

## 美國海關暨邊境保護局就強迫勞動暫扣令豁免態度的變遷

張育璋、張書芳 編譯

### 摘要

美國海關暨邊境保護局於今(2021)年6月針對合盛矽業及其子公司所製造的二氧化矽產品，或是在製造過程中使用該產品的貨物發布暫扣令，禁止涉及強迫勞動之產品進入美國市場。惟鑑於使用二氧化矽之產品種類與範圍甚廣，該局於7月曾於針對此暫扣令之常見問題集中，表示若進口的最終產品製程中僅有「微量」部分涉及使用強迫勞動之產品，則該最終產品可能例外取得豁免而不受此暫扣令的限制。據此，該局似欲以職權執行法無明文的微量豁免機制，並制定豁免認定標準，以減緩該暫扣令對進口商的衝擊。然而，該局立場於9月與10月接連修改、甚至完全刪除豁免相關內容，最終僅表示進口商可請求行政機關個案認定其進口產品是否受特定暫扣令之限制，而放棄採用微量豁免的標準。這可能意味該局仍擔憂如採行微量豁免之作法，將變相正當化強迫勞動產品的進口，有違原先欲遏止強迫勞動行為之目的。

(取材資料：Sydney H. Mintzer & Tiffany L. Smith, *Did US Customs Create a De Minimis Standard Under Its Forced Labor Regulation?*, MAYER BROWN (Aug. 16, 2021), <https://www.mayerbrown.com/en/perspectives-events/publications/2021/08/did-us-customs-create-a-de-minimis-standard-under-its-forced-labor-regulation>; Sydney H. Mintzer & Tiffany L. Smith, *US Customs Revises Guidance on De Minimis Content Under Its Forced Labor Regulation*, MAYER BROWN (Sept. 15, 2021), <https://www.mayerbrown.com/en/perspectives-events/publications/2021/09/us-customs-revises-guidance-on-de-minimis-content-under-its-forced-labor-regulation>.)

隨著全球供應鏈複雜化，如何有效防止供應鏈中的強迫勞動問題受到國際重視。美國早於「1930年關稅法 (the Tariff Act of 1930)」第307條(以下簡稱第307條規定)禁止經由強迫勞動而生產、製造的產品進入美國市場<sup>1</sup>，而美國海關暨邊境保護局 (U.S. Custom and Boarder Protection, CBP) 為執行該法，得對進口之產品發布暫扣令 (Withhold Release Order, WRO)，立即將製程中疑似有強迫勞動情事之產品暫時扣押在海關<sup>2</sup>。

<sup>1</sup> Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307 (2018).

<sup>2</sup> 19 C.F.R § 12.42(e) (“If the Commissioner of CBP finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of section 307 is being,

今(2021)年6月24日, CBP 對合盛矽業及其子公司所產之二氧化矽產品, 以及其他製程中有使用該二氧化矽產品的貨物發布 WRO (以下簡稱合盛矽業 WRO)<sup>3</sup>。鑒於二氧化矽為許多高科技產品的原料, 故該 WRO 所涉及之產品範圍非常廣泛。CBP 於 7 月就合盛矽業 WRO 之常見問題集 (Frequently Asked Questions, FAQs) 中表示, 若進口的最終產品製程中僅有「微量 (de minimis)」部分涉及使用強迫勞動之產品, 則該最終產品可能例外取得豁免而不受此 WRO 的限制。據此, CBP 似乎要以其職權執行法無明文的微量豁免機制, 並創設微量豁免之認定標準, 以減緩該 WRO 對進口商或其他國內業者之衝擊。然 CBP 其後對微量豁免機制的態度有所轉變, 不僅在 9 月表示相關豁免認定應由法院為之, 甚至在 10 月刪除所有微量豁免相關內容, 改以個案認定, 其態度轉變所代表的意涵以及可能影響值得關注。

以下將先介紹強迫勞動下之 WRO 的法源依據與運作模式, 再簡介合盛矽業案的相關背景及重要性, 並分析 CBP 於今年 7 月、9 月及 10 月針對微量豁免爭議的不同回應與可能影響, 最後做一結論。

