


Import Bans on Products from Forced Labor in the Trump Era

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ABSTRACT

On 30 September 2019, the United States prohibited the imports of five products suspected of being made with forced labor from companies all over the world. This article contextualizes these Withhold Release Orders from the perspective of international law and politics. While the Trump Administration's blunt and protectionist trade policy has been widely criticized, this article argues that it might also have created an opening to rethink the multilateral trade regime that prioritizes free trade over the abolishment of forced labor.

KEYWORDS

Withhold Release Orders; Trade; General Agreement on Tariffs and Trade; Import Restrictions; W.T.O.

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INTRODUCTION

On 30 September 2019, the United States (hereinafter U.S.) Customs and Border Protection (hereinafter C.B.P.) issued five Withhold Release Orders (hereinafter W.R.O.s) for garments from the Chinese company Hetian Taida Apparel Co Ltd, gold from artisanal small mines in the Democratic Republic of the Congo (hereinafter D.R. Congo), artisanal rough-cut diamonds from Marange Diamond Fields in Zimbabwe, bone black from Bonechar Carvao Ativado Do Brasil Ltda and disposable rubber gloves from the Malaysian company WRP Asia Pacific Sdn Bhd.¹ This article contextualizes these five W.R.O.s from the perspective of international law and politics. This article first discusses these W.R.O.s (section 1) and their legal basis, section 307 of the Tariff Act (section 2). Section 3 contextualizes the five W.R.O.s in light of international law. Much ink has been shed on the Trump Administration's protectionist trade policy which has paralyzed the World Trade Organization Dispute Settlement Mechanism's (hereinafter W.T.O. D.S.M.) Appellate Body. This body became de-facto non-operational in December 2019 due to the persistent veto of the U.S. on the appointment of new members, but the W.T.O. D.S.M.'s panels are still functioning. It is explained that the five W.R.O.s might be justified under the exception clauses of General Agreement on Tariffs and Trade (hereinafter G.A.T.T.) Articles XX and XXI.² While it is unfortunate that the Trump Administration has alienated other World Trade Organization (hereinafter W.T.O.) Members and halted cooperation towards an improved international trade regime, its controversial approach towards trade forces us to think about slavery beyond these exceptions in the G.A.T.T. Finally, section 4 analyzes the five W.R.O.s in light of international politics. It discusses significant world events that have led the C.B.P. to relax some and strengthen other W.R.O.s on products of forced labor in 2020. It is hopeful that the C.B.P. seems to continue to value the concept of international cooperation, which plays a key role in imposing or sustaining import restrictions.

¹ Press Release, C.B.P., C.B.P. Issues Detention Orders Against Companies Suspected of Using Forced Labor (Oct. 1, 2019), <https://www.C.B.P.gov/newsroom/national-media-release/C.B.P.-issues-detention-orders-against-companies-suspected-using-forced>.

² General Agreement on Tariffs and Trade, April 15, 1994, 1867 U.N.T.S. 154.

1. WITHHOLD RELEASE ORDERS

This section discusses each of the five W.R.O.s in turn. First, C.B.P. issued a W.R.O. against Hetian Taida because its textile is allegedly made by forced labour in China.³ A variety of re-education centers started to mushroom in Xinjiang Uyghur Autonomous Region in 2017.⁴ A few months before the W.R.O. was issued, then U.S. Vice President Mike Pence alleged that “Beijing is holding hundreds of thousands, and possibly millions, of Uyghur Muslims in so-called “re-education camps” ” at a Ministerial to Advance Religious Freedom.⁵ On the same day, then U.S. Secretary of State Michael Pompeo alleged that Uyghurs do not get a chance to tell their stories because “the Chinese Communist Party [. . .] demands that it alone be called God”.⁶ These concerns were echoed by twenty-two Members of the United Nations Human Rights Council.⁷ The Chinese government from its side alleged that the “re-education” of Uyghurs is a component of its “war on terror”.⁸ Counter-terrorism has often been used as an excuse to blatantly violate human rights.⁹ For example, after the Twin Towers fell due to a terrorist attack on 11 September 2001, the U.S. locked up twenty-two innocent Uyghurs captured in Afghanistan, initially without any form of judicial process, in Guantanamo Bay. There is increasingly more evidence – including leaked Chinese Communist Party files – that seem to suggest that the “re-education” facilities are – in fact – prison camps where Uyghurs are forced to work.¹⁰ Forced labor has often been authorized by authoritarian regimes to effect political coercion or education or to punish those who hold or express views contrary to the views endorsed by the ruling government.¹¹

³ US TRADE REPRESENTATIVE, 2019 REPORT TO CONGRESS ON CHINA’S W.T.O. COMPLIANCE (2020), https://ustr.gov/sites/default/files/2019_Report_on_China%E2%80%99s_W.T.O._Compliance.pdf.

⁴ David Brophy, *China’s Uyghur Repression*, Jacobin Magazine, May 31, 2018, <https://www.jacobinmag.com/2018/05/xinjiang-uyghur-china-repression-surveillance-islamophobia>.

⁵ Mike Pence, U.S. Vice President, Remarks at Ministerial to Advance Religious Freedom (Jul. 28, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/>.

⁶ Michael Pompeo, U.S. Secretary of State, <https://www.state.gov/secretary-of-state-michael-r-pompeo-at-the-release-of-the-2018-annual-report-on-international-religious-freedom/>.

