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CORPORATE RESPONSIBILITY AND U.S. IMPORT REGULATIONS AGAINST FORCED LABOR

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Corporate leaders confront unique ethical challenges while conducting business in a global trade environment, but it is the way they respond to those cross-cultural challenges that is increasingly subject to public scrutiny in our socially conscious society. Recent protests demanding corporate accountability for the use of forced child labor and the associated adverse publicity is more feared than any potential monetary penalty assessed by a government agency. However, there are currently civil and potentially criminal penalties for those companies who violate U.S. laws regarding the use of convict or forced labor.

Most discussions on resolving human rights abuses in international trade focus on bilateral and multilateral trade agreements as the impetus for establishing standards. However, the enforcement of those human rights provisions is left to domestic implementing regulations. It is critical for U.S. corporations to understand the Customs prohibitions on imported articles manufactured by convict or forced labor. More important is minimizing their liabilities and exposure. This article will begin with identifying the current Customs regulations on imports of prohibited labor. It will analyze the essential provisions of the underlying law, as well as discuss the recent revisions intended to include the perceived omission of forced child labor and strengthen the enforcement procedures overall.

Part II will discuss the importance of corporate responsibility in the socially conscious environment of today. It will discuss the rise in the

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development of corporate codes of conduct over the last twenty years and address supplier contracting in light of those codes. It will also emphasize the importance of implementing monitoring programs and penalty provisions to ensure compliance.

I. FORCED LABOR UNDER U.S. LAW

The United States first prohibited imports of goods manufactured using prison labor under section 51 of the McKinley Tariff Act of 1890.[1] This law was significantly expanded by section 1307 of the Tariff Act of 1930.[2] Specifically prohibited by the 1930 provision were imports of "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."[3] Section 1307 was subsequently codified under title 19 of the Code of Federal Regulations covering Customs duties, and the Customs regulations are still based on the language of the 1930 law.

A. The U.S. Import Regulations

The current U.S. Customs regulations authorize the detention of imported merchandise if it is suspected the merchandise was produced in violation of the prohibited labor statute. While the Treasury Department may initiate its own investigation, in most instances the Customs service is informed of a potential violation by a third party source, such as a domestic competitor or a human rights organization. The regulations require a detailed description of the pertinent facts regarding the production of the merchandise, but it must also include information regarding domestic production of the same class of merchandise based on a consumptive demand exemption.[4] Customs withholds release of the imported merchandise and publishes formal notification of investigation in both the Federal Register and the Customs Bulletin. Any interested party may comment on the investigation. The importer has three months from the date of importation to prove the admissibility of the merchandise by producing (1) a Certificate of Origin from the foreign manufacturer or seller, and (2) a statement from the ultimate consignee certifying that he has investigated the situation and determined the characteristics of the labor by "every reasonable" mean. Until recently, if the importer was

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1. McKinley Tariff Act of 1890, ch. 1244, 26 Stat. 567 (1890).

2. Smoot-Hawley Tariff Act of 1930, Pub. L. No. 361, § 307, 46 Stat. 590, 689 (1930) (codified in 19 U.S.C. § 1307 (1994)).

3. *Id.*

4. *See infra* Part I.B.

unable to provide the requisite proof, he could find an overseas buyer and export the prohibited merchandise or abandon the merchandise. However, recent revisions to the regulations now allow U.S. Customs to seize merchandise found to be violative and subject it to forfeiture proceedings.[5] The new regulations go one step further explicitly providing for seizure under the applicable federal criminal law dealing with prison-labor merchandise, thus allowing for the imposition of criminal fines and prison terms in addition to the civil penalties.[6]

B. Analysis of Section 1307

The full ramifications of the Customs regulations to a U.S. corporation may only be understood in light of an analysis of the underlying statute. Implementation of section 1307 of the Act was significant in that it broadened the scope of prohibited imports while at the same time narrowing that scope with the inclusion of a commercial exemption. Section 1307 expanded the 1890 prison labor statute by prohibiting three labor categories: convict, forced or indentured labor under penal sanctions. Forced labor is, however, the only category defined within the statute as "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."[7] Child labor is not specifically identified as a prohibited labor under the "plain language" of the statute.[8]

The second important aspect of the statute is its all-encompassing ban on imported products whether they are wholly or partly mined, produced, or manufactured by prohibited labor. For example, if the raw material is derived with the use of prison labor, but the manufacturing process does not employ any prohibited labor, the imported product may still be restricted. The statute fails to provide for a minimum content threshold level, but it is safe to assume that unless there is sufficient prohibited content, it is unlikely that the violation would be detected and more probable that an importer would be able to prove admissibility of the merchandise.

