

COLUMN: CORPORATE SUPPLY CHAINS AND HUMAN RIGHTS AND ENVIRONMENTAL ISSUES

1. INTERNATIONAL TRENDS ON HUMAN RIGHTS AND ENVIRONMENTAL ISSUES

Since the unanimous endorsement of the Guiding Principles on Business and Human Rights by the U.N. Human Rights Council in 2011, international calls for business enterprises to respect human rights have accelerated. The Guiding Principles states that respect for human rights is global standard of conduct and social responsibility for all business enterprises.

Furthermore, in recent years, mainly in Europe and the United States, laws and regulations have been introduced on the ground of human rights; and thus, business enterprises need to strengthen their efforts to respect human rights. Some of these laws and regulations include the perspectives not only of human rights, but also of environmental protection (especially in the regulations introduced by the EU and its member states).

This column provides a summary of the recent trends in laws and regulations that have been introduced in various countries, and of Japan's efforts in this area.

2. TRENDS IN EACH COUNTRY REGARDING LAWS AND REGULATIONS

(1) TRENDS IN THE U.S.

The U.S. government has imposed an import ban on products derived from forced labor based on Section 307 of the Tariff Act of 1930, and the U.S. Customs and Border Protection (CBP), Department of Homeland Security has issued a "Withhold Release Order (WRO)" to withhold imports of such products. For example, in December 2020, CBP announced the issuance of a WRO on cotton and cotton products originating from the Xinjiang Production and Construction Corps (XPCC) and its affiliates as well as any products that are made in whole or in part with that cotton, such as apparel, garments, and textiles. In addition, in January 2021, CBP announced the issuance of a WRO on cotton and tomatoes and their downstream products produced in whole or in part in Xinjiang.

In July 2021, the U.S. government issued an updated "Xinjiang Supply Chain Business Advisory," outlining the situation of forced labor and other human rights abuses in the Xinjiang Uyghur Autonomous Region. The U.S. government also cautioned companies which are connected to Xinjiang in their supply chains about significant legal and economic risks associated with their involvement with entities engaged in human rights abuses there. In addition, the Advisory reiterated that the situation of human rights abuses in Xinjiang falls under the category of genocide, and in a statement issued in the name of the Secretary of State, the U.S. government stated that it would continue to pursue accountability for human rights abuses in China in cooperation with the private sector and related countries.

Furthermore, in June 2022, the "Uyghur Forced Labor Prevention Act" was enforced, which presumes that any products produced in whole or in part in Xinjiang or by an entity included in the list created by the U.S. government (the "Entity List") are the result of forced labor and in principle, prohibits import of such products. To avoid import bans, importers need to prove that they are not relying on forced labor in any part of their supply chains. Under the said Act, in June 2022, the Forced Labor Enforcement Task Force, chaired by the Department of Homeland Security, published the strategy for enforcement of the Act, which also includes guidelines for importers. In March 2023, CBP released database on the enforcement of the Uyghur Forced Labor Prevention Act. According to the information available at the time of writing of this Report, 7,058 imports have already been suspended, of which 2,972 have been banned and 2,974 imports have been allowed

based on the Uyghur Forced Labor Prevention Act. In September of the same year, an annex to the Xinjiang Supply Chain Business Advisory was also issued, urging companies to continue to conduct appropriate human rights due diligence in accordance with the strategy for enforcement.

On the other hand, the U.S. government has also implemented and strengthened export controls on products and entities involved in human rights abuses. Specifically, since October 2019, the scope of regulation has been expanded to include Chinese government agencies and surveillance equipment companies in the Entity List for their involvement in human rights abuses.

(2) TRENDS IN GERMANY

Germany established the “National Action Plan for Business and Human Rights” (NAP) in 2016 to provide for the implementation of corporate human rights due diligence and the corrective and remedial measures available to those damaged by human rights violations. At the same time, it stipulates that if the number of companies satisfying the NAP requirements is less than a certain number, legislation would be considered. Subsequently, an investigation by the German government found that the number of companies which satisfied the NAP requirements did not reach its target. Then, in June 2021, the Act on Corporate Due Diligence Obligations in Supply Chains was enacted to oblige companies above a certain size to conduct human rights and environmental due diligence. The Act was enforced in January 2023.

This Act is applicable for enterprises based in Germany or that have branches or subsidiaries in Germany and have 3,000 or more employees in 2023, at the time of enforcement, and 1,000 or more employees from 2024. The scope of the human rights and environmental due diligence includes the enterprises themselves and their direct suppliers. For indirect suppliers (secondary suppliers, etc.), enterprises need to ensure that a grievance mechanism is established, and if they become aware of substantive signs suggesting human rights abuses or violations of environmental obligations, risk analysis and appropriate preventive measures should be carried out. Enterprises subject to the Act are required to develop internal risk management systems, conduct risk analysis, formulate a policy statement on human rights strategy, implement preventive measures in their own operations and the operations of their direct suppliers, implement corrective and remedial measures when human rights violations are confirmed, establish a grievance mechanism, and prepare and publish reports on the results of due diligence. If enterprises fail to comply with their legal obligations, they may be excluded from the award of public contracts, in addition to being liable to fines.