⁷ Letter from Sally Mansfield, Permanent Representative of Australia to the United Nations Office in Geneva et al., to the President of the Human Rights Council (Jul. 8, 2019), https://www.hrw.org/sites/default/files/supporting_resources/190708_joint_statement_xinjiang.pdf-k

⁸ *China Defends Internment Camps for Uighur Muslims*, Al Jazeera, Oct. 16, 2018, <https://tinyurl.com/2jxx2akb>.
MICHAEL DILLON, *XINJIANG IN THE TWENTY-FIRST CENTURY: ISLAM, ETHNICITY AND RESISTANCE 196-7* (2020).

⁹ Ashley Terlouw, *Angst en Regelgeving. Onderscheid door de Overheid op Grond van Nationaliteit, Afkomst en Religie [Fear and Regulations: Discrimination by the Government on grounds of Nationality, Ethnicity and Religion]* 14 (Nijmegen: Wolf Legal Publishers, 2009).

¹⁰ Austin Ramzy & Chris Buckley, “Absolutely No Mercy” Leaked Files Expose How China Organized Mass Detentions of Muslims, *New York Times*, Nov. 16, 2019, <https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html>.

¹¹ Convention concerning Forced or Compulsory Labour, art.1, June 28, 1930, Nr. C105 [hereinafter I.L.O.]; see Christopher Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. INT’L L. & POL. 19, 30 (1975).

Second, the C.B.P. prohibited imports of two scarce resources: artisanally mined gold from D.R. Congo and rough-cut diamonds from Zimbabwe's Marange region. These minerals owe their nicknames "conflict minerals" and "blood diamonds" to the fact that their trade funds civil wars and fuels human rights violations. The abundance of resources is often a source of struggle, and not a source of tremendous opportunities for people on the ground. The government, opposition groups, foreign states, and rebel groups have fought many conflicts to control access to gold and other minerals in the eastern part of D.R. Congo, while the military violently took over the Marange diamond fields in Zimbabwe in 2008.¹² The government of Zimbabwe has protested against the W.R.O. on rough-cut diamonds, noting that it is "a grave and serious attack on Zimbabwe's interests".¹³ Similarly, the state-owned Zimbabwe Consolidated Diamond Co. held that it "employs labor in terms of the Labour Relations Act and there is no compromise on that".¹⁴ The Zimbabwean government's interests heavily compromise the obligations in this Act.¹⁵

These two W.R.O.s are not the first measures that the U.S. has taken to break the spell of Africa's "resource curse".¹⁶ For example, section 1502 of the Dodd-Frank Act (2010) tried to regulate gold, cassiterite, wolframite, and coltan, their metal derivatives extraction and trade in D.R. Congo and nine adjoining countries.¹⁷ The impact of this section has been minimized under the Donald Trump Administration. The Securities and Exchange Commission announced that it only partly enforces the rules which were established to implement section 1502.¹⁸ This change in policy came after a decision by the relevant U.S. Appeals Court.¹⁹ This court agreed with the U.S. Chamber of Commerce that the requirement to post a statement that their products have "not been found to be "DRC conflict free" " on company websites violated the free speech-rights of companies.

¹² Farai Maguwu, *Marange Diamonds and Zimbabwe's Political Transition*, 8 J. PEACEBUILDING DEV. 74, 74 (2005); Stefaan Smis, *The Role of the International Community in Stabilizing the Democratic Republic of Congo (DRC)*, 58(2-4) Mededelingen der Zittingen van de Koninklijke Academie voor Overzeese Wetenschappen [Announcements of the Sessions of the Royal Academy for Overseas Sciences] (2012), at 237, 239-244 (Neth.).

¹³ Antony Sguazzin, Godfrey Marawanyika & Bill Faries, *Zimbabwe Accuses U.S. of Lying About Diamond-mining Forced Labour*, Bloomberg, Oct. 4, 2019, <https://www.bloomberg.com/news/articles/2019-10-04/zimbabwe-accuses-u-s-of-lying-about-diamond-mining-forced-labor>.

¹⁴ *Ibid.*

¹⁵ Lovemore Madhuku, *Labour Law in Zimbabwe* 12-24 (2015).

¹⁶ Daniëlla A. Dam-de Jong, *The Role of Informal Normative Processes in Improving Governance over Natural Resources in Conflict-Torn States*, 7 HAGUE J. ON RULE L. 219 (2015).

¹⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, para. 1502, 124 Stat. 1376, 2213-2218 (2010).

¹⁸ Michael Piowar, Chairman U.S. SEC, 'Statement on the Court of Appeals Decision on the Conflict Minerals Rule' (Apr. 7, 2017), www.sec.gov/news/public-statement/piowar-statement-court-decision-conflict-minerals-rule.

¹⁹ *National Association of Manufacturers, et al. v. Securities and Exchange Commission*, 800 F.3d 518; final judgment No. 13-CF-000635 (D.D.C. 3 April 2017).

