

Business and Human Rights: Global Developments

October 23, 2020

Business and Human Rights

Since Covington's last global Business and Human Rights [update](#), there have been significant developments in national, regional, and international regulatory and enforcement initiatives, which have continued to exert pressure on companies to develop or enhance their processes for identifying and mitigating human rights risks in their global operations and value chains. While the majority of these initiatives have focused on measures designed to incentivize companies to conduct human rights due diligence generally across their operations, recent months have also seen a flurry of legislative and regulatory activity focused on specific human rights issues in value chains connected to the Xinjiang Uyghur Autonomous Region ("XUAR") in China. This alert provides an update on the key regulatory, legislative, and multilateral developments.

XUAR-related Regulatory and Policy Developments

Reports of human rights violations against Uyghur Muslims and other ethnic minorities in China have for some time been the subject of international scrutiny, which has increased in intensity in recent months. Recently reported issues include forced labor within the XUAR, involuntary transfer of workers from the XUAR to factories in other areas of China, and invasive surveillance of ethnic minorities in the XUAR. This scrutiny has prompted legislative and enforcement activity that may impact companies with supply chains linked to China—particularly, but not exclusively, where those supply chains are linked to suppliers based in the XUAR.

United States

The United States has seen a significant increase in legislative and regulatory enforcement activity in response to allegations of forced labor and systemic human rights abuses in the XUAR. These initiatives have attracted rare but strong bipartisan support. The most noteworthy recent developments—covered in more detail in our recent [alert](#)—are as follows:

- *XUAR-related Withhold Release Orders ("WROs") by Customs and Border Protection ("CBP")*: CBP announced five new WROs in September 2020 prohibiting the importation of goods into the United States from certain training centers, factories, and companies doing business primarily in the XUAR due to allegations of forced labor. The imports at issue included cotton, apparel, computer parts, and hair products. There has been a significant increase by CBP in the number and frequency of WROs issued in 2019 and 2020, many of which are related to the XUAR, suggesting that CBP may issue additional XUAR-related WROs in the future, or possibly a wider regional import ban.

- *Executive Branch Sanctions and Export Controls Restrictions*: The U.S. Executive Branch has also targeted individuals and entities involved in human rights abuses in China (and specifically the XUAR) with sanctions and export control restrictions. The Treasury Department has designated an increasing number of persons for sanctions under the authority of the U.S. Global Magnitsky Human Rights Accountability Act and Executive Order 13818, which collectively give the Executive Branch authority to impose sanctions, including asset freezes and visa bans, on entities or individuals that have committed or materially assisted certain human rights abuses. The recent sanctions target certain Chinese individuals and entities that are alleged to have been involved in human rights abuses such as mass arbitrary detention, forced labor, and involuntary collection of biometric data targeting ethnic minority populations. The Department of Commerce has likewise designated on the U.S. Entity List a number of Chinese entities allegedly involved in human rights abuses in the XUAR—among certain governmental entities and private companies. In most cases, designation on the Entity List immediately prohibits anyone from exporting, re-exporting, or transferring (in-country) items subject to the Export Administration Regulations to those entities without a license from the U.S. Commerce Department’s Bureau of Industry and Security.
- *[The Uyghur Forced Labor Prevention Act \(“UFLPA”\)](#)*: On September 23, 2020, the U.S. House of Representatives voted overwhelmingly (406–3 votes) in favor of the UFLPA. The House bill has now been referred to the Senate. Although there is broad bipartisan support for the UFLPA, it is unclear whether it will pass the Senate and make it to the President’s desk for signature prior to the November 3, 2020 election. The most consequential aspect of the UFLPA for corporations would ban the importation of “all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part” in the XUAR region. The only available exception would require companies to prove to the CBP Commissioner, by “clear and convincing evidence,” that goods were *not* made with forced labor. This would be a difficult threshold to satisfy because: (i) the U.S. Government is likely to view skeptically any evidence submitted by companies, as various hurdles to conducting effective social audits in the XUAR have been reported, including harassment of auditors, suppliers requiring the use of government-appointed translators during such audits, and workers’ fear of sharing accurate information; and (ii) CBP has taken a strict approach to the enforcement of previous regional bans (e.g., in Turkmenistan and Malawi), granting few exceptions, which underscores how difficult it is to demonstrate that a product subject to a regional ban should be permitted entry into the United States.
- *[The Uyghur Forced Labor Disclosure Act of 2020 \(“UFLDA”\)](#)*: On September 30, 2020, the U.S. House of Representatives passed the UFLDA. The bill would amend the Securities Exchange Act of 1934 to require companies to disclose in their annual reports whether they have imported goods—including electronics, food products, textiles, shoes and teas—that were manufactured in the XUAR or contain materials that originated in or were sourced in the XUAR. The bill would also require a disclosure regarding whether such goods or materials originated in forced labor camps. The UFLDA does not enjoy the same bipartisan support as the UFLPA and is unlikely to progress in the Senate this session.

