protest for a shipment of cotton garments imported from China detained under the XPCC WRO.<sup>3</sup> The ruling noted that the importer “has not provided substantial evidence to establish that the entities within the XPCC that processed that cotton into the subject goods did so without the use of

forced labor.” Consequently, the cotton garments were excluded for violating the XPCC WRO and were deemed inadmissible.

A total of 15 WROs were issued in 2020 by CBP, and nine involved products originating from China, mostly products from the Xinjiang region.<sup>4</sup> Three WROs involved disposable gloves and palm oil from producers in Malaysia, and the remaining three WROs involved seafood from Taiwanese-affiliated fishing vessels.

### *CBP Forced Labor Findings*

In 2020, CBP not only significantly increased the number of WROs issued, but it also issued its first finding of forced labor<sup>5</sup> since 1996, for stevia leaf extracts and derivatives produced in China by the Inner Mongolia Hengzheng Group Baoanzhao Agriculture, Industry, and Trade Co., Ltd., based on a WRO it had issued four years earlier in May 2016.

Most recently, on March 29, 2021, CBP issued a finding of forced labor for certain disposable gloves produced in Malaysia by Top Glove Corporation Bhd.<sup>6</sup> The WRO was issued by CBP on July 15, 2020.<sup>7</sup> As a result of the CBP forced labor findings, all covered products are seized at U.S. ports of entry and subject to forfeiture proceedings.

### *CBP Penalty for Forced Labor*

In August 2020, CBP collected \$575,000 in penalties following the closure of a civil enforcement action against the importer, Pure Circle U.S.A., Inc.<sup>8</sup> Pursuant to the stevia WRO investigation, CBP discovered that Pure Circle imported at least 20 shipments of stevia powder and derivatives produced from stevia leaves that were processed in China with forced labor in violation of U.S. law.

## Export Controls

### *Entity List and Licensing Policy*

Pursuant to the Export Administration

Regulations (“EAR”), the U.S. Department of Commerce Bureau of Industry and Security (“BIS”) has the authority to add parties to the Entity List (Supplement No. 4 to Part 744) when such parties are engaging in activities contrary to U.S. national security or foreign policy interests. Designated parties on the Entity List are prohibited from receiving exports, reexports, or transfers (in-country) of items subject to the EAR without a license.

Further, BIS can also amend or set the licensing policy for licensing determinations of items subject to the EAR.

### ***BIS Entity List Designations***

To date, BIS has issued Entity List designations in October 2019, and June, July, and December 2020, for more than 50 Chinese governmental and commercial organizations implicated in human rights violations and abuses which include the implementation of China’s campaign of repression, mass arbitrary detention, forced labor, involuntary collection of biometric data and genetic analyses, and high-technology surveillance against Uyghurs, Kazakhs, and other members of Muslim minority groups in XUAR.

As a result of these designations, in general, BIS imposed additional license requirements on the Chinese entities and limited the availability of most license exceptions.

### ***BIS Licensing Policy Amendment***

BIS also amended its existing licensing policy to address human rights concerns. On October 6, 2020, BIS issued a final rule that amended the existing licensing policy in the EAR (see 15 C.F.R. § 742.7).<sup>9</sup> Notably, Section 742.7(b)(1) was modified to note that BIS generally will consider favorably, on a case-by-case basis, license applications for items controlled for crime control reasons, unless there is civil disorder in the country or region of destination, or if BIS assesses that

there is a risk that the items will be used in a violation or abuse of human rights. Moreover, BIS added a new subparagraph (b)(2), specifying that except for items controlled for short supply reasons, every license application review for all export-controlled items listed on the Commerce Control List will now include a review of human rights concerns.

## **Economic Sanctions**

### ***Global Magnitsky Human Rights Accountability Act and Executive Order***

The Global Magnitsky Human Rights Accountability Act (“Global Magnitsky Act”)<sup>10</sup> and Executive Order (“EO”) 13,818,<sup>11</sup> which builds upon and implements the Global Magnitsky Act, authorize the Secretary of the Treasury to impose economic sanctions on certain persons who, among other things, are involved in serious human rights abuses. To implement the Global Magnitsky Act and EO 13,818, the U.S. Department of the Treasury, Office of Foreign Assets Control (“OFAC”) published a final rule adding the Global Magnitsky Sanctions Regulations at 31 C.F.R. part 583.

In brief, OFAC can impose economic sanctions by adding companies and individuals who have been involved in human rights violations, including forced labor practices, to the Specially Designated Nationals (“SDNs”) and Blocked Persons List. U.S. persons are prohibited from directly or indirectly engaging in transactions or dealings with such SDNs and any entities owned 50 percent or more by one or more SDNs, unless an OFAC authorization is available.