Third, the workers in Brazil's Bonechar and Malaysia's WRP allegedly work as forced laborers in factories with frequent gas leaks. Contrary to the three W.R.O.s discussed above, both countries had started their own investigations against the targeted companies. The Paraná Public Prosecutor's Office in Maringá investigated allegations regarding forced labor in Bonechar following complaints from the Non-Governmental Organization Gipfor Instituto.²⁰ The workers were allegedly not able to leave Bonechar's premises. Gipfor had therefore staged a trip to the hospital for the workers to create a safe environment where they could voice their grievances out loud. The founder of Bonechar alleged that a Mexican corporation, its main competitor in the American and European Market, triggered the investigations. The W.R.O. targeting rubber gloves came after investigations by the Malaysia's Labor Department found that WRP had illegally withheld the salaries of its migrant workers from Bangladesh and Nepal, while forcing them to work during breaks and public holidays.²¹

2. LEGAL BASIS

The five W.R.O.s have been issued on the basis of Section 307 of the Tariff Act (1930), which prohibits the importing into the U.S. of any goods, wares, articles and merchandise mined, suspected to be produced or manufactured, wholly or in part by forced labor (and/or indentured labor and/or convict labor) in any foreign country.²² Forced labor is defined in the Act 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". While this definition was modeled after the International Labour Organisation's [hereinafter I.L.O.] Forced Labor Convention (1930), the drafters of Section 307 were primarily economically motivated.²³

²⁰ See Walter Tele, *Supostos Trabalho Escravo e Crime Ambiental em Fábrica de Carvão Ativado em Maringá Geram Inquéritos no Ministério Público. Concorrência Internacional Teria Motivado Denúncias [Alleged Slave Labor and Environmental Crimes in an Activated Coal Plant in Maringá Bring Forth a Public Investigation. International Competition Would Have Made the Accusations]*, Maringá Post, Jun. 11, 2018, <https://maringapost.com.br/negocios/2018/06/11/suposto-trabalho-escravo-e-crime-ambiental-em-fabrica-de-carvao-ativado-em-maringa-geram-inqueritos-no-ministerio-publico-concorrencia-internacional-teria-motivado-denuncias/>.

²¹ See Jason Santos, *Labour Department Monitoring Wage Payments to Workers of Liquidated Glove Maker*, Free Malaysia Today, Jan. 7, 2020, <https://www.freemalaysiatoday.com/category/nation/2020/01/07/labour-dept-monitoring-wage-payments-to-workers-of-liquidated-glove-maker/>.

²² Tariff Act, ch. 497, para. 307, 46 Stat. 590, 689-90 (1930) (codified as amended at 19 U.S.C. §1307 (2000)).

²³ Convention concerning Forced or Compulsory Labour, June 28, 1930, Nr. C029 [hereinafter I.L.O.]; Christopher Casey, Cathleen Cimino-Isaacs & Katarina O'Regan, *Section 307 and Import Produced by Forced Labour*, 1 (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11360>.

Section 307 aimed to protect U.S. producers from competing with foreign producers that have made their merchandise exceedingly low cost due to exploitation.

In February 2016, former President Barack Obama signed an Act that relaxed the rules to impose W.R.O.s. The Trade Facilitation and Trade Enforcement Act (2015) repealed the “consumptive demand” clause in Section 307.²⁴ This clause had often prevented W.R.O.s from being imposed because it allowed imports of certain forced labor-produced goods if the goods were not produced “in such quantities in the U.S. as to meet the consumptive demands of the U.S.”.

C.B.P. regulations determine that any port director or other principal Customs officer shall communicate their belief that merchandise (likely to be) imported in the U.S. falls within the ambit of Section 307 of the Tariff Act to the Commissioner of C.B.P.²⁵ Any other person may also communicate such belief to any port director or Commissioner of C.B.P. The Commissioner of C.B.P. (or their designated representative) will start an investigation “as appears to be warranted by the circumstances of the case”. Any representations offered by foreign interests, importers, domestic producers, or other interested persons are to be considered. If the Commissioner of C.B.P. 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, it will be withheld. These findings are then published in the weekly issue of the Customs Bulletin and in the Federal Register by the Commissioner of C.B.P. (with the approval of the Secretary of the Treasury).

Importers have three months to contest a W.R.O.²⁶ They must submit a certificate of origin and demonstrate that they have made “every reasonable effort” to determine both the source of and the type of labor used in any stage of production of the merchandise and its components. If the importer does not successfully contest the W.R.O. and does not remove the merchandise at issue from the U.S., then the merchandise is subject to exclusion and/or seizure. While C.B.P. publishes information about the date, merchandise type, manufacturer, and status of a W.R.O., it does not generally publish information about specific re-exportations, exclusions, seizures, or further communications with the importer. Immigration and Customs Enforcement can pursue criminal investigations of Section 307 violations.

²⁴ Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-25, 130 Stat. 122 (2015).

²⁵ 19 C.F.R. para.12.42.

²⁶ 19 C.F.R. para.12.43 (a-b).

3. W.T.O.

The U.S., Brazil, Zaïre, Zimbabwe and Malaysia signed the G.A.T.T. in 1994. China followed suit in 2001. This Agreement voided the Protocol of Provisional Application which contained a waiver that allowed domestic legislation—such as the Tariff Act (1930)—to be grandfathered into the 1947 General Agreement on Tariffs and Trade.²⁷ Therefore, W.R.O.s taken under the Tariff Act need to comply with the G.A.T.T. 1994.

This is a considerable challenge. The W.T.O. D.S.M.'s interpretation of the G.A.T.T. substantially limits the W.T.O. Members' discretion to eliminate forced labor. In particular, the W.T.O. D.S.M.'s interpretation of G.A.T.T. Article III:4, one of the foundational principles of the W.T.O., makes it difficult for the U.S. to impose W.R.O.s. This article obliges a W.T.O. Member to treat the goods of other Members the same as its own "like" goods. It prohibits discrimination by a W.T.O. Member between similar domestic and imported products in a way that treats imported products less favorably.

