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FORGING AHEAD: PROTECTING AGAINST FORCED LABOR IN GLOBAL SUPPLY CHAINS AND THE EVOLVING LANDSCAPE OF LABOR RIGHTS

by Gemma Muirhead*, with
review by Professor Michael
Jacobson**

The global landscape undeniably revolves around economic prosperity, making it a natural and inherent goal for individuals and states alike. Rooted in the aftermath of World War II, countries have exhibited a reluctance to resort to hard power methods to establish dominance over one another. Instead, an observable trend has emerged, with nations increasingly embracing diplomatic avenues and soft power strategies as alternatives to physical conflict and traditional hard power approaches. Among the soft power avenues, trade plays a pivotal role, creating pathways for both major and smaller players to gain a competitive edge.

Historically, trade agreements primarily focused on facilitating economic exchange between nations, with little direct consideration given to the treatment of individuals within those countries. Issues of human rights were often addressed through separate channels such as boycotts, NGO campaigns, international pressure, and United Nations interventions, but were not inherently linked to trade agreements themselves. Over time, the adoption of sanctions and other unilateral trade measures aimed at enhancing transparency concerning human rights abuses in foreign supply chains has gained traction, particularly in the United States and the European Union. These jurisdictions frequently apply sanctions for diverse purposes, including fostering democratic ideals, penalizing oppressive regimes, and ensuring that domestic corporations adhere to universal standards in their global supply networks.¹ Just

from the statistics alone one can see the permeation; over 75 percent of the world's governments now have trade agreements that include human rights provisions.²

I. Evolution of US Trade Policy: The Ascendance of Labor Rights in U.S. Trade Agreements

Labor rights in particular have become a focal point of U.S. trade policy. As globalization progressed a stark realization emerged: labor rights, especially in the manufacturing sector, were not just peripheral concerns but critical inputs in the production and trade of goods. The allure of lower labor standards in certain regions meant cheaper production costs, thereby impacting the terms of trade, and creating disparities in global markets. During his time in office, President Biden has made labor rights a centerpiece of his domestic policy portfolio,³ pushing for strategic global partnerships, turning away from the “America First” rhetoric of previous administrations.⁴ The Office of Trade and Labor Affairs (“OTLA”) within the Bureau of International Labor Affairs (“ILAB”)⁵ have monitored expanding la-

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1 Matthew Cline, *The Link Between Trade & Human Rights*, MINN. J. INT'L L., https://minnjil.org/2023/02/09/the-link-between-trade-human-rights/#_ftn1

2 See Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?*, World Trade Org., https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm (last visited April 26, 2023).

3 Presidential Memorandum on Advancing Worker Empowerment, Rights, and High Labor Standards Globally: <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/11/16/memorandum-on-advancing-worker-empowerment-rights-and-high-labor-standards-globally/>.

4 Uma Menon, ‘The status of labor rights in US Trade Policy’, ATLANTIC COUNCIL, (Oct. 27, 2023) <https://www.atlanticcouncil.org/blogs/econographics/the-status-of-labor-rights-in-us-trade-policy/>

5 U.S. DOL, *U.S. Government Mechanisms for Promoting Labor Rights and Responsible Business Outcomes*, <https://www.dol.gov/agencies/ilab/responsible-business-conduct-and-labor-rights-infohub/us-government-mechanisms-for-promoting-labor-rights-and-responsible-business-outcomes>.

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bor provisions in U.S. Free Trade Agreements (FTA's), including, but not limited to, the Indo-Pacific Economic Framework⁶, the U.S. – Kenya Strategic Trade and Investment Partnership⁷ and the U.S. – Mexico – Canada Agreement (“USMCA”).⁸

Changes to the USMCA, have been praised as ‘ground-breaking’ largely due to the introduction of the Rapid Response Mechanism (“RRM”) – an innovative trade agreement tool that is empowering workers in Mexico and the United States. Since 2021, the United States has requested Mexico’s review under the USMCA’s RRM on 22 occasions, covering facilities across diverse industries such as automotive, garments, mining, food manufacturing, and services. These actions have resulted in direct benefits for nearly 30,000 workers.⁹ As touted by USTR Ambassador, Katherine Tai, the transformation in trade policy is worker-central, promoting economic policy that works for all people today and in the future:

We [the Biden Administration] are empowering workers through a trade agreement. This has a real impact on working peoples’ lives—elevating labor standards drives a race to the top and reduces the incentive to ship jobs overseas. we are focusing on how we can make trade beneficial for more people, and how we can help them compete and thrive through fair competition. These values also apply to how we work in the multilateral space.¹⁰

6 USTR, *Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Fair Economy*, <https://ustr.gov/sites/default/files/files/agreements/aun/IPEF%20PIV%20Fair%20Economy%20Agreement.pdf> (last visited Apr. 26, 2024).

