

Inquiry into the Customs Amendment (Banning Goods Produced with Uyghur Forced Labour) Bill 2020

Response of the Human Rights Law Centre to Questions on Notice

6 May 2021

- 1. CHAIR (page 19): On notice, could I ask the witnesses to assist the committee by answering Senator Fierravanti-Wells's question which was asked before: how important is it for Muslim nations to show greater solidarity with the Uighurs? What more would you like to see happening?**

The Human Rights Law Centre believes it is important for all nations to act on credible reports of widespread and systemic atrocities in Xinjiang.

We would like to see the United Nations Human Rights Council create a commission of inquiry with authority to investigate the allegations of crimes against humanity and other human rights abuses. In this regard, we welcome the Australian Government's recent calls on China to grant meaningful and unfettered access to Xinjiang for United Nations experts, and other independent observers, as a step towards enabling the international community to take appropriate action.

As set out in our written submission, we also urge the Australian Government to join the United States and Canada in passing a non-discriminatory ban on imports made with forced labour. Australia should lead by example in our region by demonstrating how modern slavery can be tackled on a principled basis.

2. **Senator PATRICK (page 20): In respect of jurisprudence—and I don't know this area very well but I presume you do—are there any instances where this sort of targeted approach has been utilised in the WTO in proceedings against other countries, or is there not a mitigating factor involved here whereby there is a genocide taking place?**

As noted in our written submission, the WTO rules¹ and Australia's trade agreements with China² set out various obligations that restrict Australia's ability to impose a blanket ban on imports from Xinjiang, including obligations of non-discrimination, national treatment, most-favoured nation treatment and fair and equitable treatment.

Upon review, we have not been able to identify any WTO cases in which genocide, crimes against humanity or forced labour have been recognised as a specific mitigating factors in the imposition of trade restrictions.

Some experts in this field have argued that in the case of very serious human rights violations such as genocide, which rise to the level of peremptory norms (*jus cogens*), dispute settlement bodies might hold that such obligations take precedence over WTO obligations,³ but this has not been tested in practice.

The WTO rules also set out circumstances under which there are exceptions to prohibited restrictions on trade.⁴

Article XX of the GATT relevantly states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ...
- (e) relating to the products of prison labour...

¹ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('GATT 1994').

² *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, Australia–China, signed 17 June 2015 [2015] ATS 15 (entered into force 20 December 2015); *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, Australia–China, signed 11 July 1988 [1988] No. 14 (entered into force 11 July 1988).

³ Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press, 2011), 55: <https://fdslive.oup.com/www.oup.com/academic/pdf/openaccess/9780199565894.pdf>.

⁴ GATT 1994, art XX.

No WTO case to date has directly considered whether ‘outwardly’ focused human rights measures by a State (ie, those designed to protect the human rights of people outside the State’s jurisdiction or territory, rather than its own citizens) can fall within Article XX.⁵ Nevertheless, it is arguable that serious allegations of genocide or forced labour could justify import restrictions under one or more of the above-listed exceptions.

Even assuming an imports ban does fall within one of these exceptional categories, however, the legislation must still also be found to be ‘necessary’ (in the context of Articles XX(a) and (b)) as well as non-discriminatory in its application. There is, in our view, a real risk that the Bill as currently drafted would not meet these additional requirements.

In considering whether a particular measure is ‘necessary’, the WTO will have regard to whether there are less restrictive alternatives to the Bill available.⁶ At present, the Bill imposes a blanket ban on importing goods from Xinjiang. It does not distinguish between companies that use forced labour and those that do not. There is also no ability for companies to challenge the ban – for example, by proving that a particular import was not produced through forced labour.

Even if the ‘necessity’ test is met, the Bill also risks being found by the WTO to constitute ‘arbitrary or unjustifiable discrimination’.⁷ On its face, the Bill singles out Xinjiang and China, despite the occurrence of forced labour elsewhere.

