

## CBP's Latest Forced Labor Rulings Offer Insight into Documents Needed to Overcome Import Detentions

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U.S. Customs and Border Protection (CBP) shipment detentions and exclusions have spiked in recent months. The Port of Los Angeles/Long Beach alone has reportedly put over 100 import shipments on hold over suspicions that goods being shipped were made with forced labor. Nonetheless, **public** CBP rulings on protests or submissions made by importers to challenge these enforcement actions are virtually nonexistent, leaving many importers uncertain about what, in CBP's eyes, is sufficient enough to prove that their imported goods have not been made with forced labor.

Two rulings issued by CBP to a U.S. apparel importer provide valuable insight regarding the documentation that importers must submit to demonstrate that merchandise detained by CBP pursuant to a Withhold Release Order (WRO) was not made with forced labor.

These two rulings, in fact, are the only cases in which CBP has made public its analysis and scrutiny of the evidence provided by importers in response to forced labor suspicions that do not involve the Countering America's Adversaries Through Sanction since 2002.<sup>1</sup>

On May 25, CBP announced that it had removed the rulings from the Customs Rulings Online Search System (CROSS) noting only that the rulings had been posted on CROSS "in error" after the protestant had already withdrawn its protest. As this was an error, we will not name the specific company. In the announcement, CBP did not comment on the substance of the analysis reflected in these rulings, and therefore the removal of these rulings from CROSS does not appear to undermine their instructiveness regarding CBP's approach to such issues.

The rulings pertained to a WRO covering cotton and cotton products produced by Xinjiang Production and Construction Corps (XPCC) of China and its subordinate and affiliated entities (the XPCC WRO). They illustrate that once CBP establishes that the XPCC WRO applies to an item, CBP would require extensive documentation showing that the goods were not made with forced labor before allowing the item to enter the United States. These documents include production or processing records and descriptions for each entity and production step involved in an item's supply chain, beginning with the source of the item's raw materials. These rulings may have implications for importers in a broad range of industries that either currently or may soon face an increased risk of detention under WROs, including important considerations for designing and implementing traceability processes and other supply chain compliance efforts.

### Key Facts

- The goods at issue in both rulings were garments detained under the XPCC WRO. The XPCC WRO was issued in December 2020 and is distinct from the much broader WRO issued in January 2021 that applies to, among other things, all cotton and cotton products sourced from China's Xinjiang Uyghur Autonomous Region (XUAR) as well as any goods finished elsewhere that contain cotton or cotton products produced in XUAR (the XUAR WRO). Once goods are detained by CBP under a WRO, an importer has three months from the date of importation to establish that the goods are admissible (*i.e.* that no forced labor was used in their production). If, based on an importer's submission, CBP determines that the items are admissible, the goods may be imported into the United States.
- In its first ruling, issued May 10 (Ruling #1), CBP Headquarters concluded that the importer failed to establish that a shipment containing men's cotton shirts was not made with forced labor, upholding CBP's earlier decision at the port level to exclude the shirts from entry into the United States. CBP focused on the fact that the importer did not provide "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." CBP noted that the importer's submission lacked "production/processing records" reflecting actual cotton yarn or fabric production for several upstream segments of its supply chain. It also noted several other deficiencies in the submission to CBP, pointing out that:

- A certificate did not reflect the specific products produced, the dates of transaction, or the location of the factory
  - A Code of Conduct letter was not current
  - Certain invoices did not reflect the percentages of materials that comprised the fabric, and
  - A delivery note did not have an accurate date
- In the second ruling, issued to the same importer on May 18 (Ruling #2), CBP released from detention six of seven clothing products detained under the XPCC WRO. CBP concluded that the importer had established that these items, whose production apparently also involved XPCC-affiliated entities, were not made of cotton and thus were not subject to the WRO. For the remaining product, garments that were made of cotton, CBP concluded – as it did in Ruling #1 – that the importer failed to provide "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." Specifically, CBP noted that the importer's submission did not contain "**specific explanations relating to the actual production or processing of the cotton into the finished [cotton] garments.**" As with Ruling #1, CBP also noted several deficiencies in the documentation submitted for the cotton product, including that:
    - Purchase contracts were illegible
    - China Customs declarations were unsigned, undated, and generally illegible
    - A purchase order agreement did not contain signatures of the parties involved or the locations of the companies involved in the transaction
    - A delivery list did not reflect the composition or what is being delivered to the manufacturer, and
    - A Code of Conduct letter was outdated
  - The importer argued in both rulings that the WRO did not apply to the cotton products because the raw cotton was not sourced from XPCC or an XPCC-affiliated entity. CBP rejected this argument in both rulings, pointing to the [press release](#) announcing the XPCC WRO, which states that the WRO applies not only to raw cotton produced by XPCC and related entities, but also to "any products that are made in whole or in part with or derived from that cotton."
  - In the rulings, the importer was able to establish that the raw cotton was sourced from entities outside of China and did not involve XPCC or its affiliates. It also provided evidence relating to the sale, acquisition, source location, transportation, and delivery of the raw cotton used to produce the garments. As noted above, however, this was insufficient to establish that the cotton garments subject to the XPCC WRO were admissible.