7 USTR, *United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership* (Jul. 14, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-and-kenya-announce-launch-us-kenya-strategic-trade-and-investment-partnership>.

8 USTR, *Agreement between the United States of America, the United Mexican States, and Canada* (Jul. 1, 2020), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

9 Ambassador Katherine Tai, United States Trade Representative, Wenger Lecture at American University Washington College of Law (April, 2023).

10 USTR, *Remarks by Ambassador Katherine Tai at American University Washington College of Law*, <https://ustr.gov/about-us/>

As the U.S. shifts its international and domestic policy to play on the longstanding nexus between trade and human rights, one product-based sanction has splashed across headlines. The Uyghur Forced Labor Prevention Act (“UFLPA”) was enacted on December 23rd, 2021, to enhance the current ban on importing goods produced entirely or partially through forced labor into the U.S. The goal with the UFLPA is to ultimately put an end to the widespread practice of forced labor in the Xinjiang Uyghur Autonomous Region. Under Section 307 of the Tariff Act of 1930,¹¹ U.S. Customs and Border Protection (CBP) have the power, under a rebuttable presumption, to prohibit goods “mined, produced or manufactured wholly or in part in Xinjiang or by an entity on the UFLPA Entity List.”¹²

The United States has been implementing import restrictions due to human rights abuses from all countries since 1930.¹³ Even before the Xinjiang Crisis gained attention, efforts were made to address loopholes concerning imports manufactured through forced labor.¹⁴ Despite section 307’s existence, this provision has been largely dormant and underutilized since its implementation.¹⁵ From 2001-2015, the CBP did not issue a single Withhold Release Order (“WRO”). However, from 2016-2021 there has been a profound rise; CBP has issued 36 WROs on goods from eight countries and fishing vessels, 64 percent of which occurred in 2020 and 2021.¹⁶ The significant increase in WROs heralds a new era of stringent trade policy, emphasizing forced labor eradication and supply chain transparency as paramount concerns.

II. Addressing Forced Labor Through the UFLPA: Prioritizing & Protecting Fundamental Human Rights

[policy-offices/press-office/speeches-and-remarks/2023/april/remarks-ambassador-katherine-tai-american-university-washington-college-law](https://ustr.gov/policy-offices/press-office/speeches-and-remarks/2023/april/remarks-ambassador-katherine-tai-american-university-washington-college-law).

11 19 U.S.C. 1307.

12 U.S Customs & Border Protection, *Uyghur Forced Labor Prevention Act*, <https://www.cbp.gov/trade/forced-labor/UFLPA>.

13 See Smoot–Hawley Tariff Act, 19 U.S.C. § 1307 (1930).

14 See Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. 114–125 § 910 (2015).

15 Mark Rutkowski et. al, *How Forced Labor Laws Have Taken A Prominent Role In U.S Trade Policy*, Reuters (Feb. 16, 2022),

11 <https://www.reuters.com/legal/legalindustry/how-forced-labor-laws-have-taken-prominent-role-us-trade-policy-2022-02-16/>.

16 *Id.* at 12.

The UFLPA has catalyzed talks on the future of global supply chain dynamics, prompting stakeholders to reevaluate their sourcing practices and compliance strategies. While there is a growing focus on the implementation of robust corporate compliance programs, a pertinent question emerges: has the UFLPA, three years since its inception, effectively achieved its objective of curtailing the importation of goods from regions linked to forced labor, thus exerting pressure on the Chinese government to cease subsidizing the Xinjiang region? According to reports, the CBP has currently restricted more than “4,600 shipments with a total value of over US\$1.6 billion” since the UFLPA took effect.¹⁷ Taken at face value, these statistics seem promising. However, the importation of these products only accounts for .01% of the U.S.’s annual imports, roughly \$300 million.¹⁸

The United States has taken the most aggressive approach to date, with the hope of prompting trading partners to also implement legislation to target forced labor. At this moment, this goal has largely been unsuccessful. The group known as the Like-Minded Group of Developing Countries (LMDC), which relies on China’s economic support, has characterized China’s actions against the Uyghurs as its “internal affairs.”¹⁹ They contend that international condemnation is unwarranted, relying on the argument that China has a right to implement economic measures as they see fit.²⁰ In Europe, pressure to implement corporate compliance and targeted forced labor regulations has also been null and void. The United Kingdom, a large importer of ‘dirty’ cotton, has largely failed to implement any form of blockade on the “substantial” volume of imports tainted using Uyghur forced labor in the pro-

17 Monica Stankova, *One year of UFLPA: What Impact is the law having*, AEB, 20 (July 21, 2023), <https://www.aeb.com/en/magazine/articles/uflpa-uyghur-forced-labor-prevention-act-impact.php>.

