
NOTE

WHERE WAS THIS T-SHIRT MADE?

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In March 2021, Biden’s administration formally declared China’s treatment of Uyghur Muslims a genocide in its annual human rights report published by the Department of State. It is difficult not to conclude that these findings may have also been influenced by the rare bipartisan criticisms aimed at China’s human rights record over the last few years.

This bipartisan condemnation of the Chinese government seems to have paid off as President Joseph R. Biden signed into law the Uyghur Forced Labor Prevention Act (UFLPA) on December 23, 2021. This legislation prohibits the importation of goods produced with forced labor in China as it directs US Customs and Border Protection (CBP) to apply a rebuttable presumption that “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” have been made with forced labor.

This Note argues that given the UFLPA’s overbroad economic implications and lack of clear enforcement mechanisms, the legislation is neither an effective nor a realistic way of holding American companies, seeking to import products from China, accountable in the long term.

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I. INTRODUCTION

Look through your wardrobe and check the labels on any of your t-shirts, socks, or pairs of pants. It is likely that many of these articles were made in China—the largest exporter of clothing textiles to the United States.¹ According to the National Bureau of Statistics of China, the Xinjiang Uyghur Autonomous Region (the “XUAR” or “Xinjiang”) was the source of approximately eighty-five percent of China’s cotton in 2019—producing approximately five million of the country’s reported total of 5.89 million tons.² Moreover, some

¹ Scott Simon, Opinion, *Why You Should Think About Uighurs the Next Time You Put on Shoes*, NAT’L PUB. RADIO (Nov. 23, 2019, 7:54 AM), <https://www.npr.org/2019/11/23/782195481/opinion-why-you-should-think-about-uighurs-next-time-you-put-shoes-on> [https://perma.cc/QNK4-FX2Z].

² Press Release, Nat’l Bureau of Stat. of China, Bulletin on the Nat’l Cotton Output in 2019 (Dec. 17, 2019), http://www.stats.gov.cn/english/PressRelease/201912/t20191218_1718288.html [https://perma.cc/9XN2-C6JS]; see also LUKE ADAMS ET AL., CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, GLOBAL SUPPLY CHAINS, FORCED LABOR, AND THE XINJIANG UYGHUR AUTONOMOUS REGION 5 (2020), <https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/CECC%20Staff%20Report%20March%202020%20%20Global%20Supply%20Chains%20Forced%20Labor%20and%20the%20Xinjiang%20Uyghur%20Autonomous%20Region.pdf> [https://perma.cc/N8K3-8MG9] (noting that in 2018, the President of the China National Textile and Apparel

estimates indicate Xinjiang produces roughly twenty percent of all cotton consumed in the world, much of which is produced on Xinjiang Production and Construction Corps, also known as Bingtuan farms.³ Approximately twice the size of Texas, Xinjiang has abundant land and sunshine, making it fertile ground for cotton.⁴ The significance of Xinjiang's cotton production to the global fashion industry's vested commercial, financial, and manufacturing interests cannot be overstated.⁵

Council stated that Xinjiang planned to increase the textile and garment workforce by 100,000); Austin Ramzy, *U.S. Lawmakers Propose Tough Limits on Imports from Xinjiang*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/world/asia/xinjiang-china-labor-bill.html> [<https://perma.cc/X4P9-RCLV>] (Xinjiang increased its textile and garment workforce by over 80,000 by recruiting workers from impoverished households whose training could spur the development of the textile and apparel industry in the region).

³ David Lawder, *Apparel Group Says Broad Ban on China's Xinjiang Cotton Impossible to Enforce*, REUTERS (Sept. 17, 2020, 11:27 PM), <https://www.reuters.com/article/usa-trade-china-xinjiang/apparel-group-says-broad-ban-on-chinas-xinjiang-cotton-impossible-to-enforce-idUSKBN2690EK> [<https://perma.cc/EN3Z-YW55>]; see also Chao Deng & Eva Dou, *Western Companies Get Tangled in China's Muslim Clampdown: Kraft Heinz, Adidas and Gap Are Among the Companies Whose Supply Chains Run Through Xinjiang*, WALL ST. J. (May 16, 2019, 10:37 AM), <https://www.wsj.com/articles/western-companies-get-tangled-in-chinas-muslim-clampdown-11558017472> [<https://perma.cc/A6KA-Y5HB>] (noting that major Chinese garment manufacturers have been incentivized by authorities to move their production to the XUAR through tax exemptions and subsidies for electricity, land, and work training costs); JAMES MILLWARD & DAHLIA PETERSON, BROOKINGS INSTITUTION, CHINA'S SYSTEM OF OPPRESSION IN XINJIANG: HOW IT DEVELOPED AND HOW TO CURB IT 7 (2020), https://www.brookings.edu/wp-content/uploads/2020/09/FP_20200914_china_oppression_xinjiang_millward_peterson.pdf [<https://perma.cc/R4AT-Q5ZZ>] ("Xinjiang produces between a fifth and a quarter of the world's cotton, depending on the year, much of it on *Bingtuan* farms.").

⁴ Peter S. Goodman, Vivian Wang, & Elizabeth Paton, *Global Brands Find It Hard To Untangle Themselves from Xinjiang Cotton*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/business/xinjiang-china-cotton-brands.html> [<https://perma.cc/5VL4-SFKT>].

⁵ See Evan Clark, *Fashion's Cry for Help on Forced Labor in China*, WOMEN'S WEAR DAILY (July 27, 2020, 12:01 AM), <https://wwd.com/business->

Approximately thirty-three percent of U.S. apparel imports come from China.⁶ The United States imported about eleven billion dollars in apparel products and cotton textiles from China in 2019.⁷ If other types of imports are included, such as car parts, high-tech products, mechanical electrical parts, or even tomato sauce, the value of U.S. imports from Xinjiang approaches twenty billion dollars.⁸ Renowned brands such as Abercrombie & Fitch, Calvin Klein, Carter's, Gap, Nike, L.L.Bean, Polo Ralph Lauren, Tommy Hilfiger, and Victoria's Secret are among the major American fashion retail enterprises that have factories, supply factories, or use subcontractors throughout Xinjiang.⁹ This may be due to the fact that China has long courted foreign companies with the promise of low-wage workers who operate free from the intrusions of unions and other costly labor protections.¹⁰

news/government-trade/fashion-cry-for-help-forced-labor-china-uyghurs-1203687394 [https://perma.cc/3Z3P-2UQU].

⁶ AMY K. LEHR & MARIEFAYE BECHRAKIS, CTR. FOR STRATEGIC & INT'L STUD., CONNECTING THE DOTS IN XINJIANG FORCED LABOR, FORCED ASSIMILATION, AND WESTERN SUPPLY CHAINS 4, (2019), <https://www.csis.org/analysis/connecting-dots-xinjiang-forced-labor-forced-assimilation-and-western-supply-chains> [https://perma.cc/3EVF-9TSQ].

⁷ *US Bans Cotton Imports from China Producer, Citing 'Slave Labour'*, AL JAZEERA (Dec. 3, 2020), <https://www.aljazeera.com/economy/2020/12/3/us-bans-cotton-imports-from-china-producer-citing-slave-labour> [https://perma.cc/H67K-L5KJ].

⁸ Lora Cecere, *Preventing Uyghur Slave Labor Products Under the Tree. Maybe Next Year*, FORBES (Dec. 14, 2020, 2:00 PM), <https://www.forbes.com/sites/loracecere/2020/12/14/preventing-uyghur-slave-labor-products-under-the-tree-maybe-next-year/?sh=65cae19366f2> [https://perma.cc/9NTE-AM5T].

⁹ See, e.g., VICKY XIUZHONG XU ET AL., AUSTRALIAN STRATEGIC POL'Y INST., REPORT NO. 26/2020, UYGHURS FOR SALE: 'RE-EDUCATION,' FORCED LABOUR AND SURVEILLANCE BEYOND XINJIANG 5, (2020), <https://www.aspi.org.au/report/uyghurs-sale> [https://perma.cc/RUH6-DR]; Ana Swanson, *Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill*, N.Y. TIMES (Nov 29, 2020), <https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html> [https://perma.cc/U3U5-VDVR] (listing American multinational companies with operations in Xinjiang, such as Campbell Soup Company, Coca-Cola, and Costco among others).

¹⁰ See Goodman et al., *supra* note 4.

Unfortunately, since 2017, more than one million Uyghurs and other Turkic Muslim minorities have reportedly disappeared into a network of “re-education” camps in Xinjiang.¹¹ Government documents and interviews with former detainees show that forced labor has become an integral part of the efforts by the Chinese government to “re-educate” these ethnic minorities in order to “cleans[e them] of their extremist thoughts through not only ‘reeducation,’ but also work.”¹² As recent as December 2020, the BBC and the Center for Global Policy, a non-profit foreign policy research and advocacy think tank headquartered in Washington D.C., reported that at least a half-million Uyghurs were being put to work in cotton fields.¹³ Unlike their Han majority counterparts, Uyghur factor workers are often forced to live in dormitories, which are surrounded by iron gates and surveilled by security cameras.¹⁴ The Chinese government has also facilitated the mass transfer of Uyghurs from

¹¹ See XU ET AL., *supra* note 9, at 4; see also LEHR & BECHRAKIS, *supra* note 6, at 2 (stating that the Chinese governmental effort derives from the belief that state-imposed education and labor will integrate these minorities into the mainstream Han Chinese society by detaching them from their culture and religion and strengthening their loyalty to the Communist Party).

¹² See LEHR & BECHRAKIS, *supra* note 6, at 2; see also Mu Xuequan, *China Focus: Xinjiang Determined in Counter-Terrorism, Deradicalization, Maintaining Development*, XINHUA NET (Dec. 10, 2019, 9:12 AM), http://www.xinhuanet.com/english/2019-12/10/c_138618363.htm [<https://perma.cc/3PRW-YVD8>] (stating that in a December 2019 press conference held by the State Council Information Office in Beijing, Xu Hairong, the Party Chief of Ürümqi, the capital of the XUAR, proudly declared that “people of all ethnic groups in Xinjiang have truly felt that without the education and training, the current peaceful days would not be possible”).

¹³ ADRIAN ZENZ, CTR. FOR GLOB. POL’Y, COERCIVE LABOR IN XINJIANG: LABOR TRANSFER AND THE MOBILIZATION OF ETHNIC MINORITIES TO PICK COTTON 3 (2020), <https://newlinesinstitute.org/wp-content/uploads/20201214-PB-China-Cotton-NISAP-2.pdf> [<https://perma.cc/A8AR-FVXV>].

¹⁴ *Against Their Will: The Situation in Xinjiang*, U.S. DEP’T OF LAB., BUREAU OF INT’L LAB. AFFAIRS (last visited Sept. 20, 2021), <https://www.dol.gov/agencies/ilab/against-their-will-the-situation-in-xinjiang> [<https://perma.cc/4FZT-NA9Q>].

Xinjiang to work in factories throughout China.¹⁵ In many instances, the Communist government has seized the houses and farmland left behind by the transferred Uyghurs, which in turn has encouraged the majority Han Chinese to move in.¹⁶

The situation in Xinjiang has spurred worldwide activism calling on the Chinese government to stop these abuses against the Uyghur peoples.¹⁷ After years of this humanitarian crisis, the United States reacted by unveiling several pieces of legislation. The first was the Uyghur Human Rights Policy Act (UHRPA) that President Trump signed into law on June 17, 2020.¹⁸ The UHRPA, which is the first of its kind to promote the rights of Uyghurs and other Muslims in China facing systematic religious persecution,¹⁹ authorizes the use of targeted sanctions such as asset blocking, impositions of economic penalties, and visa restrictions against Chinese government officials deemed complicit in the

¹⁵ XU ET AL., *supra* note 9, at 3.

¹⁶ *The Uyghur Genocide Hits California*, L.A. TIMES (May 4, 2021, 8:00 AM), <https://www.latimes.com/podcasts/story/2021-05-04/the-times-podcast-uyghurs-genocide-california> [<https://perma.cc/7B3M-QEMR>].

¹⁷ See Shant Shahrigan, *Models, Uighur Activists Protests Outside Studio at Start of New York Fashion Week*, N.Y. DAILY NEWS (Sept. 13, 2020), <https://www.nydailynews.com/news/politics/ny-new-york-fashion-week-uighur-20200913-j7q66wv5ondkjflaxqvfxbv6e-story.html> [<https://perma.cc/5F2L-JGBQ>] (providing one of many examples of citizens around the world protesting the situation in Xinjiang); see also Ellen Halliday, *Uighurs Can't Escape Chinese Repression, Even in Europe*, ATLANTIC (Aug. 20, 2019), <https://www.theatlantic.com/international/archive/2019/08/china-threatens-uighurs-europe/596347/> [<https://perma.cc/4NJX-9WKA>] (providing another example of a Finnish citizen of Uyghur descent “set[ting] off on a ‘Freedom Tour’ around Europe to raise awareness of the detention of Uyghurs, including his own parents”).

¹⁸ Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648 (codified at 22 U.S.C. § 6901); S. 3744, 116th Cong. (2020) (passing the Senate by unanimous consent and the House by a 413-1 margin).