Finally, it is essential to understand that the basis of the statute was an economic one; it was drafted during the Depression. The Tariff Act of 1930, also known as the Smoot-Hawley Tariff Act, was notorious for its

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5. Forced or Indentured Child Labor, 64 Fed. Reg. 62,618 (Nov. 17, 1999) (to be codified at 19 C.F.R. pt. 12). Final regulations were effective August 25, 2000. *See* Forced or Indentured Child Labor, 65 Fed. Reg. 45,873 (July 26, 2000) (to be codified at 19 C.F.R. pt. 12).

6. 18 U.S.C. §§ 1761-1762 (1998).

7. § 307, 46 Stat. at 689.

8. *See infra* Part I.C for further discussion on this omission.

implementation of extraordinarily high tariffs and the implementing provisions were concerned with the economic effect on U.S. industry. Therefore, despite creating a broader scope of prohibited imports, section 1307 contains an important "consumptive demand" exemption. In essence, this self-interest clause exempts the importation of any goods or wares produced by forced or indentured labor which may be necessary to meet U.S. demand. Therefore, if an importer can show there is no comparable product manufactured in the United States or that domestic production of a comparable product is insufficient to meet local demand, then the imported products are allowed entry despite the use of forced or indentured labor. Conspicuously absent from the language of this exemption are products created through the use of prison labor. In the 1994 *China Diesel Imports v. United States*[9] case, the U.S. Court of International Trade (CIT) considered whether the consumptive demand exemption should be applied equally to all three categories of prohibited labor. The imported product, diesel engines combined with generator sets for household use, was determined to have been manufactured in Chinese prisons, but comparable U.S. produced engines were not deemed to be a suitable substitute.[10] China Diesel Imports argued that, despite the use of prison labor, the engines should fall under the consumptive demand exemption based on the insufficiency of U.S. manufacturers to meet local demand.[11] However, the CIT upheld Customs' import prohibition by holding that the language of section 1307 was specific in limiting the exemption to forced or indentured labor and could not be applied to products manufactured by convict labor.[12]

Section 1307 was an important early statement by the United States regarding its concern with products of prohibited labor. It broadened the scope of the 1890 prohibition by expanding the labor categories and by including merchandise that was either wholly or partly manufactured with prohibited labor. However, the consumptive demand exemption makes clear that the economic needs of the country during the Depression were overriding. It is interesting to note that the consumptive demand exemption remains untouched even in the revised regulations.

C. Omission of "Child Labor" and the Recent Revisions

Section 1307 made no mention of a prohibition on the import of merchandise produced by forced child labor. Although it has been argued

9. 18 Ct. Int'l Trade 1086 (1994).
10. *Id.* at 1090.
11. *Id.*
12. *Id.*

that the legislative history reflected a Congressional intention to implement the same "forced labor" term as that included in the International Labour Organization (ILO) Convention,[13] in fact, child labor was legal under federal law in the United Sates until the enactment of the Fair Labor Standards Act[14] in 1938. It was only through the implementation of section 634 of the 1998 Treasury Appropriations Act[15] that the mention of child labor has been applied to the Customs regulations, and it does so in a rather backhanded fashion. In essence, section 634, which has become known as the "Sanders Law,"[16] amends the 1930 Tariff Act by providing that none of the funds allocated to the U.S. Customs Service may be "used to allow the importation into the United States of any good, ware, article or merchandise mined, produced, or manufactured by forced or indentured *child labor*."[17]

On June 5, 1998, the Treasury Department established a Treasury Advisory Committee on International Child Labor Enforcement with the purpose of establishing law enforcement initiatives aimed at illegal shipments of products manufactured with the use of forced child labor.[18] The recent revisions to Customs regulations, an outgrowth of this committee, specifically include language referencing prohibitions on forced or indentured child labor.[19] In explanation of the revisions, Customs emphasized that implementation of section 634 was merely to clarify that forced child labor was implicit in the original prohibitions under section 1307. As of the date of this writing, there have been no legal challenges to the inference that forced child labor was included within the specified category of forced labor itemized in section 1307 of the Tariff Act.

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13. ILO Convention (No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55.

14. 29 U.S.C. § 212 (1994).

15. Treasury and General Government Appropriations Act, 105 Pub. L. No. 51, 111 Stat. 1272 (1997).

16. *Id.*

17. *Id.* (emphasis added).

