INTERNATIONAL FORCED LABOR IMPORT BANS: A CASE FOR WTO COMPATIBILITY

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Abstract

Several countries have had long standing (but rarely used) laws on their books authorizing bans on the import of goods made with forced labor. The combination of substantial evidence of detentions of Uyghur and other ethnic minorities in massive labor camps in China's Xinjiang Uyghur Autonomous Region and the work of civil society groups to document the use of forced labor in global supply chains changed that, with countries making far greater use of their existing laws and enacting a number of additional provisions, like the Uyghur Forced Labor Prevention Act and the Countering America's Adversaries Through Sanctions Act in the United States. The increased enforcement of import bans has raised questions about whether such actions are consistent with prevailing international trade rules, particularly the World Trade Organization (WTO) rules prohibiting export or import bans.

This Article analyzes the compatibility of forced labor bans with WTO obligations and outlines the available defenses justifying any measures that might be

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deemed inconsistent with WTO rules. It takes as its point of departure the International Labour Organization's Forced Labour Convention, 1930 (No. 29) definition of forced labor: "all work or service which is extracted from any person under threat of a penalty and for which the person has not offered himself or herself voluntarily." It summarizes the actions taken in the United States, both in response to the widespread use of forced labor in Xinjiang and in the newly added provisions to the United States-Mexico-Canada Agreement, along with an assessment of recent actions in the United States and the European Union prohibiting products made with forced labor.

The Article examines the key applicable WTO disciplines: General Agreement on Tariffs and Trade (GATT) Article XI's prohibition on export or import bans, GATT Articles I and III, and the Technical Barriers to Trade Agreement non-discrimination provisions. It finds that Article III provides a carve out for import bans if there is a comparable ban on domestic goods made with forced labor and that consumer preferences against buying products made with forced labor may provide a basis to lawfully discriminate against forced labor-made goods. The Article further notes that even if an import ban were found to run afoul of the WTO rules, it can likely fit within the general exceptions for measures designed to protect public morals or human life if implemented fairly and transparently.

The Article concludes that carefully designed forced labor import bans can be imposed consistent with, or defensible under, the WTO Agreements. It suggests that the best way to advance such import bans is to ensure that they are universally applicable, that they have analogous domestic prohibitions, and that they are procedurally consistent, transparent, and flexible.

I. Introduction

Eliminating forced labor is as urgent an issue as it is complex. At every stage of production in the global value chain, vulnerable workers are subject to conditions that violate international standards and basic human rights.[1] In addition to representing a severe injustice to the workers themselves, forced labor violations are also an economic harm. Suppliers and multinational corporations (MNCs) who engage in or ignore forced labor do so in part to capitalize on the marginal benefit of eliminating fair labor costs; by some estimates, the private economy

1. *See generally Forced Labor in Global Supply Chains*, Eur. Center for Const. & Hum. Rts. [ECCHR], https://www.ecchr.eu/en/case/forced-labor-in-global-supply-chains/ (last visited May 1, 2023); Genevieve LeBaron, *The Role of Supply Chains in the Global Business of Forced Labor*, 57 J. Supply Chain Mgmt. 29 (2021); *Policy as a One-Legged Stool: U.S. Actions Against Supply Chain Forced Labor Abuses*, 136 Harv. L. Rev. 1700 (2023).

extracted USD 236 billion in illegal profits from the market in 2024 alone.[2] This and the issue of "misaligned incentives" explains not only the prevalence of forced labor but also the difficulties in addressing its abuse: those with the power to adequately monitor and enforce labor conditions along the supply chain (i.e., MNCs) are often not the same parties who will be punished for a violation.[3] Yet, the incentive to engage in and cover up forced labor has only grown with the rise of techno-capitalism and globalized consumer demand; by one estimate, twenty-seven and a half million people are victims of forced labor worldwide.[4] International Labour Organization (ILO) statistics show that this number has gone up considerably in the last five years.[5]

Identifying the scope of the problem is just one step in the process of fixing it. What exactly is forced labor, and why should it be eliminated in all its forms? The ILO's Forced Labour Convention, 1930 (No. 29) provides one of the most frequently-cited definitions of forced labor: "all work or service which is exacted from any person under threat of a penalty and for which the person has not offered himself or herself voluntarily."[6] This language covers not only the most extreme and recognizable forms of forced labor, but also a vast spectrum of economically coercive situations that are repugnant to public morals and human health.[7]

In the mission to identify and punish perpetrators—and to achieve justice for victims—states, workers, international unions, non-government

2. ECCHR, *supra* note 1; *Annual Profits from Forced Labour Amount to US$236 Billion, ILO Report Finds*, INT'L LAB. ORG. [ILO] (Mar. 19, 2024), https://www.ilo.org/resource/news/annual-profits-forced-labour-amount-us-236-billion-ilo-report-finds.

3. Kishanthi Parella has richly explored the problem of misaligned incentives in forced labor governance. *See, e.g.*, Kisanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747 (2014).

4. HUM. TRAFFICKING LEGAL CTR., GLOBAL JUSTICE: USING STRATEGIC LITIGATION TO COMBAT FORCED LABOR 1 (2023), https://htlegalcenter.org/wp-content/uploads/Global-Justice_Using-Strategic-Litigation-To-Combat-Forced-Labor-2023.pdf.

5. *See Statistics on Forced Labour, Modern Slavery and Human Trafficking*, ILO, https://www.ilo.org/global/topics/forced-labour/statistics/lang–en/index.htm (last visited May 1, 2023).

6. Convention Concerning Forced or Compulsory Labour (ILO No. 29) art. 2, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932).

7. The ILO provides 11 indicators of forced labor, which may be relevant in establishing the threshold of evidence necessary for legal action pursuant to any of the import bans discussed in this memo and the report; those indicators are (1) abuse of vulnerability, (2) deception, (3) restriction of movement, (4) isolation, (5) physical and sexual violence, (6) intimidation and threats, (7) retention of identity documents, (8) withholding of wages, (9) debt bondage, (10) abusive working and living conditions, (11) excessive overtime. ILO, ILO INDICATORS OF FORCED LABOUR (2012), https://www.ilo.orgE/wcmsp5/groups/public/–ed_norm/–declaration/documents/publication/wcms_203832.pdf.

organizations (NGOs), and MNCs have enacted public and private regulations to address this problem,[8] including international conventions[9] and domestic civil and criminal codes.[10] Voluntary codes of conduct and corporate disclosures are frequently utilized as well.[11] Ultimately, however, the existing tools of enforcement have fallen short. This is attributable both to the insidious prevalence of forced labor and to the increasingly complex nature of modern global supply chains. As a result, advocates and lawmakers have increasingly turned to trade law tools as a source of redress. Trade holds a unique position on the threshold of these greater enforcement efforts because it provides a means of dealing with items produced in multiple jurisdictions without violating sovereignty. The most targeted of recent trade law efforts to address forced labor are import bans.[12] In the United States, Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) prohibits any item suspected of being made wholly or in part with forced labor from entering the domestic stream of commerce.[13] The Uyghur Forced Labor Prevention Act (UFLPA) and Countering America's Adversaries through Sanctions Act (CAATSA) create a rebuttable presumption triggering enforcement of Section 307 for all items being imported into the United States from the Xinjiang Uyghur Autonomous Region (XUAR) in China or North Korea, respectively.[14] Regional trade agreements like the United States-Mexico-Canada Agreement (USMCA) have seen internationally coordinated efforts to ban the import of goods produced with forced labor. Additionally, on December 13,

8. *See* CATHERINE D. CIMINO-ISAACS ET AL., CONG. RSCH. SERV., R46631, SECTION 307 AND U.S. IMPORTS OF PRODUCTS OF FORCED LABOR: OVERVIEW AND ISSUES FOR CONGRESS 4–10 (2021).

