

U.S. Legislation on Forced Labor: Customs Challenges

ICC Global Customs & Trade Facilitation Commission Meeting
May 17, 2022

Presenters



Stephan E. Becker

Partner, Washington, DC

+1.202.663.8277

stephan.becker@pillsburylaw.com



Benjamin J. Cote

Counsel, Washington, DC

+1.202.663.8305

benjamin.cote@pillsburylaw.com

Background Briefing

Driving Force of Recent Changes



- U.S.-China Geopolitical tension
- New Approach to Trade relationship
- Concerns about human rights, particularly in the Xinjiang Uyghur Autonomous Region (“XUAR”)

U.S. Response Has Involved a Wide Range of Policy Tools



- **Sanctions -- Global Magnitsky Act**
 - OFAC designated XPCC and multiple other parties in 2020-21 related to XUAR events
- **Export Controls -- EAR Entity List**
 - BIS designates entities implicated in forced labor of ethnic minorities from Xinjiang.
- **Import Restrictions**
 - CBP Withhold Release Orders (“WROs”) -- ban imports made with forced labor.
- **Others**

Section 307 of Tariff Act of 1930 and Withhold Release Orders (WROs)

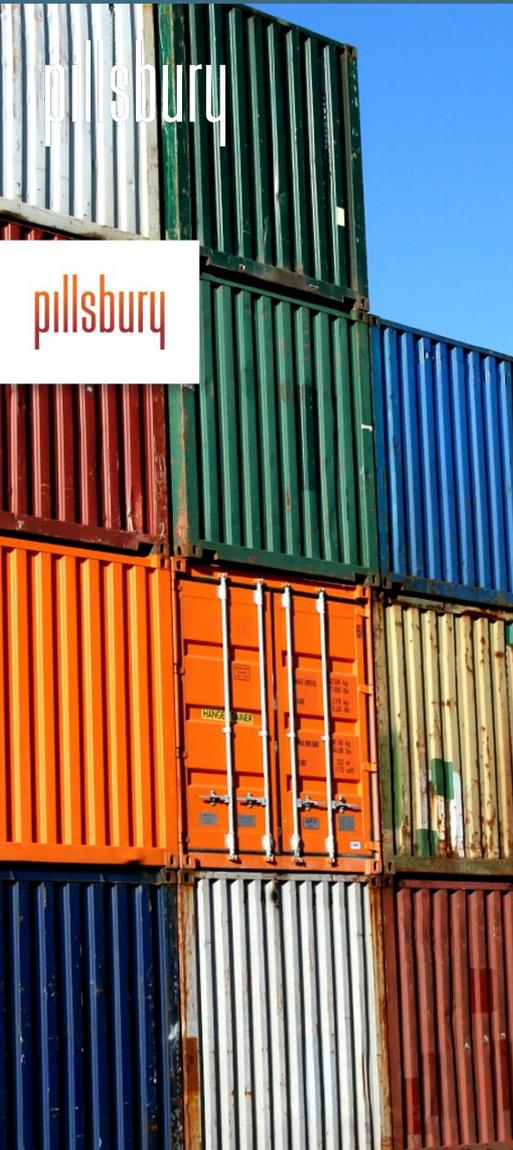
Section 307 of Tariff Act of 1930

- 19 USC 1307 bans the import of goods produced “wholly or in part” by convict labor or forced labor

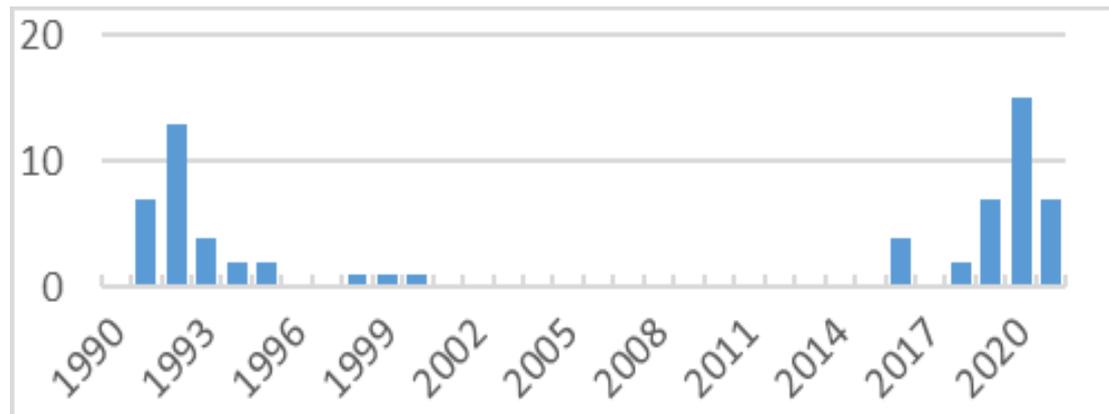
19 USC 1307: All goods, wares, articles, and merchandise mined, produced, or **manufactured wholly or in part** in any foreign country by **convict labor or/and forced labor or/and indentured labor** under penal sanctions **shall not be entitled to entry** at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

“Forced labor”, as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term “forced labor or/and indentured labor” includes forced or indentured child labor.