18. Treasury Advisory Committee on International Child Labor Enforcement, 63 Fed. Reg. 30,813 (June 5, 1998). The Advising Committee's charter was renewed for an additional two years, extending it until 2001. *Id.*

19. Forced or Indentured Child Labor, 64 Fed. Reg. 62,618 (Nov. 17, 1999) (to be codified at 19 C.F.R. pt. 12).

II. CORPORATE RESPONSIBILITY IN THE 21ST CENTURY

Understanding the laws regulating the prohibitions on imports is necessary, but taking pro-active steps to ensure corporate transparency and compliance is the most effective way for businesses to protect themselves against potential liability. As human rights, employment, and environmental concerns have grown over the last thirty years, many U.S. corporations have developed voluntary codes of conduct to deal with the complexities of the ethical issues in a cross-cultural environment.

A. Corporate Codes of Conduct

The first corporate codes of conduct, drafted in the 1970s, dealt with particular human rights issues in specific countries, but over the last ten years these codes have evolved into ethical operating guidelines for U.S. corporations and their contracting partners throughout the world. For example, the Sullivan Principles, developed in 1977 by a Baptist minister on the board of directors for General Motors, were created as basic principles of conduct to promote racial equality in the employment practices of U.S. corporations doing business in South Africa.[20] The MacBride Principles were specifically designed in 1984 for companies dealing with religious discrimination issues while doing business in Northern Ireland.[21] The Slepak Principles were for companies establishing business relationships in the New Republics following the dissolution of the Soviet Union,[22] and the Miller Principles were aimed at conducting business in China.[23] In essence, each of these codes of conduct has the same basic labor principles regarding fair employment practices, training programs, and some, but not all, have included provisions prohibiting the use of forced labor.

More recently companies have developed broader subcontractor and supplier codes of conduct for their global sourcing efforts.[24] In 1997, the Apparel Industry Partnership (AIP) allied the leaders of the footwear and apparel industry with government and non-governmental organizations to

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20. Reverend Leon H. Sullivan, *Sullivan Principles for U.S. Corporations Operating in South Africa, reprinted in* 24 I.L.M. 1496 (1985).

21. IRISH NATIONAL CAUCUS, THE MACBRIDE PRINCIPLES 2 (1984).

22. SLEPAK FOUNDATION, 1 SLEPAK REPORT NO. 1, at 1 (Mar. 1989).

23. The Miller Principles, *reprinted in* H.R. 1571, 102d Cong, 1st Sess. (1991).

24. For example, *see* Levi-Strauss & Co., *Global Sourcing and Operating Guidelines* (1997), *available at* http://www.levistrauss.com/about/code.html. *See also NIKE's New Code of Conduct* (Mar. 1997), *available at* http://www.citinv.it/associazioni/CNMS/archivio/strategie/nike_newcode.html; Mattel, Inc., *Responsibility: Global Manufacturing Principles* (Nov. 1997), *available at* http://www.mattel.com/corporate/company/responsibility/.

address workplace issues and develop a standardized Workplace Code of Conduct.[25] The common basic elements of these more recent codes include (1) prohibitions on forced, convict, or child labor, (2) non-discrimination at all levels, (3) health and safety concerns, (4) improvement of working conditions, (5) provisions on hours, wages, and benefits, and (6) supporting the freedom of association and the right to organize.[26]

To eliminate possible non-compliance with the Customs laws, section 634 of the Appropriations Act has made it important for U.S. companies to include contractual provisions prohibiting the use of child labor in addition to the prohibitions on forced, indentured, or convict labor. One concern with child labor provisions is defining the age of a "child." The laws vary from country to country and even the revisions to the Customs regulations have not attempted to set a definitive age. In reviewing several current corporate codes of conduct, generally U.S. companies take one of three approaches to this issue: (1) they use the legal age as defined by the manufacturing country; (2) identify its own minimum age requirements; or (3) use a combination of the two by stating the supplier will be required to attest that it does not employ any person under the minimum age established by law, but in no case under the age of "X" years.[27]

Beyond simply establishing a code of conduct, it is imperative that a corporation's contracts reflect its strong commitment to supporting and enforcing its code. To minimize potential risks, supplier contracts should clearly state that the corporation is bound under U.S. law to enforce the U.S. forced labor prohibitions and any involvement or association with prohibited labor practices must be avoided absolutely. Additionally, corporations should require certification by the manufacturer, supplier, or subcontractor that the imported products were not made or produced through the use of prohibited convict, indentured, forced or child labor.

B. Monitoring and Enforcement Provisions

Until recently, U.S. corporations have always relied on a "handshake" philosophy of doing business, and the codes of conduct were essentially voluntary. Clearly this self-monitoring atmosphere is no longer acceptable given the public scrutiny drawn to human rights issues, and naive reliance will not protect a company from potential legal liabilities and adverse

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25. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMIN., REPORT OF APPAREL INDUSTRY PARTNERSHIP, *Workplace Code of Conduct*, *available at* http://www.dol.gov/dol/esa/public/nosweat/partnership/report.htm (Apr. 14, 1997) [hereinafter REPORT OF APPAREL INDUSTRY PARTNERSHIP].

