

Withhold Release Orders, in Three Acts: Herald A New Enforcement Era

Meg Roggensack, Consultant to The Human Trafficking Legal Center

Anasuya Syam, Human Rights and Trade Advisor, The Human Trafficking Legal Center

The Tariff Act of 1930 included a little-known and rarely used weapon to combat importation of goods made with forced labor, Section 307. But the act included an exception – the “consumptive demand” exception – that eclipsed the rule. Advocates fought for decades to repeal the exception to Section 307 of the Tariff Act. In 2015, they succeeded. Since then, Customs and Border Protection (CBP), the agency tasked with enforcing the law, has issued 13 Withhold Release Orders halting imports of goods into the U.S. market. A dedicated Forced Labor Division was established within CBP’s Office of Trade to oversee implementation of Section 307. Since the amendment, these orders, or WROs, have targeted seven countries, covering more than 16 different products. This prohibition under the Tariff Act, a promising tool to combat forced labor, poses both new possibilities and challenges.

Act One: From dreaded loophole to shiny new tool

Before the repeal of the consumptive demand exception, it was unusual for CBP to issue a withhold release order, let alone several, in the span of a year. Following repeal, CBP did just that.

Shortly after President Obama signed the Trade Facilitation and Trade Enforcement Act into law in February 2016, CBP made news with WROs on potassium and soda ash from China. Two additional orders followed that year, also involving products from China - stevia (March), and garlic (September). After a pause of nearly two years, in March 2018, CBP issued a fifth WRO, again targeting China, this one focused on toys. This first cluster of WROs was most likely self-initiated by CBP. Though conditions in China made conventional investigations impossible, significant press and NGO reporting had revealed appalling prison labor conditions. In addition, these WROs reflected ongoing engagement on this issue by the Congressional Executive Commission on China and the US-China Economic and Security Review Commission.

In a departure from its exclusive focus on China, CBP issued another WRO in May 2018, this time blocking importation of all cotton from Turkmenistan. CBP had earlier declined to act on a Turkmen cotton [petition](#) submitted by the International Labor Rights Forum in 2016. The decision to bar Turkmen cotton coincided with widespread use of forced child labor in the 2017-2018 harvest cycle. Those violations led to a downgrade in ranking for Turkmenistan in the U.S. State Department’s 2017 annual Trafficking in Persons (TIP) Report. That report, used by the U.S. Government to exert pressure on foreign governments to step up their anti-trafficking efforts, indicated that Turkmenistan was in the cross-hairs.

What came next surprised advocates: 2019 marked a watershed in the U.S. government’s use of Section 307 to combat forced labor. CBP issued a slew of orders, beginning with a WRO against a shipping vessel, Tunago no. 61, in February 2019. In all, CBP issued seven WROs in 2019, with five orders on a single day in September, involving five countries: China (garments); Malaysia (gloves); Democratic Republic of Congo (gold); Zimbabwe (diamonds); and Brazil (bone black). The seventh and final WRO, against tobacco from Malawi, was issued in November, 2019. These

WROs shared several key markers: multiple forced labor indicators, solid documentation from multiple nongovernmental and governmental sources, and a history of ongoing engagement by stakeholders.

Act Two: Factory, Mine or Farm or... Vessel?

Section 307 of the Tariff Act has always applied to all kinds of products. The law does not differentiate based on production methods. But the WROs issued to date indicate possible distinctions based on production methods.

Of the orders from 2018 and 2019, two of the three commodity-oriented orders – on tobacco from Malawi and cotton from Turkmenistan – are country-wide. A third order, on bone black (activated charcoal from charred cattle bones) from Brazil is company specific. The supply chains for all three commodities covered by these WROs are easily traceable. In all of these cases, extensive NGO engagement and international pressure preceded the WRO, including the Cotton Campaign’s advocacy on Turkmenistan, the International Labor Organization and U.S. Department of Labor Bureau of International Labor Affairs’ engagement in Malawi, and local NGO reports and law enforcement investigations in the bone black factories in Brazil. The cattle industry in Brazil has also been in the news for its terrible labor conditions. In 2017, the Inter-American Court of Human Rights rendered its seminal [Laborers of Hacienda Verde](#) decision, ordering Brazil to pay over five million dollars to formerly enslaved cattle ranch workers.

The orders that cover mining of gold and diamonds are somewhat narrower. One WRO covers all artisanal gold mines in the Democratic Republic of Congo (DRC). The other mining WRO covers only one site, the Marange diamond field, in Zimbabwe. CBP specifically noted the role of armed groups in managing production at these mines. In both cases, the WROs supported broader U.S. “get tough” policy initiatives to address continuing armed conflict.