People concerned with forced labor will find that disposable rubber gloves produced by forced labor in Malaysia are not at all "like" disposable rubber gloves made without such labor in the U.S.. Yet, concerns about core labor rights violations are not often reflected in consumption behavior. This is due to various factors that influence people when they buy products including limited time, information, cognitive capacities, money, and options. The inconsistency between what people value or believe and what they actually do has been labeled the "value-action gap" in various disciplines, including sociology, psychology and business studies.²⁸ However, the W.T.O. D.S.M. only employs criteria concerned with competitive relationships in the marketplace to assess "likeness" in G.A.T.T. Article III:4.²⁹ I have argued elsewhere that this interpretation is unfortunate because it reduces people to subjects merely interested in consumption.³⁰ This creates, in turn, a breeding ground for questions about the W.T.O. D.S.M.'s legitimacy.

Despite the above, the five W.R.O.s can be justified under the exceptions regime of the G.A.T.T. First, the two relevant security exceptions contained in Article XXI need to be discussed. G.A.T.T. Article XXI(c) permits measures "to prevent any contracting party from taking any action in pursuance of its obligations under the U.N. Charter for the

²⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM J. OF INT'L L 663, 689 (1997).

²⁸ Daina Mazutis & Anna Eckardt, *Sleepwalking into Catastrophe: Cognitive Biases and Corporate Climate Change Inertia*, 59 CAL. MGMT. REV., n. 3, 2017, at 74, 82-90.

²⁹ Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, 101-03 and 113-17, W.T.O. Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

³⁰ Aleydis Nissen, *Can WTO Member States Rely on Citizen Concerns to Prevent Corporations from Importing Goods Made from Child Labour?*, 14 UTRECHT L. R., n. 3, 2018, at 70, 75.

maintenance of international peace and security”. The W.R.O. on gold mined in artisanal mines in D.R. Congo fits within the scope of the U.N. Security Council Resolution 1857 and later resolutions.³¹ This resolution calls upon all Member States of the U.N. to urge individuals or entities supporting the illegal armed groups in the eastern part of D.R. Congo through illicit trade of natural resources to exercise due diligence. Furthermore, G.A.T.T. Article XXI(b)(ii) contains an exception which allows a W.T.O. Member to take any action which it considers necessary for the protection of its essential security interests “relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”.³² The U.S. has a relatively high degree of latitude to determine whether this provision is applicable.³³ It follows, that the U.S. can conceivably justify both, the W.R.O. on gold mined in artisanal mines in D.R. Congo and the W.R.O. on Marange diamonds from Zimbabwe on the basis of paragraph (b)(ii).

Second, paragraphs (a), (b), (c), (e) and (g) of G.A.T.T. Article XX are relevant. To begin, it is unclear whether all five W.R.O.s can be justified on the basis of paragraph (e) of Article XX, which contains an exception for measures “relating to [. . .] the products of prison labour” abroad. There is an ongoing discussion about whether this paragraph might be used to justify measures against products made under conditions of forced labor.³⁴ Those scholars who advocate for such a broad interpretation of paragraph (e) find that there is no difference between labor in a prison environment and in other environments in which labor is coerced. Those who find such interpretation too extensive usually argue that this is not in line with the text of paragraph (e). A textual interpretation of paragraph (e) would only justify the W.R.O. on products from Hetian Taida Apparel as they can likely be categorized as “products of prison labor”. While the Chinese government maintains that Uyghurs have been placed in “re-education” facilities, it has been noted above that there is increasingly more evidence that these facilities seem to be prison camps.

³¹ S.C. Res. 1857 ¶ 4.g (Dec. 22, 2008); Daniëlla A. Dam-de Jong, *Standard Setting Practices for the Management of Natural Resources in Conflict-Torn States*, in ENVIRONMENTAL PROTECTION AND TRANSITIONS FROM CONFLICT TO PEACE: CLARIFYING NORMS, PRINCIPLES, AND PRACTICES 169, 183-4 (Carsten Stahn, Jens Iverson & Jennifer Easterday eds., 2017).

³² For an analysis of Article XXI(b) see Chao Wang, *Invocation of National Security Exceptions under G.A.T.T. Article XXI: Jurisdiction to Review and Standard of Review*, 18 CHINESE J. INT’L L. 695 (2019).

³³ See Jaemin Lee, *Commercializing National Security? National Security Exceptions’ Outer Parameter Under GATT Article XXI*, 13 ASIAN J. W.T.O. & INT’L HEALTH L. & POL’Y 277, 293-94 (2018).

³⁴ E.g. Federico Lenzerini, *International Trade and Child Labour Standards*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 287, 301-02 (Francesco Francioni ed., 2001). Nicola Wenzel, *Article XX Lit. e G.A.T.T., in WTO - Technical Barriers and SPS Measures* 537, 537-40 (Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr eds., 2007).