9. *Id.* at 22–23.

10. *Id.* at 10–11.

11. *See* IVANKA MAMIC, IMPLEMENTING CODES OF CONDUCT: HOW BUSINESSES MANAGE SOCIAL PERFORMANCE IN GLOBAL SUPPLY CHAINS 12–14, 23–35 (2004).

12. These active and proposed bans have been introduced by the legislatures of the United States, the European Union (E.U.), the United Kingdom (U.K.), the Netherlands (Child Labor Due Diligence Law (5/14/2019)), Australia, France, the Czech Republic, Estonia, Norway, and others. *See, e.g.*, AUSTL. GOV'T, AUSTRALIAN GOVERNMENT RESPONSE TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE REPORT: CUSTOMS AMENDMENT (BANNING GOODS PRODUCED BY UYGHUR FORCED LABOUR) BILL 2020 (2022), https://www.dfat.gov.au/sites/default/files/australian-government-response-to-the-senate-foreign-affairs-inquiry-into-customs-bill-forced-labour-amendment.pdf.

13. 19 U.S.C. § 1307.

14. *Uyghur Forced Labor Prevention Act*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/trade/forced-labor/UFLPA (last modified Oct. 16, 2024); *CBP Enforces Countering America's Adversaries Through Sanctions Act*, U.S. CUSTOMS & BORDER PROT., (Dec. 27, 2022) https://www.cbp.gov/newsroom/national-media-release/cbp-enforces-countering-americas-adversaries-through-sanctions.

2024, a European Union (EU) regulation entered into force, prohibiting products made with forced labor, including child labor, from being introduced into the internal market of the EU (EU Regulation).[15]

This uptick in legislation—and for the United States, the renewed enforcement of Section 307—comes on the back of tireless advocacy by survivors and civil society, and a growing recognition that the role of trade policy must continue to evolve.[16] While facilitating market access and trade liberalization remain important goals, trade policy must also work towards leveling the playing field for businesses and workers, including by making forced labor a serious financial, legal, and reputation issue for those that would tolerate its abuse.

The use of import bans comes with formal limitations, however—most pressingly, their potential violation of World Trade Organization (WTO) rules. This Article addresses the consistency of forced labor import bans with WTO obligations and international norms of transparency, fairness, and due process. Following this introduction, the Article proceeds as follows: Part II summarizes the U.S. and EU forced labor bans and the USMCA as examples of a coordinated international effort to enforce import bans on products made with forced labor. Then, Part III addresses the compatibility of these forced labor bans with WTO obligations and law. Part IV outlines some potential defenses if, and to the extent that, any of the outlined provisions are incompatible with WTO law, and finally, Part V explains the Article's conclusion that carefully designed forced labor import bans can be imposed consistent with, or in a manner defensible under, the WTO Agreements.

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15. *Products Made With Forced Labour To Be Banned From EU Single Market*, EUR. PARL. (Apr. 23, 2024), https://www.europarl.europa.eu/news/en/press-room/20240419IPR20551/products-made-with-forced-labour-to-be-banned-from-eu-single-market.

16. *See, e.g.*, *Trafficking Awareness Training for Health Care Act of 2014: Hearing on H.R. 5411 Before the Subcomm. on Health of the H. Comm. on Energy & Com.*, 113th Cong. (2014) (statement of Katherine Chon, Senior Advisor on Trafficking in Persons, Admin. for Child. & Fams.); ANASUYA SYAM & MEG ROGGENSACK, IMPORTING FREEDOM: USING THE U.S. TARIFF ACT TO COMBAT FORCED LABOR IN SUPPLY CHAINS (Martina E. Vandenberg ed. 2020); Jim Wormington, *European Union Should Adopt Forced Labor Law*, HUM. RTS. WATCH (Mar. 12, 2024), https://www.hrw.org/news/2024/03/12/european-union-should-adopt-forced-labor-law; Terry FitzPatrick, *ATEST Testifies to House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on Ways to Plug Gaps in U.S. Anti-trafficking Programs*, ATEST (Apr. 27, 2022), https://endslaveryandtrafficking.org/atest-testifies-to-house-judiciary-subcommittee-on-crime-terrorism-and-homeland-security-on-ways-to-plug-gaps-in-u-s-anti-trafficking-programs/; *Survivor Voices of Human Trafficking*, COMBATING TRAFFICKING IN PERSONS: U.S. DEP'T OF DEF., https://ctip.defense.gov/Survivor-Voices/ (last visited Dec. 26, 2024).

II. Efforts to Combat Circulation of Products Made with Forced Labor Through Remedies in Trade

In the United States, the primary tool for import bans on forced labor is Section 307 of the Tariff Act of 1930. Section 307 creates a mechanism, Withhold Release Orders (WROs), discussed below, for the U.S. Customs and Border Protection (CBP) to hold shipments at their port of entry, at the expense of importers, that are suspected of being made wholly or in part with forced labor.[17] The UFLPA established a rebuttable presumption that *all* goods being imported from the XUAR are in violation of Section 307.[18] CAATSA creates the same rebuttable presumption for goods produced in North Korea.[19] The USMCA created a binding obligation between North American Member States *not* to allow the import of products made with forced labor.[20] Similar efforts are underway in the EU, but with a ban that would apply to goods produced both domestically and for import.[21]

A. *U.S. Legislation and Trade Remedies for Forced Labor*

While the United States has prohibited the import of goods manufactured with convict labor since 1890, the Tariff Act of 1930 (passed the same year as the ILO Forced Labour Convention) expanded that prohibition to *all* products made wholly or in part with forced labor.[22] There was some discussion of humanitarian concerns during debate over the bill, but the legislative history demonstrates a primary focus on protecting domestic producers from unfair competition with products made with forced labor, rather than a concern for the workers themselves.[23] This accounts for the "consumptive demand" clause, under which Section 307 allowed for the admission of products made with forced labor *if* it could be shown that there was no comparable product made in the United States, or that the level of domestic production could not

17. 19 U.S.C. § 1307.

18. Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, §3, 135 Stat. 1525 (2021).

19. 22 U.S.C. § 9241a.

20. Language from USMCA art. 23.6.1: "The Parties recognize the goal of eliminating all forms of forced or compulsory labor, including forced or compulsory child labor. Accordingly, each Party shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor." United States-Mexico-Canada Agreement art. 23.6.1, Nov. 30, 2018, 134 Stat. 11 [hereinafter USMCA].

21. *Products Made With Forced Labor To Be Banned From EU Single Market*, *supra* note 15.

22. 19 U.S.C. § 1307.

