

U.S. Customs Authorizes Seizure of Stevia from China for Alleged Use of Forced Labor

by Dave Townsend and T. Augustine Lo

On October 20, 2020, U.S. Customs and Border Protection (“CBP”) published a finding that stevia extracts and derivatives produced in the People’s Republic of China (“PRC”) by Inner Mongolia Hengzheng Group Baoanzhao Agriculture, Industry, and Trade Co., Ltd. (“Baoanzhao”) are subject to seizure and forfeiture at U.S. ports because CBP asserts that forced labor was used in their production.¹ This CBP decision could have potential implications for U.S. food producers and, eventually, U.S. consumers, as stevia extract has become increasingly popular as a natural sugar substitute in beverages and food products.

Stevia is a small shrub whose leaves can produce an extract that is 200 – 350 times sweeter than sugar but also has zero caloric content, making it a strong contender as a sugar replacement. Although biologists believe stevia is native to the region in modern day Paraguay and Brazil, the plant is well suited to any tropical climate with ample water, long hours of sunlight and warmth. Stevia extract is one of the latest additions to the unique “artificial sweeteners” segment of the global food and beverage industry that is projected to reach some two billion U.S. dollars by 2024.

Stevia is now grown commercially in Mexico and other parts of Latin America and in Asia, especially in the PRC. The PRC has become the world’s largest global producer of stevia products for the beverage and food industries, both in the United States and around the world, and, within the PRC, large amounts of stevia are grown in the Xinjiang Uyghur Autonomous Region (“Xinjiang”) which has vast amounts of agricultural land with abundant warmth and sunny weather.

CBP’s October 20 publication capped a four-year saga that began in May 2016 when CBP first issued a Withhold Release Order (“WRO”) to detain imported stevia extract made by another PRC company, PureCircle, Ltd. (“PureCircle”), alleging such products had been made with forced labor in violation of Section 307 of the Smoot-Hawley Tariff Act of 1930 (19 U.S.C. §1307). In August 2020, CBP announced that it had collected \$575,000 in civil penalties from PureCircle in connection with its customs violations.²

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However, PureCircle stated in a press release that its imports of stevia extract did not involve forced labor; that CBP had withdrawn its WRO against PureCircle as a result; and that the penalty payment, which represented a settlement of only seven percent of CBP's original demand, was without any admission of Section 307 liability by PureCircle.³

Apparently undeterred by its modest results against PureCircle, CBP proceeded to issue its recent finding against other stevia products sourced from Baoanzhao in the PRC. However, unlike the earlier WRO against PureCircle, which merely authorized the detention of imported merchandise pending a further factual determination whether it had been made with forced labor, CBP's October 20 published finding against Baoanzhao indicates CBP has already reached that threshold determination and so it establishes the basis under U.S. customs law for CBP to seize and forfeit this merchandise at any U.S. port of entry (i.e., to cause the importer the permanent loss of its property rights in such goods). CBP port directors across the United States are now required to be on the lookout for Baoanzhao's stevia products to detain and then to seize and forfeit them, including any merchandise that has been held in customs custody since CBP's issuance of its initial WRO for stevia imports against PureCircle in 2016.

To contest any such CBP detention of stevia under this new finding against Baoanzhao, importers of the detained merchandise would need to follow the procedures set forth in CBP's regulations to "establish by satisfactory evidence that the merchandise was not mined, produced, or manufactured in any part with the use of a class of labor specified in the finding."⁴ If CBP remains unpersuaded and commences forfeiture proceedings, the importer then would need to consider submitting a petition to CBP for remission or mitigation of the forfeiture.⁵ Alternatively, the importer could commence a lawsuit in the federal courts to challenging the seizure and forfeiture.

However, the legal authority of CBP's finding against Baoanzhao may be in some doubt. Under CBP's regulations, the Secretary of the U.S. Department of Homeland Security ("DHS"), the Cabinet department that oversees CBP, must approve any Section 307 finding.⁶ However, according to the U.S. Government Accountability Office and a recent U.S. federal court ruling, Acting DHS Secretary Chad Wolf, who currently occupies that position, was not properly appointed by President Trump and so is not legally able to act as the DHS Secretary, as he apparently sought to do in his approval of the CBP Section 307 findings against Baoanzhao.⁷ To remedy that apparent appointment issue, President Trump has recently nominated Mr. Wolf for the DHS Secretary position, and, as of this date, his confirmation remains pending in the U.S. Senate. Assuming Mr. Wolf is so confirmed by the Senate, it remains unclear if such an after-the-fact confirmation would be given retroactive effect in regard to this particular Section 307 finding by CBP or if the Secretary might have to "re-sign" it following his proper confirmation. It is also not known if any U.S. stevia importers adversely affected by the October 20 CBP finding would raise this particular procedural issue to contest such forfeitures.