The Appellate Body held that the words “relating to” implicate that there should be “a close and genuine relationship of ends and means”.³⁵ The inquiry of whether such a relationship exists should be based on consideration of the measure’s predictable effects – inherent in, and discernible from, the design and structure of the measure – and not its empirical or actual effects.³⁶

Article XX(c) contains an exception for restrictive measures “relating to” the imports (or exports) of gold and silver. Like paragraph (e), paragraph (c) has an explicit extraterritorial dimension. It will likely be easier to justify the W.R.O. on gold mined in artisanal mines in D.R. Congo on the basis of this paragraph, than on paragraph (g) of Article XX – which contains an exception for measures “relating to the conservation of exhaustible natural resources” – but does not explicitly refer to extraterritorial applications.³⁷ There has been a long-standing discussion whether paragraph (g) allows such applications. In the *Shrimp* case – which considered U.S. restrictive measures to conserve the endangered species of turtles – the Appellate Body explicitly did “not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation”.³⁸ Rather, the Appellate Body held that turtles were an essentially migratory species, and therefore sufficiently within U.S. territory to provide a “jurisdictional nexus” between the turtles and the U.S. Various scholars have interpreted this decision as permitting extraterritorial production measures for environmental policy objectives, a truly global concern under paragraph (g).³⁹ However, extraterritorial measures that protect from forced labor in exporting states would be more controversial. While all Member states of the I.L.O. are obliged to respect, promote and realize in good faith the elimination of all forms of forced or compulsory labor, China and Zimbabwe have, for example, opposed the W.R.O.s.⁴⁰

³⁵ Appellate Body Reports, *China - Measures Related to the Exportation of Various Raw Materials*, ¶ 355, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012) referring to Appellate Body Report, *U.S. - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 136, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

³⁶ Appellate Body Reports, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶ 5.113, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 29, 2014).

³⁷ PETER VAN DEN BOSSCHE ET AL., *UNILATERAL MEASURES ADDRESSING NON-TRADE CONCERNS: A STUDY ON WTO CONSISTENCY, RELEVANCE OF OTHER INTERNATIONAL AGREEMENTS, ECONOMIC EFFECTIVENESS AND IMPACT ON DEVELOPING COUNTRIES OF MEASURES CONCERNING NON-PRODUCT-RELATED PROCESSES AND PRODUCTION METHODS* 94-96 (2007).

³⁸ *Shrimp*, *supra* note 35, at 133; see CEDRIC RYNGAERT, *SELFLESS INTERVENTION: THE EXERCISE OF JURISDICTION IN THE COMMON INTEREST* 169 (2020).

³⁹ See e.g. Carola Glinski, *CSR and the Law of the WTO – The Impact of Tuna Dolphin II and EC-Seal Products* 2017 *Nordic J. Com. L.* 121, 130.

⁴⁰ I.L.O., *Declaration on Fundamental Principles and Rights at Work*, adopted at its Eighty-sixth Session (Jun. 18, 1998); I.L.O., *Declaration on Social Justice for a Fair Globalization*, adopted at its Ninety-seventh Session, (Jun. 10, 2008).

It would be another option to try and justify all five W.R.O.s on the basis of paragraphs (a) and (b) of G.A.T.T. Article XX. Like paragraph (g), these paragraphs do not have an explicit extraterritorial dimension. This means that it is not clear whether they might be used to justify measures necessary to protect “public morals” (paragraph (a)) or the “human, animal or plant life or health” (paragraph (b)) abroad. It is, however, possible to argue that the W.R.O.s protect the “public morals” of people in the U.S.. In 2014, the European Union (E.U.) successfully relied upon paragraph (a) to argue that import bans of seal products are necessary measures to protect the public morals of E.U. citizens in the *Seal* case against Norway and Canada.⁴¹ The E.U. argued that E.U. citizens were concerned about the welfare of seals anywhere in the world, and about exposure to economic activity that sustains the market for seal products obtained from animals killed and skinned in a way that causes pain and other forms of suffering. This seems to indicate that if public morals concerns exist in the U.S. about being exposed to the economic activity that sustains the market for products from forced labor, then import prohibitions might be necessary to protect the public morals of the U.S. population. Note that the test in paragraphs (a) and (b) is stricter than the test in paragraphs (c), (e) and (g). It is not sufficient that measures taken under paragraphs (a) and (b) “relate to” the protection of “public morals” of U.S. citizens. They need to be “necessary” for the protection of these objectives. This means that the employed measures were the least trade-restrictive measures that could have been reasonably employed to achieve the desired objective.⁴² The W.T.O. D.S.M. uses a holistic “weighing and balancing” test to assess this condition. Some of the factors that the W.T.O. D.S.M. applies to use this test are the importance of the interests or values protected by the measure at issue and the accompanying impact of this measure.

If an import ban on products that were produced by violating labor standards would survive an exception formulated in G.A.T.T. Article XX, then it must also pass the chapeau test of this article. According to this test, measures that constitute an arbitrary or unjustifiable discrimination between W.T.O. Members where the same conditions prevail and disguised restrictions on international trade are forbidden. The W.T.O. D.S.M.’s approach to the chapeau test has been unpredictable, but various scholars have tried to make sense of it.⁴³ It is not necessary to repeat all their arguments here in detail, but it is useful to note that the 2016 elimination of the consumptive demand exception

⁴¹ Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (2014).

⁴² Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* 50 (2001).