¹⁹ Nury Turkel, *The U.S. Must Use the New Uyghur Human Rights Policy Act To Sanction Chinese Officials for Religious Persecution*, TIME (Jun. 8, 2020, 5:59 AM), <https://time.com/5847184/uyghur-human-rights-policy-act-china/> [<https://perma.cc/L3NM-85KQ>].

persecution of Uyghurs and other Muslim minority groups.²⁰ The UHRPA, however, only focuses on Chinese state actors or foreign actors who are directly or indirectly responsible for the human right abuses against the Uyghur people and falls short of holding any other actors accountable. Although the co-founder of the Uyghur Human Rights Project, an independent nonprofit organization, and Commissioner on the United States Commission on International Religious Freedom, Nury Turkel, cheered the passage of this legislation, he urged Congress to pass a second bill—House Bill 6210, the Uyghur Forced Labor Prevention Act (UFLPA).²¹

On September 22, 2020, in the 116th Congress, the U.S. House of Representatives passed its version of the UFLPA by an overwhelming 406-3 majority.²² Fashion retailers were specifically concerned about section 4²³ and section 5²⁴ of the

²⁰ Uyghur Human Rights Policy Act of 2020 § 6(c), 22 U.S.C § 6901 (2018) (notes).

²¹ See Turkel, *supra* note 19; H.R. 6210, 116th Cong. (2020) (roll call 196).

²² H.R. 6210; Juliegrace Brufke, *House Passes Legislation To Crack Down on Business with Companies that Utilize China's Forced Labor*, HILL (Sept. 22, 2020, 5:32 PM), <https://thehill.com/homenews/house/517656-house-passes-legislation-to-crack-down-on-business-with-companies-that-utilize> [<https://perma.cc/95ZN-D7MX>].

²³ H.R. 6210, § 4(a) (mandating that all articles, goods, and merchandise produced, or manufactured wholly or in part in Xinjiang, or by persons working with the government of Xinjiang for purposes of the poverty alleviation or pairing-assistance programs shall be deemed to be articles, goods, wares, and merchandise described in section 307 of the Tariff Act of 1930 and not entitled to entry at any U.S. port unless the Commissioner of the CBP determines, by clear and convincing evidence, that any of aforementioned specific goods, wares, articles, or merchandise were not produced wholly or in part by convict, forced, or indentured labor under penal sanctions; and submits and makes available to the public a report containing such determination to the appropriate congressional committees). See *infra* Part I for discussion of how the retail industry would be affected by section 4.

²⁴ H.R. 6210, § 5(a) (mandating that a Forced Labor Enforcement Task Force submit to the appropriate congressional committees a report containing the U.S. Government's specific enforcement plans regarding any imported goods or merchandise from China and third countries, if they have been mined, produced, or manufactured in part in the XUAR or by persons

House bill. Section 4 requires any corporation wanting to import goods from Xinjiang to demonstrate, through clear and convincing evidence,²⁵ that there was no forced labor involved in any of their supply chains.²⁶ Section 5 specifies the enforcement strategy against corporations found to be in violation of the UFLPA.²⁷ The Senate approved its version of legislation by unanimous consent during the 117th Session of Congress.²⁸ The House voted to pass its updated version of the legislation (“House Bill 1155”) during the 117th Session of Congress on December 8, 2021 by a vote of 428-1.²⁹ On December 14, 2021, H.R. 6256 titled “To ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China do not enter the United States market, and for other purposes” was introduced and passed the House.³⁰ A couple of days later, H.R. 6256 passed in the Senate without amendment by unanimous consent.³¹ On December 20, 2021, the bill was formally

working with the XUAR government for purposes of either the “poverty alleviation” or “pairing-assistance” programs). *See infra* Part I for discussion of how the retail industry would be affected by section 5.

²⁵ H.R. 6210, § 4(b)(1); *See Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (holding that the evidence under the clear and convincing standard has to be highly probable and “instantly tilt the evidentiary scales”).

²⁶ Press Release, Cong.-Exec. Comm. on China, Xinjiang: Chairs Release New Legislation & Report on Global Supply Chains and Forced Labor, (Mar. 11, 2020), <https://www.cecc.gov/media-center/press-releases/cecc-chairs-release-new-legislation-report-on-global-supply-chains-and> [<https://perma.cc/8T5S-DQTY>].

²⁷ *See* H.R. 6210, § 5.

²⁸ S. 65, 117th Cong. (2021); 167 CONG. REC. S4908 (daily ed. July 14, 2021).

²⁹ *See* H.R. 1155, 117th Cong. (2021); *see also* Ellie Kaufman, *House Passes Bill Blocking Imports of Products Produced by Forced Labor in China’s Xinjiang Region*, CNN (Dec. 8, 2021), <https://www.cnn.com/2021/12/08/politics/house-bill-forced-labor-uyghurs-china/index.html> [<https://perma.cc/43JX-H7NZ>] (noting the House’s passage of the legislation). The 116th Congress’ version of the House bill, H.R. 6210 is substantively similar to the 117th Congress’ version, H.R. 1155. Because it is currently the 117th Congress, this Note will refer to the House bill as “House Bill 1155.”

³⁰ 167 CONG. REC. H7808 (daily ed. Dec. 14, 2021).

³¹ 167 CONG. REC. S9231 (daily ed. Dec. 16, 2021).

presented to President Joe Biden and signed the next day, now known as PL 117-78.³²

Despite the Trump Administration's constant alienation of allies and general disdain for international institutions and their mandates, human rights abuses in China have comprised one of the few issues where the Trump Administration engaged with the international community.³³ However, given the complicated relationship between Washington and Beijing, a relationship notably fraught with tension during the Trump Administration, it is likely that one of the motivations behind bringing forth forced-labor legislation, particularly after the COVID-19 pandemic entered the United States at the beginning of 2020, was to hurt China economically and reputationally.³⁴ In any case, everything seems to indicate that the Biden Administration will prioritize human rights.³⁵ Therefore, it was not far-fetched that a version of the UFLPA was ultimately signed into law without much resistance less than a year into Biden's term, making the United States the leader³⁶ in condemning

³² Press Release, White House, Bill Signed: H.R. 6256 (Dec. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/bill-signed-h-r-6256/> [<https://perma.cc/RQ82-LZBK>].

³³ Pierfilippo M. Natta, *In Rare Unanimity, Biden Could Double Down on Trump's Uighur Sanctions*, FOREIGN POL'Y (Dec. 3, 2020, 2:55 PM), <https://foreignpolicy.com/2020/12/03/biden-uighurs-xinjiang-china-forced-labor-sanctions/> [<https://perma.cc/V2TG-XMER>].

³⁴ See Steven Lee Myers, *China Lashes Out at U.S.'s Action Against Mass Incarcerations*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/world/asia/china-trump-pompeo-xinjiang-uighurs-bolton.html> [<https://perma.cc/9Y6L-QSLU>] (discussing the juxtaposition between President Trump signing the Uyghur Human Rights Policy Act into law on the same day that his former national security adviser, John Bolton, accused him of once supporting Beijing's crackdown in Xinjiang).

³⁵ Press Statement, Antony J. Blinken, Sec'y of State, Putting Human Rights at the Center of U.S. Foreign Policy (Feb. 24, 2021), <https://www.state.gov/putting-human-rights-at-the-center-of-u-s-foreign-policy/> [<https://perma.cc/5G7J-TAS4>].

³⁶ See Stephen Johnson, *Australia Is Set to Fight Forced Muslim Labour in China with Import Bans on Goods Made in 'Re-education Camps'*, DAILY MAIL (Jan. 27, 2021), <https://www.dailymail.co.uk/news/article->

China over its human right abuses against the Uyghurs and other Turkic Muslim minorities.³⁷

This Note argues that given the UFLPA's overbroad economic implications and lack of a clear enforcement mechanism, it is neither an effective nor a realistic way of holding American companies seeking to import products from China accountable in the long term. More sensible ways of immediately eliminating forced labor from importers' supply chains would have been to consider initially focusing enforcement on the worst actors; establishing a clear timetable for all stakeholders involved to move their production out of Xinjiang or find alternative suppliers; encouraging more cotton-growing in other parts of the world;³⁸ having CBP create a more transparent and standardized process in its issuance of Withhold Release Orders (WRO);³⁹ and having CBP collaborate closely with the

9190739/Senator-Rex-Patrick-wants-Australia-ban-Chinese-imports-using-forced-labour-Uighur-Muslims.html [https://perma.cc/GM7G-WBYD] (discussing the fact "Australia could join the United States in banning Chinese imports made with forced Muslim labour under a crossbench senator's push for new laws."); see also Ryan Patrick Jones, *Federal Government Moves To Seal Off Canadian Companies from Human Rights Violations in China*, CAN. BROAD. CORP. (Jan. 12, 2021), <https://www.cbc.ca/news/politics/canada-xinjiang-forced-labour-1.5869752> [https://perma.cc/Y6G6-L3C5] (discussing that the Canadian government has set new requirements for firms that do business in Xinjiang and "a pledge to ban the export of products from Canada to China if there is a chance they could be used by Chinese authorities for surveillance, repression, arbitrary detention or forced labour").

³⁷ See Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648 (codified at 22 U.S.C. § 6901) ("An Act To condemn gross human rights violations of ethnic Turkish Muslims in Xinjiang[.]")

³⁸ See *Working on the Chain Gang; Congress Is Moving To Block Goods Made with the Forced Labour of Uyghurs*, ECONOMIST (Jan. 9, 2021), <https://www.economist.com/united-states/2021/01/09/congress-is-moving-to-block-goods-made-with-the-forced-labour-of-uyghurs> [https://perma.cc/5JEZ-DR9W].

³⁹ See Johanna Estes & Alyssa Dickinson, *Forced Labor Overview*, U.S. CUSTOMS & BORDER PROT., (Dec. 12, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/Forced%20Labor%20Presentation%20December%2012%202019%20FINAL.pdf> [https://perma.cc/B2S4-7DPW] ("Withhold release orders are

retail industry on any technology-based solutions, such as supply chain tracing.⁴⁰ Although foreclosing U.S. supply chain links to forced labor in Xinjiang is a legitimate objective from both a humanitarian and a policy stance, the challenge lies in figuring out exactly how to enforce this law without negatively impacting billions of dollars of global trade in supply chains that employ millions of workers throughout the world.⁴¹

Part II of this Note explains House Bill 1155 in detail, focusing on the heightened legal standard and the U.S. government's enforcement plans towards products believed to have been manufactured with forced labor. Part III discusses how some important players in the fashion retail industry have responded to the potential passage of this legislation. It also examines the process by which WROs are passed and more specifically, the blanket WRO issued by the Trump Administration a few days before the end of his term. Passing the House version of the UFLPA will lead to a *de facto* permanent statutory WRO on Xinjiang, similar to the blanket

internal instructions to all port directors to withhold release of specific merchandise into the U.S. commerce pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation.”).

⁴⁰ See *U.S. Customs & Border Protection – Intent to Sole Source for Cotton Origin Verification Pilot Program*, GOVTRIBE (last updated Aug. 17, 2020), <https://govtribe.com/opportunity/federal-contract-opportunity/u-dot-s-dot-customs-border-protection-intent-to-sole-source-for-cotton-origin-verification-pilot-program-70b06c20p00000466> [https://perma.cc/BJ58-V7Q4] (discussing that CBP “intends to enter a firm, fixed price contract with Oritain USA, Inc. for a pilot demonstration of Oritain’s cotton origin verification capability as a result of an unsolicited proposal received and evaluated[.]”).

⁴¹ *Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang: Hearing Before the Subcomm. On Trade of the H. Comm. on Ways and Means*, 116th Cong. 3 (2020) [hereinafter *Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang*, Hearing] (statement of Steve Lamar, President and CEO of American Apparel & Footwear Association), <https://www.congress.gov/116/meeting/house/111010/witnesses/HMTG-116-WM04-Wstate-LamarS-20200917.pdf> (on file with the Columbia Business Law Review).

WRO issued by CBP on January 13, 2021, to detain all cotton products produced in Xinjiang.⁴²

When this administrative decree starts being implemented in full force in 2022, it will likely lead to procedural legal challenges by the affected retailers. Immediately following CBP's swift administrative action, the American Apparel & Footwear Association (AAFA), the National Retail Federation (NRF), the Retail Industry Leaders Association (RILA), and the United States Fashion Industry Association (USFIA) released a joint statement affirming that the companies that they represent are outraged by the reports of forced labor in Xinjiang and emphasizing that eradicating forced labor in their supply chains has long been their operational and public policy priority.⁴³ In that same statement, these trade associations demanded that CBP share "the evidence gathered, and the evidentiary thresholds used, that led to [the blanket WRO]."⁴⁴

Lastly, Part IV proposes that the retail industry should seek other sensible solutions—including implementing and using data-sharing platforms to collect reliable information on responsible suppliers, which would eliminate redundancies in the auditing process,⁴⁵ or better yet, integrating forensic

⁴² See Press Release, U.S. Customs & Border Prot., CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave> [<https://perma.cc/GLC2-DTR2>] (noting that as of January 13, 2021, CBP would detain cotton products and tomato products produced in the XUAR based on information that reasonably indicates the use of detainee or prison labor and situations of forced labor).

⁴³ Press Release, Am. Apparel & Footwear Ass'n, Nat'l Retail Fed'n, Retail Indus. Leaders Ass'n & U.S. Fashion Indus. Ass'n, Joint Statement from AAFA, NRF, RILA, USFIA in Response to Ban on All Cotton Imports from XUAR (Jan. 13, 2021), https://www.aafaglobal.org/AAFA/AAFA_News/2020_Press_Releases/Joint_Association_Statement_Ban_XUAR_Cotton.aspx [<https://perma.cc/6MU4-GBTF>].