As a countermeasure against various U.S. actions targeting Chinese companies, including certain of the actions described above, the Chinese Government recently promulgated regulations creating an “Unreliable Entity List.” Companies that are placed on the list could face a host of adverse consequences including being banned from importing or exporting products to

or from China, or being barred from investing in the country. China has not yet announced the placement of any companies on the Unreliable Entity List. China also recently enacted an [Export Control Law](#) that contained provisions permitting China to retaliate against countries or jurisdictions that China found to have “abused” export control laws to endanger China’s national security or national interests.

United Kingdom and European Union

While the response of other governments has lagged behind that of the United States, the United Kingdom and the European Union (“EU”) have taken preliminary steps that suggest they may take action to address reports of human rights abuses in the XUAR.

On September 15, 2020, the House of Commons Foreign Affairs Committee launched an [inquiry](#) into XUAR detention camps, including mechanisms the UK Government might use to discourage private sector companies from contributing to human rights abuses, and to hold UK-linked businesses with operations in Xinjiang to account for any involvement in human rights abuses. In addition, on September 18, 2020, the House of Commons Business, Energy and Industrial Strategy Committee announced a parallel [inquiry](#) into the extent to which UK businesses may be exploiting the forced labor of Uyghurs in the XUAR. The Committee will also consider the extent to which existing legislation and the audit system generally are sufficient to prevent UK businesses from contributing to Uyghur human rights abuses.

Following a virtual summit between Chinese President Xi Jinping and EU leaders in September 2020, China has agreed to allow EU officials to visit the XUAR to assess the human rights situation.

Additional U.S. Enforcement Actions Based on Forced Labor

CBP recently [announced](#) the first civil penalty for forced labor violations, imposing a \$575,000 penalty against a U.S. importer of stevia for the use of forced labor in its production in China. More than twenty shipments were imported into the United States in violation of a 2016-issued WRO that remains in effect. Civil penalties may be imposed on importers who do not exercise “reasonable care” when importing merchandise into the United States, including by ensuring that production of the merchandise does not involve forced labor.

CBP also issued a formal “Finding” related to stevia sourced in China on October 20, 2020, which was the first Finding issued by CBP since 1996. Such formal Findings are issued under the authority of the forced labor statute implementing regulations, and arguably have a greater impact on importers than a WRO. All Findings are published in the Federal Register for public awareness, and once it is published, CBP will seize and commence forfeit proceedings of the merchandise. There is no opportunity for importers to re-export the subject goods, as with WROs. Offers of proof to contest the Finding must address the Finding itself, by demonstrating that forced labor is not occurring at the named facility.

In addition to the recent WROs issued for XUAR-related products, CBP issued a WRO on September 30, 2020 against all palm oil imports from a Malaysian palm oil company and its subsidiaries and joint ventures, based on information alleging that forced and child labor were being used on its plantations. Palm oil is included in nearly half of all packaged food products and is a common ingredient in cosmetics and a raw material for biofuels, among other uses. CBP will now detain palm oil and palm oil products made by the relevant entities at all U.S. ports

of entry. Meeting the evidentiary burden to show that products have not been produced with forced labor can be an onerous task for businesses.