⁴³ E.g. Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 AM. J. INT’L L. 95 (2015). Fengping Gao, *Trade and Environment Standard Rendering China-Rare Earths GATT Article XX Exemptions Impossible, Other International Laws Incompatible*, 45 DENV. J. INT’L L. & POLY 97 (2016).

seems to negate possible claims that the purpose of Section 307 of the Tariff Act is really to protect American consumers and industries.⁴⁴

While it seems to be possible to justify the said violation of G.A.T.T. Article III:4 under the exceptions regime of G.A.T.T. Articles XX and XXI, various scholars have long questioned why forced labor, one of the I.L.O. core labor standards, needs to be framed as an “exception” to a free trade regime. Notably, James Thuo Gathii argued that we need to think about core labor rights “beyond” this regime “which creates unacceptable levels of inequality”.⁴⁵ The Trump Administration’s approach towards trade has been controversial. Notoriously, the U.S. and China have imposed unilateral measures on each other, while alienating other W.T.O. Members to work together on an improved multilateral trade regime. Amongst others, the U.S. has been accused of abusing the exceptions regime in G.A.T.T. Article XXI, while China rigs the system by exploiting its slow and non-retroactive sanction regime.⁴⁶ Yet, at the same time the Trump Administration’s blunt and protectionist approach towards trade has created an opening to think out of “the comfort zone of the given economical order”.⁴⁷

4. RELAXING AND STRENGTHENING OF THE W.R.O.S

4.1. RELAXING

Three W.R.O.s have been relaxed at the time of writing. First, the C.B.P. revoked the W.R.O. on WRP, saying that this corporation is no longer producing rubber gloves under forced labor conditions in March 2020.⁴⁸ Various things have changed for WRP workers in Malaysia. For example, a private equity fund injected MYR 325 million (USD 750,144 at USD 1: MYR 433) to enable the interim liquidators to pay salaries to workers and executives during the temporary suspension of W.R.P.’s business operations.⁴⁹ The C.B.P. communicated that it “worked together” with and “provided feedback” to W.R.P. “in

⁴⁴ See Matthew T. Mitro, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. UNIV. L. R. 1223, 1272-73 (2002).

⁴⁵ James Thuo Gathii, *International Justice and the Trading Regime*, 19 EMORY INT’L L. REV. 1407, 1421-23 (2005).

⁴⁶ See Lee, *supra* note 33, Mark Wu, *China’s Export Restrictions and the Limits of WTO Law*, 16 WORLD TRADE REV. 673 (2017).

⁴⁷ See Stijn Smismans, *Risk Regulation at Risk. Brexit, Trump It, Risk It*, 8 EUR. J. RISK REGUL. 33, 41 (2017).

⁴⁸ See Press Release, C.B.P., C.B.P. Revokes Withhold Release Order on Disposable Rubber Gloves (Mar. 24, 2020), <https://www.C.B.P.gov/newsroom/national-media-release/C.B.P.-revokes-withhold-release-order-disposable-rubber-gloves>.

⁴⁹ See Chester Tay, *Glove Maker WRP Asia Pacific Sues ex-CEO over Alleged CBT*, The Edge Markets, Jun. 23, 2020, <https://www.theedgemarkets.com/article/glove-maker-wrp-asia-pacific-sues-exceo-over-alleged-cbt>.

order to adjust its manufacturing and labor practices and ensure that its supplies are compliant with U.S. and international labor standards”, including the I.L.O.’s labor standards.⁵⁰ This is the right approach. Import restrictions alone are insufficient and ineffective to eliminate forced labor in third countries. They need to be backed up by collaborative cross-border efforts to change the situation for slaves on the ground.

While the C.B.P. did not mention the coronavirus disease 2019 pandemic, it is highly likely that the sudden escalating demand and depleting supplies of gloves for health and other essential workers in the U.S. has been a factor in its decision. While the U.S. and various other countries have taken extensive emergency measures during this pandemic,⁵¹ this revocation seems to be reasonable for two reasons. First, import restrictions may only be sustained as long as more cooperative measures are not feasible because they can have various undesirable consequences. For example, migrants who are no longer allowed to work at W.R.P. might move to other dangerous sectors that are not involved in exports, such as the construction industry. Labor activist Andy Hall suggested that money raised from the sale of W.R.P. gloves needs to be used to remediate the past recruitment fees and related costs that its migrant workers allegedly had to pay.⁵² Second, rubber gloves are essential protective equipment for health and essential workers in the U.S. that have been risking their lives to save lives. After the outbreak of the pandemic, the W.H.O.’s Director Tedros Adhanom Ghebreyesus called for a lift of export bans or limits on the free flow of necessary medical supplies and personal protective equipment.⁵³ It can, nevertheless, be considered unfortunate that the C.B.P. has not referred explicitly to the need to protect WRP workers during the current pandemic. Amongst other things, they should get protective equipment, a hardship allowance, and labor inspections.

⁵⁰ C.B.P., *supra* note 48, 50; C.B.P. (@C.B.P.TradeGov), Twitter (Mar. 24, 2020, 12:50 PM), <https://twitter.com/C.B.P.TradeGov/status/1242554291635847178>.

⁵¹ See Liora Lazarus et al., *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-10 Pandemic Across 11 Jurisdictions*, 3 (2020), https://www.law.ox.ac.uk/sites/files/oxlaw/v3_bonavero_reports_series_human_rights_and_covid_19_20203.pdf.

⁵² See Khalid Azizuddin, *Human Rights Concerns Arise as EU Asks Malaysian Glovemakers to Ramp Up Production*, Responsible Investor, Apr. 8, 2020, <https://www.responsible-investor.com/articles/human-rights-concerns-arise-as-eu-asks-malaysian-glovmakers-to-ramp-up-production?fbclid=IwAR2DJHaCr0PiGPX-DPWknSCsJDqbwhehKUfxCcfLiMAeuxPUcQZr4O1oib0>.