Section 307 of Tariff Act 1930 - History



- Largely not enforced until 1990s
 - Original concern was protecting domestic producers
 - Had exception where no or insufficient US production to satisfy US demand)
- Amended in 2015 with human rights focus to remove exception
- CBP implements the ban through **WROs**

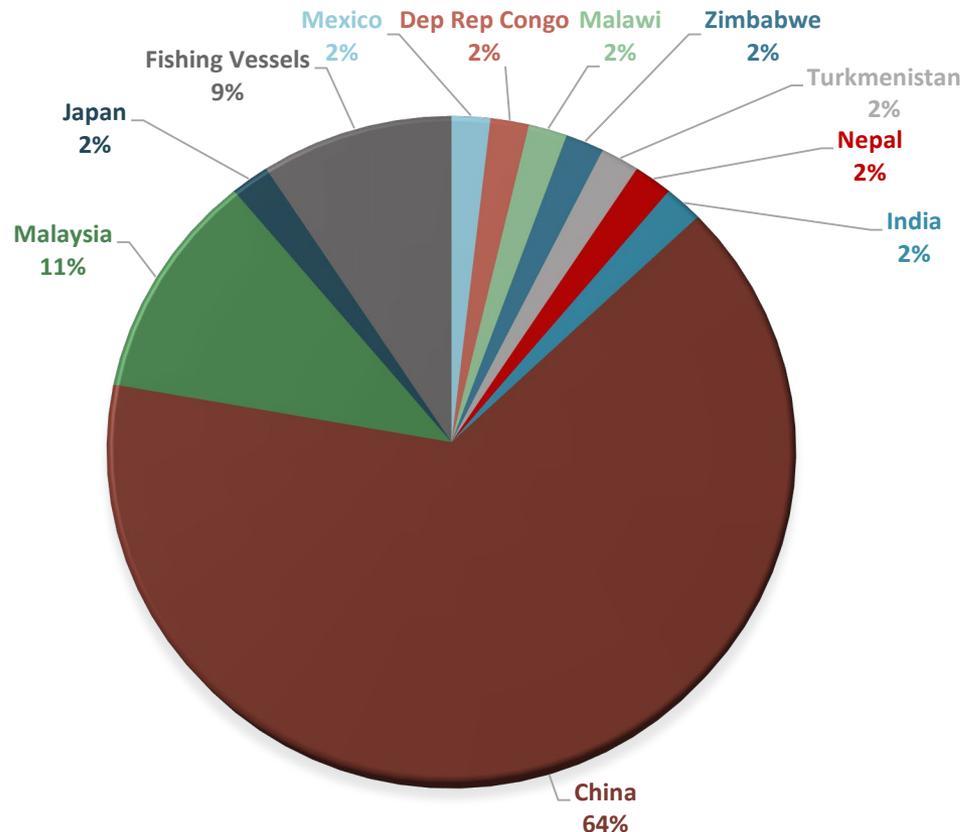


WROs Issued per Year as of Dec 15, 2021

Source: Congressional Research Service

WRO Distribution

- Not limited to China, but China has been by far the most targeted country
- Most recent WRO – January 2022 regarding disposable gloves from Malaysian company



ACTIVE WROs AND FINDINGS AS OF MAY 16, 2022, BY COUNTRY

Source: CBP Website

Expansion from Case-by-case Implementation to Region-wide Ban



- Early 2020 - WROs targeting hair products, garments and apparel produced by specific XUAR based companies
- Dec 2020 - WRO targets cotton produced by Xinjiang Production and Construction Corps (XPCC)
- January 2021 - region-wide WRO targeting all cotton and tomato products from Xinjiang
- June 2021 - WRO prohibiting imports of all silica-based products from Hoshine Silicon Industry Co. Ltd in Xinjiang

Advance Rulings

- Importers may seek an advance ruling from CBP regarding the compliance with law of a “prospective transaction.”
- Such rulings may be applied to later importations which are substantially similar to the ones outlined in the ruling request.
- On March 1, 2022, CBP issued guidance for importers seeking to establish admissibility packages as part of an application for an advance ruling on forced labor.
- Relevant documents may include:
 - Certificates of origin;
 - Purchase orders, invoices, and proof of payment;
 - Packing lists;
 - Payment records;
 - Shipping records;
 - Production records;
 - Inventory records;
 - List of production steps and chain of custody records for merchandise;
 - Transportation documents;
 - Daily manufacturing process reports; and
 - Any other relevant information that the importer believes may show that the shipments are not in violation of 19 U.S.C. 1307.