## 壹、簡介強迫勞動下之 WRO

美國「1930 年關稅法」第 307 條禁止進口全部或部分利用強迫勞動 (包括強迫兒童勞動)、契約奴工 (Indentured Labor) 或強制監獄勞動 (Convict Labor) 等不正當形式勞力所開採、生產或製造的所有貨物和產品<sup>4</sup>, 而該條將「強迫勞動」定義為「以懲罰脅迫勞工從事非本人自願的一切勞動或服務」<sup>5</sup>。

此外, 第 307 條規定原另訂有豁免條款, 規定若該產品在美國國內的產量不足以滿足國內消費需求, 即允許進口強迫勞動下生產的產品<sup>6</sup>, 此規定減緩第 307 條規定對於進口商所產生的衝擊。然而, 美國前總統歐巴馬於 2016 年 2 月 24 日簽署通過的「2015 年貿易便捷化及貿易執行法 (Trade Facilitation and Trade Enforcement Act of 2015, TFTEA)」修訂「1930 年關稅法」, 刪除上述豁免規定, 並藉此讓 CBP 有更多裁量空間判斷是否違反強迫勞動相關規定<sup>7</sup>。

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or is likely to be, imported, he will promptly advise all port directors accordingly and the port directors shall thereupon withhold release of any such merchandise pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation.”).

<sup>3</sup> Press Release, U.S. Customs and Border Protection [CBP], The Department of Homeland Security Issues Withhold Release Order on Silica-Based Products Made by Forced Labor in Xinjiang (June 24, 2021).

<sup>4</sup> Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307 (2018).

<sup>5</sup> *Id.*

<sup>6</sup> Section 307 of the Tariff Act of 1930, 19 U.S.C. § 1307 (2012) (“[B]ut 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.”).

<sup>7</sup> Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 239-240 (2016) (codified as amended at 19 U.S.C. §§ 1307, 4453).

CBP 得調查認定進口產品是否涉及強迫勞動情事而做出相關行政處分，若有合理 (reasonable) 但非決定性 (not conclusive) 的證據顯示某即將或可能進口之產品涉嫌使用強迫勞動，CBP 將發布 WRO，通知關務長 (port director) 立即暫停該產品之進口<sup>8</sup>；而當所得資訊明確顯示該產品違反第 307 規定，CBP 則會在海關公告 (Custom Bulletin) 及聯邦公報 (Federal Register) 公布認定結果，正式禁止該產品進口<sup>9</sup>。

WRO 的發布可以根據 CBP 自身所為的調查，或是吹哨者、非政府組織等第三方所提供的資料<sup>10</sup>。實務上，CBP 在 WRO 的程序中會利用國際勞工組織 (International Labour Organization, ILO) 所提出的「強迫勞動指標 (ILO Indicators of Forced Labor)」，以認定是否涉及強迫勞動<sup>11</sup>。

一進口產品被發布 WRO 後，進口廠商得於收到通知後三個月內轉出口至其他國家，或提交相關證據以證明該產品的製造過程並未涉及強迫勞動<sup>12</sup>。倘若未於時限內轉出口，且進口商未於時限內提出相關證據或是所提證據不足以證明該

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<sup>8</sup> 19 C.F.R § 12.42(e) (“If the Commissioner of CBP finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of section 307 is being, or is likely to be, imported, he will promptly advise all port directors accordingly and the port directors shall thereupon withhold release of any such merchandise pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation.”).

<sup>9</sup> 19 C.F.R § 12.42(f) (“If it is determined on the basis of the foregoing that the merchandise is subject to the provisions of the said section 307, the Commissioner of CBP, with the approval of the Secretary of the Treasury, will publish a finding to that effect in a weekly issue of the Customs Bulletin and in the Federal Register.”).

<sup>10</sup> 19 C.F.R §§ 12.42(a), 12.42(b) (“If any port director or other principal Customs officer has reason to believe that any class of merchandise that is being, or is likely to be, imported into the United States is being produced, whether by mining, manufacture, or other means, in any foreign locality with the use of convict labor, forced labor, or indentured labor under penal sanctions, including forced child labor or indentured child labor under penal sanctions, so as to come within the purview of section 307, Tariff Act of 1930, he shall communicate his belief to the Commissioner of CBP... Any person outside CBP who has reason to believe that merchandise produced in the circumstances mentioned in paragraph (a) of this section is being, or is likely to be, imported into the United States may communicate his belief to any port director or the Commissioner of CBP.”).