### ***OFAC Sanctions***

Pursuant to the Global Magnitsky Act and EO 13,818, OFAC sanctioned multiple parties in 2020 and 2021 for human rights abuses. In July 2020 and March 2021, OFAC added parties to the SDN List for their connection with serious human rights

abuses (mass arbitrary detention and severe physical abuse, among others) against ethnic minorities (e.g., Uyghurs) in XUAR.

## **Department of State**

The U.S. Department of State (“State”) has also taken actions against parties involved in human rights violations. On October 8, 2019, State announced a visa restriction policy under section 212(a)(3) (C) of the Immigration and Nationality Act for Chinese government and Chinese Communist Party (“CCP”) officials implicated in human rights abuses in XUAR.

In 2020, State continued to issue additional visa restrictions and travel bans. On July 9, 2020,<sup>12</sup> it designated three senior CCP officials<sup>13</sup> under section 7031(c) of the FY 2020 Department of State, Foreign Operations, and Related Programs Appropriations Act for their involvement in gross human rights violations. Consequently, the three individuals and their immediate family members are ineligible for entry into the United States.

Additional visa restrictions were also placed on other CCP officials believed to be involved in unjust detention or abuse of minority groups in XUAR. For example, on July 31, 2020, State announced that because of the July 31, 2020 OFAC designations, travel to the United States was restricted for Sun Jinlong (former Party Secretary of the XPCC), and Peng Jiarui (Deputy Party Secretary and Commander of the XPCC).<sup>14</sup>

## **Other Laws**

### ***The Trafficking Victims Protection Act’s Crime of Forced Labor (18 U.S.C. § 1589)***

Pursuant to the Trafficking Victims Protection Act (“TVPA”), the USG can criminally charge any person benefiting

from forced labor, if the person knew of, or recklessly disregarded, evidence of such forced labor and knowingly participated in the relevant venture. Criminal violations of the TVPA may result in companies facing a fine up to \$500,000, and executive and company employees involved may face up to 20 years of imprisonment. Additionally, the TVPA permits a civil right of action.

#### ***Uyghur Human Rights Policy Act of 2020***

On June 17, 2020, the Uyghur Human Rights Policy Act of 2020<sup>15</sup> was signed into law. It directs United States resources to address human rights violations and abuses of specified ethnic Muslim minority groups in China's XUAR.

#### ***Uyghur Forced Labor Prevention Act***

Two bills, both titled the Uyghur Forced Labor Prevention Act ("UFLPA"), were reintroduced at the beginning of 2021 in both the U.S. House of Representatives (H.R. 1155)<sup>16</sup> and the U.S. Senate (S. 65).<sup>17</sup> These bills may ban all goods produced in whole, or in part, in XUAR, unless importers can prove that the goods were not made with forced labor. Under the UFLPA bills, CBP would be authorized to issue a region-wide WRO, enabling it to detain all products from XUAR, and sanctions for violations could be issued.

### **Why Should Industry Care?**

It is expected that the Biden administration will maintain the focus on human rights, and that there will continue to be an increase in trade-related restrictions, including WROs, BIS Entity List designations, export licensing policies, economic sanctions, and visa restrictions, among others.

Companies need to carefully review their trade compliance programs to ensure that all risks of forced labor/human rights abuses and violations in their supply chains are addressed. For example, companies should conduct risk assessments and contract review, and improve policies and procedures, due diligence and auditing processes, and training. Other suggested measures include having anonymous reporting mechanisms and internal controls to detect noncompliance issues.

In addition to the legal risks related to forced labor and human rights, there are also economic and reputational risks. Companies that fail to conduct due diligence reviews of their global supply chains are likely to face significant revenue losses when products are seized or forfeited or when they must change suppliers at the very last minute. And, of course, companies may face reputational harm when their products are associated with human rights violations.

### **Conclusion**

We advise that all companies closely monitor their global supply chains for potential human rights compliance issues. While many of the above actions have related to China, human rights abuses can occur throughout the globe. With the high frequency of measures taken by the USG to address forced labor and human rights abuses and violations, companies should take affirmative steps to strengthen their supply chains and ensure inadvertent violations are avoided. The time to act is now.