23. Cimino-Isaacs et al., *supra* note 8, at 3–4.

meet domestic demand.[24] Cocoa and palm oil were two such products permitted entry notwithstanding substantial concerns over labor violations in their harvest and production.[25]

Enforcement of Section 307 languished for several decades, until there was an uptick in the 1980s and 90s, as political and economic concerns over China steadily grew.[26] In 2016, the Trade Facilitation and Trade Enforcement Act (PL 114-125) removed the consumptive demand clause.[27] Since then, and amidst increasing concern over (and interest in) workers' rights in trade policy, enforcement of Section 307 has increased.[28]

On the U.S. side, CBP enforces the Section 307 import ban through WROs. A WRO can originate from either a specific allegation about goods intended for import or from a rebuttable presumption about goods produced in a specific region (as is the case with UFLPA and CAATSA) or by a specific industry.[29] In the case of an individual allegation, anyone who has "reason to believe that any class of merchandise that is being, or is likely to be, imported into the United States" that was produced wholly or in part by forced labor may submit an allegation to CBP.[30] Similarly, port directors and principal customs officers must report to the CBP Commissioner if they have reason to believe that imported goods were produced with forced labor.[31]

Upon receipt of the report, the CBP Commissioner will initiate an investigation if such action seems warranted based on the "amount and reliability" of the information submitted with the tip.[32] If the information "reasonably but not conclusively" indicates that imports might be the product of forced labor, the Commissioner can issue an order to "withhold the release" of such goods (i.e., the WRO).[33] The importer

24. CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 1 (2024); 19 U.S.C. § 1307.

25. CIMINO-ISAACS ET AL., *supra* note 8, at 7.

26. *Withhold Release Orders and Findings List*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings (last modified Nov. 1, 2024).

27. Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-125, §910, 130 Stat. 122 (2015).

28. CIMINO-ISAACS ET AL., *supra* note 8, at 6–7.

29. *See Information and Resources on Withhold Release Orders (WROs)*, U.S. DEPT OF LAB., https://www.dol.gov/agencies/ilab/comply-chain/steps-to-a-social-compliance-system/step-6-remediate-violations/key-topic-information-and-resources-on-withhold-release-orders-wros (last visited Sept. 7, 2024).

30. 19 C.F.R. § 12.42(a) (2024).

31. *Id.*; CASEY ET AL., *supra* note 24, at 1.

32. CASEY ET AL., *supra* note 24, at 1.

33. *Id.*

may, at this point, take back and export the merchandise at their own expense or they can contest the WRO.[34] If they elect to contest, the importer has three months to "demonstrate 'every reasonable effort' has been made to determine both the source and type of labor used to produce the merchandise and its components."[35] If CBP finds "conclusive evidence, i.e. probable cause, that the goods were made with forced labor[,]"[36] in violation of the ban, the agency (with the approval of the Secretary of the Treasury) will publish a formal finding in the Customs Bulletin and the Federal Register (19 C.F.R. § 12.42(f) (2017)), and may also impose civil liabilities.[37] Such penalties can extend beyond the importer of record to a person or corporation that "benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of [forced labor]."[38] If that person or corporation knew, or recklessly disregarded, how that labor was obtained, they may also face further criminal and civil penalties under anti-trafficking laws.[39]

Other laws buttressing Section 307 enforcement include the CAATSA[40] and the UFLPA,[41] the latter of which serves as a timely, representative example of a broader tool.[42] CAATSA contains a rebuttable presumption about goods produced by North Korean labor (in North Korea or by North Korean workers abroad),[43] while the UFLPA contains a rebuttable presumption about goods made from material or labor in the XUAR in China.[44]

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34. *Id.*

35. *Id.*

36. *U.S. Customs and Border Protection Steps Up Enforcement Activity Against Products Made with Forced or Indentured Labor*, JONES DAY (Apr. 21, 2021), https://www.jonesday.com/en/insights/2021/04/us-customs-and-border-protection-steps-up-enforcement-activity-against-products-made-with-forced-or-indentured-labor.

37. CIMINO-ISAACS ET AL., *supra* note 8, at 9–11; 19 U.S.C. §1592(a); *see also CBP Collects $575,000 from Pure Circle U.S.A. for Stevia Imports Made with Forced Labor*, U.S. CUSTOMS & BORDER PROT. (Aug. 13, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor.

38. CIMINO-ISAACS ET AL., *supra* note 8, at 11.

39. 18 U.S.C. § 1589.

40. 22 U.S.C. § 9241.

41. *See* Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, §§ 4–5, 135 Stat. 1525 (2021).

42. For UFLPA enforcement statistics, see *Uyghur Forced Labor Prevention Act Statistics*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics (last modified Oct. 22, 2024).

43. 22 U.S.C. § 9421a.

44. *See, e.g.*, *The Department of Homeland Security Issues Withhold Release Order on Silica-Based Products Made by Forced Labor in Xinjiang*, U.S. CUSTOMS & BORDER PROT. (June 24, 2021),

The UFLPA was enacted in the wake of numerous reports (including satellite photos and video testimony) that China had detained more than one million Uyghurs and other mostly Muslim minorities in its far western XUAR. This included an estimated 100,000 Uyghurs and other ethnic minority ex-detainees working in conditions of forced labor following detention in "re-education" camps.[45] While previously, certain goods produced in the XUAR—like cotton (and cotton products) and tomatoes (and tomato products)—had been flagged by CBP for purposes of Section 307 enforcement as high risk, Congress took the presumption much further with the nearly unanimous and bipartisan passage of UFLPA. This came on the tail end of more than a decade of reporting about the conditions of forced labor in the XUAR.[46] Upon its entry into force on June 21, 2022, all imports derived in whole or in part from goods or materials produced in Xinjiang were subject to a presumption that they were made with forced labor and therefore banned from importation.[47] Importers wishing to bring in goods from Xinjiang or made by certain identified entities had to prove under a "clear and convincing evidence" standard that their goods were not made in or derived from materials from XUAR or that their goods did not involve any forced labor.[48] 19 U.S.C. § 1307, as amended by the UFLPA, now requires CBP to presume that *any* goods "mined, produced or manufactured wholly or in part" in the XUAR or "produced" by an entity on the UFLPA Entity List violate the forced labor import

https://www.cbp.gov/newsroom/national-media-release/department-homeland-security-issues-withhold-release-order-silica; *see also* 19 C.F.R. § 12.43 (2024).

45. Bureau of Int'l Lab. Affs., *Against Their Will: The Situation in Xinjiang*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ilab/against-their-will-the-situation-in-xinjiang (last visited Sept. 4, 2024); *see also* CONG.-EXEC. COMM'N ON CHINA, GLOBAL SUPPLY CHAINS, FORCED LABOR, AND THE XINJIANG UYGHUR AUTONOMOUS REGION 5 (2020), https://www.cecc.gov/sites/evo-subsites/cecc.house.gov/files/documents/CECC%20Staff%20Report%20March%202020%20-%20Global%20Supply%20Chains%2C%20Forced%20Labor%2C%20and%20the%20Xinjiang%20Uyghur%20Autonomous%20Region.pdf; CTR. FOR STRAT. & INT'L STUDS., CONNECTING THE DOTS IN XINJIANG: FORCED LABOR, FORCED ASSIMILATION, AND WESTERN SUPPLY CHAINS 8 (2019), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/Lehr_ConnectingDotsXinjiang_interior_v3_FULL_WEB.pdf.

46. *See, e.g.*, *Report Released: Cotton: The Fabric Full of Lies*, CITIZEN POWER INITIATIVES FOR CHINA (Aug. 27, 2019), https://www.citizenpowerforchina.org/report-released-cotton-the-fabric-full-of-lies/.

47. U.S. CUSTOMS & BORDER PROT., *supra* note 42; *see also* Brent J. Gurney et al., *Uyghur Forced Labor Prevention Act Goes into Effect*, WILMER HALE (July 7, 2022), https://www.wilmerhale.com/insights/client-alerts/20220707-uyghur-forced-labor-prevention-act-goes-into-effect.