26. *Id.*

27. *See NIKE's New Code of Conduct*, *supra* note 24.

publicity. While contracts may shift liability, the shift in responsibility requires contractual language regarding monitoring and enforcement. The AIP also developed Principles of Monitoring, setting forth corporate standards for monitoring programs.[28] These principles include establishing clear standards, creating an informed workplace, and conducting periodic visits and audits.[29]

Despite the efforts to promote standardization of monitoring programs, a recent Department of Labor survey of forty-five companies in the apparel industry found that very few of the codes of conduct contained detailed provisions regarding monitoring for compliance.[30] Most of the companies surveyed relied on an inactive, self-certification process, shifting the burden of monitoring onto the foreign supplier. On the other hand, some reported a more pro-active approach by including provisions for announced and unannounced factory visits by corporate staff or independent third parties.[31] It is important for U.S. companies to include monitoring obligations in their supplier contracts, allowing for unannounced inspections on a regular basis throughout the duration of the contract and not simply at the time of implementation.

Various trade organizations have developed third-party monitoring programs to aid U.S. corporations. For example, the AIP formed the Fair Labor Association to accredit independent external monitors, to certify that the brands of the Participating Companies are produced in compliance with the standards, and to address sweatshop issues.[32] The American Apparel Manufacturers Association has created the Worldwide Responsible Apparel Production[33] for monitoring individual plants, and the RUGMARK Foundation[34] was created to monitor carpet producers. Additionally, many churches and human rights organizations in the

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28. *See Principles of Monitoring*, *in* REPORT OF APPAREL INDUSTRY PARTNERSHIP, *supra* note 25.

29. *Id.*

30. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM?, *available at* http://www.dol.gov/dol/ilab/public/media/reports/apparel/main.htm [hereinafter THE APPAREL INDUSTRY AND CODES OF CONDUCT].

31. *Id.* Examples of third-party monitoring organizations include the Council on Economic Priorities (CEPAA), The Worldwide Responsible Apparel Production (WRAP), and RUGMARK.

32. *Id.*

33. American Apparel & Footwear Association, *Worldwide Responsible Apparel Production (WRAP) Program: An Initiative Aimed at Improving Apparel Industry Working Conditions Worldwide*, *available at* http://www.americanapparel.org/RAPP_Principles.html (Dec. 1998).

34. RUGMARK Foundation, *at* http://www.rugmark.org (last modified Sept. 26, 2000).

manufacturing country will have personnel available to monitor plants and factories for prohibited labor abuses.

Monitoring alone may be sufficient inducement for a supplier to eliminate its reliance on prohibited labor, but contracts should also include strong enforcement clauses. While the Department of Labor study indicated that none of the companies responding to the questionnaire ever found any violations, several did include enforcement provisions.[35] Such clauses may include immediate suspension of shipments, refusal to reinstitute contracts until remedies are in place, or even termination of the relationship.[36] Corporate codes of conduct are an important part of developing a global sourcing plan, but they require the supporting contractual provisions of monitoring and enforcement to ensure a compliance program that will withstand scrutiny.

III. CONCLUSION

The current U.S. regulatory prohibitions on the importation of merchandise manufactured with convict or forced labor offer fertile territory for potential violations. With the newly revised regulations significantly increasing the potential penalties for non-compliance to include criminal prosecution, U.S. corporations must be diligent in their efforts to monitor against the use of prohibited labor. While it is the apparel industry that has drawn the most recent attention for child labor abuses, there is evidence that prohibited labor abuses occur in a variety of other products and from many different developing countries. No industry should consider itself immune. Even more important to a U.S. corporation is the risk of negative media attention and loss of goodwill should a violation be exposed. A U.S. corporation dealing in an international environment must take a global approach to human rights issues that will transcend its corporate boundaries. Developing a code of conduct alone is not a cure for corporate liability, but when it is supported by strong contractual provisions for monitoring and enforcement, it is a major step in minimizing risks and creating a transparency that will enable all parties to know their obligations and responsibilities.

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35. *See* THE APPAREL INDUSTRY AND CODES OF CONDUCT, *supra* note 30.

36. *See generally Federated Department Stores Statement of Corporate Policy, in* THE APPAREL INDUSTRY AND CODES OF CONDUCT, *supra* note 30, § V, app. C.5.