This latest CBP action involving stevia imports from Xinjiang follows a series of CBP detentions of Chinese-origin goods and threatened WROs under Section 307 that have

increased in intensity and frequency since May 2020. Section 307 had long prohibited the importation into the U.S. of goods made with convict labor, forced labor, or indentured labor, but the law was little used or enforced for decades, particularly because the original 1930 legislation had contained an exemption for imports that met U.S. “consumptive demand.” In early 2016, Congress enacted an amendment to Section 307 to remove that exemption, which substantially stiffened the law and made it more amenable to meaningful enforcement by CBP.⁸ Invigorated by that amendment and other enforcement powers granted under the Trade Facilitation and Trade Enforcement Act of 2015, CBP has actively pursued enforcement actions since mid-2016 against imports that appear to involve the use of forced labor. Moreover, CBP has indicated that, given sufficient facts, it is now prepared to apply its WRO authority to exclude not only the individual products of specific individual companies but all such products made in a particular region of a country where the use of forced labor appears to be endemic and widespread, as it recently signaled in regard to cotton goods sourced from Xinjiang.

The Trump Administration has raised many trade tensions with the PRC and has sought to disrupt many established U.S. supply chains reliant upon Chinese-origin goods in an effort to “re-shore” manufacturing and manufacturing jobs to the United States. In line with that White House strategy, CBP has increased its Section 307 enforcement with respect to the PRC to a level that has not been seen since the early 1990s, issuing eight different WROs just since May 2020 (as compared with one such case in each of the entirety of 2018 and 2019). All of these recent WROs stem from allegations that certain products made in Xinjiang involve the use of forced labor from the Uyghur and other Muslim minorities in Xinjiang and coincide with significant bipartisan political pressure in the United States to confront the PRC with respect to the human rights situation in Xinjiang. (We have previously highlighted these same sorts of human rights issues in regard to the importation of cotton and cotton-based products such as garments and textiles from Xinjiang in an earlier article, which can be found [here](#).)

It is unclear how (or how much) CBP’s invocation of its Section 307 authority against Chinese-origin stevia extract will affect U.S. food processors and beverage makers, but various private studies had projected a steadily growing use of stevia and a growing American consumer acceptance of this particular sugar substitute. However, with multiple non-sugar sweeteners on the market today (and with many Latin American and other Asian producers of stevia extract and products still competing actively for a share of that growing world market), these latest CBP actions under Section 307 may not cause either U.S. producers or U.S. consumers to abandon stevia as a sweetener of choice if that is their preference.

As U.S. importers have previously looked to diversify and augment their supply chains because of various disruptions such as punitive U.S. import tariffs on Chinese-made goods over the past few years, U.S. importers of stevia products may consider shifting all or part of their supply chains to other eagerly interested foreign stevia producer nations such as Paraguay, Brazil, Mexico and other Asian countries. Moreover, given the strong and growing political consensus between Republicans and Democrats in Washington DC about the human rights problems in Xinjiang, the pressures to invoke Section 307

against stevia products (or other goods) from Xinjiang will probably not diminish in the coming years, regardless of whichever party prevails in the upcoming Presidential and Congressional elections on November 3, 2020.

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¹ Notice of Finding That Certain Stevia Extracts and Derivatives Produced in the People's Republic of China With the Use of Convict, Forced or Indentured Labor Are Being, or Are Likely To Be, Imported Into the United States, 85 Fed. Reg. 66,574 (Oct. 20, 2020) (CBP Dec. 20-17).

² <https://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor>.

³ <https://purecircle.com/news/purecircle-and-u-s-customs-and-border-protection-resolve-2014-stevia-sourcing/>.

⁴ 19 C.F.R. §§12.42(g), 12.43.

⁵ 19 C.F.R. §171.0 *et seq.*

⁶ 19 C.F.R. §12.42(f).

⁷ In the Matter of Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security, Dec. B-331650 (U.S. Gov't Accountability Off. Aug. 14, 2020); Memorandum Opinion at 44-45, *Casa de Md., Inc. v. Wolf*, No. 20-cv-02118-PX, ECF No. 69 (D. Md. Sept. 11, 2020).

⁸ Act of June 17, 1930, ch. 497, tit. III, §307, 46 Stat. 689; Pub. L. 114-125, tit. IX, §910, 130 Stat. 239 (Feb. 24, 2016).