48. Gurney et al., *supra* note 47.

ban.[49] In order to avoid the detention process, importers have the option to (1) demonstrate that their goods are outside the UFLPA's scope (and not subject to the rebuttable presumption) or (2) obtain an exception to the UFLPA by rebutting the presumption through clear and convincing evidence, with three subsidiary obligations (PL 117-78 §3(b)(1)-(2)): (1) first, they must present (within 30 days of detention) "clear and convincing" evidence that the imported goods were not mined, produced, or manufactured wholly or in part by forced labor; (2) second, they must have "completely and substantively responded" to all related requests for information from CBP; and (3) third, they must have "fully complied with" CBP's Operational Guidance for Importers and the interagency Forced Labor Enforcement Task Force's Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China.[50]

As explained in the CBP Operational Guidance and Forced Labor Enforcement Task Force (FLETF) Strategy, "clear and convincing" evidence from importers might include: a) a "supply chain map identifying all entities involved in production of the goods"; b) pictures of living and working accommodations; c) "information on workers at each entity involved in the production of the goods in China such as wage payment and production output per worker"; d) "information on worker recruitment and internal controls to ensure that all workers in China were recruited and are working voluntarily"; or e) "credible audits [recent, unannounced, and performed by third parties] to identify forced labor indicators and remediation of these if applicable."[51]

B. *The USMCA as an Example of a Regional Trade Agreement Combating Forced Labor*

The USMCA is a recent example of a Regional Trade Agreement (RTA) that facilitates international cooperation on import bans. The

49. Jessica Lynd & David E. Bond, *WROs, UFLPA and Revised CTPAT*, WHITE & CASE (Jan. 3, 2023), https://www.whitecase.com/insight-alert/wros-uflpa-and-revised-ctpat.

50. Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, §§ 3(b)(1)–(2), 135 Stat. 1525 (2021).

51. CUSTOMS & BORDER PROT., UYGHUR FORCED LABOR PREVENTION ACT: U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS 15 (2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf [hereinafter UFLPA GUIDANCE]; Lynd & Bond, *supra* note 49.

USMCA entered into force on July 1, 2020,[52] replacing the North American Free Trade Agreement.[53] Unlike its predecessor, the USMCA prohibits the importation of goods made by forced labor and obligates parties to the agreement to adopt measures enacting that prohibition. Specifically, Chapter 23 obligates each party to "adopt and maintain in its statutes and regulations, and practices … as stated in the ILO Declaration on Rights at Work: (b) the elimination of all forms of forced or compulsory labor."[54] Article 23.5 "recognize[s] the goal of eliminating all forms of forced or compulsory labor" and stipulates that each party shall "prohibit the importation of goods into its territory *from other sources* produced in whole or in part by forced or compulsory labor."[55] As such, the obligation is on all three USMCA countries to ensure that none of the inputs into goods that are traded among the three have been made with forced labor.

Beyond implementation of the import ban, the USMCA also obligates parties to "establish cooperation for the identification and movement of goods produced by forced labor."[56] Parties are empowered to establish cooperative arrangements with the ILO or other organizations to draw on their expertise and resources in furtherance of the USMCA forced labor provisions.[57] To facilitate cooperation, the USMCA established a Labor Council, composed of senior government representatives designated by each party, where matters such as those concerning the effectiveness and operation of policies on forced labor may be brought and examined.[58] Lastly, parties are held accountable through the dispute settlement mechanism established by the USMCA, and Article 23.17 allows each party to request consultation on matters arising out of the labor chapter—including issues pertaining to forced labor bans.[59] If the consulting parties fail to resolve the matter, they can request the establishment of a Panel under the USMCA Dispute Settlement Chapter.[60]

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52. *United States-Mexico-Canada Agreement*, OFF. OF THE U.S. TRADE REP., https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last visited May 1, 2023).

53. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M 289.

54. USMCA, *supra* note 20, art. 23.3.1(b); *see also id.* art. 23.1 (defining the ILO Declaration on Rights at Work to mean the ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)*).

55. *Id.* art. 23.6.1.

56. *Id.* art. 23.6.2; *see also id.* art. 23.12.5(c).

57. *Id.* art. 23.12.6.

58. *See id.* art. 23.14.

59. *Id.* art. 23.17.

60. *Id.* art. 23.17.8; *see also id.* art. 31.6.

Canada has reinforced compliance with the USMCA via the 2020 Canada-United States-Mexico Agreement Implementation Act.[61] Under that Act, Canada Border Services Agency (CBSA) officials are empowered to seize items destined for importation if there is "sufficient evidence" that the imports have been tainted by forced or prison labor.[62] Generally the CBSA works with the Labour Program of Employment and Social Development Canada to identify goods at a high risk of involving forced labor.[63] Where the CBSA has a reasonable suspicion that goods are tainted with forced labor, the importers have a burden to prove, based on the civil standard of "a balance of probabilities," that goods are not made with forced labor.[64] The CBSA makes this determination based on all evidence submitted by the importer.[65]

Furthermore, unlike the UFLPA's reverse onus presumption, the CBSA must treat each import on a case-by-case basis or "shipment-specific risking" based on available supporting evidence.[66] This practice was explained and upheld by the Federal Court of Canada in *Kilgour v. Canada*.[67] In *Kilgour*, Canadians in Support of Refugees in Dire Need argued that the CBSA should, absent evidence to the contrary that a product is not made by forced labor, prohibit goods presumptively imported from Xinjiang.[68] This request was denied by CBSA, on the grounds that it had no statutory authority to apply such a presumption and would have to examine imports on a case-by-case basis.[69]

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61. Canada–United States–Mexico Agreement Implementation Act, S.C. 2020, c 1 (Can.).

62. BAKER MCKENZIE, CANADA: ENFORCEMENT UPDATE ON CANADA'S IMPORT PROHIBITION ON FORCED AND CHILD LABOR 2 (2023), https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAWuU9AaVDeFghmhBf1TYMQL&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAeDNLcIAJ%2FsII%3D&fromContentView=1; CAN. BORDER SERVS. AGENCY, MEMORANDUM D9-1-6 (May 28, 2021), https://www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-6-eng.html.

63. CAN. BORDER SERVICES AGENCY, *supra* note 62. The CBSA has stated that their current "commodities of interest" include cotton and cotton products produced or manufactured in Xinjiang, tomatoes and tomato paste, and polysilicon. BAKER MCKENZIE, *supra* note 62, at 2.

64. BAKER MCKENZIE, *supra* note 62, at 2.

65. *Id.*

66. BAKER MCKENZIE, *supra* note 62, at 3; *Canada Not Doing Enough to Fight Forced Labor, Say Experts*, FREEDOM UNITED (May 2, 2022), https://www.freedomunited.org/news/canada-not-doing-enough-to-fight-forced-labor-say-experts/.

67. Kilgour v. Canada (Att'y Gen.) (2022), F.C. 472, para. 49 (Can.).

68. *Id.*

69. *Id.*; Zena Olijnyk, *Efforts to Remove Forced Labour from Canadian Supply Chain Expected to Ramp Up: McMillan Lawyer*, CANADIAN LAW. (July 19, 2022), https://www.canadianlawyermag.com/practice-areas/crossborder/efforts-to-remove-forced-labour-from-canadian-supply-chain-expected-to-ramp-up-mcmillan-lawyer/368350.