⁴⁴ *Id.*

⁴⁵ See AMY K. LEHR, CTR. FOR STRATEGIC & INT'L STUD., *NEW APPROACHES TO SUPPLY CHAIN TRACEABILITY: IMPLICATIONS FOR XINJIANG AND BEYOND* 7 (2020), <https://www.csis.org/analysis/new-approaches->

science to assure cotton supply chain integrity,⁴⁶ or adopting high-tech solutions such as isotope and microbiome tracing focused on identifying the origin of cotton or the identity of intermediary suppliers.⁴⁷ These proposed solutions are not only expensive but also require a significant investment in time and oversight.⁴⁸

II. LEGISLATION AFFECTING UYGHURS

In the international arena, the existence of human right abuses that have taken and continue to take place in Xinjiang are well documented.⁴⁹ This, coupled with the fact that the Uyghur humanitarian crisis has been repeatedly denounced by various countries, most recently by thirty-nine countries via a joint statement to the United Nations led by Germany, shows that there is wide consensus on the situation of the Uyghur minority in China.⁵⁰ The Chinese government has

supply-chain-traceability-implications-xinjiang-and-beyond
[<https://perma.cc/R95F-P7UW>].

⁴⁶ See MeiLin Wan, Judy Murrah & John Jasper, *How Forensic Science Can Assure Cotton Supply Chain Integrity*, JUST STYLE, (Apr. 7, 2020), https://www.just-style.com/comment/how-forensic-science-can-assure-cotton-supply-chain-integrity_id138351.aspx [<https://perma.cc/8C27-ZKQ8>].

⁴⁷ LEHR, *supra* note 45, at 9.

⁴⁸ See *id.*, at 19 (“Widescale adoption of these approaches may be needed to make them efficient and less costly.”)

⁴⁹ See, e.g., Nathan Sales & Sam Brownback, Opinion, *China’s Attack on Uighurs Isn’t Counterterrorism. It’s Ugly Repression*, WASH. POST (May 22, 2019), https://www.washingtonpost.com/opinions/chinas-attack-on-uighurs-isnt-counterterrorism-its-ugly-repression/2019/05/22/7bfb1d60-7ccb-11e9-a5b3-34f3edf1351e_story.html (on file with the Columbia Business Law Review).

⁵⁰ See Joint Statement by Ambassador Christoph Heusgen, Permanent Representative of the German Mission to the United Nations, Joint Statement on the Human Rights Situation in Xinjiang and the Recent Developments in Hong Kong Delivered by Germany on Behalf of 39 Countries (Oct. 6, 2020), <https://usun.usmission.gov/joint-statement-on-the-human-rights-situation-in-xinjiang-and-the-recent-developments-in-hong-kong-delivered-by-germany-on-behalf-of-39-countries> [<https://perma.cc/QU5F-UWBM>] (specifying that the cross-regional joint statement came from Albania, Australia, Belgium, Bosnia and Herzegovina,

been the only party to tirelessly deny the situation, claiming that “China has no genocide,”⁵¹ and has defensively asserted that the human rights violations in Xinjiang have been “fabricated by some American politicians.”⁵² Yet, paradoxically, China noted on Twitter that a study “shows that in the process of eradicating extremism, the minds of Uygur women in Xinjiang were emancipated and gender equality and reproductive health were promoted, making them no longer baby-making machines.”⁵³ Twitter responded by not only removing the tweet and replacing it with “a label stating that it was no longer available” but it also suspended the Chinese Embassy’s account given the company’s explicit prohibition on tweets or direct messages that seek to dehumanize “a group of people based on their religion, caste,

Bulgaria, Canada, Croatia, Denmark, Estonia, Finland, France, Germany, Haiti, Honduras, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, the Republic of the Marshall Islands, Monaco, Nauru, the Kingdom of the Netherlands, New Zealand, North Macedonia, Norway, Palau, Poland, Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and the United States).

⁵¹ Paul D. Shinkman, *China Fires Back at Blinken’s Condemnation Regarding Uighurs: ‘No Genocide – Period’*, US NEWS (Jan. 8, 2021, 10:40 AM), <https://www.usnews.com/news/world-report/articles/2021-01-28/china-fires-back-at-blinkens-condemnation-regarding-uighurs-no-genocide-period> (on file with Columbia Business Law Review) (detailing that Zhao Lijian, the Chinese Foreign Ministry spokesperson offered a rare display of exasperation, only hours after the Antony Blinken had been sworn as Secretary of State, at a press conference, saying “China has no genocide; China has no genocide; China has no genocide, period . . . the most important thing should be repeated three times.”).

⁵² John Feng, *China Calls Xinjiang Human Rights Violations Claims ‘Lie of the Century’*, NEWSWEEK (Dec. 29, 2020, 7:58 AM), <https://www.newsweek.com/china-calls-xinjiang-human-rights-violations-claims-lie-century-1557697> [<https://perma.cc/7HG8-7ZAS>] (quoting Zhao Lijian, Chinese Foreign Ministry’s spokesperson).

⁵³ Helen Davidson, *Twitter Removes China US Embassy Post Saying Uighur Women No Longer ‘Baby-Making Machines’*, GUARDIAN (Jan. 10, 2021, 12:31 AM), <https://www.theguardian.com/world/2021/jan/10/twitter-removes-china-us-embassy-post-saying-uighur-women-no-longer-baby-making-machines> [<https://perma.cc/PH3S-88J8>].

age, disability, serious disease, national origin, race, or ethnicity.”⁵⁴

Given this level of awareness exhibited at the international level, activism at the grassroots level has also increased especially among young people, who have been increasingly attuned to some of the most pressing issues facing society such as human rights, systemic racism, and police brutality.⁵⁵ At the civic level, the Coalition to End Forced Labor in the Uyghur Region stands out among recently created civil organizations in that it is a coalition consisting mostly of trade unions across various countries. The coalition members call on leading brands and global retailers to ensure that they are neither supporting nor benefiting from forced labor as well as hold them accountable for contributing to supply chains linked to Xinjiang.⁵⁶ The mounting public

⁵⁴ *Twitter Locks Account of China's US Embassy for Post on Xinjiang*, AL JAZEERA (Jan. 21, 2021), <https://www.aljazeera.com/news/2021/1/21/twitter-locks-account-of-chinas-us-embassy-for-post-on-xinjiang> [<https://perma.cc/A7HK-WV7K>]; see also *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/8WNL-VH46>] (last visited February 13, 2021).

⁵⁵ See e.g., Katherine Fung, *16-Year-Old Petitions Congress To Ban Products Made Through China's Forced Labor of Uyghurs*, NEWSWEEK (Feb. 16, 2021, 5:14 PM), <https://www.newsweek.com/16-year-old-petitions-congress-ban-products-made-through-chinas-forced-labor-uyghurs-1569721> [<https://perma.cc/Q7WY-6NDN>] (detailing the activism of a young woman from North Carolina that started an online petition on Change.org calling on members of Congress to pass the Uyghur Forced Labor Prevention Act); Tenzin Chime, Irade Kashgary & Joyce Ho, *Opinion, China's Crackdown on Hong Kong, Tibet, Uyghurs: What to Know*, TEEN VOGUE (Sept. 30, 2020), <https://www.teenvogue.com/story/china-hong-kong-tibet-uyghurs-global-day-action> [<https://perma.cc/JZ4C-MBXB>]. The fact that publications such as Teen Vogue, whose audience is teenagers and young adults, publish pieces concerning the Uyghur situation in China demonstrates the interest that young people have taken towards this cause.

⁵⁶ See *About Our Coalition*, COALITION TO END FORCED LABOR IN THE UYGHUR REGION, <https://enduyghurforcedlabour.org/about> (last visited Oct. 10, 2020) (on file with the Columbia Business Law Review); see also Kate Duffy, *Human Rights Groups Say the Xinjiang Forced Labor Bill Will Likely Be Passed as Huge Companies Like Nike and Coca-Cola Lobby Against It*, BUS. INSIDER (Dec. 6, 2020, 8:00 AM),

pressure seems to have yielded results as the AAFA, which alone represents more than one thousand brands in the apparel industry, the NRF, the RILA, the USFIA, and the Footwear Distributors and Retailers of America (FDRA), issued a joint statement on March 10, 2020 expressing their deep concern over reports of forced labor and treatment of Uyghurs and other minority workers in Xinjiang.⁵⁷

In their statement, the organizations also urged the U.S. government to engage a multi-stakeholder working group to develop a collective approach to assess the problem and generate solutions to target bad actors, protect workers' rights, and uphold the integrity of global supply chains.⁵⁸ Likely not coincidentally, the timing of the release of this joint statement coincided with the AAFA's sudden willingness to address this issue. Nate Hernan, the AAFA's Senior Vice President, said "[w]e know there's an issue," referring to the opacity of supply chains Xinjiang and the Uyghur situation back in May 2019.⁵⁹ Indeed, the day AAFA released its joint statement, March 11, 2020, a group of five Democrat and six Republican Representatives unveiled legislation restricting imports to the United States from Xinjiang as a response to the humanitarian crisis.⁶⁰

<https://www.businessinsider.com/human-rights-groups-battle-against-firms-on-xinjiang-forced-labor-2020-12> [<https://perma.cc/GU7Q-TFYH>] (describing the Coalition to End Forced Labor in the Uyghur Region's activism).

⁵⁷ Press Release, Am. Apparel & Footwear Ass'm, Nat'l Retail Fed'n, Retail Indus. Leaders Ass'n, U.S. Fashion Indus. Ass'n & Footwear Distribs. & Retailers of Am., Joint Statement from AAFA, NRF, RILA, USFIA, and FDRA on Reports of Forced Labor in Xinjiang (Mar. 10, 2020), https://www.aafaglobal.org/AAFA/AAFA_News/2020_Press_Releases/Joint_Statement_Xinjiang.aspx [<https://perma.cc/22FL-ZZ5X>].

⁵⁸ *Id.*

⁵⁹ Deng & Dou, *supra* note 3.

⁶⁰ See Austin Ramzy, *U.S. Lawmakers Propose Tough Limits on Imports from Xinjiang*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/world/asia/xinjiang-china-labor-bill.html> [<https://perma.cc/X4P9-RCLV>]; see also Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2020) (listing the initial eleven cosponsors of the bill, among them Rep. Christopher Smith [R-NJ-4]; Rep. Thomas Suozzi [D-NY-3]; Rep. Tom Malinowski [D-NJ-7]; Rep. Vicky

As a result of the global disruptions caused by the COVID-19 pandemic and the need for Congress to work on various pressing domestic legislative acts, the proposed Uyghur legislation stalled in Congress for a few months.⁶¹ Scrutiny over the Uyghur human rights crisis accelerated in late summer and early fall of 2020 as evinced by the various congressional hearings.⁶² For instance, the House Committee on Oversight and Reform's Subcommittee on National Security and the House Foreign Affairs' Subcommittee on Asia, the Pacific, and Nonproliferation held a joint briefing on "China's Oppression of Muslim Uyghurs in Xinjiang" on August 17, 2020.⁶³ The Trade Subcommittee of the House Ways and Means Committee held a hearing on "Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang" in mid-September,⁶⁴ only a few days before the House of Representatives voted on and passed House Bill 6210.⁶⁵

Hartzler [R-MO-4]; Rep. Joe Wilson [R-SC-2]; Rep. Mark Meadows [R-NC-11]; Rep. Ted Yoho [R-FL-3]; Rep. Mike Gallagher [R-WI-8]; Rep. Jamie Raskin [D-MD-8]; Rep. Rashida Tlaib [D-MI-13]; Rep. Jennifer Wexton [D-VA-10]), <https://www.congress.gov/bill/116th-congress/house-bill/6210/cosponsors?searchResultViewType=expanded> (on file with the Columbia Business Law Review).

⁶¹ See Sarah Frazer, *The Uyghur Forced Labor Prevention Act in Congress*, BORGES MAG. (July 25, 2020), <https://www.borgenmagazine.com/the-uyghur-forced-labor-prevention-act> [https://perma.cc/Z254-REYZ].

⁶² *U.S. Blocks Imports from China Due to Suspected Forced Labor, Continuing Its Aggressive Enforcement Actions and Leading to Potential Supply Chain Disruptions*, COVINGTON & BURLING (Sept. 17, 2020), <https://www.cov.com/en/news-and-insights/insights/2020/09/us-blocks-imports-from-china-due-to-suspected-forced-labor-continuing-its-aggressive-enforcement-actions-and-leading-to-potential-supply-chain-disruptions> [https://perma.cc/V7PS-JVH4].

⁶³ Press Release, House Comm. on Oversight and Reform, Subcomms. Hold Joint Briefing on China's Oppression of Uyghur Population (Aug. 18, 2020), <https://oversight.house.gov/news/press-releases/subcommittees-hold-joint-briefing-on-china-s-oppression-of-uyghur-population> [https://perma.cc/CC3N-J8WU].

⁶⁴ See *Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang*, Hearing, *supra* note 41.

⁶⁵ Swanson, *supra* note 9.

A. Section 307 of the Tariff Act of 1930

For almost 100 years, section 307 of the Tariff Act of 1930 (also known as the Smoot-Hawley Tariff),⁶⁶ codified at 19 U.S.C. § 1307, has explicitly prohibited the importation of products that have been “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.”⁶⁷ This law, however, initially contained a “consumptive demand” exception,⁶⁸ which allowed the importation of a good manufactured by forced labor if it could be shown that no comparable good was made in the United States or that its level of domestic production did not meet the domestic demand for it.⁶⁹ It was not until February 2016 that the Trade Enforcement Act of 2015 was enacted,⁷⁰ eliminating this exception that had, up until that point, been a major limitation on CBP’s ability to fully enforce section 307 of the Tariff Act of 1930.⁷¹

The removal of the exception immediately resulted in CBP banning the importation of more goods in the years following it than in the fifteen years preceding its repeal via a dramatic

⁶⁶ See *The Battle of Smoot-Hawley; Protectionism*, ECONOMIST (Dec. 18, 2008), <https://www.economist.com/christmas-specials/2008/12/18/the-battle-of-smoot-hawley> [<https://perma.cc/8EVK-87TV>].