Legislative Developments

European Union

There have been several recent developments at an EU level, the most noteworthy of which are as follows:

- *Human rights due diligence agenda:* As discussed in a prior [alert](#), in April 2020, EU Commissioner for Justice Didier Reynders committed to the introduction of mandatory human rights and environmental due diligence in the EU. We expect a formal legislative proposal from the European Commission to be tabled in the first quarter of next year and consultations to inform the Commission's legislative proposal to occur in the coming months. Separately, the European Parliament, in an attempt to set the agenda for the Commission's proposal, is currently working on an own-initiative report requesting legislative action, spearheaded by MEP Lara Wolters, who is acting as a Special Rapporteur on this agenda. In September 2020, the European Parliament's Committee on Legal Affairs at the European Parliament published Wolters' [draft report](#), which makes detailed recommendations to the European Commission on a proposed framework for a Directive requiring mandatory human rights, environmental, and governance due diligence. Members of the European Parliament on the Legal Affairs Committee, as well as the Foreign Affairs and International Trade Committees, will now have an opportunity to submit amendments to the report before it is adopted by the European Parliament, and several hundred proposed amendments have already been tabled.

Wolters' draft recommends that the proposed Directive should:

- apply to both EU companies and non-EU "limited liability undertakings" that operate in the EU selling goods or providing services, regardless of their size or sector;
- require subject entities to conduct due diligence on human rights, environmental and governance risks (all concepts that are defined broadly) and mitigate such risks through a range of prescribed measures, such as risk assessments and strategies to mitigate risks, measures to bind suppliers and subcontractors to human rights, environmental and governance commitments, and grievance mechanisms;
- require subject entities to conduct such due diligence in their own operations and across their entire value chains, including in relation to "all activities, operations, business relationships and investment chains [...] inside or outside the EU" and any "entities with which the undertaking has a direct or indirect business relationship, upstream and downstream, and which either (a) supply products or services that contribute to the undertaking's own products or services, or (b) receive products or services from the undertaking";
- require Member States to enforce the due diligence standards through investigations and the imposition of "effective, proportionate and dissuasive penalties," including criminal sanctions in appropriate cases;
- require Member States to ensure that when an undertaking identifies that it has caused or contributed to harm, it provides for or cooperates with remediation, which

may include financial or non-financial compensation, reinstatement, public apologies, restitution, rehabilitation, or contributions to investigations; and

- require the Commission to publish general non-binding guidelines for undertakings on how best to fulfill the due diligence obligations set out in the Directive, including guidance as to how proportionality may be applied to obligations according to the size and sector of an undertaking.
- *Sustainable corporate governance agenda*: A separate EU legislative [agenda](#) on sustainable corporate governance is currently running in parallel to the due diligence agenda. On September 9, 2020, the Special Rapporteur on the file, MEP Pascal Durand, submitted an own-initiative [report](#), which envisaged both: (i) a broadening of requirements of the Non-Financial Reporting Directive (which is currently up for revision by EU legislators, and which already requires certain large companies to include a non-financial statement as part of their annual public reporting obligations to cover sustainability issues including human rights); and (ii) the introduction of a directors' duty to integrate long-term interests and sustainability risks, impacts, opportunities and dependencies into the overall strategy of the company. It is possible that this initiative and the related due diligence initiative might ultimately be addressed in the same legal instrument.
- *Human rights sanctions regime*: On October 19, 2020, the European Commission and High Representative of the EU for Foreign Affairs and Security Policy introduced a legislative proposal in the Council of the EU for an "EU Global Human Rights Sanctions Regime" (informally referred to as the "European Magnitsky Act"). The Council reached an agreement on the political appropriateness for such a regime in December 2019, but the recent poisoning of Alexei Navalny seems to have brought new political momentum. The legislative proposal is not public, but it is expected that a new sanctions regime would primarily target individuals that are responsible for violating human rights anywhere in the world by freezing their assets and banning their travel to the EU.

Germany

Although the German Government's [decision](#) to introduce a supply chain due diligence law was made months ago, the Government has not yet been able to agree on a legislative proposal due to divergent views within the Government as to the scope of the legislation. While the Ministry of Labor and Social Affairs and the Ministry of Economic Cooperation and Development are strongly advocating for mandatory rules, including liability provisions, the Ministry of Economic Affairs and Energy is trying to narrow the scope of the legislative proposal. The powerful head of the latter ministry, Peter Altmaier, who is a leading figure within Chancellor Merkel's Christian Democratic Union, holds significant sway in the cabinet and has been able to stall the process to negotiate the details. Chancellor Merkel has signaled her support for a law but has refrained from specific statements as to the content. We anticipate that the Government will soon agree on and table a proposal that represents a compromise between the respective views of the relevant ministries.

