



# Grappling with the Uyghur Forced Labor Prevention Act

USCIB - February 1, 2022

# Presenters



**Aaron R. Hutman**

Partner, Washington, DC  
+1.202.663.8341  
aaron.hutman@pillsburylaw.com



**Benjamin J. Cote**

Counsel, Washington, DC  
+1.202.663.8305  
benjamin.cote@pillsburylaw.com



**Stephan E. Becker**

Partner, Washington, DC  
+1.202.663.8277  
stephan.becker@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 -- Magnitsky**
  - 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 1930 and Withhold Release Orders (WROs)

# Section 307 of Tariff Act 1930

- 19 USC 1307 Bans import of goods produced “in whole 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.

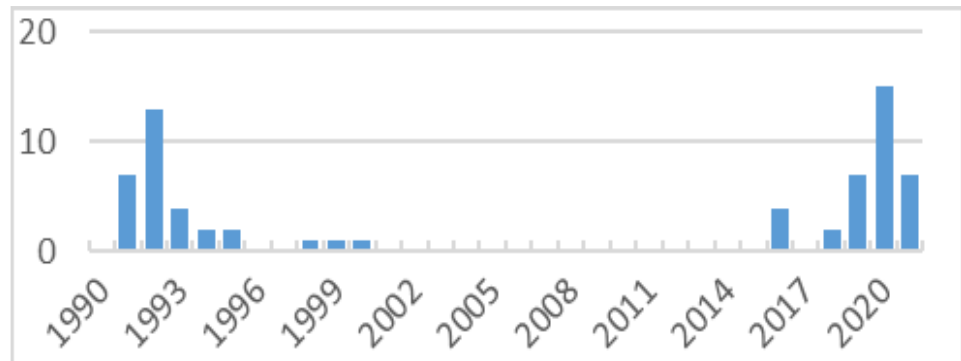
“Forced labor”, as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term “forced labor or/and indentured labor” includes forced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



# Section 307 of Tariff Act 1930 - History



- Largely not enforced until 1990s
  - Original concern was protecting domestic producers
  - Had a “consumptive demand” clause
- Amended in 2015 with human rights focus
- CBP implements the ban through **WROs**



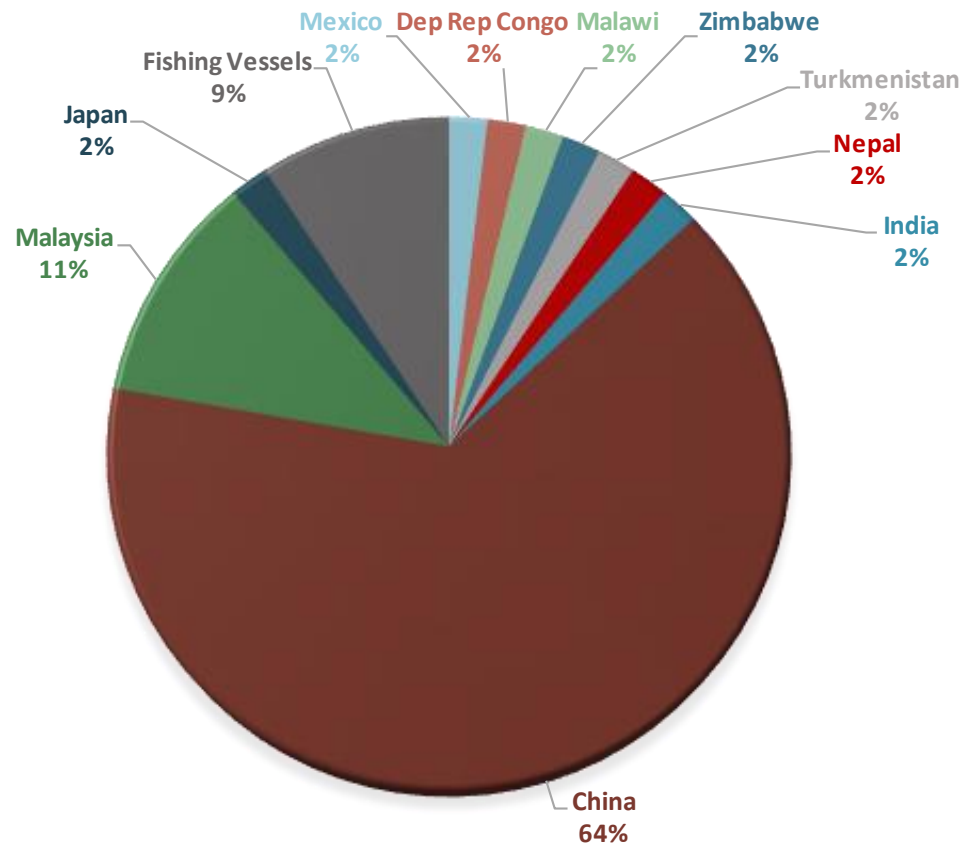
**WROS Issued per Year as of Dec 15, 2021**

Source: Congressional Research Service



# WRO Distribution

- Not limited to China, but China has been by far the most targeted country
- Most recent WRO – Friday January 28 regarding disposable gloves from Malaysia



ACTIVE WROs AS OF JAN 31, 2022, BY COUNTRY

# 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

# Uyghur Forced Labor Prevention Act (UFLPA)

# Uyghur Forced Labor Prevention Act: Rebuttable Presumption of Prohibition



- 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

The Pillsbury logo is positioned in the upper left corner of a dark vertical band. Below it, a large, light blue, stylized number '3' is centered vertically. The background of this band features faint, concentric circular lines, suggesting a globe or a target.

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

# 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



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?

# Anticipated Challenges, Guideposts, and Response

# Stormy Seas Ahead: Key Challenges for Industry



## Race to June 2021

- 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**

- 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**

- Comply Chain App: Tools for labor compliance in global supply chains
- List of Goods Produced by Child Labor or Forced Labor

## ▪ **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



# Guideposts (Continued)



## ▪ **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

## ▪ **Conflicts Minerals and Blood Diamonds**

- Lessons from companies seeking to comply with SEC and EU regulations?

# Supply Chain Ethics – Is the Genie Out of the Bottle?



- Threshold question – is the response to the UFLPA a narrow one, or will it raise broader questions of supply chain ethics?
- How will compliance efforts once begun relate to ESG and company ethics policies?
- What other internal stakeholders may have interest in UFLPA legal and business risk assessments and compliance responses?

# How Can the Industry Respond?



## Industry Driven Session

# Questions?