⁶⁷ The Tariff Act of 1930 § 307, 19 U.S.C. § 1307 (2018).

⁶⁸ The original statute included that “in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.” The Tariff Act of 1930 § 307, Pub. L. 71-361, 46 Stat. 590, 689–90. This language was removed in 2016. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910(a)(1), 130 Stat. 122, 239 (2016).

⁶⁹ See U.S. CUSTOMS & BORDER PROT., CBP PUB. NO. 2133-0416, TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015: REPEAL OF CONSUMPTIVE DEMAND CLAUSE – FREQUENTLY ASKED QUESTIONS (2020).

⁷⁰ Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910(a)(1), 130 Stat. 122, 239 (2016).

⁷¹ Sandra L. Bell, *The US Prohibition on Imports Made with Forced Labour: The New Law Is a ‘Force’ to be Reckoned With*, 11 GLOB. TRADE & CUSTOMS L. 580, 581 (2016).

increase in its issuance of WROs.⁷² “The ‘wholly or in part’ statutory language of section 307, combined with the broad authority granted to the CBP Commissioner, suggests that even the smallest component of a good, at the lowest tier of a supply chain, is enough to prohibit the importation of the entire good if that component is produced with forced labor.”⁷³ That level of supply chain scrutiny for multinational companies such as the retailers in question, however, is unrealistic.⁷⁴ This is one of section 307’s major defects—the fact that corporations most often “source raw materials for their products through complex and opaque supply chains located far from where the finished goods are ultimately sold.”⁷⁵ Section 307 is able to reasonably address forced labor

⁷² Elliot Brewer, *Closed Loophole: Investigating Forced Labor in Corporate Supply Chains Following the Repeal of the Consumption Demand Exception*, 28 KAN. J.L. & PUB. POL’Y. 86, 90 (2018) (detailing that between the elimination of the exception clause in February of 2016 and September of 2018, CBP banned the importation of six goods, while it had not banned the importation of any goods from 2001 until 2016). CBP has banned the importation of thirty-four goods from the repeal of the exception and the publication of this note. *Withhold Release Orders and Findings List*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> [<https://perma.cc/9V27-XPRW>] (last visited Nov. 2, 2021).

⁷³ Brewer, *supra* note 72, at 91.

⁷⁴ John Ruggie states:

Where business enterprises have large number of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 29 NETH. Q. OF HUM. RTS. 224, 240 (2011).

⁷⁵ See Amy L. Groff, Caitlin C. Blanche & John F. Sullivan, *Top 10 Tips for an Ethical Supply Chain in 2018*, K&L GATES (Jan. 30, 2018),

by a product's final manufacturer, but the task is much more challenging at the early stages of the production cycle "several steps down the link in a [multinational company's] supply chain."⁷⁶

This was also one of the main defects with both versions of the UFLPA. The UFLPA asks the CBP Commissioner to apply a presumption that "assumes that all goods manufactured in Xinjiang are made with forced labor and therefore banned under the 1930 Tariff Act,"⁷⁷ and this presumption can prove to be effective in handling forced labor allegations by manufacturers situated within the geographical confines of Xinjiang. However, given reports that the Chinese government has moved thousands of Uyghurs from Xinjiang to factories throughout China over the last few years, where they are subjected to work "under conditions that strongly suggest forced labor,"⁷⁸ the UFLPA's presumption is similar to that of section 307 of the Tariff Act of 1930. This presumption is arguably the UFLPA's main feature and will likely prove ineffective in combatting forced labor deeper in the supply chain. This is because corporations could either fail to detect forced labor in one of their many supply chain

<https://www.klgates.com/Top-10-Tips-for-an-Ethical-Supply-Chain-in-2018-01-30-2018> [<https://perma.cc/GC5J-KB2Z>].

⁷⁶ Brewer, *supra* note 72; See John Foote, *Can the U.S. End Supply Chain Links to Forced Uighur Labor?* LAWFARE (Feb. 2, 2021), <https://www.lawfareblog.com/can-us-end-supply-chain-links-forced-uighur-labor> [<https://perma.cc/KB7X-H95K>] [<https://perma.cc/KB7X-H95K>] ("While Section 307 is reasonably capable of addressing forced labor by a final manufacturer of imported goods, it struggles mightily to target forced labor where it is most pervasive—at the base of the supply chain.").

⁷⁷ See David Brunnstrom, *U.S. Lawmakers Seek to Tighten Ban on Forced-labor Goods from China's Xinjiang*, REUTERS (Mar. 11, 2020, 11:28 AM), <https://www.reuters.com/article/us-usa-china-xinjiang-labor/u-s-lawmakers-seek-to-tighten-ban-on-forced-labor-goods-from-chinas-xinjiang-idUSKBN20Y2DQ> [<https://perma.cc/J5A3-XSSA>]; S. 65, 117th Cong. § 5 (2021); H.R. 1155, 117th Cong. § 4 (2021).

⁷⁸ Jack Kelly, *China Moves Uyghur Muslims into 'Forced Labor' Factories*, FORBES (Mar. 5, 2020, 12:24 PM), <https://www.forbes.com/sites/jackkelly/2020/03/05/china-moves-uyghur-muslims-into-forced-labor-factories/?sh=543a3b8e44e5> (on file with the Columbia Business Law Review) (quoting XU ET AL., *supra* note 9, at 3).

workflows⁷⁹ or willingly neglect to thoroughly investigate forced labor allegations.⁸⁰

B. House Version of the UFLPA—H.R. 1155

Currently, CBP may issue a WRO to detain a particular shipment of a particular commodity when information reasonably, but not conclusively, indicates that the merchandise was produced by forced labor.⁸¹ It is only when

⁷⁹ See *U.S. Senator Calls for Action on Forced Labor in China's Xinjiang*, REUTERS (Mar. 10, 2020, 5:48 PM), <https://www.reuters.com/article/us-usa-china-xinjiang/u-s-senator-calls-for-action-on-forced-labor-in-chinas-xinjiang-idUSKBN20X34Z> [<https://perma.cc/SN28-XFLJ>] (In a letter to Commerce Secretary Wilbur Ross, Democratic Senator Bob Menendez wrote, “[T]here are consistent reports that U.S. companies fail to undertake basic labor and human rights assessments in Xinjiang, in essence willfully ignoring the horrific conditions of forced labor in Xinjiang”).

⁸⁰ See *U.S. Senator Calls for Action on Forced Labor in China's Xinjiang*, REUTERS (Mar. 10, 2020, 5:48 PM), <https://www.reuters.com/article/us-usa-china-xinjiang/u-s-senator-calls-for-action-on-forced-labor-in-chinas-xinjiang-idUSKBN20X34Z> [<https://perma.cc/SN28-XFLJ>] (In a letter to Commerce Secretary Wilbur Ross, Democratic Senator Bob Menendez wrote, “[T]here are consistent reports that U.S. companies fail to undertake basic labor and human rights assessments in Xinjiang, in essence willfully ignoring the horrific conditions of forced labor in Xinjiang”).

⁸¹ See *The Uyghur Forced Labor Prevention Act: How It Impacts Your Company*, MILLER & CHEVALIER (Oct. 29, 2020), <https://www.millerchevalier.com/publication/uyghur-forced-labor-prevention-act-how-it-impacts-your-company> [<https://perma.cc/5S8X-RESB>]. Forced labor “indicators are:

- [1] Abuse of vulnerability;
- [2] Deception;
- [3] Restriction of movement;
- [4] Isolation;
- [5] Physical and sexual violence;
- [6] Intimidation and threats;
- [7] Retention of identity documents;
- [8] Withholding of wages;
- [9] Debt bondage;
- [10] Abusive working and living conditions; and
- [11] Excessive overtime.”

the importer “establishes by satisfactory evidence that merchandise was not mined, produced, or manufactured in any part with the use of a class of labor specified in the finding” that CBP can release the held merchandise to the importer.⁸² This means that an importer of any article detained under this provision can submit a certificate of origin⁸³ signed by the foreign seller or owner of the article to the CBP Commissioner or port director within a three-month period after the date the article was imported.⁸⁴ If the certificate of origin is submitted within the prescribed time period and the CBP Commissioner finds that the merchandise is admissible, the port director is required to release the merchandise.⁸⁵

One of House Bill 1155’s main features is section 4, which states that if importers want their merchandise to fall within

INT’L LAB. OFF., ILO INDICATORS OF FORCED LABOUR (2012), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_203832.pdf (on file with the Columbia Business Law Review). Furthermore, the ILO reports states that “[t]he presence of a single indicator in a given situation may . . . imply the existence of forced labour . . . the set of eleven indicators covers the main possible elements of a forced labour situation, and hence provides the basis to assess whether or not an individual worker is a victim of this crime.” *Id.*

⁸² 19 CFR §12.42(g) (2017).

⁸³ A certificate of origin states:

I, _____, foreign seller or owner of the merchandise hereinafter described, certify that such merchandise, consisting of _____ (Quantity) of _____ (Description) in _____ (Number and kind of packages) bearing the following marks and numbers _____ was mined, produce, or manufactured by _____ (Name) at or near _____, and was laden on board _____ (Carrier to the United States) at _____ (Place of lading) (Place of final departure from country of exportation) which departed from on _____; (Date); and that _____ (Class of labor specified in finding) was not employed in any stage of the mining, production, or manufacture of the merchandise or of any component thereof.

Dated _____ (Signature).

Id. §12.43(a).

⁸⁴ *Id.*

⁸⁵ *Id.* §12.43I.

the exception to the prohibition on importation of goods made in Xinjiang, they would have to prove, “by clear and convincing evidence,” that their merchandise was not produced wholly or in part by forced labor.⁸⁶ This is a heightened legal standard that would require the U.S. State Department to report on not only these products, but also the businesses that sell them in the United States.⁸⁷ Furthermore, although technically no *mens rea* is specifically required,⁸⁸ this heightened standard creates a rebuttable presumption that *all* goods manufactured wholly or in part in Xinjiang, particularly for purposes of the “poverty alleviation” or the “pairing-assistance” programs are products of forced labor.⁸⁹ The retail industry contends that such rebuttable presumption language would essentially allow CBP to find an importing company guilty until proven innocent.⁹⁰

⁸⁶ H.R. 1155, 117th Cong. § 4(b) (2021).

⁸⁷ See Editorial, *Western Companies Must Stop Profiting from China's Crimes Against Humanity*, WASH. POST (Mar. 14, 2020), https://www.washingtonpost.com/opinions/global-opinions/western-companies-must-stop-profiting-from-chinas-crimes-against-humanity/2020/03/13/2cdaeab6-63b7-11ea-845d-e35b0234b136_story.html (on file with the Columbia Business Law Review).

⁸⁸ Black's Law Dictionary defines “rebuttable presumption” defined as “[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.” *Rebuttable Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁸⁹ H.R. 1155, § 4(a). Poverty alleviation programs are “presented by state media as a noble, benevolent effort by the ruling Communist Party to help predominantly poor rural workers gain access to the material benefits enjoyed by China's urban residents [through which] they are offered free training and stable jobs to enable them to support their families and achieve a better life.” Rebecca Wright, Ivan Watson & Isaac Yee, *Black Gold: How Global Demand for Hair Products is Linked to Forced Labor in Xinjiang*, CNN (Oct. 10, 2020), <https://www.cnn.com/interactive/2020/10/asia/black-gold-hair-products-forced-labor-xinjiang/> [<https://perma.cc/8FBL-MU6Z>]. Pairing assistance programs refer to the “mass transfer of Uyghur and ethnic minority labor from Xinjiang to factories in other parts of the province and across China . . . at least 80,000 Uyghurs have been transferred to 27 factories across China since 2017.” *Id.*

⁹⁰ See, e.g., Rick Helfenbein, *Xinjiang China – U.S. Retail's XUAR Question Has A Truly Ugly Answer*, FORBES (Sept. 29, 2020), <https://www.forbes.com/sites/rickhelfenbein/2020/09/29/xinjiang-chinaus->

Oftentimes, an independent audit can help an importer overcome the type of presumption that is being included in this version of the bill. However, given that in Xinjiang “[a]uditor interviews with workers cannot be relied upon given the pervasive surveillance, and evidence of workers’ fear of sharing accurate information,”⁹¹ this suggests that “third-party audits alone may not be a credible source of information for indicators of labor abuses[.]”⁹² Furthermore, according to a multi-agency report issued in July of 2020, auditors in Xinjiang face a range of unique challenges such as detainment, harassment, threatening, and invasive airport stops by Chinese authorities.⁹³ Auditors have also reportedly been required to use government translators who convey misinformation or do not speak the workers’ first language.⁹⁴

Even if an importer were able to overcome the presumption and satisfy the import requirements independent of an audit, CBP would be required to prepare a public report explaining the reasons for having made such a determination.⁹⁵ This

retails-xuar-question-has-a-truly-ugly-answer/ (on file with the Columbia Business Law Review); *The Uyghur Forced Labor Prevention Act: How It Impacts Your Company*, *supra* note 81 (noting that although rebutting a presumption of forced labor is challenging, based on the firm’s experience, CBP would expect to see that the companies “have a program that effectively addresses the [ILO’s] 11 Indicators of Forced Labor, which represent the most common signs or ‘clues’ that point to the possible existence of a forced labor.”).