## Takeaways

- **When CBP concludes that an item is subject to the XPCC WRO, the importer faces an uphill battle in establishing admissibility.** Items subject to the XPCC WRO are those that meet two criteria: 1) the item is cotton or contains cotton, and 2) XPCC or an XPCC-affiliated entity was involved in the production or processing of the cotton or cotton product. If **both** criteria are met, an importer's burden of establishing that item's admissibility is substantial, requiring detailed documentation and explanations regarding the production and processing of the cotton items. CBP has referenced in published guidance the value of third-party audit reports of production facilities, although these have become increasingly challenging to undertake in XUAR.

Given the complexity and opacity of many apparel and textile supply chains, it can be extremely difficult for companies in the clothing and apparel industries to establish an item's admissibility once CBP concludes that a WRO applies.

- **If an importer can reasonably show that the subject goods are not covered by the XPCC WRO, the importer can avoid the uphill battle to establish admissibility.** This is illustrated by the difference in how CBP scrutinized the cotton and non-cotton products in the shipments at issue in the rulings. In both rulings, given CBP's conclusion that 1) the item is cotton or contains cotton and 2) XPCC or an affiliated entity was involved in the production or processing of the cotton or cotton product, the importer's burden of establishing that the goods were not made with forced labor was high and could not be met without detailed documentation regarding the production and processing steps involved in the finished cotton goods. This is true even when it is not clear how submitting certain documents – such as production records – would indicate the absence or presence of forced labor.

Conversely, in Ruling #2, for the items that were **not** made of cotton, once the importer's documentation showed that the items were not cotton and therefore not subject to the WRO, notwithstanding the involvement of an XPCC entity in the supply chain, CBP allowed the goods to enter the United States. Thus, if an importer of *cotton* goods can establish that no XPCC or XPCC-affiliated entity was involved with the production of the finished product, the importer could also establish that the XPCC WRO does not apply to the goods and would likely face a much lower burden of establishing admissibility. Of course, this only applies if the products are detained under the XPCC WRO, and not the XUAR WRO.

- **Unfortunately, the rulings did not identify the XPCC-affiliated entities in the importer's supply chain or note where an XPCC-affiliated entity was involved.** Examining a company's China-based suppliers for connections or affiliations with XPCC is a daunting task given its status as an opaque, quasi-state entity with thousands of reported affiliates and subsidiaries. CBP has not thus far provided an official list of entities that it believes has affiliations with XPCC or provided guidance on how an importer can definitively establish that there is no connection between its supply chain and XPCC, which would be helpful to importers seeking to prioritize resources to mitigate forced labor risks.
- **As a general matter, clothing and apparel importers whose supply chains run through China should be prepared to present extensive documentation about their supply chains in case their shipments are detained under the XPCC WRO or the broader XUAR WRO.** These documents include transportation documents, invoices containing detailed descriptions of the cotton items at issue, properly dated and descriptive certificates of origin, and, where possible, documents related to the processing of the various intermediary materials used in the final product by each entity involved in the supply chain. Importers should expect CBP to check whether the information submitted in response to a detention notice is detailed, consistent, and accurate, as demonstrated by the specific shortcomings cited in the recent rulings. Interestingly, though, these rulings indicate that CBP may recognize practical limits on the types of documentation it can reasonably expect from importers. Specifically, the detention notices that preceded the rulings requested that the importer provide documents related to employees that picked the cotton, such as timecards and wage payment receipts. While the rulings did not make clear whether these documents were provided to CBP, considering the substantial practical difficulties that importers face in obtaining such documentation, it is likely that they were not. If this is the case, the absence of commentary on this point in the rulings may signal that that such documentation is not a critical factor in CBPs assessment.

## Conclusion

Companies that import the types of products that are currently subject to anti-forced labor WROs should map their supply chains in detail and implement effective traceability processes, so as to be prepared to provide detailed, descriptive documents that establish that forced labor is not used in their supply chain in case their shipments are detained. If an item is detained pursuant to a WRO, importers only have three months from the time of importation to establish the item's admissibility. While it was previously understood that CBP would not continue reviewing an importer's documentation after this three-month deadline is reached, CBP officials made clear in a conversation with us on June 4 that importers have a full three months to submit the evidence of admissibility and CBP will continue to review the submission after the three-month deadline has passed. These circumstances highlight the potential value of effective traceability processes to facilitate prompt production of necessary documentation.

WROs currently cover cotton products and tomato products from XUAR, certain computer parts from China, certain palm oil and palm oil products from Malaysia, gold from small artisanal mines in the Democratic Republic of the Congo, certain tobacco from Malawi, artisanal rough-cut diamonds from Zimbabwe, cotton from Turkmenistan, and many other products. There are currently 47 active WROs involving ten countries.<sup>2</sup> More WROs are expected. All U.S. importers are responsible for using reasonable care to ensure that forced labor is not used to produce the goods they import. Prudent importers are examining their supply chains to be certain that they can make those representations.