Due to ongoing criticisms and limited seizures of goods, the Canadian government proposed and recently passed further legislation to strengthen its enforcement mechanisms.[70] In the two years since passing the Canada-United States-Mexico Agreement Implementation Act, CBSA seized only one shipment from China suspected of being manufactured with forced labor.[71] In the same period, the United States seized more than 1,300 shipments.[72] The enforcement gap is driven by differing standards for triggering detention and the evidentiary burden required to overcome it.[73] Under the UFLPA, goods from Xinjiang are presumed to be made with forced labor and are therefore prohibited from entry into the United States.[74] To rebut this presumption, importers must demonstrate "clear and convincing" evidence that the goods are not made wholly or in part by forced labor.[75] In contrast, in Canada, detention occurs when there is reasonable suspicion that goods are made with forced labor.[76] Once detained, importers need only to demonstrate "a balance of probabilities" (i.e., greater than fifty percent) that goods are not made with forced labor to ensure entry into Canada.[77] In response to criticism of this meager enforcement, the Canadian government recently passed one bill, S-211, An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff,[78] and proposed another, S-204, An Act to amend the Customs Tariff (goods from Xinjiang),[79] that would strengthen enforcement efforts.[80]

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70. Jonathan O'Hara et al., *Canada Poised to Increase Regulation of Forced Labour in Supply Chains*, MCMILLAN LLP (June 7, 2022), https://mcmillan.ca/insights/canada-poised-to-increase-regulation-of-forced-labour-in-supply-chains/.

71. *Canada Not Doing Enough to Fight Forced Labor, Say Experts*, *supra* note 66.

72. *Id.*

73. Note that the USMCA does not impose a uniform standard of enforcement on the prohibition of goods made with forced labor. *See generally* USMCA, *supra* note 20, art. 23.

74. UFLPA GUIDANCE, *supra* note 51, at 4.

75. *Id.*

76. BAKER MCKENZIE, *supra* note 62, at 2.

77. *Id.*

78. Fighting Against Forced Labour and Child Labour in Supply Chains Act, S.C. 2023, c. 9 (Can.) [hereinafter Bill S-211 (Can.)]

79. An Act to Amend the Customs Tariff (Goods from Xinjiang), S-204, 44th Parliament (2021) (Can.) [hereinafter Bill S-204 (Can.)].

80. *See* Simon Lester, *Canadian Senator Introduces Bill To Ban Goods from Xinjiang Uyghur Autonomous Region; Senate Discusses Enforcement of Existing Laws*, CHINA TRADE MONITOR (Nov. 28, 2021), https://www.chinatrademonitor.com/canadian-senator-introduces-bill-to-ban-goods-xinjiang/.

Mexico buttressed their USMCA compliance efforts in February 2023 by introducing administrative regulations prohibiting the importation of goods produced with forced labor.[81] Mexico's Forced Labor Regulation became effective on May 18, 2023.[82] The Forced Labor Regulation provides that the Ministry of Labor and Social Welfare (MLSW) may initiate, *ex officio* or at the request of a private party, a procedure to determine whether forced labor was used in the production of goods.[83] After the procedure, the MLSW will publish resolutions (i.e., findings) on its website, and goods covered by the resolutions are denied entry into Mexico.[84]

The reflection of import bans and broader policy around combating forced labor in the USMCA are evidence of growing international momentum, and the potential use of RTAs in this fight. Particularly in countries where the political will already exists, encouraging renewed legislation or increased enforcement can help keep products made with forced labor out of the consumer market. Further discussion on the compatibility of these initiatives with WTO obligations may be found throughout Part III, below, where they are used as illustrative examples.

C. *EU Trade Remedy to Combat Forced Labor*

Finally, on December 12, 2024, the EU approved a Regulation prohibiting products made with forced labor, which came into force the following day, December 13.[85] Member states will then have three years to implement the Regulation.[86] The implementation of the Regulation will fall to individual Member States with respect to their investigative

81. Acuerdo que Establece las Mercancías Cuya Importación está Sujeta a Regulación a Cargo de la Secretaría del Trabajo y Previsión Social [Agreement establishing the goods whose importation is subject to regulation by the Ministry of Labor and Social Security], Diario Oficial de la Federación [DOF] 02-17-2023 (Mex.), formato HTML, https://www.dof.gob.mx/nota_detalle.php?codigo=5679955&fecha=17/02/2023#gsc.tab=0.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Products Made With Forced Labor To Be Banned From EU Single Market*, *supra* note 15; *see also*, Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on Prohibiting Products Made With Forced Labor on the Union Market and Amending Directive (EU) 2019/1937, http://data.europa.eu/eli/reg/2024/3015/oj [hereinafter *E.U. Regulation Approved Text*].

86. *See E.U. Regulation Approved Text*, *supra* note 85, art. 39.

and executive procedure.[87] The purpose of the Regulation is set out in the Explanatory Memorandum of the European Commission's proposal of the Regulation to the Council and Parliament, with specific reference to upholding human rights and encouraging corporate sustainability.[88]

Key features of the EU Regulation include:

Characteristic	Article
Coverage of both domestically produced and imported products.	1(1), 3
A definition of forced labor that incorporates by reference Article 2 of the ILO Forced Labour Convention, 1930 (No. 29) defining forced and compulsory labor as noted above, and Article 1 of the ILO Abolition of Forced Labour Convention, 1957 (No. 105), prohibiting forced or compulsory labor as a means of political coercion, labor mobilization or discipline, or as a means of discrimination.	2(1)-(2)
Enforcement by customs authorities at the border, and use by authorities of a risk-based approach for investigations	14
The donation (if perishable), or recycling or destruction (if not perishable) of products that have been found to violate the prohibition on forced labor	Preamble, clause 53
A provision for Member States to share information, ensuring consistency and reducing the technical burdens on decision-making and investigations (Articles 6, 7); a provision for international cooperation	6, 7, 13

III. Compatibility of Forced Labor Bans with WTO Law

While promising, a major challenge to the success of these import bans is whether they are compatible with Member States' WTO obligations and generally with international norms of transparency, fairness, and due process. The WTO is the key multilateral governing body for international trade and several multilateral agreements come under

87. *See Proposal for a Regulation of the European Parliament and of the Council on Prohibiting Products Made With Forced Labour on the Union Market*, at 3–5, COM (2022) 453 final (Sep. 14, 2022) (noting Legal Basis, Subsidiarity and Proportionality) [hereinafter *E.U. Forced Labor Ban Proposal*].

88. *Id.* at 1.

the WTO framework, including the two that are most relevant for import ban challenges: the General Agreement on Tariffs and Trade (GATT) and the Technical Barriers to Trade Agreement (TBT Agreement or TBT).[89] Member States may bring claims contesting the compatibility of other states' trade measures with WTO rules, including the import bans discussed in this Article. The validity of any such claims would be determined by a WTO Panel and, until it became defunct due to the United States' blockage of appointments, the WTO Appellate Body.[90]

The GATT entered into force in 1947, long before the 1994 establishment of the WTO as an international organization.[91] The provisions of the GATT were incorporated into the WTO Agreements as GATT 1994 and made a legally binding part of the WTO rules.[92] The TBT Agreement was adopted as one of the WTO Agreements and is intended to "further the objectives of GATT 1994"[93] by setting down rules for technical regulations and standards to improve their conformity, eliminate unnecessary restrictions on international trade, and prevent discrimination in respect of technical regulations.[94] A ban on products made with forced labor unequivocally falls under the GATT, and as discussed below, very likely falls under the TBT Agreement because it concerns the process by which a product is made.[95]

It is important to note that, although the GATT and TBT are the two key agreements to consider for import ban compatibility, they are not the only relevant WTO agreements for addressing forced labor. For instance, the General Agreement on Trade in Services (GATS) would be relevant to bans on trade in *services* performed with the use of forced labor.[96] There are also a range of instruments dealing with forced labor

89. *See generally WTO Legal Texts*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited May 22, 2024).