⁵³ See B20 Saudi Arabia Chair Yousef Al-Benyani, WHO Director General Tedros Adhanom Ghebreyesus and ICC Secretary General John W.H. Denton AO, Open letter dated Mar. 23, 2020 addressed to G20 Heads of State and Government, <https://iccwbo.org/content/uploads/sites/3/2020/03/open-letter-to-g20-leaders-on-response-to-covid-19.pdf>.

Second, the importer Chambers Federations successfully contested the W.R.O. for D.R. Congo in May 2020.⁵⁴ This importer is now allowed to import gold from D.R. Congo into the U.S. This partial revocation is an interesting approach that seems to remedy an issue that has often been raised regarding Section 1502 of the U.S. Dodd-Frank Act. This section would create an incentive for corporations to pull out of D.R. Congo altogether, depriving those who work in artisanal mines of their livelihoods.⁵⁵ The C.B.P. did not give much explanation as to how it conducted its “rigorous evaluation” of the Chambers Federations’ due diligence program in D.R. Congo and whether it worked together with this importer.⁵⁶ But the C.B.P.’s Brenda Smith warned that the C.B.P. “will continue to vigilantly monitor U.S.-bound supply chains for products made with forced labor” when the partial revocation was announced.⁵⁷ In the past, we have learned that the credibility of the voluntary Kimberley Process Certification Scheme diminished because it certified Marange diamonds.⁵⁸ While this scheme - the first that received a W.T.O. waiver for human rights reasons - aimed at stopping the trade of blood diamonds, it has been accused of becoming a “diamond laundering” marketing tool for diamond traders.

Finally, the C.B.P. lifted Bonechar’s W.R.O. in December 2020. The C.B.P. explained that Bonechar submitted a report which sufficiently supports that workers are free to leave the premises of Bonechar and an affiliated company if they wish, and are not subjected to any form of punishment since at least August 2020.⁵⁹ This report addressed the I.L.O. indicators of forced labor and incorporated data from worker interviews, a site visit and document reviews. Smith said that this demonstrates that “companies are taking the consequences of C.B.P.’s forced labor enforcement seriously”.⁶⁰

⁵⁴ See Press Release, C.B.P., C.B.P. Modifies Withhold Release Order Gold Imports Democratic Republic of the Congo (May 28, 2020), <https://www.C.B.P.gov/newsroom/national-media-release/C.B.P.-modifies-withhold-release-order-gold-imports-democratic-republic>.

⁵⁵ See Donald Trump, U.S. President, Presidential Memorandum: Suspension of the Conflict Minerals Rule (Feb., 2017) (unenacted), <https://www.documentcloud.org/documents/3457048-Documents-Final.html#document/p1>.

⁵⁶ C.B.P., *supra* note 48, 56.

⁵⁷ *Id.*

⁵⁸ See also Paidamoyo Bryne Saurombe, Legal Perspective on the Regulation of Trade in (Conflict) Diamonds in Zimbabwe by Means of the Kimberley Process Regulation Scheme, 35 (2014), <https://repository.nwu.ac.za/handle/10394/15536>.

⁵⁹ See Press Release, CBP, CBP Modifies Withhold Release Order on Imports of Bone Black from Bonechar Carvao Ativado Do Brasil Ltda (Dec. 7, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-withhold-release-order-imports-bone-black-bonechar-carv>.

⁶⁰ *Ibid.*

4.2. STRENGTHENING

The U.S. has further strengthened the import restrictions imposed on China. In May 2020, the C.B.P. issued a new W.R.O. on hair products from Hetian Haolin Hair Accessories Co. Ltd., based in the Xinjiang Uyghur Autonomous Region, for allegations of forced labor.⁶¹ In addition, the U.S. adopted the Uyghur Forced Labor Prevention Act in September 2020.⁶² This act presumptively prohibits U.S. imports of all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region or by entities working with the Chinese government of the Xinjiang Uyghur Autonomous Region under poverty alleviation or mutual pairing assistance programs. This broad scope is likely inspired by a report from the Australian Strategic Policy Institute that alleges that Uyghurs are trafficked to re-education camps outside Xinjiang Uyghur Autonomous Region.⁶³ The presumption can be rebutted if clear and convincing evidence shows that targeted goods do not involve forced labor. The U.S. has previously created a similar legal rebuttable presumption for goods made by North Koreans (all over the world) in the Countering America's Adversaries through Sanctions Act (2017).⁶⁴

While former President Trump has never publicly spoken about the Uyghur sanctions, his former National Security Advisor John Bolton wrote in his memoir that Trump did not favour such sanctions.⁶⁵ They impeded the bilateral trade negotiations between the U.S. and China. Bolton alleges that Trump even approved President Xi Jinping's policy on Uyghurs during the 2019 G20 meeting in Osaka. He writes, "Trump said that Xi should go ahead with building the camps, which Trump thought was exactly the right thing to do".⁶⁶ Behind Trump, however, there were officials, as noted in Section 1, who were genuinely concerned about the alleged mass detainment of Uyghurs.⁶⁷ These officials, politically supported by evangelicals at home, have shown a lot of interest in the freedom of religion. Their approach has not always been

⁶¹ See Press Release, C.B.P., C.B.P. Issues Detention Order on Hair Products Manufactured with Forced Labor in China (May 1, 2020), <https://www.C.B.P.gov/newsroom/national-media-release/C.B.P.-issues-detention-order-hair-products-manufactured-forced-labor>.