(3) TRENDS IN FRANCE

In France, the Duty of Vigilance Act was enacted and entered into force in 2017 to stipulate human rights and environmental due diligence in supply chains. This Act is applicable for companies based in France that, at the end of two consecutive fiscal years, employ (i) at least 5,000 employees (including employees of direct and indirect subsidiaries located in France) or (ii) at least 10,000 employees (including employees of direct and indirect subsidiaries located in France or abroad).

Companies subject to the Act are required to (a) prepare a vigilance plan and effectively implement the plan and (b) disclose the plan and its implementation status in annual reports. The “vigilance plan” is intended to include reasonable measures adequate to identify risks and to prevent severe impacts on “human rights, fundamental freedoms, health and safety of individuals and the environment.” The “vigilance plan” provides for a court order for performance and damages as civil enforcement, and in certain cases, human rights organizations and environmental organizations are entitled to file a lawsuit against companies. A few lawsuits based on this Act have already been filed against companies by human rights organizations and environmental organizations.

(4) TRENDS IN THE EU

(i) Proposal for a Directive on Corporate Sustainability Due Diligence

In Europe, adding to the moves to make human rights and environmental due diligence mandatory in some member states such as Germany and France as mentioned above, moves to extend similar laws and regulations to the entire EU have accelerated.

Although the EU Council and the European Parliament reached a tentative political agreement in December 2023 with respect to the “Proposal for a Directive on Corporate Sustainability Due Diligence” published by the European Commission in February 2022, some member states subsequently abstained from a vote on the proposal for a Directive. However, in March 2024, the permanent representative committee of the EU Council agreed on the proposal for a Directive that was revised for the threshold of companies subject to the Directive, and the revised proposal was approved by the Committee on Legal Affairs of the European Parliament. It is expected that the proposal for a Directive will be formally adopted by the plenary session of the European Parliament and the subsequent plenary session of the EU Council.

This proposal for a Directive obliges large companies in the EU (including companies from third countries operating in the EU) to conduct due diligence on human rights and the environment.

Companies to which the Directive will apply are defined based on the number of employees and annual revenue, and will be required to (a) integrate due diligence into corporate policies, (b) identify, assess and prioritize actual or potential adverse impacts on human rights and the environment, (c) prevent and mitigate potential adverse impacts, (d) terminate actual adverse impacts, (e) establish and maintain notification mechanism and complaint procedures, (f) monitor the effectiveness of due diligence policies and measures, and (g) publicly communicate on due diligence.

With respect to measures for violations, the proposal for a Directive requires EU member states to establish administrative penalties for violations in their domestic laws, and to ensure civil liability for companies that violate their obligations and cause damage. Once the proposal for a Directive is formally adopted by the EU Council and the European Parliament, each member state will be required to enact national legislation within two years after the Directive comes into effect.

(ii) Other laws and regulations

In Europe, in addition to the proposal for a Directive described above, a number of laws and regulations regarding human rights and the environment are examined and enforced.

For example, the EU has also implemented and strengthened export controls on the grounds of human rights suppression, and in September 2021, it implemented revised export control regulations including regulations on cyber surveillance systems.

The EU Council and the European Parliament reached a tentative political agreement in March 2024 with respect to a proposal for the Regulation on prohibiting products made with forced labor from entering the EU market or being exported outside the EU that was published by the European Commission in September 2022, and the proposal has moved to the formal adoption procedure.

The battery regulation, which came into effect in August 2023, aims to make the entire life cycle of batteries sustainable. For example, this Regulation includes due diligence obligations on business operators of a certain size or larger regarding the social and environmental risks associated with batteries, and the business operators need to develop and implement policies to address risks such as climate change, environmental pollution and violation of workers’ rights in their supply chains. The business operators are also required to fulfil certain obligations such as to display the amount of greenhouse gas emissions over the entire life cycle of batteries using a QR code.

The Regulation on deforestation-free products, which came into effect in June 2023, requires business operators to conduct due diligence to ensure that cattle, cocoa, coffee, oil palm, rubber, soya and wood, and

their derivative products will not be imported into or sold in the EU market unless they are deforestation-free in the production process. Deforestation risk will be classified as “high risk,” “low risk” or “standard risk” for each country (such classification are expected to be finished by the end of 2024), and the risk assessment and other obligations imposed on business operators will vary depending on the risk classification of the producing country.

Furthermore, the EU Council and the European Parliament reached a tentative political agreement in March 2024 with respect to a proposal for the Regulation on packaging and packaging waste that was published by the European Commission in November 2022. The proposal for the Regulation requires the reuse and recycling of bottles, cans, PET bottles, plastic materials and other containers and packaging used in the EU market, and provides for the reduction of packaging and packaging waste and the restriction of specific plastic packaging forms. The impact on the food and beverage industries is expected to be significant, and attention should be paid to its formal adoption and subsequent operation.