90. *See A Unique Contribution*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited May 22, 2024).

91. *See History of the Multilateral Trading System*, WTO, https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited May 1, 2023).

92. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

93. *See* Agreement on Technical Barriers to Trade, pmbl., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

94. *See generally Technical Barriers to Trade*, WTO, https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited May 22, 2024).

95. *See* TBT Agreement, *supra* note 93, annex 1.

96. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

under bilateral agreements and RTAs, which are relevant to the general regulatory initiatives.[97] While many of these non-WTO trade agreements go beyond WTO law in terms of trade-related labor rules, they often use the foundational principles of non-discrimination and market access and include comparable exceptions to those located in WTO law.[98] Many of the principles expounded in this Article are applicable and form a potential foundation for analyzing the compatibility of import bans against trade agreements beyond the WTO.

The cornerstone GATT and TBT obligations addressed by this Article are (1) the prohibition on quantitative restrictions and (2) the principle of non-discrimination between like products, de jure or de facto.[99] Therefore, this part will walk through the concepts of quantitative restrictions, "likeness," and non-discrimination as they relate to import bans on products made with forced labor. As will be discussed further, the characteristics of a WTO-compatible import ban can be demonstrated with specific reference to each of these concepts. This Article concludes that it is possible to craft a robust, compatible, and defensive import ban on products made with forced labor. Further lessons from the analysis are detailed in Part V.

A. *Non-discrimination and Quantitative Restrictions*

A key goal of the GATT and WTO is to ensure the elimination of discriminatory quantitative restrictions (Article XI of the GATT).[100] On its

97. *See, e.g.*, USMCA, *supra* note 20, for labor provisions in trade agreements. *See generally Labour Provisions in Trade Agreements Hub*, ILO, https://webapps.ilo.org/LPhub/(last accessed May 22, 2024).

98. *See generally* MALEBAKENG AGNES FORERE, THE RELATIONSHIP OF WTO LAW AND REGIONAL TRADE AGREEMENTS IN DISPUTE SETTLEMENT, ch. 2 (2015). For example, see the New Zealand-United Kingdom Free Trade Agreement (NZ-UK FTA), in which Article 2.3 follows the language of GATT Article III National Treatment, and the General Exceptions of Article 16.3 utilize similar language to GATT Article XX General Exceptions. Free Trade Agreement Between New Zealand and the United Kingdom of Great Britain and Northern Ireland, N.Z.-U.K., arts. 2.3, 16.3, May 31, 2023; GATT, *supra* 92, art. III, XX. Yet, the NZ-UK FTA also contains a dedicated chapter on Trade and Labour (Chapter 23). Free Trade Agreement Between New Zealand and the United Kingdom of Great Britain and Northern Ireland, N.Z.-U.K., art. 23, May 31, 2023.

99. For GATT and TBT obligations, unless otherwise stated, the burden of proof is on the complainant to show that a measure is inconsistent with the obligations—that is, if country A bans the importation of products made in country B under an import ban, it is the responsibility of country B to demonstrate that the import ban is inconsistent with WTO obligations if and when they lodge a complaint. For exceptions, the burden is on the respondent.

100. GATT, *supra* 92, art. XI:1 ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any

face, an import ban, being "a limitation on action, a limiting condition[,] or regulation,"[101] is a quantitative restriction of the type prohibited by Article XI. However, application of Article XI is qualified in at least two ways that are relevant to import bans on products made with forced labor. The first and key qualifier is that Article XI does not apply to an import ban where there is a corresponding domestic restriction that bans domestic production or sales on the same basis as the import ban. The point of this is non-discrimination—if a product is banned domestically, it is not discriminatory to prevent a similar product from accessing the domestic market from a foreign location. Second, Article XI also contains an exception for restrictions related to the regulation of commodities. A country would only need to rely on this second exception as a backup if it did not have a domestic law corresponding to its import ban.

Regarding the first qualifier, the basis for the carve-out of a comparable domestic measure is contained in an "Ad Note" to Article III of the GATT.[102] The relevant text of the Article III Ad Note is as follows:

> [A]ny law, regulation or requirement of the kind referred to in paragraph 1 [regulations affecting the internal sale or distribution

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product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.")

101. Panel Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.129, WTO Doc. WT/DS90/R (adopted Sept. 22, 1999). In developing the understanding of the phrase "limiting condition," the Panel in *India—Autos* stated: "That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect." Panel Report, *India—Measures Affecting the Automotive Sector*, ¶ 7.270, WTO Doc. WT/DS146/R, WT/DS175/R (adopted Apr. 5, 2002). It is not necessary to quantify the limiting effects of a measure, as "such effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context." Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, ¶ 5.217, WTO Doc. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (adopted Jan. 26, 2015) (referring to Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶¶ 319–20, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012)).

Article XI also covers both de jure and de facto quantitative restrictions. *See* Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.17, WTO Doc. WT/DS155/R (adopted Feb. 16, 2001) [hereinafter Panel Report, *Argentina—Hides and Leather*]. In any case, an import ban clearly has a "limiting effect" on imports, both de jure and de facto, on the products covered by the measure. Whether there is de facto, but not de jure, discrimination based on the hardship of complying with import procedure however is another question.

102. An Ad Note is effectively a footnote to certain provisions of the GATT, indicated by a * symbol rather than a numbered footnote. They explain and inform the operation of the relevant Article. *See, e.g.*, GATT, *supra* note 92, art. III.

> of products] which *applies to an imported product and to the like domestic product* and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as … a law, regulation or requirement of the kind referred to in paragraph 1, and *is accordingly subject to the provisions of Article III*.[103]

This means that if a border measure has a parallel or corresponding domestic measure, the measure should be assessed against the standard of Article III, which concerns non-discrimination between imported products and domestic products, rather than against the standard of Article XI. If the domestic regulation and the import ban equally restrict any sales of products made with forced labor, then there is no impermissible discrimination.

Articles 1 and 3 of the EU Regulation, for example, along with its Explanatory Memorandum, clearly state that the law applies both to imports and to products produced within the Union Market.[104] Thus, it satisfies the requirements of the Ad Note and should be considered under Article III instead of Article XI.

While the situation is not explicit in the United States, U.S. laws likely also satisfy the requirements of the Ad Note, because forced labor is illegal under the U.S. Constitution.[105] Moreover, there are certain restrictions on interstate commerce for goods produced in violation of certain labor laws.[106]

Though the United States has a strong case that its laws constitute a comparable domestic restriction to its import bans, the second qualifier

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103. For further text of Article III:1: "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production." *Id.* (emphasis added).

104. *E.U. Regulation Approved Text*, *supra* note 85, arts. 1, 3; *E.U. Forced Labor Ban Proposal*, *supra* note 87, at 1.

105. 13th Amendment to U.S. Constitution: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII; *see also* 18 U.S.C. § 1589 (criminalizing forced labor); *Involuntary Servitude, Forced Labor, and Sex Trafficking Statutes Enforced*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced (last modified Aug. 6, 2015).