Uyghur Forced Labor Prevention Act (UFLPA)

Uyghur Forced Labor Prevention Act: Rebuttable Presumption of Prohibition

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- Effective June 21, 2022, UFLPA will replace existing case-by-case implementation of WROs with a new **broad U.S. import ban**
 - All goods from XUAR will be presumed to be made with forced labor and banned from import
 - Also targets goods from yet-to-be identified entities both within and outside XUAR

Section 3(a) IN GENERAL.—The Commissioner of U.S. Customs and Border Protection shall, except as provided by subsection (b), apply a presumption that, with respect to any goods, wares, articles, and merchandise mined, produced, or manufactured **wholly or in part** in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China or produced by an **entity on a list** required by clause (i), (ii), (iv) or (v) of section 2(d)(2)(B)— (1) the importation of such goods, wares, articles, and merchandise is prohibited under section 307 of the Tariff Act of 1930 (19 U.S.C. 1307); and (2) such goods, wares, articles, and merchandise are not entitled to entry at any of the ports of the United States.

List of Additional Companies

Task Force to identify list of companies meeting Section 2(d)(2)(B) of the UFLPA by June 21, 2022 –



- (i) Entities in the XUAR that mine, produce, or manufacture with forced labor;
- (ii) Entities working with the government of the XUAR to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the XUAR;
* * *
- (iv) Entities that exported products from the People's Republic of China into the U.S. that are mined, produced, or manufactured wholly or in part by entities in (i) or (ii);
- (v) a list of facilities and entities ... that source material from the Xinjiang Uyghur Autonomous Region or from persons working with the government of the Xinjiang Uyghur Autonomous Region or the Xinjiang Production and Construction Corps for purposes of ... government labor scheme that uses forced labor.

“Mined, produced, or manufactured wholly or in part”

*Critically, because the law prohibits the importation of goods made “wholly or in part” by forced labor, entities importing merchandise in the United States are liable for enforcement actions if there is forced labor **at any tier of their supply chain, down to every input into the products** actually or potentially destined for importation into the United States*

-- Forced Labor Enforcement Task Force – July 30, 2021
Report to Congress (discussing 1307 prohibition)

Uyghur Forced Labor Prevention Act: the “Rebuttable” Presumption

- “Clear and convincing evidence” Standard
 - High burden on importers to prove the negative
 - Similar to North Korea forced labor rebuttal standard per CAATSA - 22 USC 9241a
 - CBP discretion
- CBP to report to Congress if exception granted—may discourage exceptions

Section 3(b) EXCEPTIONS.—The Commissioner shall apply the presumption under subsection (a) unless the Commissioner determines—

- (1) that the importer of record has— (A) **fully complied with the guidance** described in section 2(d)(6) and any regulations issued to implement that guidance; **and** (B) completely and substantively **responded to all inquiries** for information submitted by the Commissioner to ascertain whether the goods were mined, produced, or manufactured wholly or in part with forced labor; **and**
- (2) by **clear and convincing evidence**, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor.

(c) REPORT REQUIRED.—The Commissioner shall submit to the appropriate congressional committees and **make available to the public**, not later than 30 days after making a determination of an exception under subsection (b), a report identifying the good and the evidence considered under subsection (b).

Countdown to June 21 and Next Steps

Countdown to June 21, 2022

- ✓ January 24 – FLETF published Request for Comments
- ✓ March 10 – Comment Deadline
- ✓ April 24 – Public Hearing
- ☐ ***Before June 21*** – CBP to issue guidance for importers
- ☐ **June 21 – Effective Date for Rebuttable Presumption & FLETF Strategy Report (same day)**, which includes guidance for importers on due diligence, supply chain tracing, and supply chain management measures

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January FR Notice - Questions

- Purpose – “How best to ensure that goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China are not imported into the United States”
- Types of Questions (18 total were issued)
 - **Risks and Methods.** Highlight risks and forms of forced labor, mechanisms leading to imports, government procedures to reduce threats, enforcement methods priorities.
 - **What companies can do** for diligence, evidence, and tools
 - **How US government can collaborate**

January FR Notice – Questions - Examples

1. What are the risks of importing goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China....?

11. What due diligence, effective supply chain tracing, and supply chain management measures can importers leverage to ensure that they do not import any goods mined, produced, or manufactured wholly or in part with forced labor from the People's Republic of China, especially from the Xinjiang Uyghur Autonomous Region?

12. What type, nature, and extent of evidence can companies provide to reasonably demonstrate that goods originating in the People's Republic of China were not mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region?

