

Locke Lord QuickStudy: Between a Rock and a Hard Place: ?Conflicting Legal Obligations

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Conflicts of laws between the United States and the People’s Republic of China (“PRC”) leave manufacturers and importers in a vexing and complex situation when conducting bilateral business and trade. Both countries agree that “forced labor” is unacceptable; where they disagree is whether certain groups of PRC workers are being exploited into forced labor.

The [Uyghur Forced Labor Prevention Act](#) (the “UFLPA”) came into force on June 21, 2022, which requires the U.S. Customs and Border Protection (the “CBP”) to “presume” that products made in certain regions of the PRC by certain ethnic groups are made with forced labor. The PRC has recently enacted laws to protect its manufacturers by giving those manufacturers a right of action in PRC courts against customers who stop doing business with them based on non-PRC laws (“PRC Anti-Boycott Laws”). The PRC Anti-Boycott Laws also make it a crime for the PRC manufacturer to fail to pursue such actions.

United States Perspective

As of 2017, the U.S. has maintained that the PRC has committed crimes against humanity by using forced labor of ethnic minorities, namely the Uyghur, Kazakh, and Kyrgyz peoples, in the Xinjiang Uyghur Autonomous Region (“XUAR”). Accordingly, the U.S. and many of its Western allies believe that the PRC condones the use of forced labor by these people in the XUAR.

Specifically, [Section 307 of the Tariff Act of 1930](#), as amended, prohibits imports of all “goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by [...] forced labor.” To reinforce the provisions of this act and the ability for CBP to enforce it, the U.S. implemented the UFLPA. This act requires the CBP to presume all goods manufactured in whole or in part within XUAR use forced labor, and thus are prohibited from being imported into the U.S. absent the importer providing clear and convincing evidence to the contrary. Prohibited goods may be re-exported out of the U.S. or, in certain cases if the CBP believes that there was intent to obfuscate the origin of XUAR products, the products can be confiscated and the bad actors can be subject to a number of penalties, including exclusion from the U.S. and criminal charges that carry up to twenty years imprisonment.

The U.S. is utilizing its major economic powers to influence U.S. importers to examine their supply chain and avoid

products from the XUAR. This action is intended to reduce the demand for XUAR products and potentially to discourage the perceived PRC approval of forced labor in the XUAR.

PRC Perspective

The PRC government adamantly denies that its ethnic minorities are being exploited. In response to the UFLPA and other Western economic policies aimed to malign PRC policies in the XUAR and elsewhere, the PRC has implemented sanctions and three blocks of “Anti-Boycott Laws”. These sanctions and Anti-Boycott Laws are intended to uphold and protect PRC interests, PRC-based companies, and PRC citizens.

The PRC has responded to civil unrest with assimilation policies, which have resulted in further alienation, polarization of local identities, and radicalized activism within Hong Kong, Taiwan, and XUAR. The international response to such policies, particularly by the G7, led to the PRC expressing that such countries have made baseless accusations against China, thus interfering with its internal matters. Starting in 2019, the PRC has retaliated with sanctions aimed at Western nations that criticize PRC actions in Hong Kong, Taiwan, and Xinjiang. The PRC has sanctioned individuals, organizations, and even private businesses. Individuals directly affected by these sanctions have primarily been politicians, researchers, and non-governmental organizations. For example, members of the European Parliament’s Subcommittee on Human Rights (“MEPs”) denounced PRC human rights violations and breaches of international law; these expressions of concern for the Uyghurs in the PRC resulted in the MEPs being sanctioned by the PRC. Some organizations (including individuals involved with them) that have been affected by these sanctions include Freedom House, National Endowment for Democracy, and MERICS. Lastly, private businesses within the defense industry have also been sanctioned.

In September 2020, China’s Ministry of Commerce (“MOFCOM”) issued the Provisions of the Unreliable Entity List (“UEL”). Though unclear as to how the provisions are to be implemented in practice and the entities to be listed are yet to be specified, the UEL represents a mechanism for the PRC to restrict and prohibit designated foreign entities from engaging in Chinese economic activities. It is unclear whether a foreign entity or individual that stops conducting normal business with Chinese companies in order to comply with foreign laws, regulations, or government orders will be so listed. Nonetheless, the main targets of this provision are foreign persons (including enterprises, organizations, or individuals) who (i) engage in certain activities that could endanger China’s national sovereignty, security, or development, and/or (ii) cause serious damage to the legitimate rights and interests of PRC parties by suspending normal market trading or apply discriminatory measures. Penalties for not complying with the UEL can include restriction or prohibition from engaging in China-related import or export activities and investment in China; restriction or prohibition on entering China; restriction or revocation of the relevant personnel’s work permit, qualification to stay in China, or Chinese residence; and/or fines.