106. *See, e.g.*, Wage & Hour Div., *Fact Sheet #80: The Prohibition against Shipment of "Hot Goods" Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB. (Oct. 2014), https://www.dol.gov/agencies/whd/fact-sheets/80-flsa-hot-goods.

discussed here is a fallback option available for a segment of imports found in the exception to Article XI itself, which states:

> The provisions of paragraph 1 of this Article [the prohibition on quantitative restrictions] shall not extend to the following: . . . (b) Import and export prohibitions or restrictions *necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.*[107]

There are three questions that the United States must answer to satisfy this exception: (1) first, whether the import ban on products made with forced labor is enforced through applying a standard or regulation; (2) second, whether the standard or regulation concerns classification, grading, or marketing; and (3) third, whether the goods in question are commodities.

In response to the first, an import ban on products made with forced labor is clearly enforced through regulation. The types of import bans described here would also meet the more restrictive definition of "regulation" found in the TBT Agreement,[108] which, though a separate agreement, should be read consistently with the GATT.[109] To the second, the types of import bans in question arguably regulate the "marketing" of certain products, in that they prevent their domestic marketing entirely, or might be read as "classifying" products as not fit for sale in the domestic market.[110] And to the third, the definition of

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107. GATT, *supra* note 92, art. XI(2)(b) (emphasis added).

108. A Technical Regulation is defined in the Annex to the TBT Agreement as a "document which lays down *product characteristics or their related processes and production methods*, including the applicable administrative provisions, with which compliance is *mandatory* . . ." (emphasis added). TBT Agreement, *supra* note 93, annex 1(1).

109. *See, e.g.*, Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 90–91, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012) [hereinafter Appellate Body Report, *US—Clove Cigarettes*]; Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.582, WTO Doc. WT/DS400/R; WT/DS401/R (adopted June 18, 2014) [hereinafter Panel Report, *EC—Seal Products*]; Simon Lester, *The Relationship Between the GATT and TBT Non-Discrimination Obligations*, INT'L ECON. L. & POL'Y BLOG (July 31, 2013), https://worldtradelaw.typepad.com/ielpblog/2013/07/the-relationship-between-the-gatt-and-tbt-non-discrimination-obligations.html (describing the TBT Agreement in its Preamble as "furthering the objectives of the GATT 1994").

110. Jurisprudence on the operation of this subparagraph is limited, with no WTO Dispute Settlement cases appearing to deal with this subparagraph substantially. A GATT Panel from 1987 (*Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*) provides guidance only in an export context. *See* WTO, GATT ANALYTICAL INDEX (PRE-1995) ARTICLE XI 326–27 (1994), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_gatt47.pdf.

commodity arguably covers all traded products that are produced with forced labor—although it is more likely to cover only raw goods or materials.[111] For example, this may mean that seafood harvested from boats utilizing forced labor or crops harvested using forced labor would be captured by the Article XI:2(b) exception, and could be used as a backup if a measure failed to meet the domestic parallel requirements of the Ad Note. With import bans therefore falling within the carve-out to the prohibition on quantitative restrictions, the analysis turns to other elements of non-discrimination.

B. *Non-Discrimination Against Like Products*

Article I of the GATT deals with non-discrimination of measures based on national origin, or what could be described as "at the border" discrimination, while Article III deals with non-discrimination of measures "behind the border." The TBT deals with these two forms of discrimination in Article 2.1. Analysis of whether an import ban on products made with forced labor *discriminates* under GATT and TBT obligations starts with consideration of: (1) the scope and intent of the trade measure; and (2) its effect or impact.[112] However, these obligations only apply to measures directed at "like" products.[113] If the product being imported is not "like" the relevant domestic product, then Articles I and III do not apply, since there is no reason to compare the treatment of different products. So, if it can be successfully argued that a product made with forced labor is not "like" a product made without forced labor, there is no impermissible discrimination between the two. For that reason, an analysis of like products will be considered before a consideration of whether import bans are discriminatory, in the event that products are "like."

Key criteria when assessing whether two products are deemed "like" are set out below, as per the Panel Report in *US— Poultry* (China):

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111. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.1179, WTO Doc. WT/DS363/R (adopted Jan. 19, 2010) [hereinafter Panel Report, *China—Publications and Audiovisual Products*] (using the Shorter Oxford English Dictionary to define commodity as: "'[A] thing of use or value; spec. a thing that is an object of trade, esp. a raw material or agricultural crop'; or 'a thing one deals in or makes use of.'").

112. *See generally*, WTO, WTO ANALYTICAL INDEX: TBT AGREEMENT - ARTICLE 2 (DS REPORTS) 5–7 (2024), https://www.wto.org/english/res_e/publications_e/ai17_e/tbt_art2_jur.pdf.

113. *See* GATT, *supra* note 92, art 1, 3; TBT Agreement, *supra* note 93, art 2.1.

> (i) The *properties,* nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.[114]

The Appellate Body in *EC— Asbestos* expanded on the consumer perceptions element, noting that "likeness" may depend on "the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand."[115]

Taken together, a key question for consideration of likeness is whether two products compete in the marketplace.[116] Another concept that draws on several of the criteria is whether a product can be distinguished on the basis of non-product-related process and production methods (PPMs).[117] That is, even if the final products are physically indistinguishable, we should consider whether there is a difference between, for example, a shirt made by a process using forced labor (a non-product-related PPM) and a shirt made by a process which does not use forced labor. Each of the four characteristics identified by the WTO and Appellate Body are considered below. The most likely element for arguing that such products are *not* "like" would be consumer tastes and preferences and potentially tariff classification, although the latter would most likely require extra steps in amending individual tariff schedules or the Harmonized System (HS) codes.

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114. Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, ¶ 7.425, WTO Doc. WT/DS392/R (adopted Oct. 25, 2010) (emphasis added).

115. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 101, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter Appellate Body Report, *EC—Asbestos*].

116. *Id.* ¶ 99 ("a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.").

117. Andreas Oeschger & Elisabeth B. Bonanomi, *PPMs Are Back: The Rise of New Sustainability-Oriented Trade Policies Based on Process and Production Methods*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 14, 2023), https://www.iisd.org/articles/policy-analysis/ppms-rise-new-sustainability-oriented-trade-policies-process-production-methods.

1. Properties, Nature, and Quality

This element may be read literally.[118] The Panel in *EC– Asbestos* noted that properties, nature, and quality are "intended to cover the physical qualities and characteristics of the products."[119] For example, the Panel found that asbestos is a unique product because of its physical and chemical characteristics.[120] However, when comparing a product made with forced labor and a similar product made without forced labor, the physical and chemical composition of the product will most likely be non-differentiable (i.e., textiles made with forced labor are made with the same technical methods and same materials as textiles made with regular labor; the same metal mined by forced labor does not have a different chemical makeup to that mined by regular labor), militating against a determination that such products are "unlike" each other on such grounds.

2. End Uses

End use may also be read literally, as considering the (consumer) purpose of a product. In this respect, products made with and without forced labor are again similar, if not identical; a shirt produced with cotton picked under forced labor conditions in the XUAR is worn in the same way as a shirt produced with fair trade cotton, where workers are compensated and treated with dignity and respect. Similarly, tomatoes picked under forced labor conditions can be and are used in the same dishes as tomatoes grown locally by well-compensated agricultural workers. This likely will not provide the basis for an argument that products made with and without forced labor are not "like" one another.

3. Consumer Tastes and Habits

In contrast with physical characteristics and end use, consumers' tastes and habits may provide a strong basis for arguments that products made with forced labor are not "like" products made without forced labor. Not only do consumers prefer products that they know have been produced under fair labor conditions, but there is also growing interest in the availability of data about the circumstances of

118. *See* Robert Read, *Process and Production Methods and the Regulation of International Trade*, *in* THE WTO AND THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES BETWEEN THE EUROPEAN UNION AND THE UNITED STATES 244 (Nicholas Perdikis & Robert Read eds., 2005).