In contrast, the WROs on gloves from Malaysia and garments from China are factory-specific. Prior to issuance of the WRO, both the Malaysian and Chinese factories were the target of extensive public pressure, with investigative reporting, NGO reporting, and Malaysian government investigations. In Malaysia, Andy Hall, a leading migrant worker rights advocate, has long [documented](#) the exploitative practices in the rubber glove industry. In January 2019, the Malaysian Department of Labor [found evidence](#) of exploitative labor conditions, including non-payment of wages, delay in overtime payment, and illegitimate wage deductions in the factories cited in the WRO. In the Chinese case, evidence of forced labor against the Chinese garment producer was also corroborated by significant international press coverage and [leakage of official state documents](#). Those documents, which detailed the operation of detention facilities against minority ethnic groups in Xinjiang, gave CBP additional ammunition. Direct links to U.S. importers bolstered the case.

Of all 13 WROs issued since the amendments to the Tariff Act entered into force, there is one outlier. The February 2019 order against a shipping vessel, Tunago No. 61, was unusual in two respects. First, CBP extended its authority to a vessel in international waters. And second, the order encompassed anything caught on that vessel, whether shipped from that vessel or not. The particular vessel has been under international scrutiny since [2006](#), with the publication of reports

by the [International Transport Workers Federation](#), the [Environmental Justice Foundation](#) and Greenpeace. The vessel-specific order, while unusual, was not a surprise.

The patterns of Withhold Release Orders highlight several other common denominators. Forced labor that is either state-sanctioned or tacitly supported by the government is an easy mark for CBP. Evidence of forced labor in such cases is relatively straightforward to identify, making this “low-hanging fruit,” ripe for enforcement under Section 307.

Nevertheless, each of the WROs raises difficult questions. In the case of Malaysia, worker advocates sounded the alarm about the abrupt loss of employment and social protections for workers. Advocates called for remedies for workers, including replacement wages and emergency financial assistance. In other instances, labor rights advocates have voiced fear of retaliation by business interests and governments to punish reporting. In China, state-sponsored prison or forced labor make firsthand testimony impossible. These issues can be handled, but advocates must address these challenges head-on.

Act Three: Is Past Prologue?

Does this history foreshadow trends for 2020? The current public health crisis has upended global trade, [threatening workers worldwide](#). Labor advocates face uncharted territory due to the COVID-19 pandemic. Indeed, on March 24, CBP [revoked the WRO](#) on rubber gloves from Malaysia, a reflection of the dire need for medical supplies in the United States, with or without forced labor. CBP cited evidence that forced labor had been eradicated from the factory. Andy Hall, the advocate whose work had provided evidence of the abuse, agreed that conditions had improved. But he expressed skepticism that forced labor has been eradicated in the glove factories. Hall supported lifting the sanctions, citing the factory’s pledge to use glove sales revenues to remedy past abuse.

Advocates and their allies on the Hill continue to advocate for robust Tariff Act enforcement. As of this writing, [Congress](#) is considering legislation to establish a rebuttable presumption that products from Xinjiang, China are produced with forced labor, and therefore subject to WROs. Congress is also awaiting scheduled annual reports from CBP on its use of Section 307, and considering whether additional legislation is necessary to make the current process more transparent and responsive.

Several organizations, such as the International Labor Rights Forum (ILRF) and the Solidarity Center, have worked on the Tariff Act for years. Nongovernmental organizations, awakened to the Tariff Act’s potential, are working closely with partners in the field to identify forced labor petition opportunities. The Freedom Fund has made small grants available to encourage filing of petitions to CBP.

Advocates are adopting increasingly creative approaches to Section 307 petitions to hold corporations accountable for forced labor. On Valentine’s Day, the Corporate Accountability Lab and International Rights Advocates [submitted a petition](#) to CBP under Section 307 requesting an import ban for cocoa from Cote d’Ivoire “manufactured in any part with” forced child

labor. Charity Ryerson, executive director of the Corporate Accountability Lab, told the [Washington Post](#), “We needed to push back on the companies’ claims that they were taking meaningful steps against child labor. Our investigation showed that their efforts have been woefully inadequate.”

Section 307 of the Tariff Act has the potential to deter forced labor and advance corporate accountability. There are already signs of a ripple effect in other countries - for example, after the WRO against the Malaysian rubber glove manufacturer was issued, [groups in Australia](#) pressured their government to block Australian companies from importing gloves from the Malaysian manufacturer. Similarly, advocates have initiated a [push in Canada](#) for the government to include more stringent provisions in its [Modern Slavery legislation](#) beyond corporate reporting on forced labor and soft import controls.

Section 307 has tremendous promise to serve as a sanction against the use of forced labor. The Tariff Act’s new relevance is a reminder of trade remedies’ potential to compel respect for worker rights in global supply chains.

One thing is certain: the coronavirus-induced economic collapse will harm workers. It already has. Forced labor may increase in medical equipment supply chains, as factories demand overtime to meet urgent demand. At the same time, governments’ appetite for enforcement may shrink. But, as the Malaysia rubber gloves case shows, advocates can seize this opportunity to demand additional protections for workers. Supply chains are under greater scrutiny than ever before. Now is the time to end forced labor. Now is the time to demand greater rights for workers.