Olga Torres is the Managing Member of Torres Law, PLLC. Ms. Torres concentrates her practice in the areas of international trade and national security law, anti-corruption compliance, and Customs matters. Ms. Torres is a frequent speaker and moderator. She has lectured on export controls and international trade for organizations, universities, and government agencies in different countries, including the United Kingdom, the Netherlands, Mexico, Thailand, France, and Canada. She authored several chapters in selected trade publications including the WorldECR's Export Compliance Manager's Handbook and the Society of International Affairs Export Voluntary Disclosure Handbook. She was previously an attorney in the International & Cross Border Transactions group at Holland & Knight LLP in Washington, D.C.

Maria Alonso assists clients with a broad range of international trade and national security matters, including those governed by the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), economic sanctions, U.S. customs laws and regulations, and the Foreign Corrupt Practices Act (FCPA). Ms. Alonso advises clients on the U.S. national security review process administered by the Committee on Foreign Investment in the United States (CFIUS). She has experience advising clients on the potential national security risks of proposed transactions and assists clients in seeking clearances from CFIUS for transactions subject to review. Ms. Alonso also advises clients on a variety of compliance matters, including export classification, compliance procedures, voluntary disclosures to government agencies regulating trade, and corporate investigations. ■

## Endnotes

- 1 U.S. Dep'ts of State, Treasury, Commerce, and Homeland Security, Xinjiang Supply Chain Business Advisory: Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and Other Human Rights Abuses in Xinjiang (July 1, 2020), available at [https://www.state.gov/wp-content/uploads/2020/07/Xinjiang-Supply-Chain-Business-Advisory\\_FINAL\\_For-508-508.pdf](https://www.state.gov/wp-content/uploads/2020/07/Xinjiang-Supply-Chain-Business-Advisory_FINAL_For-508-508.pdf).
- 2 Press Release, U.S. Customs and Border Protection, CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>.
- 3 See U.S. Customs and Border Protection, Ruling HQ H318182 (May 10, 2021).
- 4 A complete list of all the WROs issued by CBP are available at <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings> (last visited May 28, 2021).
- 5 Notice of Finding That Certain Stevia Extracts and Derivatives Produced in the People's Republic of China With the Use of Convict, Forced or Indentured Labor Are Being, or Are Likely To Be, Imported Into the United States, 85 Fed. Reg. 66,574 (Oct. 20, 2020).
- 6 Notice of Finding That Certain Disposable Gloves Produced in Malaysia With the Use of Convict, Forced or Indentured Labor Are Being, or Are Likely to be, Imported Into the United States, 86 Fed. Reg. 16,380 (Mar. 29, 2021).
- 7 On May 4, 2021, CBP announced the seizure of 3.97 million disposable gloves valued at over half a million dollars that were produced in Malaysia by a subsidiary of Top Glove. See Press Release, U.S. Customs and Border Protection, CBP Cleveland Seizes Top Glove Products Under Forced Labor Finding (May 4, 2021), <https://www.cbp.gov/newsroom/local-media-release/cbp-cleveland-seizes-top-glove-products-under-forced-labor-finding>.
- 8 Press Release, U.S. Customs and Border Protection, CBP Collects \$575,000 from Pure Circle U.S.A. for Stevia Imports Made with Forced Labor (Aug. 13, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor>.
- 9 Amendment to Licensing Policy for Items Controlled for Crime Control Reasons, 85 Fed. Reg. 63,007 (Oct. 6, 2020) (to be codified at 15 C.F.R pt. 742).
- 10 Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, 130 Stat. 2533 (2016) (codified as amended at 22 U.S.C. § 2656 note (2018)).
- 11 Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 26, 2017).
- 12 Press Release, U.S. Dep't of State, The United States Imposes Sanctions and Visa Restrictions in Response to the Ongoing Human Rights Violations and Abuses in Xinjiang (July 9, 2020), <https://2017-2021.state.gov/the- united-states-imposes-sanctions-and-visa-restrictions-in-response-to-the-ongoing-human-rights-violations-and-abuses-in-xinjiang/index.html>.
- 13 The three CCP officials included: 1) Chen Quanguo, the Party Secretary of the XUAR; 2) Zhu Hailun, Party Secretary of the Xinjiang Political and Legal Committee; and 3) Wang Mingshan, the current Party Secretary of the Xinjiang Public Security Bureau.
- 14 Press Release, U.S. Dep't of State, On Sanctioning Human Rights Abusers in Xinjiang, China, (July 31, 2020), <https://2017-2021.state.gov/on-sanctioning-human-rights-abusers-in-xinjiang-china/index.html>.
- 15 Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648 (2020).
- 16 Uyghur Forced Labor Prevention Act, H.R. 1155, 117th Cong. (2021).
- 17 Uyghur Forced Labor Prevention Act, S. 65, 117th Cong. (2021).