These issues reflect the difficulty of establishing the Article XX defence. We are aware of only two cases which have successfully defended measures on the basis of the Article XX exceptions:⁸

- *US – Shrimp case* – the US prohibited the importation of shrimp products from all countries that did not use particular types of fishing nets. The WTO initially ruled that although the ban was covered by Article XX(g),⁹ it was arbitrarily and unjustifiably discriminatory because of its rigidity, lack of transparency and coercive effect on the policy decisions of foreign

⁵ Rachel Harris and Gillian Moon, ‘GATT Article XX and Human Rights: What Do We Know from the First 20 Years?’ (2015) 16(2) *Melbourne Journal of International Law* 1, 23 <https://law.unimelb.edu.au/data/assets/pdf_file/0007/1687786/Harris-and-Moon.pdf>.

⁶ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm>.

⁷ GATT 1994, art XX.

⁸ Public Citizen, ‘Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception’ (Media Release, 19 August 2015) 1–2 <<https://www.citizen.org/article/only-one-of-44-attempts-to-use-the-wtos-general-exception-to-only-one-of-44-attempts-to-use-the-gatt-article-xx-gats-article-xiv-general-exception-has-ever/>>.

⁹ Article XX(g) exempts measures ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’.

countries.¹⁰ Following the decision, the US reduced the regulatory burden placed on other nations. The WTO subsequently ruled the measure was no longer discriminatory and upheld Article XX(g).¹¹

- *EC – Asbestos case* – France placed a ban on imported asbestos, which indirectly favoured domestically-produced alternatives. The WTO held the ban protected the life and health of French citizens (Article XX(b)) in a manner that was not arbitrarily or unjustifiably discriminatory.¹²

Any challenge to the legislation by China, irrespective of the outcome, would likely be protracted and costly. We recommend that the Committee consider the implications of the Bill in the context of Australia’s international trade obligations, and refer to Section 5 of our written submission for an alternative non-discriminatory legislative model for restricting imports of goods produced with forced labour, which would still enable targeted action by the Australian Border Force to investigate and ban imports from Xinjiang or elsewhere in China thought to be produced with forced labour.

3. Given that the United States already has the ability to issue withhold release orders (WROs) relating to forced labour in Xinjiang, and has done so, why is it pursuing standalone legislation on this matter and why is it your position a WRO-style ability would be sufficient in Australia?

The *Uyghur Forced Labor Prevention Bill* which has been proposed in the United States builds on the existing US *Tariff Act*. It proposes, among other things, the creation of a rebuttable presumption that all goods produced in Xinjiang, and goods produced by persons working for the Xinjiang Uyghur Autonomous Region Government for the purpose of certain subsidy schemes, are deemed to be produced with forced labour for the purposes of section 307 of the *Tariff Act*.¹³

In other words, the proposed US legislation would act similarly to a WRO but focuses on all products from the region as a whole, rather than issuing multiple bans on a product by product or company basis (as has generally been the practice to date of US Customs and Border Protection).

¹⁰ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Docs WT/DS58/AB/R (12 October 1998) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>.

¹¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WTO Docs WT/DS58/AB/RW (22 October 2001) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>.

¹² Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WTO Docs WT/DS135/AB/R (12 March 2001) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm>.

¹³ *Uyghur Forced Labor Prevention Act*, H.R.6210, 117th Congress (2021), s 4(a).

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It is important to note that this standalone legislation still proposes to operate under the auspices of the broader, non-discriminatory framework set out in the *Tariff Act* in relation to banning imports produced with forced labour. The presumption is also able to be challenged on a case-by-case basis.¹⁴

Given Australia does not have underlying legislation in place to address imports produced with forced labour, we believe that Australia should, as a necessary first step, introduce this, along with a WRO-style regime in order to be in a position to introduce more targeted measures focused on Xinjiang. In our view, this approach is more justifiable and less likely to be subject to challenge by China than legislation which specifically singles out all products from Xinjiang, for the reasons set out above. We note that it is possible for WROs to be framed broadly in any event so that they target whole product lines or industries, rather than just specific products or manufacturers. Thus much the same objective could be achieved through this approach.

As set out in Section 6.2 of our written submission, we also consider that the enactment of a mandatory human rights due diligence regime alongside a US-style ban on goods produced with forced labour will provide Australia with stronger and more targeted tools to address corporate complicity in serious human rights abuses like those reported in Xinjiang.

¹⁴ *Uyghur Forced Labor Prevention Act*, H.R.6210, 117th Congress (2021), s 4(b).