<sup>11</sup> *Forced Labor*, CBP, <https://www.cbp.gov/trade/programs-administration/forced-labor> (last visited Oct. 31, 2021); 國際勞工組織對強迫勞動之認定有 11 項指標，分別為濫用職權 (abuse of vulnerability)、詐欺、限制人身自由、孤立、肢體暴力及性暴力、威脅恐嚇、扣留身份證明文件、拖欠工資、負債擔保 (debt bondage)、惡劣的工作及生活環境、過度加班。International Labour Organization, *ILO Indicators of Forced Labor*, (Oct. 1, 2012), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_203832.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf).

<sup>12</sup> 19 C.F.R §§ 12.44(a), 12.43(a) (“Merchandise detained pursuant to § 12.42(e) may be exported at any time prior to seizure pursuant to paragraph (b) of this section, or before it is deemed to have been abandoned as provided in this section, whichever occurs first. Provided no finding has been issued by the Commissioner of CBP under § 12.42(f) and the merchandise has not been exported within 3 months after the date of importation... If an importer of any article detained under § 12.42(e) or (g) desires to contend that the article was not mined, produced, or manufactured in any part with the use of a class of labor specified in section 307, Tariff Act of 1930, he shall submit to the port director or Commissioner of CBP within 3 months after the date the article was imported a certificate of origin, or its electronic equivalent, in the form set forth below, signed by the foreign seller or owner of the article.”).

產品之製造過程未涉及強迫勞動，關務長會以書面正式告知進口廠商不得進口該產品<sup>13</sup>。

## 貳、合盛矽業案

自 TFTEA 通過後，CBP 對涉嫌經由強迫勞動製造的進口產品已發布超過 30 個 WRO<sup>14</sup>。相關案例如 CBP 於今年 1 月對新疆維吾爾自治區所產的棉花與番茄產品發布 WRO，以及於 2020 年 12 月對馬來西亞森那美公司(Sime Darby Berhad)所產之棕櫚油產品發布 WRO，這些地區或公司所生產的產品在製程中涉及強迫勞動或強迫兒童勞動等，而被暫緩通關<sup>15</sup>。

於 2021 年 6 月 24 日，CBP 對位於新疆的合盛矽業及其子公司所製造的以二氧化矽為基礎之產品，以及其他使用該二氧化矽產品作為材料所製成的產品發布 WRO<sup>16</sup>。基於所得資訊顯示，合盛矽業在製造二氧化矽產品的過程中涉及強迫勞動，並在調查中發現合盛矽業符合 ILO 強迫勞動指標中的威脅恐嚇(intimidation and threats)以及限制人身自由(restriction of movement)的行為<sup>17</sup>。

由於合盛矽業為全世界最大的有機矽及工業矽產品生產商之一，且像集成電路(integrated circuits)、太陽能發電機(solar genitor)及太陽能板(solar panel)等許多重要科技產品中都含有二氧化矽<sup>18</sup>，故合盛矽業 WRO 之影響範圍甚廣。發布此 WRO 後，相關產品的進口商可能必須負擔其進口產品未涉及強迫勞動的舉證責任，而面臨被暫緩通關的風險，這無疑將大大減損美國進口商的利益。

## 參、合盛矽業 WRO 之微量豁免爭議與影響

基於合盛矽業 WRO 影響甚廣，引起重大爭議：倘若最終產品僅含有一小部分合盛矽業及其子公司所製造的二氧化矽產品，該最終產品是否會同受此 WRO

<sup>13</sup> 19 C.F.R. § 12.44(a) (“If the proof has not been timely submitted, or if the Commissioner of CBP advises the port director that the proof furnished does not establish the admissibility of the merchandise, the port director will promptly advise the importer in writing that the merchandise is excluded from entry.”).

<sup>14</sup> *Withhold Release Orders and Findings List*, CBP, <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> (last visited Nov. 6, 2021).

<sup>15</sup> Press Release, CBP, CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021); Press Release, CBP, CBP Issues Withhold Release Order on Palm Oil Produced by Forced Labor in Malaysia (Dec. 30, 2020).