⁹¹ U.S. Dep’t of State et al., *Xinjiang Supply Chain Business Advisory, Risks and Considerations for Businesses with Supply Chain Exposures to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang*, U.S. DEP’T OF STATE (July 1, 2020), https://www.state.gov/wp-content/uploads/2020/07/Xinjiang-Supply-Chain-Business-Advisory_FINAL_For-508-508.pdf (on file with the Columbia Business Law Review).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *Uyghur Forced Labor Legislation Could Create New Compliance Challenges for Importers*, HUSCH BLACKWELL LLP: ALERTS, (Dec. 10, 2020), <https://www.huschblackwell.com/newsandinsights/uyghur-forced-labor-legislation-could-create-new-compliance-challenges-for-importers> [<https://perma.cc/K6XB-9CUU>].

report would then have to be submitted to the appropriate congressional committee and made available to the public.⁹⁶ Some believe this would disincentivize CBP from finding that the products from Xinjiang are not produced by forced labor, as it could expose them to criticism by Congress.⁹⁷ This is yet another flaw in this version of the bill that could potentially influence the way CBP manages its findings and come into direct conflict with the bill's objective of assuring that the CBP renders accurate and transparent reports to Congress.

Section 5 of House Bill 1155, which addresses the Act's enforcement strategy, should also be of great concern to retailers. This provision mandates that the Forced Labor Enforcement Task Force submit to the appropriate congressional committees a report containing the U.S. Government's specific enforcement plans regarding any imported goods or merchandise, not only from the People's Republic of China, but also third countries, if they have been mined, produced, or manufactured in part in Xinjiang,⁹⁸ or by those working with the Xinjiang government for purposes of either the "poverty alleviation" or "pairing-assistance" programs.⁹⁹ The requirement of this provision does "not have *de minimis* limitations," meaning that any part of an imported product, no matter the size, could lead to its banning.¹⁰⁰ Moreover, corporations wishing to import products manufactured in other regions of China or in third countries to the United States could also see themselves having to trace even the most minute inputs into their goods to ensure compliance with this provision.¹⁰¹

Aside from the heightened standard and the enforcement strategy, House Bill 1155 also shifts the burden of proof under

⁹⁶ See H.R. 1155, 117th Cong. § 4(b)(2) (2021).

⁹⁷ See *Uyghur Forced Labor Legislation Could Create New Compliance Challenges for Importers*, *supra* note 95.

⁹⁸ See H.R. 1155, § 5(a).

⁹⁹ See *Id.* § 5(a)(2).

¹⁰⁰ See *Uyghur Forced Labor Legislation Could Create New Compliance Challenges for Importers*, *supra* note 95.

¹⁰¹ *Id.*

section 307 to importers.¹⁰² It should be noted that such shifts are actually not unprecedented. While CBP once bore the burden of proving that forced labor was involved in the production of imported merchandise, the enactment of the Countering America's Adversaries Through Sanctions Act (CAATSA) in 2017 shifted this burden to importers, specifically for imported goods believed to have been produced by North Korean nationals, whose labor is automatically presumed to be forced given North Korea's country conditions.¹⁰³

For corporations that need to continue importing from Xinjiang, the brunt of this burden may be not only financially challenging, but also impossible to meet. The U.S. Departments of State, Treasury, Commerce, and Homeland Security jointly published the *Xinjiang Supply Chain Business Advisory*, which explains that even if corporations are to conduct thorough due diligence checks and audits to avoid tainted supply chains, the intrusive surveillance by local authorities and the inability to obtain reliable information from workers would render diligence results highly questionable.¹⁰⁴ In a congressional hearing from 2019,

¹⁰² Nelson Dong, Dave Townsend & T. Augustine Lo, *U.S. Bars More Imports and Weighs Broader Measures on Cotton from Xinjiang, China*, DORSEY & WHITNEY LLP (Sept. 21, 2020), <https://www.dorsey.com/newsresources/publications/client-alerts/2020/09/us-bars-more-imports-and-weighs-measures-on-cotton> [<https://perma.cc/SU3N-MHE8>].

¹⁰³ Countering America's Adversaries Through Sanctions Act, Pub. L. 115-44, § 302A, 131 Stat. 886, 952 (codified at 22 U.S.C. 9241a); *see also* Nate Bolin, *CBP Issues Guidance on Complying with New Prohibitions on the Use of North Korean Labor and Inputs in Imported Merchandise*, FAEGRE DRINKER BIDDLE & REATH LLP (2017), https://pdf.faegredrinker.com/pdfrenderer.svc/v1/ABCpdf9/GetRenderedPdfByUrl/CBPIssuesGuidanceonComplyingwithNewProhibitionsOntheUseofNorthKoreanLaborandInputs_.pdf?url=https%3a%2f%2fwww.faegredrinker.com%2fen%2finsights%2fpublications%2f2017%2f11%2fcbp-issues-guidance-on-complying-with-new-prohibitions-on-the-use-of-north-korean-labor-and-inputs_.%3fformat%3dpdf&attachment=false [<https://perma.cc/DF7U-23XM>].

¹⁰⁴ *See* ADAMS ET AL., *supra* note 2, at 7 (cautioning against relying on auditing of supply chains in the XUAR "given the impossibility of obtaining

researcher Adrian Zenz said that “asking for an ‘independent social audit’ in an environment as controlled as Xinjiang is like asking the fox to check that no hens are missing,” illustrating the impossibility of obtaining an accurate audit in Xinjiang.¹⁰⁵ Furthermore, many human rights and labor activists argue that auditors “risk becoming enablers that help brands justify source in Xinjiang,” as they were unable to conduct proper examinations of the factories.¹⁰⁶ In turn, this has led some auditing groups to withdraw from Xinjiang altogether, which has added a layer of difficulty for brands to work with suppliers based in Xinjiang.¹⁰⁷

Moreover, CBP may require evidence of implementation of policies combatting forced labor as well as supply chain maps, location of production steps, and remediation plans among other documentation from importers.¹⁰⁸ Given that there is evidence that the aforementioned poverty alleviation programs in Xinjiang have evolved into large-scale factory and labor programs, the likelihood that a company is complicit in

accurate information from the region”). *But see* Swanson, *supra* note 9 (noting that Apple had issued a statement indicating that “it had the strongest supplier code of conduct in its industry and that it regularly assessed suppliers, including with surprise audits,” and that Apple added had “conducted a detailed investigation with [their] suppliers in China and found no evidence of forced labor on [their] production lines[.]”).

¹⁰⁵ *Authoritarianism with Chinese Characteristics: Political and Religious Human Rights Challenges in China: Hearing before the Subcomm. on Asia, the Pac. and Nonproliferation of the H. Comm. on Foreign Affs.*, 116th Cong. 16 (2019) (statement of Dr. Adrian Zenz, Senior Fellow, China Studies, Victims of Communism Memorial Found.)

¹⁰⁶ See Eva Xiao, *Auditors to Stop Inspecting Factories in China’s Xinjiang Despite Forced-Labor Concerns*, WALL ST. J. (Sep. 21, 2020, 11:41 AM), <https://www.wsj.com/articles/auditors-say-they-no-longer-will-inspect-labor-conditions-at-xinjiang-factories-11600697706> (on file with the Columbia Business Law Review).

¹⁰⁷ *Id.* (reporting that the Bureau Veritas SA of France, TUV SUD AG of Germany, Sumerra LLC of the U.S., RINA SpA of Italy, and the Worldwide Responsible Accredited Production have said that they would not be providing labor-audit or inspection services in Xinjiang).

¹⁰⁸ See *The Uyghur Forced Labor Prevention Act: How It Impacts Your Company*, *supra* note 81.

the forced labor regime remains extremely high.¹⁰⁹ Due to the fact that cotton is a highly fungible commodity that it is often co-mingled with similar cotton fibers from other sources, cotton sourced from Xinjiang could show up in final products made all over the world.¹¹⁰

C. Senate Version of the UFLPA—S. 65

The bill passed in the House of Representatives in September of 2020¹¹¹ but failed to get through the Senate before congressional adjournment. The House version was re-introduced in the 117th Congress on February 18, 2021.¹¹² The Senate version of the bill was introduced on January 27, 2021, during the 117th Session of Congress by Senators Jeff Merkley (D-OR) and Marco Rubio (R-FL), as Senate Bill 65.¹¹³ In the Senate bill, section 5 seems to mostly concern retailers who import from Xinjiang. This section would mandate that the CBP Commissioner apply a presumption with respect to any article that is produced wholly or in part in Xinjiang or produced by “a list of entities working with the government of

¹⁰⁹ See U.S. Dep’t of State et al., *supra* note 91; Chris Buckley & Austin Ramzy, *China’s Detention Camps for Muslims Turn to Forced Labor*, N.Y. TIMES (Dec. 16, 2018), <https://www.nytimes.com/2018/12/16/world/asia/xinjiang-china-forced-labor-camps-uyghurs.html> [<https://perma.cc/2EUH-U54G>].

¹¹⁰ See *Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang*, Hearing, *supra* note 41 (statement of Steve Lamar, President and CEO of American Apparel & Footwear Association).

¹¹¹ *Working on the Chain Gang; Congress Is Moving To Block Goods Made with the Forced Labour of Uyghurs*, *supra* note 38.

¹¹² See Press Release, James P. McGovern, Rep., McGovern, Smith, Colleagues Re-Introduce the Bipartisan Uyghur Forced Labor Prevention Act (Feb. 18, 2021), <https://mcgovern.house.gov/news/documentsingle.aspx?DocumentID=398673> [<https://perma.cc/9H98-ME5D>].

¹¹³ See Press Release, Marco Rubio, Sen., Rubio, Merkley, Colleagues Re-Introduce Uyghur Forced Labor Prevention Act (Jan. 27, 2021), <https://www.rubio.senate.gov/public/index.cfm/press-releases?id=51CB92F4-BC6F-47AB-BB06-58DE5AE6F08E> [<https://perma.cc/8GNJ-AUAN>].

[Xinjiang] to move forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of [Xinjiang].”¹¹⁴

Both the House and Senate versions of the proposed legislation shift the burden to importers of goods from Xinjiang to prove that the merchandise is prohibited by the Tariff Act of 1930. However, only the House version mandates a heightened standard, instructing that importers of goods from Xinjiang must prove through “clear and convincing evidence” that their articles are “not produced wholly or in part by convict, forced, or indentured labor.”¹¹⁵ The American retail industry and the associations that represent it are likely eager to know whether this thorny legal provision will ultimately be included in the final version of the bill, and, if it is included, the industry will demand more guidance on CBP’s evidentiary standard language.¹¹⁶

D. Passed Version of the UFLPA —H.R. 6256

After lawmakers reached a compromise between the House and Senate versions of the UFLPA,¹¹⁷ President Biden signed

¹¹⁴ S. 65, 117th Cong. §§ 4(d)(B)(i), 5(a) (2021) (mandating that “The Commissioner of U.S. Customs and Border Protection shall, except as provided by subsection (b), apply a presumption that, with respect to any significant 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 entities on a list required by section 4(d)(2)(B)(i)[.]”).

¹¹⁵ H.R. 6210, 116th Cong. § 4 (2020).

¹¹⁶ Letter from Am. Apparel & Footwear Ass’n, Nat’l Retail Fed’n, Retail Indus. Leaders Ass’n, U.S. Fashion Indus. Ass’n & Footwear Distribs. & Retailers of Am., to Nancy Pelosi, Speaker of the House, Chuck Schumer, Senate Majority Leader, Kevin McCarthy, House Minority Leader and Mitch McConnell, Senate Minority Leader (Jan. 27, 2021), https://www.aafaglobal.org//AAFA/AAFA_News/2021_Letters_and_Comments/Multi_Association_Letter_Urges_Clear_and_Decisive_Action_on_Xinjiang.aspx (on file with the Columbia Business Law Review) (discussing the fact that they perceive that “[o]n the issue of an evidentiary standard, CBP’s ‘Hints for Proof of Admissibility’ do not provide enough guidance for importers on what specific information is needed to prove that forced labor does not exist in a supply chain.”).

¹¹⁷ David Brunnstrom & Paul Grant, *Biden Signs Bill Banning Goods from China’s Xinjiang over Abuse of Uyghurs*, REUTERS, (Dec. 23, 2021, 6:10

the bicameral and bipartisan UFLPA on December 23, 2021.¹¹⁸ Importers essentially have 180 days from this date to work with CBP and the Forced Labor Enforcement Task Force to develop standards to allow them to rebut the new statutory presumption that products from Xinjiang are made using forced labor and therefore, should be denied entry into the United States.¹¹⁹ Senator Jeff Merkley, a co-sponsor of the legislation as well as the chairman of the Congressional-Executive Commission on China, stated that the passage of the UFLPA “sends a powerful, bipartisan message that the United States will not turn a blind eye to China’s violations of human rights” and that American businesses and consumers “can buy goods without inadvertent complicity in China’s horrific human right abuses.”¹²⁰

President Biden’s signing of the UFLPA follows a move made by President Trump before leaving office in January 2021 that issued a sweeping ban on imports of cotton or tomato products from Xinjiang.¹²¹ Unsurprisingly, some of the goods such as cotton, tomatoes, and polysilicon—used in solar-panel manufacturing, have been designated as “high priority” for enforcement action.¹²²

PM), <https://www.reuters.com/world/us/biden-signs-bill-clamp-down-products-chinas-xinjiang-2021-12-23/> (on file with the Columbia Business Law Review).

¹¹⁸ Press Release, White House, Bill Signed: H.R. 6256 (Dec. 23, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/23/bill-signed-h-r-6256/> [<https://perma.cc/RQ82-LZBK>].

¹¹⁹ Carl A. Valenstein & Katelyn M. Hilferty, *US Congress Passes the Uyghur Forced Labor Prevention Act*, MORGAN LEWIS, (Dec. 27, 2021), <https://www.morganlewis.com/pubs/2021/12/us-congress-passes-the-uyghur-forced-labor-prevention-act> [<https://perma.cc/2FA4-DGZV>].