3. EFFORTS BY THE JAPANESE GOVERNMENT

In line with this global trend, the Japanese government developed a national action plan on “Business and Human Rights” (2020-2025) in October 2020. From September to October 2021, the Ministry of Economy, Trade and Industry of Japan and the Ministry of Foreign Affairs of Japan jointly conducted a questionnaire survey on the status of human rights initiatives in the supply chains of Japanese companies as part of the follow-up to the national action plan. The survey was conducted on 2,786 companies, including those listed on the First Section and the Second Section of the Tokyo Stock Exchange, and 760 companies responded. As a result of the survey, it became clear that the efforts of Japanese companies still need improvement, with only about 50% of respondents conducting human rights due diligence. In the survey, many respondents expressed requests to the government for the development of guidelines, and half of the companies that had not made progress in human rights initiatives answered that they did not know how to implement concrete measures.

In light of this situation, the Japanese government established the “Study Group on Guidelines for Respecting Human Rights in Supply Chains” in the Ministry of Economy, Trade and Industry of Japan in March 2022 to promote business efforts to respect human rights based on international standards, and in September 2022, published the “Guidelines on Respecting Human Rights in Responsible Supply Chains.” Based on the UN Guiding Principles, the Guidelines for Multinational Enterprises by the OECD, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the “ILO MNE Declaration”) by the ILO and other international standards, the Guidelines aim to help deepen business enterprises’ understanding and promote their efforts by explaining activities that business enterprises are requested to undertake to respect human rights, in a concrete and easy-to-understand manner, which is tailored to the actual situation of business enterprises engaging in business activities in Japan. Furthermore, in April 2023, the Ministry of Economy, Trade and Industry of Japan prepared and published the “Practical Reference Materials for Respecting Human Rights in Supply Chains” to help business enterprises that have not fully taken measures for respecting human rights to advance their efforts in accordance with the Guidelines, taking into account the concerns of business enterprises that have not yet taken such measures.

At the G7 Hiroshima Summit in May 2023, the need to deepen discussions on business and human rights within and outside G7 was recognized, and it was agreed that international cooperation will be strengthened to enhance predictability for business. Based on this agreement, the Japanese government is expected to promote its efforts to respect human rights while enhancing predictability of business enterprises, while advancing international efforts.

4. RELATION TO INTERNATIONAL AGREEMENTS

Respect for human rights and preservation of the global environment are now global standards of conduct, and further efforts are expected from business enterprises. In this regard, as outlined above, the international trend of expanding and strengthening laws and regulations on human rights and the environment is expected to continue.

On the other hand, it should be noted that laws and regulations on international corporate activities of this kind inevitably have an impact on international trade and investment (often a limiting and withering effect). In the GATT and WTO regimes, this issue has been discussed in relation to the principle of free trade (see GATT Article I, Article II, Article III, Article XI:1, etc.) and the exceptions based on regulatory authority of each country (see each item of GATT Article XX, etc.), and has been argued as a dispute sometimes.

With respect to the above-mentioned laws and regulations of each country, if trade in products is directly restricted, it may be in violation of GATT Article XI:1. In addition, if laws and regulations are designed and operated in a manner that substantially prejudice the competitive conditions of products from countries other than those imposing regulations, it may be inconsistent with the most-favored-nation treatment obligation (GATT Article I) and the national treatment obligation (GATT Article III) (actually, many countries have expressed concern about the current trend.).

Furthermore, regulations restricting imports of products due to specific human rights and environmental risks may fall under the “technical regulations” (Annex 1.1 of the TBT Agreement), in which trade restrictions more than necessary to fulfill a legitimate objective are prohibited (Article 2.2 of the TBT Agreement). According to precedents, the “technical regulations” refers to mandatory regulations that are applied to product characteristics of identifiable product groups (Appellate Body Report in *EC - Asbestos*). Regulations requiring labeling of human rights and environmental risk assessment on a product itself (such as the battery Regulation) are likely to fall under this category. Even if there is no labeling requirement, if it has an effect that enforces a specific production method or location, it may be interpreted as regulations on product characteristics that fall under the category of the “technical regulations.”

On the other hand, countries imposing regulations would argue that the regulations are justified for the purpose of respecting human rights and protecting the environment. For example, they would argue against the GATT inconsistency on grounds such as “necessary to protect public morals” (GATT Article XX (a)), “necessary to protect human, animal or plant life or health” (GATT Article XX (b)) and “relating to the conservation of exhaustible natural resources” (GATT Article XX (g)). However, in light of the trend of precedents that strictly interpret the applicability of chapeau and each item of GATT Article XX, it is obvious that easy trade restrictions and preferential treatment of domestic products in the name of “human rights” and “environment” are not permissible under international agreements.

Japan should make efforts to contribute to international efforts to respect human rights and protect the environment, and actively participate in efforts to establish appropriate international disciplines so that international economic activities of Japanese companies are not unduly hindered or discriminated, by closely following the trend of laws and regulations in each country.