13. What tools could provide greater clarity to companies on how to ensure upcoming importations from the People's Republic of China were not mined, produced, or manufactured wholly or in part with forced labor in the Xinjiang Uyghur Autonomous Region? To what extent is there a need for a common set of supply chain traceability and verification standards, through a widely endorsed protocol, and what current government or private sector infrastructure exists to support such a protocol?

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Themes from Public Comments and Hearing

- Challenges in information collection on supply chains
- Need for CBP guidance BEFORE June 21 Implementation
- Lack of existing Section 307 guidance – e.g. “in part”
- Lack of clear evidentiary requirements for proof of admissibility
- Risk of abuse of process and reputational/brand damage
- Human rights organizations called for strict enforcement of the UFLPA

Advanced Notice of Known Importer Letters

Dear [Importer],

As you are likely aware, Congress recently passed, and the President signed into law, the Uyghur Forced Labor Prevention Act ("the Act"). The Act, codified under 22 U.S.C. §6901 note, established a rebuttable presumption that any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region (XUAR) of the People's Republic of China or produced by an entity on a list required by clause (i), (ii), (iv) or (v) of section 2(d)(2)(B) are prohibited under section 307 of the Tariff Act of 1930 (19 U.S.C. §1307) are not entitled to entry at any of the ports of the United States.

The Act requires CBP to apply the rebuttable presumption unless the importer can overcome the presumption of forced labor by establishing, by clear and convincing evidence, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor. This elevated standard will require the importer to not only use due diligence in evaluation of its supply chain, but also to respond completely and substantively to CBP requests for information regarding entries it may review.

As your company has previously imported merchandise from locations or entities potentially subject to the Act, you are being notified that subsequent entries of such merchandise may result in, among other things, suspension or removal from the Customs Trade Partnership Against Terrorism (CTPAT) program, seizure, forfeiture and/or penalties, or other appropriate action under the customs laws. Please note that this notice may serve as an aggravating factor should CBP take enforcement action upon determining future violations of the Act.

In anticipation of the rebuttable presumption becoming effective on June 21, 2022, an implementation strategy and guidance for the trade community will be issued to ensure compliance with the Act. CBP is urging importers to be proactive and closely review their supply chains to ensure any goods or materials are not sourced from the XUAR in violation of the Act. It is incumbent upon you as an importer to apply due diligence, effective supply chain tracing, and supply chain management measures to ensure that such imports are free from any goods mined, produced, or manufactured wholly or in part with forced labor from the People's Republic of China, especially from the XUAR.

For the most up-to-date information on CBP's UFLPA implementation, please see our website at <https://www.cbp.gov/trade/forced-labor/UFLPA>. Questions regarding UFLPA may be submitted to UFLPAInquiry@cbp.dhs.gov.

Sincerely,

Thomas Overacker, Executive Director
Cargo and Conveyance Security
Office of Field Operations

- Prior to June 21, CBP will issue letters to importers identified as having previously imported merchandise that may be subject to the UFLPA.
- Letters
 - Caution of consequences of future imports; letter itself may serve as an **aggravating** factor in an enforcement action;
 - Urge importers to be proactive and closely review their supply chains to ensure goods are not sourced from the XUAR in violation of the UFLPA.
 - Note that it is incumbent on importer to apply due diligence, effective supply chain tracing, and supply chain management measures to ensure that such imports are free from forced labor.
- Lack of a letter does **not** automatically indicate a supply chain is free of forced labor

Source: CBP Website, last accessed May 16, 2022

Anticipated Challenges, Guideposts, and Response

Key Challenges for Industry



Sprint to June 21

- Bespoke Risk Assessment and Compliance Responses
- Supply chain due diligence –
 - No easy tools like geo-location or screening
 - What is “enough”? No clear end point for due diligence
- Conduct reviews of contract language
- How to identify provenance of parts, components, materials?
 - External stakeholders – U.S. officials, government and media
 - Internal stakeholders

Guideposts



- **CBP**
 - In March 2022, CBP issued a best practice guide, encouraging due diligence in the following categories: **Compliance, Social Responsibility, Traceability and Remediation.**
 - Informed Compliance Publication on Reasonable Care- Section on forced labor.
 - Guidance following cotton/tomatoes region wide WRO; Hoshine WRO
 - Social Compliance System
 - Forced Labor factsheet
- **Department of Labor**
 - List of Goods Produced by Child Labor or Forced Labor

Guideposts (Continued)



- **International Labor Organization**
 - Indicators of Forced Labor
 - List of factors to evaluate risk of forced labor– e.g., Abuse of vulnerability, Deception, Restriction of movement
- **DHS**
 - Xinjiang Business Advisory (July 2021)
 - Strategy to Combat Human Trafficking, the Importation of Goods Produced with Forced Labor and Child Sexual Exploitation
- **OECD**
 - Due Diligence Guidance for Responsible Business Conduct
 - Includes guidance for supply chains in the garment and footwear industries