¹²⁰ Felicia Sonmez, *Biden Signs Uyghur Forced Labor Prevention Act into Law*, WASH. POST, (Dec. 2, 2021, 1:00 PM), https://www.washingtonpost.com/politics/biden-uyghur-labor-law/2021/12/23/99e8d048-6412-11ec-a7e8-3a8455b71fad_story.html [<https://perma.cc/75CY-F6Y9>].

¹²¹ *Id.*

¹²² Brunnstrom & Grant, *supra* note 117.

III. INDUSTRY RESPONSE TO THE PROPOSED LEGISLATION

When the legislation takes effect by the middle of 2022, it will surely spur action. Retail companies are not likely to sit idly by without putting up a fight, as many businesses are not ready to decouple from Xinjiang entirely, at least not right away.¹²³ PVH Corp., which owns Calvin Klein and Tommy Hilfiger, stated in July of 2020 that it would cease “all business relationships with any factories and mills that produce garments or fabric, or use cotton grown, in Xinjiang within the next 12 months.”¹²⁴ However, it seems like many of the major U.S.-based retail corporations such as American Apparel and Nike, as well as trade groups such as the National Retail Federation and the U.S. Chamber of Commerce, have thus far focused their efforts on hiring lobbyists to water down some of the provisions in the proposed legislation.¹²⁵ These groups have argued that “while they strongly condemn forced labor and current atrocities in Xinjiang, the act’s ambitious requirements could wreak havoc on supply chains that are deeply embedded in China.”¹²⁶

In the first three quarters of 2020, for example, Nike spent around one million dollars on in-house lobbying of Congress and other federal agencies on matters including the Uyghur Forced Labor Prevention Act.¹²⁷ The allegations of corporate

¹²³ *Working on the Chain Gang; Congress Is Moving To Block Goods Made with the Forced Labour of Uyghurs*, *supra* note 38.

¹²⁴ *See* Xiao, *supra* note 106.

¹²⁵ *See* Tyler Sonnemaker, *Nike, Coca-Cola, and Apple Reportedly Lobbied To Weaken a Bill Aimed at Preventing Them from Manufacturing Products in China Using Forced Uighur Labor*, *BUS. INSIDER* (Dec. 1, 2020, 1:41 AM), <https://www.businessinsider.com/apple-nike-coca-cola-lobbied-china-uyghur-forced-labor-bill-2020-11> [<https://perma.cc/NX8A-6BY5>].

¹²⁶ Swanson, *supra* note 9.

¹²⁷ *Id.* (showing that Nike “paid outside firms like Cornerstone Government Affairs, Ogilvy, Capital Counsel, GrayRobinson, American Continental Group, DiNino Associates and Empire Consulting Group more than \$400,000 this year to lobby on issues including the [Uyghur Forced Labor Prevention Act]”); *see also* Thomas Barrabi, *Nike, Coca-Cola Lobbying to Weaken China Forced Labor Bill: Report*, *FOX BUS.* (Nov. 30,

lobbying efforts by Nike prompted its Director of Global Communication, Greg Rossiter, to declare that Nike had not lobbied against the Uyghur Forced Labor Prevention Act, but rather, that they “had ‘constructive discussions’ with congressional staff aides aimed at eliminating forced labor and protecting human rights.”¹²⁸ In March 2020, around the same time Congress unveiled plans to introduce its initial version of the legislation, House Bill 6210, Nike published a statement declaring that it did not source products from Xinjiang and confirming that its contract suppliers did not use textiles or spun yarn from the region.¹²⁹ Nike stated that its “ongoing diligence [did] not [find] evidence of employment of Uyghurs, or other ethnic minorities from the XUAR, elsewhere in [their] supply chain in China.”¹³⁰ Nike also boldly asserted that although it regularly provides insight and feedback at the request of policymakers on issues such as human rights and supply chain integrity, it “ha[s] not lobbied against the Uyghur Forced Labor Prevention Act, or any other proposed forced labor legislation.”¹³¹

Reporting by the New York Times directly contradicts Nike’s assertions.¹³² Moreover, the Australian Strategic Policy Institute, a defense and strategic policy think tank, published a report specifically focusing on Nike’s operations in Qingdao, which reports that as of January 2020, “around 600 ethnic minority workers from Xinjiang were employed at Qingdao Taekwang Shoes Co. one Ltd.,” one of the largest shoe manufacturers for Nike.¹³³ This reporting tarnishes Nike’s credibility, especially since this is not the first time the

2020), <https://www.foxbusiness.com/politics/nike-coca-cola-lobbying-uyghur-forced-labor-prevention-act> [https://perma.cc/D7DC-GBB9] (discussing that Coca Cola has allegedly spent \$4.68 million on in-house and outside lobbying on the Uyghur Forced Labor Prevention Act).

¹²⁸ Swanson, *supra* note 9.

¹²⁹ Press Release, Nike, Statement on Xinjiang, <https://purpose.nike.com/statement-on-xinjiang> [https://perma.cc/3Z5D-29SC] (last visited Oct. 13, 2021).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Swanson, *supra* note 9.

¹³³ See XU ET AL., *supra* note 9.

multinational company has been accused of labor abuses in its factories abroad.¹³⁴

A. Sweeping Ban on All Cotton Products from Xinjiang

Generally, CBP follows a nine-step process for initiating, investigating, and ultimately adjudicating a forced labor allegation as set out in its published process map.¹³⁵ It starts either when the agency initiates a forced labor investigation on its own or when they receive an allegation of forced labor under the provisions set out in 19 C.F.R. § 12.42.¹³⁶ Such allegations often come from domestic or international NGOs that focus on combatting forced labor.¹³⁷ For example, on August 28, 2020, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), along with other organizations such as Freedom United and the Human Trafficking Legal Center, filed a petition under 19 U.S.C § 1307 “calling for a WRO prohibiting the entry of all cotton-made goods, including from third countries, linked to forced labor in the Uyghur Region.”¹³⁸ Once the investigation is

¹³⁴ Kate Hodal, *Nike Factory To Pay \$1m to Indonesian Workers for Overtime*, GUARDIAN (Jan. 12, 2020, 4:10 AM), <https://www.theguardian.com/world/2012/jan/12/nike-1m-indonesian-workers-overtime> (on file with Columbia Business Law Review) (discussing that aside from owing Indonesian factories worker unpaid overtime, Nike “has been accused in the past of using child labour in its supply chain and in relation to working conditions in its 1,000 overseas supplier factories[.]”).

¹³⁵ See U.S. CUSTOMS & BORDER PROT., CBP PUB. NO. 0847-0219, FORCED LABOR PROCESS (2019).

¹³⁶ See *Forced Labor: Government and Industry Groups Intensify Focus on Xinjiang*, AKIN GUMP STRAUSS HAUER & FELD LLP (March 17, 2020), <https://www.akingump.com/en/news-insights/forced-labor-government-and-industry-groups-intensify-focus-on-xinjiang.html> [<https://perma.cc/LMD3-4JXF>].

¹³⁷ *Id.*

¹³⁸ See Press Release, Richard Trumka, President, AFL-CIO, AFL-CIO Applauds Action to Ban Goods Made with Forced Labor Linked to Xinjiang Production and Construction Corps (Dec. 2, 2020), <https://aflcio.org/press/releases/afl-cio-applauds-action-ban-goods-made-forced-labor-linked-xinjiang-production-and> [<https://perma.cc/NL2L-VAG3>].

initiated, CBP may engage with the submitter and the importer to develop additional evidence by issuing administrative subpoenas, requesting for information such as customs forms (e.g., CF-28s),¹³⁹ or carrying out informal agency outreach.¹⁴⁰ This is then followed by an evaluation in which CBP must determine or establish reasonable suspicion to issue a WRO.¹⁴¹

If the CBP Commissioner approves the WRO, then the agency detains the merchandise, and it immediately issues the WRO instructing port directors throughout the United States to withhold the release of the merchandise suspected to have been produced wholly or in part by forced labor.¹⁴² Once CBP starts detaining the shipments that fall within these parameters, the importer can export the detained good or contest the order, and the agency may release or withhold the shipment.¹⁴³ To have the shipment released, the importer needs to submit, within three months of the importation, a certificate of origin and a detailed statement, such as a supply chain audit report, that demonstrates that the subject merchandise was not produced wholly or in part using forced labor.¹⁴⁴ If the importer is able to persuade CBP, through convincing evidence,¹⁴⁵ that its merchandise was not

¹³⁹ See Chase Samuels, *Understanding a CF-28: Customs Form 28, TRADE RISK GUAR.* (JULY 30, 2019), <https://traderiskguaranty.com/trgpeak/understanding-cf-28/#> [<https://perma.cc/TM7B-DE7P>] (explaining that Customs Form 28 is a formal request from CBP for more information from importers during entry to the United States).

¹⁴⁰ See *Forced Labor: Government and Industry Groups Intensify Focus on Xinjiang*, *supra* note 136.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See U.S. CUSTOMS & BORDER PROT., CBP PUB. NO. 1165-0620, HELPFUL HINTS FOR SUBMITTING PROOF OF ADMISSIBILITY AND WRO REVOCATION/MODIFICATION REQUESTS (2019) (setting out examples of helpful evidence to provide which may include copies of policies and evidence of company addressing ILO indicators of forced labor; copies of recent unannounced third party audits; copies of remediation plans; supply chain maps that specify locations of manufacturers, factories, processing

produced using forced labor, CBP orders the merchandise's release.¹⁴⁶ If on the other hand, the importer fails to do so, CBP excludes (i.e., rejects entry of) the detained merchandise, treats it as an importation statutorily prohibited by 19 U.S.C. § 1307,¹⁴⁷ and publishes a formal finding in the Customs Bulletin and the Federal Register.¹⁴⁸ Lastly, CBP seizes the merchandise, and at this step, the importer may petition once again for the release of the merchandise; if unsuccessful, CBP commences summary forfeiture proceedings and destroys the merchandise.¹⁴⁹

Historically, CBP has cited staff shortages and a lack of funding for dropping forced labor investigations against importers and limiting its ability to monitor open cases.¹⁵⁰ But

centers; pictures of living and working accommodations among others. Examples of documentation to avoid are data and document dumps; policies without an explanation of how they are implemented; information about efforts to detect and address child labor without actually explaining the relevance to combatting forced child labor).

¹⁴⁶ *Forced Labor: Government and Industry Groups Intensify Focus on Xinjiang*, *supra* note 136.

¹⁴⁷ Tariff Act of 1930, 19 U.S.C. § 1307 (2018). The Act says that

[a]ll 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.

Id.

¹⁴⁸ *Forced Labor Frequently Asked Questions*, U.S. CUSTOMS AND BORDER PROT. (last modified June 26, 2019), <https://www.cbp.gov/print/350485> [<https://perma.cc/87TT-PFDR>]

¹⁴⁹ Casey et al., *supra* note 52.

¹⁵⁰ *Id.*

since President Trump took office in 2016, twelve WROs were issued out of the total of forty-three WROs issued to China since 1991—nine of them in 2020 alone and eight of which specifically targeted Xinjiang.¹⁵¹ The retail industry has often criticized CBP's WROs for consistently striving to go beyond mere compliance.¹⁵² The AAFA Statement from September 2020, for example, criticized the WROs passed as “vague and poorly defined.”¹⁵³

Effective January 13, 2021, the broadest WRO, dubbed a “blanket import ban” by the retail industry,¹⁵⁴ went into effect, and CBP started to detain all cotton products and tomato products produced in Xinjiang at all U.S. ports of entry.¹⁵⁵ CBP justified the WRO against all cotton products and tomato products from this region based on information that reasonably indicate[d] the use of detainee or prison labor and situations of forced labor. The agency identified the following forced labor indicators through the course of its investigation: debt bondage, restriction of movement, isolation, intimidation, and threats, withholding of wages, and abusive living and working conditions.¹⁵⁶

B. Issues with Enforceability

Since one-fifth of the world's cotton comes from Xinjiang, it is inevitable that cotton picked, spun, woven, and ultimately transported from this region of the world will leak into global supply chains and contaminate cotton far beyond its geographical borders.¹⁵⁷ Xinjiang's enormous production

¹⁵¹ See *Withhold Release Orders and Findings*, *supra* note 72.

¹⁵² See *Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang*, Hearing, *supra* note 41 (statement of Steve Lamar, President and CEO of American Apparel & Footwear Association).

¹⁵³ *Id.*

¹⁵⁴ See Lawder, *supra* note 3.

¹⁵⁵ Press Release, U.S. Customs & Border Prot., CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang, *supra* note 42.

¹⁵⁶ *Id.*

¹⁵⁷ Rick Helfenbein, *China Update: Fashion's Next Apocalypse Is Cotton from Xinjiang*, FORBES (Sept. 23, 2020, 6:27 AM),

capacity cannot be readily or quickly replaced.¹⁵⁸ It is also important to note that few products currently ship directly from Xinjiang to the United States.¹⁵⁹ Xinjiang's direct cotton shipments to the United States are minimal since they typically enter the garment supply chain either in China or elsewhere in Asia.¹⁶⁰ Furthermore, because global supply chains frequently include multiple layers of suppliers, it is difficult to trace the origin of cotton beyond first-tier suppliers.¹⁶¹ As the simplified seven-step cotton supply chain process shows,¹⁶² an article of clothing made out of cotton will

<https://www.forbes.com/sites/rickhelfenbein/2020/09/23/china-update-fashions-next-apocalypse-is-cotton-from-xinjiang/?sh=377295c53d77> [<https://perma.cc/FA87-CRMJ>].