⁶² Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. (2020).

⁶³ See Vicky Xiuzhong Xu et al., *Uyghurs for Sale*, ASPI, 3 (2020), <https://www.aspi.org.au/report/uyghurs-sale>.

⁶⁴ See, e.g. Countering America's Adversaries through Sanctions Act, Pub. L. No.115-4, 131 Stat. 886 (2017).

⁶⁵ See generally JOHN BOLTON, *Thunder Out of China*, in *THE ROOM WHERE IT HAPPENED: A WHITE HOUSE MEMOIR* (2020).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*; See also, Fumiaki Kubo, *Reading the Trump Administration's China Policy*, *ASIA-PACIFIC REV.*, Dec. 2019, at 58, 66.

straight-forward.⁶⁸ Yet, it appears that the sheer scale of the alleged repression of Uyghurs made this a “no-brainer” for them.

It is estimated that there are more than one million Uyghurs detained in Xinjiang Uyghur Autonomous Region, a region that supplies twenty percent of the world’s cotton to companies such as the Coca-Cola Company and Tommy Hilfiger.⁶⁹ It is better to turn the question around. Why have other Member States of the I.L.O. – including various Member States of the Organisation of Islamic Cooperation [hereinafter O.I.C.] – not yet voiced any concerns about the situation of Uyghurs?⁷⁰ U.S.-based Muslim groups accused the O.I.C. of paying lip-service to China to prioritise perceived economic interests.⁷¹

The sanctions are relatively consistent with the Trump Administration’s dislike for regulatory regimes beyond the U.S. Trump deserves credit for increasing awareness about China’s mercantilist policies, albeit in a self-righteous and perfunctory way.⁷² While Trump tried to make controversial business deals with Xi,⁷³ he also used the word “China” as a trigger to rally supporters for his populist “America first” agenda. He accused China of “taking advantage”, “stealing”, and “raping” the U.S. economy.⁷⁴ Trump seemed to understand that China’s perceived free-rider attitudes in the world economy are a sensitive issue for those negatively affected by globalization in the U.S..⁷⁵ Not unlike his predecessors, Trump did, however, not seem to have a long-term China strategy.

⁶⁸ See Peter Henne, *Pompeo Investigation Could Undo Religious Freedom Movement’s ‘Success’*, RELIGION NEWS SERV. (May 20, 2020) <https://religionnews.com/2020/05/20/pompeo-investigation-could-undo-religious-freedom-movements-success/>.

⁶⁹ See Uyghur Forced Labor Prevention Act, S. 3471, 116th Cong. 2(1) & (7) (2020); See also Amy Lehr, *Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region: Towards a Shared Agenda*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (July 30, 2020), <https://www.csis.org/analysis/addressing-forced-labor-xinjiang-uyghur-autonomous-region-toward-shared-agenda>.

⁷⁰ E.g. Barbara Kelemen & Richard Turcsányi, *It’s the Politics, Stupid: China’s Relations with Muslim Countries on the Background of Xinjiang Crackdown*, 21 ASIAN ETHNICITY 223 (2020).

⁷¹ X., *US Muslim Groups Accuse OIC of Abetting China’s Uighur “Genocide”*, Al Jazeera (Dec 18, 2020) <https://www.aljazeera.com/news/2020/12/18/us-muslims-press-organization-of-islamic-cooperation-on-china>.

⁷² See, e.g. Thea Lee, *U.S.-China Trade and Competition 3*, Docs House, (2020), <https://tinyurl.com/29aartfs>.

⁷³ Bolton, *supra* note 65.

⁷⁴ See, e.g. Nick Glass, *Trump: ‘We can’t continue to allow China to rape our country’*, Politico (Feb. 5 ,2016), <https://tinyurl.com/y2cr89sb>; E.g. Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 10:59 AM), <https://twitter.com/realDonaldTrump/status/1164914959131848705>; E.g. Donald Trump (@realDonaldTrump), Twitter (Aug. 23, 2019, 5:00 PM), <https://twitter.com/realDonaldTrump/status/1165005927864512512>.

⁷⁵ See generally, LUDGER KÜHNHARDT, *THE GLOBAL SOCIETY AND ITS ENEMIES: LIBERAL ORDER BEYOND THE THIRD WORLD WAR* 200 (2017).

CONCLUSION

This article discussed five recent Withhold Release Orders on products from forced labor that have been issued by U.S. Customs and Border Protection under the relaxed Tariff Act (1930) from the perspective of international law and politics. While the W.R.O.s seem to be justified under the exceptions regime set out in the G.A.T.T., we need to think about slavery “beyond” this exceptions regime. It is unfortunate that President Trump alienated other W.T.O. Members from working together on an improved international trade regime, but there is hope in that the C.B.P. seems to value the concept of international cooperation, which plays a key role in imposing or sustaining import restrictions. The Trump Administration’s approach towards trade has been highly controversial, but this article has demonstrated that it might potentially create an opening to rethink the international trade regime. The new US President Joe Biden - who took office in January 2021 - seems to acknowledge this. He immediately asked a task force to review key U.S. supply chains, including semiconductors, medical supplies and rare earth materials.⁷⁶ While this assessment aims to support national security and emergency preparedness, it might have far-reaching consequences for the elimination of forced labor in supply chains.

⁷⁶ The White House, FACT SHEET: Securing America’s Critical Supply Chains (Feb. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/fact-sheet-securing-americas-critical-supply-chains/>.