18 Flacks supra note 166. - Marti Flacks, *The Uyghur Forced Labor Prevention Act Goes into Effect*, CTR. FOR STRATEGIC & INT’L STUD. (June 27, 2022), <https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect>.

19 Monica Stankova, *One year of UFLPA: What Impact is the law having*, AEB, 20 (July 21, 2023), <https://www.aeb.com/en/magazine/articles/uflpa-uyghur-forced-labor-prevention-act-impact.php>.

20 *Combating the Uyghur Genocide via the WTO’s Public Morals Exception*, Connor Stanford Moldo, p. 210.

duction process.²¹ In January 2023, the UK high court rendered a decision in the case of “R. [on the application of World Uyghur Congress “WUC”] v. Secretary of State for the Home Department”²², stating that British Customs agencies were not required under the Foreign Prison-Made Goods Act of 1897²³ to initiate further investigations into the origin of cotton imports that were, allegedly, were made wholly or in part in China’s Xinjiang Uyghur Autonomous Region. Further, the European Union itself is unlikely to undertake such targeted measures in the near future. The breakdown of the Corporate Sustainability Due Diligence negotiations²⁴ should be a signal to the United States that further customs blockades, around the globe, are unlikely. In the absence of a more comprehensive international response, the restriction on importation relies solely on companies’ import decisions into the U.S. market; whether stakeholders are concerned about social pressures and increased costs.

III. Conclusion

Although this discussion’s primary focus surrounded labor rights, it’s important to acknowledge that trade and various other branches of human rights intersect significantly within the U.S. market. Global supply chains are ever more complex as countries open their borders and become interdependent. Over the last two centuries, global trade, in all sectors, has skyrocketed and continues to grow. Statistics indicate that “exports today are more than 40 times larger” than that of export volumes in 1913. The trade system that exists today is not the same as the one that was created in the GATT 1947 era; we are moving at a faster rate and the established multilateral systems, such as the WTO and the

21 Jasmine M. Chua, *Uyghur Forced Labor Goods ‘Flooding’ EU Market: Report*, Sourcing Journal, Dec. 7 2023, 2 <https://sourcingjournal.com/topics/labor/xinjiang-forced-labor-european-union-uyghur-nike-adidas-inditex-hm-shahi-exports-476782/>.

22 Jason Williamson & Jack Zaher, *UK High Court Judgement Spotlights Importance of Managing Supply Chains*, Feb. 20 2023, Skadden Publ’/ White Collar Def. Investigations <https://www.skadden.com/insights/publications/2023/02/uk-high-court-judgment-spotlights-importance-of-managing-supply-chain-risks>.

23 *Id.* at 72.

24 Jennifer Youanan & Elise Edson, *EU Council Waters Down Corporate Sustainability Due Diligence Directive (CS3D)*, Shearman & Sterling, 19 (March 18, 2024) citing Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, March 13, 2024.

ILO, are seemingly incapable of responding at an efficient and effective pace. In such politically polarized forums, bringing labor rights to the forefront could set the house on fire.²⁵

However, as we look to the future of U.S. economic policy, we cannot underestimate internal and external pressures to turn the tide towards isolation. Political leaders are, arguably, moving dangerously inward and placing domestic industry ahead of economic integration. At the heart of this is the fluctuating relationship between China and the U.S., thus framing the UFPLA as a contentious piece of legislation. The escalation of the trade tensions poses significant dangers for both countries and the global economy at large. Heightened tariffs and retaliatory measures not only disrupt existing trade flows but also increase uncertainty for businesses, investors, and consumers. The global market, like that of a domestic market, does not cope under periods of uncertainty. Producers and consumers alike crave a system that guarantees them a future of prosperity. Although the rhetoric of the USTR touts setting responsible standards of labor for the ‘common good’²⁶, one cannot look solely at the proposed aims of agendas such as Biden’s ‘Investing in America Agenda’ without considering the real intention behind their implementation. Outward retaliatory measures such as RRM and the UFLPA are a starting point for turning the tide against the presence of forced labor in our supply chains. However, the fundamental freedoms of workers around the globe cannot be solely resolved by one-off targeted measures that have been criticized for placing competitive advantage ahead of social welfare.²⁷ In this complex landscape, finding the equilibrium between promoting ethical practices and respecting sovereignty emerges as a critical challenge for policymakers navigating the intricacies of global trade.

25 Roberto Azevêdo, Former Director General of the WTO, Georgetown Global Trade Academy: Lecture Series (April 18, 2024).

26 Ambassador Katherine Tai, United States Trade Representative. Wenger Lecture at American University Washington College of Law (April, 2023).

27 Michael J. Trebilock & Joel Trachtman, *Advanced Introduction to Int’l Trade Law*, (Edward Elgar Publishing), 2nd ed. 2020.