<sup>16</sup> Press Release, CBP, *supra* note 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Hoshine Silicon Industry Co. Ltd Withhold Release Order Frequently Asked Questions: Answer to What is the Scope of the Hoshine WRO? Does It Apply Only to Silica-Based Products Produced in Xinjiang, or Does It also Cover Products Made in other Parts of China, or Third Countries Using Inputs Made by Hoshine and Its Subsidiaries?*, CBP (Oct. 26, 2021), <https://www.cbp.gov/trade/programs-administration/forced-labor/hoshine-silicon-industry-co-ltd-withhold-release-order-frequently-asked-questions>.

之限制？法律對此並無明文規定，而 CBP 分別於今年 7 月、9 月與 10 月，在針對該 WRO 所發布的 FAQs 中，就此問題為不同的回應，以下依序分析之。

## 一、CBP 似欲以職權創設「微量」豁免機制

CBP 在 7 月所發布的 FAQs 中表示<sup>19</sup>：「第 307 條規定禁止任何全部或部分以強迫勞動、契約奴工或監獄勞動所生產的產品。但若最終產品中有涉及強迫勞動的部分，在數量上及品質上對該最終產品的而言並非重大 (insignificant)，則有可能被視為該規定的例外。舉例而言，若車輛引擎當中僅有某一部分零件是透過強迫勞動生產，則該強迫下的勞動於生產過程中對於這台車的貢獻度可能被視為『微量』。惟若該零件係屬引擎中不可或缺的部分，或是製造該零件所投入的勞力佔總勞動投入相當大的比例，整部車仍有可能違反第 307 條規定。」

據此，CBP 原先似乎欲在執行第 307 條規定時，以其職權創設豁免機制並制定豁免之認定標準，即當進口的最終產品中僅有「微量」部分涉及強迫勞動時，給予進口商更多彈性的空間。若此豁免機制持續發展成為 CBP 的政策，生產者及美國進口商僅需確保進口最終產品中的重大部分符合第 307 條規定，而不須顧及其中瑣碎的部分，這會有利於在複雜供應鏈下所製造的產品。

## 二、交由法院個案認定微量豁免之適用

然 CBP 於 9 月修改先前的回應內容，表示<sup>20</sup>：「第 307 條規定禁止任何全部或部分以強迫勞動所生產的產品。惟 CBP 承認在某些具體個案中，法院可能參酌本條之立法目的，以判斷經強迫勞動生產的部分在品質和數量上對於最終產品的貢獻。」

相較 CBP 於 7 月表示欲以其職權執行「微量」豁免機制，9 月的回應卻表明應交由法院就個案為豁免認定。這表示即使進口產品僅含有微量合盛矽業所製造之二氧化矽產品，進口商基本上還是受合盛矽業 WRO 之限制，除非進口商尋求美國國際貿易法院 (Court of International Trade) 進一步確認該產品內容的相關製程，認定其取得微量豁免<sup>21</sup>。

<sup>19</sup> 目前 CBP 已刪除 7 月所發布的相關 FAQs 內容，原內容可參見此文章：Nate Lankford et al., *Trade Compliance Flash: Takeaways from the Hoshine WRO FAQs*, MILLER & CHEVALIER (Aug. 4, 2021), <https://www.millerchevalier.com/publication/trade-compliance-flash-takeaways-hoshine-wro-faqs>.

<sup>20</sup> 目前 CBP 已刪除 9 月所發布的相關 FAQs 內容，原內容可參見此文章：Sydney H. Mintzer & Tiffany L. Smith, *US Customs Revises Guidance on De Minimis Content Under Its Forced Labor Regulation*, MAYER BROWN (Sept. 15, 2021), <https://www.mayerbrown.com/en/perspectives-events/publications/2021/09/us-customs-revises-guidance-on-de-minimis-content-under-its-forced-labor-regulation>.