It is noteworthy that these discussions are continuing in parallel with the development of the EU's mandatory due diligence proposal. We will be following developments in Germany to understand how the national legislative agenda may intersect with the EU legislative agenda given that Germany currently holds the rotating presidency of the Council of the EU until the end of the calendar year.

The Netherlands

The Dutch Child Labor Due Diligence Law, which [requires](#) companies to identify and prevent the use of child labor in their supply chains is expected to come into effect in early- to mid-2022. Separately, on September 18, 2020, the [Dutch Socio-Economic Council](#) (an influential advisory council) recommended that the Netherlands introduce legislation requiring broader mandatory human rights due diligence in line with the UN Guiding Principles on Business and Human Rights (“UNGPs”) and the OECD Guidelines of Multinational Enterprises (“OECD Guidelines”). This recommendation follows publication of two Government-commissioned studies earlier in the summer, one of which [concluded](#) that the effectiveness of the country’s voluntary Agreements promoting International Responsible Business Conduct (“IRBC Agreements”) would be enhanced if supplemented by mandatory requirements. We are monitoring the Government’s response to the recommendation and its progress on implementing legislation for the Child Labor Due Diligence Law.

United Kingdom

While there have been calls from various stakeholders in recent years for the UK Government to introduce broad human rights due diligence legislation (including from the [Joint Committee on Human Rights](#)), the Government has continued to take a piecemeal approach. Recent legislative developments include the following:

- *Deforestation and ecosystem supply chain proposal:* In August 2020, the UK Government [announced](#) plans to develop legislation that would: (i) make it illegal for large businesses to use, in production or trade within the UK, certain “forest risk” commodities that have not been produced in line with local laws in the country where they are grown; and (ii) require in-scope companies to conduct due diligence to ensure that their supply chains are free from illegal deforestation and ecosystem change. The law would be applicable to large businesses (to be determined by turnover and employee number) that produce or include in their products certain commodities whose rapid expansion is associated with deforestation—including beef, cocoa, leather, palm oil, pulp and paper, timber, rubber and soya. The UK Government’s consultation on the potential law closed on October 5, 2020.
- *Modern Slavery Act developments:* On September 22, 2020, the UK Government published its long-awaited [response](#) to a consultation on the supply chain reporting requirement contained in Section 54 of the UK Modern Slavery Act (“MSA”). The response proposes: (i) mandating the topics that MSA statements must cover (as opposed to providing for optional topics); (ii) introducing a single reporting deadline and requiring companies to publish MSA statements on a new Government-run reporting portal; and (iii) extending the section 54 requirements to public bodies with a budget of £36 million or more. The Government has also committed to considering different enforcement options for non-compliance and to issue a further update in due course. The majority of these proposals must be implemented through further legislation, and the Government has indicated that changes will be made once parliamentary time allows. Although the proposals may be revised when they face legislative scrutiny, the Government’s sizeable majority in the House of Commons, combined with the cross-party approach to prior modern slavery initiatives, increases the likelihood that these reforms will be adopted in the future.
- *Human rights sanctions regime:* In July 2020, the UK [introduced](#) a human rights sanctions regime that allows the Government to impose sanctions—including travel bans

and asset freezes—on individuals and entities known or reasonably suspected to be involved in significant human rights abuses. The UK Government has already sanctioned several entities and individuals under the regime, including against targets in Russia, Saudi Arabia, Myanmar, North Korea, and most recently, on September 29, 2020, in [Belarus](#) (in relation to concerns regarding human rights abuses in the context of the recent elections). As noted in our prior [alert](#) on this topic, prominent parliamentarians have also urged the Government to use the new regulations to designate persons who have been involved in the suppression of pro-democracy protests in Hong Kong, and abuses against the Uyghur minority in China.