¹⁵⁸ See *Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang*, Hearing *supra* note 41 (statement of Steve Lamar, President and CEO of American Apparel & Footwear Association); see also *Working on the Chain Gang*, *supra* note 38 (discussing the fact that in its intense lobbying efforts, the retail industry has sought “a delay of up to one year in enforcement” if the UFLPA is passed).

¹⁵⁹ See LEHR & BECHRAKIS, *supra* note 6, at 2.

¹⁶⁰ Finbarr Bermingham, *US Drops Sweeping Xinjiang Goods Ban, China's Cotton Sector Breathes Temporary Sigh of Relief*, S. CHINA MORNING POST (Sept. 15, 2020), <https://www.scmp.com/economy/global-economy/article/3101611/us-drops-sweeping-xinjiang-goods-ban-chinas-cotton-sector> (on file with the Columbia Business Law Review).

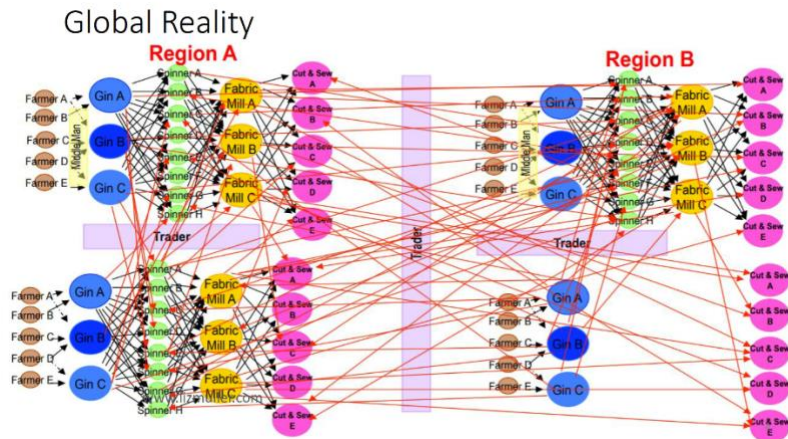
¹⁶¹ See Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L.J. 419, 458 (2015). See also Finbarr Bermingham, *US Drops Sweeping Xinjiang Goods Ban, China's Cotton Sector Breathes Temporary Sigh of Relief*, S. CHINA MORNING POST (Sept. 15, 2020) (on file with the Columbia Business Law Review).

¹⁶² See *Cotton Around the World: Domestic vs. Foreign Cotton Supply Chain*, HOMEGROWN COTTON (April 12, 2018), <https://www.homegrowncotton.us/blog/cotton-around-the-world-domestic-vs-foreign-cotton-supply-chain> [<https://perma.cc/U7MW-Y9RY>]. The basic cotton supply chain is a string of value chain actors that transform it from a natural fiber to an article of clothing typically following a seven-step process in the following order:

- 1) the cotton is planted and grown to maturity;
- 2) the cotton is harvested, packed, and ginned;
- 3) the cotton is baled for shipping to the spinning mills;
- 4) once at the spinning mills, the cotton is spun into thread or yarn, depending on the final product, then shipped to a garment manufacturing facility;

usually travel thousands of miles along a supply chain before ending up in a retail store for commercial consumption.¹⁶³ In more complex processes where commodity traders are used as middlemen and the practice of fiber blending¹⁶⁴ from multiple sources is employed, value chains can have more than fifteen nodes.¹⁶⁵

Figure 1



Another important consideration is that given the numerous reports that Uyghurs are trafficked to regions

- 5) the cotton is dyed to the desired color before being woven into fabric;
- 6) the cotton is cut and sewn into the final product; and
- 7) the final product is then packaged and shipped to the warehouses or stores for sale.

Id.

¹⁶³ *Id.*

¹⁶⁴ See Menghe Miao, *Fiber Blending*, in ENGINEERING OF HIGH-PERFORMANCE TEXTILES 59, 59 (Menghe Miao & John H. Xin eds., 2018) (“Blending refers to the process of mixing various lots of fibers to produce a homogenous mass. Blending is typically carried out before spinning a staple fiber yarn or before forming a staple fiber web in a nonwoven process.”).

¹⁶⁵ See *Transparency in Fashion – UNECE Mobilizing Industry and Experts To Develop Blockchain Traceability Tool and Policy Framework Under EU-funded Project*, UNECE (Nov. 8, 2019), <https://unece.org/trade/news/transparency-fashion-unece-mobilizing-industry-and-experts-develop-blockchain> [<https://perma.cc/T8WR-HL86>].

outside of Xinjiang to work in factories across China,¹⁶⁶ the proposed *de facto* geographical ban¹⁶⁷ that will result from the UFLPA's presumption standard does not solve the human right abuses taking place against Uyghurs by the Chinese government. This *de facto* statutory ban is likely to deter businesses from engaging with legitimate suppliers in the long run, worsen the economic security of vulnerable workers in China in dire need of wages,¹⁶⁸ and inflict extreme economic harm on the American retail industry.

This last effect may push the retail industry to find creative ways to circumvent these types of legislative prohibitions. These can include engaging in intense lobbying efforts to weaken enforcement aspects of the law,¹⁶⁹ maneuvering production supply chains so that they fall outside of Xinjiang while continuing to directly or indirectly benefit from forced labor or having their Chinese counterparts reshuffle their supply chains internally.¹⁷⁰ Human rights

¹⁶⁶ See XU ET AL., *supra* note 9, at 18; see also Uyghur Forced Labor Prevention Act, S.65, 117th Cong. § 2(5) (2021) (“[N]ongovernmental organizations estimate that more than 80,000 Uyghurs [have been] transferred out of the Xinjiang Uyghur Autonomous Region to work in factories across the People’s Republic of China between 2017 and 2019, and some of them were sent directly from detention camps.”).

¹⁶⁷ See Foote, *supra* note 76 (clarifying that “WROs have been almost universally described as actions to ‘ban’ the importation such goods, though they [do] no such thing. CBP itself has explained that a ‘WRO is not a ban’”).

¹⁶⁸ CHRISTOPHER A. CASEY, CATHLEEN D. CIMINO-ISAACS & KATARINA C. O’REGAN, CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 2 (2021).

¹⁶⁹ See Swanson, *supra* note 9.

¹⁷⁰ See Ana Swanson & Brad Plumer, *China’s Solar Dominance Presents Biden with an Ugly Dilemma*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/business/economy/china-biden-solar-panels.html> [<https://perma.cc/2CTM-92D5>] (discussing that the solar energy sector depends heavily on polysilicon—a raw material that most solar panels use to absorb energy from sunlight). Half of the global supply of polysilicon comes from Xinjiang, and due to the restrictions that may stem from the UFLPA, some Chinese companies have reshuffled their supply chains by funneling polysilicon and other solar products manufactured outside of Xinjiang to American buyers and directing their Xinjiang-made products domestically or to other markets without these looming restrictions. *Id.*

advocates have correctly pointed out that allowing Chinese companies to “cleave their supply chains to serve American as well as non-American buyers may do little or nothing to materially improve the conditions in Xinjiang.”¹⁷¹ It should also be noted that the bill’s legislative intent is solely to disincentivize forced labor and not to disrupt legitimate supply chains that pass through Xinjiang.¹⁷²

IV. PROPOSED SOLUTIONS

According to the International Cotton Advisory Committee—an international trade association in Washington—China exports unprocessed cotton to fourteen countries such as Bangladesh, India, Pakistan, Thailand, and Vietnam, and yarn to approximately 190 countries.¹⁷³ During a congressional hearing, Stephen Lamar, the President of the AAFA, said that “there is no technology available to trace cotton origin with reasonable accuracy.”¹⁷⁴ Oritain,¹⁷⁵ a New Zealand firm, disputes this assertion, claiming that it can trace a swatch of cotton to the soil of Xinjiang with ninety-five

¹⁷¹ *Id.*

¹⁷² See H.R. 1155, 117th Cong. § 3(4)–(5) (2021) (stating that it is the policy of the United States to actively prevent, denounce, and end human trafficking, torture, enforced disappearances, severe deprivation of liberty, widespread forced labor, and persecution targeting identifiable ethnic or religious groups as horrific assaults on human dignity and to restore the lives of those affected); S. 65, 117th Cong. § 3(3)–(4) (2021) (stating the same).

¹⁷³ Goodman et al., *supra* note 4.

¹⁷⁴ See Lawder, *supra* note 3.

¹⁷⁵ *Our Verification*, ORITAN, <https://oritain.com/about/our-certification/> [<https://perma.cc/5TVJ-MMQT>] (last visited Dec. 13, 2021). Oritain is a forensic science firm that can identify the place of origin of cotton fibers by tracing elements in cotton from natural elements, such as local nutrients and waters. *The Science*, ORITAN, <https://oritain.com/how-it-works/the-science/> [<https://perma.cc/7ZPJ-ZZHA>]. Furthermore, samples are run through statistical models to determine whether each element is consistent with a claimed origin). *Id.*

The Science, ORITAIN, <https://oritain.com/how-it-works/the-science/> [<https://perma.cc/5ELE-KA6X>] (last visited Nov. 3, 2021).

percent confidence.¹⁷⁶ Lamar counters that under the UFLPA, results that had a probability of being ninety-five percent accurate would not be enough to quash CPB's presumption and that "without 'foolproof accuracy,' products [would] be detained."¹⁷⁷ Lamar's supposition, however, is not supported by evidence.

The UFLPA suggests that for an importer to be exempted from the CBP presumption—that any merchandise produced wholly or partially in Xinjiang or by persons working under the auspices of any government-run poverty-alleviation program is the result of forced labor—it must meet a specific threshold of certainty or confidence.¹⁷⁸ A clear and convincing standard would almost certainly be satisfied with evidence that had a 95% chance of being accurate.¹⁷⁹

A. Tracing Technologies

A sustainable supply chain is characterized by a high degree of both transparency and traceability. Since cotton is often traded as an international commodity with little or no traceability between the cotton farm gate and its end-users,

¹⁷⁶ *Working on the Chain Gang; Congress Is Moving To Block Goods Made with the Forced Labour of Uyghurs*, *supra* note 38.

¹⁷⁷ *Id.*

¹⁷⁸ H.R. 6256, 117th Cong. (2021).

¹⁷⁹ *See, e.g.*, Kevin F. O'Malley, Jay E. Grenig & Hon. William C. Lee, 3 *Federal Jury Practice & Instructions* § 104:02 (6th ed. 2012) (Explaining that while the "clear and convincing" standard requires more persuasion than the "preponderance of evidence" standard, the "clear and convincing" does not require "absolute certainty"); David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J. L. & TECH. 429, 439 (2013). A 1980s survey reported that active, senior, and retired federal judges at that time, when asked to assign a percentage value for the clear and convincing evidence standard, 4 judges out of 170 surveyed assigned this standard a value between 50% to 55%, 27 judges rated it between 60% to 65%, 111 judges assigned this standard a value between 70% to 80% probability, 24 judges rated it between 85% to 90%, and just 4 judges rated it between 95% to 100% probability. The average probability of all the surveyed judges was 75%. *Id.*

cotton has historically been difficult to trace.¹⁸⁰ These same traits, plus authenticity, are also especially appealing to today's socially-conscious customers who are likely willing to pay more for their clothes if they can be assured that they are not contributing to the child labor or forced labor schemes that are often associated with cotton supply chains in the developing world.¹⁸¹ An empirical study conducted by two political science professors at George Washington University found that when presented with different types of ethical labeling campaigns and a set of hypothetical labels based on ILO's core labor standards, such as "Union Made," "Women Empowered," "Child Labor Free," and "Living Wage," respondents were willing to pay as much as double for garments advertised as "Child Labor Free."¹⁸² Since many consumers in the market equate "child labor" with "forced labor," [this] suggest[s] that they could be responsive to products certified and labeled as free from the abuses reported in Xinjiang."¹⁸³

One of the core challenges in current traceability systems is identifying suppliers when the materials have been blended or paper trails have simply been lost.¹⁸⁴ "One method . . . is to spray a fine mist of synthetic DNA onto cotton fib[er] at the gin before it is baled. The molecular tag stays on the cotton fiber through weaving and cutting, so the raw material can be identified."¹⁸⁵ Retailers, however, should go a step further and

¹⁸⁰ ENV'T JUST. FOUND., SOMEBODY KNOWS WHERE YOUR COTTON COMES FROM: UNRAVELLING THE COTTON SUPPLY CHAIN 5 (2009), https://ejfoundation.org/resources/downloads/track_and_trace_web.pdf [<https://perma.cc/AAG5-D9DG>].

¹⁸¹ *Id.*

¹⁸² See Aparna Ravi & Emmanuel Teitelbaum, *The U.S. Banned Xinjiang Cotton Imports Because of Forced Labor. Textile Workers Face Abuses in Other Countries, Too*, WASH. POST, (Feb. 10, 2021, 5:00 AM), <https://www.washingtonpost.com/politics/2021/02/10/us-banned-xinjiang-cotton-imports-because-forced-labor-textile-workers-face-abuses-other-countries-too/> (on file with the Columbia Business Law Review).

¹⁸³ *Id.*

¹⁸⁴ See Lehr *supra* note 45, at 9.