On January 9, 2021, MOFCOM issued the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (“Blocking Statute”). This statute was immediately effective upon enactment. Enforcement, however, is tabled until the PRC establishes a working Task Force. As such, it essentially functions as a sanction-blocking framework that is poised to block extraterritorial application of foreign laws and measures if the PRC deems such laws to unjustifiably restrict or prohibit the PRC person or organization from engaging in “normal” economic and trade activities. The Blocking Statute requires affected Chinese parties to report any foreign government’s restrictions they experience within thirty days and allows them to sue in Chinese courts for compensation. If an individual complies with foreign legislation that is not in the interest of

China, the PRC can carry out legal proceedings against them in a PRC court.

Most recently, on June 10, 2021, the China National Petroleum Corporation (“SCNPC”) issued the [Anti-Foreign Sanction Law](#) (“AFSL”). The AFSL permits the PRC government and aggrieved private parties to take counter-measures if another “country “violates international law and basic norms of international relations [...], or adopts discriminatory restrictive “measures against Chinese citizens and organizations, and interferes in the PRC’s internal affairs.” The broad “language of the AFSL allows an aggrieved Chinese supplier with a private right of action to sue the breaching non-“Chinese party in Chinese courts. This legislation also provides the PRC government with the ability to blacklist non-Chinese “parties and implement many stringent measures (e.g., asset seizures, denial of entry into China, visas cancellations for key “personnel working in the PRC). “Without established enforcement proceedings or mechanisms attached to it yet, the AFSL essentially is a legal framework for developing tools in adopting retaliatory

Outlook

Ultimately, the implementation of sanctions and counter-sanctions leaves companies between a rock and a hard place. Complying with the U.S. UFLPA likely means breaching Chinese law, while breaching the UFLPA to comply with Chinese law leaves the company at risk of having their goods detained at the U.S. border (among potential other penalties).

Conducting international business is likely to become more complex and have more risks attached to it. It is therefore paramount for companies to recognize and adjust to this new economic environment. Though seemingly daunting, there are ways for companies to generally to strategically navigate this particular set of conflicts.

Given the complex and, at times, opaque nature of supply chains within the PRC, many U.S. importers may find it difficult to comply with the UFLPA, especially since the cost of due-diligence may not outweigh the benefits. Therefore, one solution may be to steer clear of suppliers that conduct business in the XUAR. This however must be done delicately so as to avoid triggering PRC retribution.

Other circumstances may require importers to consider relocating its supply entities to outside XUAR regional borders, diversifying its supply chains, and developing its due-diligence processes. Some ways to effectively do so may include, without limitation, (i) mapping all stages of production, manufacturing, or extraction process, (ii) identifying supplier identities, (iii) obtaining relevant factory production reports, worker identities, and wage files, (iv) enhancing commercial contracts with suppliers (including strengthening criteria, explicated in commercial terms rather than under regulatory compliance, for breaches of representations and warranties, consequential remedies, and indemnification), (v) monitoring supplier compliance to UFLPA, and (vi) obtaining written commitments from suppliers regarding UFLPA compliance. An importer having the necessary, thorough, and correct information regarding the supply chain of their company’s production could prove helpful in the case of being questioned by the CBP and/or attempting to rebut a CBP presumption regarding a violation of UFLPA.

Adopting such approaches to tackle these responsibilities now resting on importers ultimately allows for risk to be mitigated when balancing both U.S. and Chinese law.

Further guidance for due-diligence in conflict-affected regions can be found by referring to the following

documents: the UN's [Guiding Principles on Business and Human Rights](#); the Organization for Economic Cooperation and Development's [Guidelines for Multinational Enterprises](#); the International Labor Organization's [Combating Forced Labor: A Handbook for Employers and Business](#); and [The Corporate Responsibility to Respect Human Rights](#) by the Office of the High Commissioner for Human Rights. Such documents include information for how to effectively go about cutting business ties to avert forced labor.

Conclusion

Much uncertainty is generated by conflicting legal obligations; however, a nuanced understanding of the background and risk associated with these conflicting laws is crucial to navigating this new economic landscape.

Please reach out to the authors for any questions regarding these issues or for assistance in management and procedural development to comply with these conflicting restrictions.

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