Australia

Australia's Modern Slavery Act 2018 came into force on January 1, 2019 and included reporting requirements modelled on those contained in the UK MSA, although the Australian legislation is more prescriptive than the UK legislation in several important respects. In a [report](#) released in July 2020, the Australian Law Reform Commission ("ALRC") called on the Australian Government to create a corporate "failure to prevent" offense applicable to serious transnational human rights offenses, including slavery, human trafficking, torture and genocide. The ALRC's report was tabled in Parliament on August 31, 2020 and the Government is reviewing its recommendations.

Canada

The Canadian Government has introduced an amendment to its [Customs Tariff](#) that prohibits the importation of goods that are "mined, manufactured or produced wholly or in part by forced labor." The amendment was introduced following the entry into force of the United States-Mexico-Canada Agreement, which required each party "to prohibit the importation of goods into its territory from sources produced in whole or in part by forced or compulsory labor." There are clear parallels with the CBP WRO regime discussed above, although it is not yet clear what steps the Canadian authorities are taking to enforce the new provision.

United States

On September 30, 2020, the U.S. Department of State [issued](#) non-binding "Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities" (the "Guidance"). The Guidance acknowledges that human rights risks exist when products or services are exported to foreign government or private end-users that have close relationships with governments that do not demonstrate respect for human rights or the rule of law. "Downstream" human rights impacts can include stifling of dissent, intimidation of minority communities, and arbitrary or unlawful interference with privacy.

"Products or Services with Intended or Unintended Surveillance Capabilities" covered by the Guidance are defined broadly to include products or services "marketed for or that can be used (with or without the authorization of the business) to detect, monitor, intercept, collect, exploit, preserve, protect, transmit, and/or retain sensitive data, identifying information or communications concerning individuals or groups". Examples of such products or services, include sensors, biometric identification, data analytics, internet surveillance tools, non-cooperative location tracking and recording devices.

The Guidance encourages U.S. businesses to integrate human rights due diligence—in line with the UNGPs and OECD Guidelines—into their export compliance programs by developing and

implementing appropriate policies, systems and processes to identify and mitigate human rights risks when contemplating transactions where there is a risk that an end-user will likely misuse the product or service to carry out human rights violations or abuses.

In particular, businesses are expected to:

- review the capabilities of the product/service to determine potential misuses to commit human rights violations or abuses by foreign government end-users or private end-users that have close relationships with a foreign government;
- review the human rights record of the foreign government agency end-user of the country intended to receive the product or service;
- review whether the foreign government end-user's laws, regulations and policies that implicate products and services with surveillance capabilities are consistent with the Universal Declaration of Human Rights;
- review stakeholders involved in the transaction (including end-user and intermediaries such as distributors and resellers);
- to the extent possible, tailor the product or service distributed to countries that do not demonstrate respect for human rights and the rule of law to mitigate risks of misuse;
- prior to and after sale, strive to mitigate human rights risks through contractual and procedural safeguards and strong grievance mechanisms; and
- publically report on sale practices.

International Developments

UN Treaty on Business and Human Rights

The [Second Revised Draft](#) of the UN Treaty on Business and Human Rights was published on August 6, 2020 and is due to be discussed further at the Sixth Session of the UN Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.

The proposed treaty requires State Parties to: (i) introduce mandatory human rights due diligence measures covering all transnational corporations and other business enterprises that undertake business activities of a transnational character within their territory or jurisdiction, as well as State-owned enterprises; and (ii) provide legal recourse (which may be civil, criminal, or administrative) to victims who suffer negative impacts to their human rights as a result of such business activities.

While the draft treaty is now in its third iteration and is reportedly approaching negotiation by the States in the coming months, important questions remain regarding its eventual scope, and it is not yet clear which States will be willing to become parties.

In light of the emerging human rights requirements and enforcement risks discussed in this and previous Business and Human Rights alerts, companies should review and assess the adequacy of their related existing compliance efforts. As one of the few international law firms with a strong expertise in the area of Business and Human Rights, Covington is well-placed to support such assessments. Our unique team draws upon attorneys and policy experts across four continents with deep human rights backgrounds. We regularly advise clients with respect to human rights due diligence, emerging best practices for human rights policies and procedures, political risk mitigation, and litigation. This is done in the context of internationally recognized standards, including the UNGPs, and domestic regulatory and legal regimes.

If you have any questions concerning the material addressed in this client alert, or would like further information about our Business and Human Rights capabilities, please contact any of the following members of our team:

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