<sup>21</sup> See Victor D. Ban et al., *Breaking Developments in Business & Human Rights Enforcement—Top Glove Finding Modification, De Minimis Exception Revocation, and New Timelines*, COVINGTON (Sept. 15, 2021), <https://www.cov.com/en/news-and-insights/insights/2021/09/breaking-developments-in->

### 三、交由行政機關為個案認定進口產品是否受特定 WRO 限制

而在 10 月時 CBP 卻將有提及「微量」之相關內容刪除，並另新增一問題<sup>22</sup>：「進口商將其產品進口至美國前，可以如何得知其產品是否同受合盛矽業 WRO 之限制？」

CBP 針對此問題做出回答<sup>23</sup>：「CBP 致力於提高資訊透明度，以使進口商得以知曉其產品是否會受特定 WRO (包含合盛矽業 WRO) 之限制。進口商若欲知特定 WRO 是否及如何限制其將進口之產品，可藉由以下管道獲得資訊：(一) 進口商對於預期交易 (prospective transaction) 可在進口前請求 CBP 預為個案裁定 (ruling)。而所謂預期交易係指那些由於貨物尚未抵達、通關等原因，而未受 CBP 調查的特定交易<sup>24</sup>；(二) 進口商可以就特定進口產品，向美國海關卓越與專家中心 (Center of Excellence and Expertise, CEE) 詢問<sup>25</sup>；或(三) 進口商可以聯繫貿易救濟執法部門 (Trade Remedy Law Enforcement) 中的副執行長 (Deputy Executive Director)。」

根據 CBP 於 10 月新增之內容，未來進口商可藉由三種管道，要求行政機關個案判斷其進口之產品是否受特定 WRO 限制。然其中並未提及任何有關微量豁免之內容，且先前相關內容亦已被刪除，顯然 CBP 已轉變立場，不願明確開放微量豁免的空間，更遑論創設認定標準，僅表示特定 WRO 之限制範圍一併交由行政機關個案認定。

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business-and-human-rights-enforcement-top-glove-finding-modification-de-minimis-exception-revocation-and-new-timelines.

<sup>22</sup> *Hoshine Silicon Industry Co. Ltd Withhold Release Order Frequently Asked Questions: Answer to What Can Importers Do If They Want Information, Prior to Importing Merchandise into the United States, Regarding Whether Their Product May Be Subject to the Hoshine WRO?*, CBP (Oct. 26, 2021), <https://www.cbp.gov/trade/programs-administration/forced-labor/hoshine-silicon-industry-co-ltd-withhold-release-order-frequently-asked-questions>.

<sup>23</sup> *Id.*

<sup>24</sup> 19 C.F.R. § 177.1(a)(1) (“Prospective transactions. It is in the interest of the sound administration of the Customs and related laws that persons engaging in any transaction affected by those laws fully understand the consequences of that transaction prior to its consummation. For this reason, the Customs Service will give full and careful consideration to written requests from importers and other interested parties for rulings or information setting forth, with respect to a specifically described transaction, a definitive interpretation of applicable law, or other appropriate information. Generally, a ruling may be requested under the provisions of this part only with respect to prospective transactions - that is, transactions which are not already pending before a Customs Service office by reason of arrival, entry, or otherwise.”).

<sup>25</sup> CEE 主要是負責貨物放行後的審查工作，像是審查貨物之商標、分估報單審核 (entry summary review) 及審核進口商提出的異議。Centers of Excellence and Expertise, CUSTOM BROKERS AND FORWARDERS ASSOCIATION OF NORTHERN CALIFORNIA (last visited Nov. 6, 2021), [https://www.cb fanc.org/docs/CBP\\_CentersExcellenceExpertiseNov2015.pdf](https://www.cb fanc.org/docs/CBP_CentersExcellenceExpertiseNov2015.pdf).

相較 CBP 於 7 月、9 月曾試圖以微量豁免規定減緩合盛矽業 WRO 對進口商之衝擊，如今其態度愈趨保守，可能是因為顧慮到一旦開啟微量豁免的大門，將有違第 307 條規定遏止強迫勞動行為之目的。

#### 肆、結論

綜上所述，鑒於合盛矽業 WRO 影響甚廣，CBP 在 7 月似欲以職權創設微量豁免機制並制定相關標準，以減緩對進口商利益的影響。然 CBP 一再改變其態度，不僅在 9 月表示相關豁免認定應交由法院個案進行，更在 10 月完全刪除 FAQs 中微量豁免相關內容，表明往後進口產品是否受特定 WRO 限制，將一併由行政機關個案認定。這可能意味著，CBP 雖然曾想透過微量豁免規定以緩和第 307 條規定與暫扣令的效果，但另一方面仍顧忌其若敞開豁免的大門，將變相正當化強迫勞動產品的進口，有違第 307 條規定欲保護勞工權益的目的。未來 CBP 之態度是否還有變化，仍待持續關注。