¹⁸⁵ See John Gapper, *Forced Labour Is the Price of a Cheap Cotton T-shirt*, FIN. TIMES, (Sep. 18, 2020), <https://www.ft.com/content/703b360a->

engage in more intense supplier identification, not only to check that “they are getting what suppliers promise,”¹⁸⁶ but also to help deal with suppliers who are outright “uncooperative or untrustworthy.”¹⁸⁷

Three types of tracing technology—*isotope*, *microbiome*, and *tag*—have been identified by the Center for Strategic and International Studies (CSIS), a non-partisan think-tank based in Washington D.C., as showing particular promise.¹⁸⁸ Though the efficacy of these technologies has not been independently validated, the companies and organizations that piloted these technologies have shared results and other data with CSIS Human Rights Initiative (HRI).¹⁸⁹ This Note will not examine *tag* tracing because it requires that “a marker be applied by each supplier a brand wants to identify[.]”¹⁹⁰ something infeasible in Xinjiang due to the region’s inaccessibility.¹⁹¹

Cotton has been shown to have differing isotope ratios based on growth stage and region of the plant,¹⁹² and it also has different isotopic signatures based on its geographic

7536-4520-b9b8-3ee06fef5fcc (on file with the Columbia Business Law Review) (pointing out that brands offering ethically-made clothes “have every incentive to want their produce marked and traced, but many in Xinjiang . . . prefer to cover their tracks.”).

¹⁸⁶ *Id.*

¹⁸⁷ See Lehr *supra* note 45, at 9.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 11.

¹⁹¹ See NIKOS TSAFOS, ADDRESSING FORCED LABOR CONCERNS IN POLYSILICON PRODUCED IN XINJIANG, CTR. FOR STRATEGIC & INT’L STUD (2020), <https://www.csis.org/analysis/addressing-forced-labor-concerns-polysilicon-produced-xinjiang> [<https://perma.cc/BKW7-3LNM>].

¹⁹² See DOUGLAS J. BEUSSMAN, NAT’L INST. OF JUST, THE ANALYSIS OF TRACE FORENSIC EVIDENCE USING ISOTOPE RATIO MASS SPECTROMETRY: DIFFERENTIATING FIBERS 4 (2017), <https://www.ojp.gov/pdffiles1/nij/grants/251209.pdf> [<https://perma.cc/MC4M-FYCP>] (“Another major problem is that there is limited visibility into the actual conditions under which polysilicon is produced. In part, this is because Xinjiang is inaccessible, so it is hard to get verifiable facts on the working conditions inside factories.”)

origin.¹⁹³ The technique of isotope tracing can verify if cotton is actually from the claimed place of origin because it uses a chemical “fingerprint” that can be extracted from materials at any stage of the apparel supply chain, including finished goods.¹⁹⁴ Fibers from the same source can be expected to have the same isotope ratio profile while fibers coming from different sources are likely to be differentiated even if they are made from the same chemical composition.¹⁹⁵ For this technique to be effective, the chemical “fingerprint” has to be matched against a database, and a HRI investigation has shown that some service providers have databases that cover ninety percent of the cotton-growing regions of the world, including Xinjiang.¹⁹⁶

The science behind the second type of tracing technology proposed—microbiome tracing—has been explained as simply as taking a cotton swab, wiping it across an article, and sequencing the DNA of the microbes it collects in order to find a blend of microscopic objects that is unlikely to occur anywhere else.¹⁹⁷ Phylagen, a San Francisco-based firm in the supply chain track-and-trace market, claims to be “building the world’s largest environmental microbiome database . . . [by] working directly with its clients’ channel partners, usually located in the region where products originate.”¹⁹⁸ While this type of tracing technology is similar to isotope tracing, it may be more effective in providing identifiable information for the players in the middle of the supply chain because “[d]ust with unique signatures gathers on a product

¹⁹³ *Id.*

¹⁹⁴ See Lehr, *supra* note 45, at 10.

¹⁹⁵ See BEUSSMAN, *supra* note 192, at 42.

¹⁹⁶ See Lehr, *supra* note 45, at 10.

¹⁹⁷ See Paul Tullis, *Using Dust and DNA to Trace Products All the Way Back to the Factory*, SEATTLE TIMES (April 23, 2020, 1:01 PM), <https://www.seattletimes.com/business/using-dust-and-dna-to-trace-products-all-the-way-back-to-the-factory/> [<https://perma.cc/9ERG-JYWH>]. After a product arrives at the end of the supply chain, often a warehouse, the package is opened and the inside swabbed. This sample would identify whether the product came from a prohibited region, such as Xinjiang. See *id.*

¹⁹⁸ *Id.* (internal quotation marks omitted).

at every facility it passes through and can be matched to microbiome signatures of known locations.”¹⁹⁹ It should be noted that a weakness of the microbiome tracing technology lies in the volatility of the microbiome signatures— “[t]he dust data is not continuous from the [cotton] farm to the [completed] garment, and the intense processes cotton fibers are subject[ed] to, such as color dyeing, may erase [the dust signatures].”²⁰⁰

Lastly, the development of data-sharing platforms, which would exponentially increase knowledge sharing among industry players, would be a way to move the entire retail industry towards the collaborative model needed to face the inevitable passage of a potentially profit-wrecking bill such as the UFLPA. An obvious advantage to the utilization of data-sharing platforms would be to serve as a deterrent to untrustworthy suppliers because they can be identified as such on an industry-wide platform, damaging their reputations, which could lead to loss of clients.²⁰¹ Repositories of shared data in the industry could also offer a chance to decrease or eliminate redundancies if multiple brands employ the same factories or suppliers. The most obvious challenge in the implementation of this type of industry-wide effort is that since retailers likely have their own audit standards,²⁰² the type of information collected may not be standardized. From a technological standpoint, given a company’s specific needs, it may not wish to implement a system that is not customized out of fear of incompatibility, delays, privacy concerns, or security breaches.²⁰³ If this solution is to be seriously examined, industry standards should be created sooner rather than later with the help of powerful retail associations such as the AAFA, NRF, RILA, and the USFIA.

¹⁹⁹ See Lehr, *supra* note 45 at 10.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 15.

²⁰² *Id.* at 16.

²⁰³ *Id.*

V. CONCLUSION

The most serious denunciation of the Uyghur situation in China was announced less than a month before the Trump Administration transitioned out of power with then-U.S. Secretary of State, Mike Pompeo, ordering a review to determine whether China's repression of Uyghurs amounted to genocide.²⁰⁴ This designation would not only have served as a significant diplomatic and symbolic message following years of pressure from lawmakers and human rights organizations, but it also would have raised tensions between Washington and Beijing for the newly-elected Biden Administration.²⁰⁵ In February of 2021, however, the U.S. State Department's Office of the Legal Advisor concluded that although "China's mass imprisonment and forced labor of ethnic Uighurs in Xinjiang amounts to crimes against humanity[,] . . . there was insufficient evidence to prove genocide[.]"²⁰⁶ Wielding the word genocide lightly and without a solid legal basis carries the risk of politicizing and eroding the power of the

²⁰⁴ See Colum Lynch, Robbie Gramer & Amy Mackinnon, *Pompeo Weighs Genocide Designation for China*, FOREIGN POL'Y (Dec. 23, 2020, 1:53 PM), <https://foreignpolicy.com/2020/12/23/pompeo-weighs-genocide-designation-china-uyghur-xinjiang> (on file with Columbia Business Law Review) (noting that the United States "rarely makes a formal declaration of genocide[.]" and if confirmed, "this would be the first genocide determination by the State Department since March 2016, when U.S. Secretary of State John Kerry determined that the Islamic State terrorist organization was 'responsible for genocide' against the region's Yazidi, Christian, and Shiite Muslim minorities."). To illustrate how serious making a genocide designation is, it should be noted that the State Department under the Obama Administration concluded "that it did not have sufficient evidence" to characterize "Syrian President Bashar al-Assad's violent crack-down on civilians living in opposition-controlled territory that resulted in the deaths of hundreds of thousands of civilian" as genocide. *Id.*

²⁰⁵ *Id.*

²⁰⁶ Colum Lynch, *State Department Lawyers Concluded Insufficient Evidence to Prove Genocide in China*, FOREIGN POL'Y (Feb. 19, 2021, 11:36 AM), <https://foreignpolicy.com/2021/02/19/china-uyghurs-genocide-us-pompeo-blinken/> (on file with Columbia Business Law Review).

designation,²⁰⁷ and the fact that former Secretary Pompeo did not make “a similar declaration about Myanmar and its treatment of the Rohingya population,”²⁰⁸ gives the impression that the decision not to designate China’s treatment of the Uyghurs a genocide was a political move. Regardless of the State Department’s conclusion, it is the Secretary of State, currently Anthony Blinken, who “wields the ultimate authority to make the final judgment.”²⁰⁹ During a press briefing on his first day on the job, Secretary Blinken stated that “[m]y judgment remains that genocide was committed against the Uighurs and that hasn’t changed[.]”²¹⁰ It will be interesting to see if he decides to forge ahead with the designation despite his agency’s recommendation.

It is clear that through their legislative efforts, U.S. lawmakers “believe an all-out bar is the way to tackle the problem,” yet they do not acknowledge that “it would be hugely difficult for the apparel sector to enforce the Act due to the sheer scale and complexity of its supply chains.”²¹¹ There are those who believe that companies should simply leave China altogether because, even if the decision hits profits and initially causes loss of revenue, it will help bolster their reputations with global consumers in the long term,²¹² and

²⁰⁷ *Id.*

²⁰⁸ See Bill Chappell, *Pompeo Accuses China of Genocide Against Muslim Uighurs in Xinjiang*, NPR (Jan. 19, 2021, 4:18 PM), <https://www.npr.org/2021/01/19/958468971/pompeo-accuses-china-of-genocide-against-muslim-ughurs-in-xinjiang> [https://perma.cc/V9V3-NA7S].

²⁰⁹ Lynch, *supra* note 206.

²¹⁰ See Humeyra Pamuk & David Brunnstrom, *New U.S. Secretary of State Favors Cooperation with China Despite Genocide of Uighurs*, REUTERS (Jan. 27, 2021, 4:08 PM), <https://www.reuters.com/article/us-usa-china-blinken/new-u-s-secretary-of-state-favors-cooperation-with-china-despite-genocide-of-uighurs-idUSKBN29W2RC>. [https://perma.cc/L8FR-2PEL].

²¹¹ See *Boycotting Xinjiang Cotton Will Be No Easy Feat*, GLOB. DATA (Sep. 29, 2020), <https://www.globaldata.com/boycotting-xinjiang-cotton-will-no-easy-feat/> [https://perma.cc/YLC6-75CV].

²¹² See Elisabeth Braw, *Why Western Companies Should Leave China*, FOREIGN POL’Y (Feb. 17, 2021, 7:12 AM), <https://foreignpolicy.com/2021/02/17/why-western-companies-should-leave-china/> (on file with Columbia Business Law Review) (pointing out that

such companies will not have to worry about “ending up in the increasingly busy line of geopolitical fire.”²¹³ On the other hand, there are other experts who argue that these efforts by American lawmakers and President Trump during his administration “will have a limited impact unless other governments follow suit.”²¹⁴ Their reasoning is that an article of clothing that cannot go to the United States due to the risk of detention can end up in regions such as Canada or Europe that lag behind the United States’ progress on the matter²¹⁵ despite those countries’ strong pronouncements against the human rights situation in Xinjiang.

Given the forceful renunciations from civil society, the U.S. government, other Western governments, and China’s own consumers,²¹⁶ the pressure and scrutiny under which the retail industry finds itself are mounting with the passage of time and are unlikely to dissipate. On the one hand, global retailers can appease human rights advocates by shunning cotton from Xinjiang to protect their sales in the West. On the other, forsaking Xinjiang cotton carries the risk of angering Chinese consumers who view “the attention on the Uyghurs as a Western plot to sabotage China’s development.”²¹⁷ Therefore, the retail industry needs to quickly find and implement solutions, such as the ones presented in this Note,

“[c]itizens all over the West . . . have taken a radically dimmer view of China than was the case even a few years ago). A 2020 Pew Research Center found that 81% of Australians held unfavorable views of China (32% increase from 2017), as did, 85% of Swedes (49% increase), 74% of Britons (37% increase), 73% of Americans (47% increase), 73% of Canadians (40% increase), and 71% of Germans (53% increase). *Id.*

²¹³ *Id.* (asking the rhetorical question of “[w]hat could be more negative than being associated with 21st century concentration camps?”).

²¹⁴ See *Working on the Chain Gang; Congress Is Moving To Block Goods Made with the Forced Labour of Uyghurs*, *supra* note 38.

²¹⁵ *Id.*

²¹⁶ See Goodman et al., *supra* note 4 (discussing that certain statements from apparel companies regarding human rights abuses in Xinjiang has provoked anger among many Chinese consumers and reporting that, on Chinese social media, many people have posted photos of themselves throwing away their Nike-branded sneakers or covering the logos on their sweaters with tape).

²¹⁷ *Id.*

before its public image is further tarnished, and its imports are detained and prevented from entering the United States and other significant markets.²¹⁸

²¹⁸ See, e.g., *China Could Be Designated as Perpetrator of Genocide in Xinjiang*, GUARDIAN (Dec. 29, 2020, 2:59 PM), <https://guardian.ng/features/china-could-be-designated-as-perpetrator-of-genocide-in-xinjiang/> [<https://perma.cc/6XBL-BGCP>] (noting that aside from the United States, other countries are taking a stance against China for the allegations of Uyghur forced labor such as France, which opposed the proposed Comprehensive Agreement on Investment deal between the European Union and China.); Meredith Rathbone & Nicholas Kimbrell, *US Government Ramps Up Actions To Combat Forced Labor*, STEPTOE INT'L L. ADVISORY, (Nov. 30, 2020), <https://www.steptoel.com/en/news-publications/us-government-ramps-up-actions-to-combat-forced-labor.html> [<https://perma.cc/NH2F-MSFA>] (noting that the European Union, United Kingdom, and Canada are considering imposing export controls and sanction restrictions on entities implicated in forced labor in the XUAR).