119. Appellate Body Report, *EC—Asbestos*, *supra* note 115, ¶ 110.

120. *Id.*

production.[121] In one World Vision report from 2017, eighty-four percent of Canadian consumers indicated that they felt "frustrated by [how] difficult it is to determine where the products they buy are made, how they're made and who makes them"—an increase of six percent from a similar poll in 2015.[122] A further seventy-seven percent of consumers claimed that "if they found out that a product they were buying regularly was made by children working in dirty, dangerous or degrading conditions, they would stop buying it and switch to another brand or ethically-certified product."[123]

In the United States, consumers have sued manufacturers for failing to disclose the presence of forced labor in their supply chains based on consumer protection laws, the Alien Tort Statute, and the Trafficking Victims Protection Reauthorization Act.[124] Even when experiments comparing stated demand and consumer behavior indicate that customers may default to the cheapest product, rather than spending extra money every time for an item marked "fair trade," this does not belie the fact that consumer taste overall distinguishes between products that have been produced with and without forced labor and that consumers are increasingly concerned about environmental and human rights issues in their spending habits.[125] Moreover, the complexity of supply chains makes discerning consumer tastes difficult, as the "consumer" for purposes of a "like" product analysis is normally the first arm's-length purchaser, which may be several steps up the supply chain from retail purchasers buying a final product.[126] It may be that a distinction in consumer preferences alone is enough to consider the products not "like"; however, the WTO has demonstrated some preference for

121. *See* Robert Handfield et al., *Consumer Pressure Is Key to Fixing Dire Labor Conditions in the Clothing Supply Chain*, HARV. BUS. REV. (Nov. 2, 2022), https://hbr.org/2022/11/consumer-pressure-is-key-to-fixing-dire-labor-conditions-in-the-clothing-supply-chain (outlining one plan to amalgamate and review audit data for the Ethical Apparel Index).

122. WORLD VISION CAN., CANADA'S FORCED & CHILD LABOUR PROBLEM 2 (2017), https://www.worldvision.ca/WorldVisionCanada/media/NCFS/canadas-child-and-forced-labour-problem.pdf.

123. *Id.* at 9.

124. *Global Spotlight on Labor Trafficking in Health Care and Corporate Supply Chains*, JONES DAY, (Oct. 31, 2022), https://www.jonesday.com/en/insights/2022/10/global-spotlight-on-labor-trafficking-in-health-care-and-corporate-supply-chains.

125. *See* Andrew Luttrell et al., *Yes, Consumers Care if Your Product Is Ethical*, KELLOGG INSIGHT (Oct. 4, 2021), https://insight.kellogg.northwestern.edu/article/consumers-care-if-your-product-is-ethical.

126. Christina Stringer & Snejina Michailova, *Why Modern Slavery Thrives in Multinational Corporations' Global Value Chains*, 26 MULTINAT'L BUS. REV. 194, 197 (2018).

characteristics that go towards a product's functionality as markers of likeness.[127]

4. The Tariff Classification of the Products

Tariff classification is a less frequently cited element in analyses of likeness. The Appellate Body addressed the relevance of tariff classification for establishing "likeness" of products in *Japan — Alcoholic Beverages II*, noting that tariff classification, if sufficiently detailed, can be helpful in determining like products. The uniform classification in tariff nomenclatures based on the HS was recognized in GATT 1947 practice as providing a useful basis for confirming "likeness" in products.[128] Furthermore, although rare, specific HS codes do exist for production methods for otherwise directly competitive products. For instance, some HS codes differentiate between organic and non-organic food.[129]

The Appellate Body expressed reservations regarding tariff bindings (tariff concessions under GATT Article II), noting that several countries have bindings in their tariff schedules that cut across different HS tariff headings.[130] Overall, the Appellate Body found that the reliability of tariff classification in determining likeness should be made on a case-by-case basis.[131] Thus, tariff bindings, and by extension tariff classifications, that include a wide range of products or are not

127. *See generally* Emily B. Lydgate, *Consumer Preferences and the National Treatment Principle: Emerging Environmental Regulations Prompt a New Look at an Old Problem*, 10 WORLD TRADE REV. 165 (2011).

128. The Appellate Body noted that tariff classification has been used as a criterion for determining "like products" in previous adopted panel reports. In the 1987 *Japan—Alcohol* Panel Report, when examining certain wines and alcoholic beverages, the Panel utilized the Customs Cooperation Council Nomenclature (CCCN) for the classification of goods in customs tariffs which has been accepted by Japan. WTO, WTO ANALYTICAL INDEX: GATT 1994 ARTICLE III (DS REPORTS) 18 (2023), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art3_jur.pdf (referencing Report of the Panel, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, ¶ 5.6, L/6216 (adopted Nov. 10, 1987)); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 21–22, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) [hereinafter Appellate Body Report, *Japan—Alcoholic Beverages II*].

129. JASON POTTS, THE LEGALITY OF PPMS UNDER THE GATT: CHALLENGES AND OPPORTUNITIES FOR SUSTAINABLE TRADE POLICY 14 (2018), https://www.iisd.org/system/files/publications/ppms_gatt.pdf.

130. *See* Appellate Body Report, *Japan—Alcoholic Beverages II*, *supra* note 128, at 22.

131. *Id.* at 20–22.

sufficiently precise would not be reliable criteria for determining likeness.[132]

In light of this, the most likely avenue to distinguish between products on the basis of non-product-related PPMs is consumers' tastes and habits criteria.[133] Tariff classification is also a potential supporting element, but it would require individual countries to make a distinction in their tariff schedules between the goods made with and without forced labor and for the HS at the World Customs Organization to do the same—a significant task.[134] Past WTO cases have rarely applied consumer tastes as the primary basis for determining likeness, suggesting that criteria related to the functionality of a product (e.g., physical or end use characteristics) might be more important or at least more predictable than non-functional criteria.[135] However, the Appellate Body in *EC — Asbestos* dismissed the idea that physical characteristics are sufficient in and of themselves.[136] Although, *EC — Asbestos* dealt with products that were physically different from one another, in correcting the Panel's analysis, the Appellate Body insisted on the need to consider *all* relevant criteria.[137] The process of considering individual criterion on their own merit suggests that any single criterion may be sufficient (i.e., consumer tastes and habits), and by extension products which exhibit distinctiveness in the marketplace can be found to be unlike despite having identical physical properties and end-uses.[138]

This interpretation would permit a wide range of consumer interests to serve as the basis for differential treatment under GATT Article III. In the case of *EC — Asbestos,* the Appellate Body applied "risks posed by

132. For example, Canada implemented a forced labor ban by amending its tariff schedule. Tariff item No. 9897.00.00 was amended to read, in part: "Goods manufactured or produced wholly or in part by prison labour; Goods mined, manufactured or produced wholly or in part by forced labour." In this instance, relying on the tariff schedule would not be a reliable indicator of "likeness," however, as Tariff item No. 9897.00.00 includes a whole range of products in addition to products made with forced labor that are all generally banned from importation into Canada. *See* Customs Tariff Schedule, S.C. 1997, c. 36, Tariff Item 9897 (Can.)

133. For instance, in a 2017 World Vision report, "77% of Canadians claim that if they found out that a product they were buying regularly was made by children working in dirty, dangerous or degrading conditions, they would stop buying it and switch to another brand or ethically-certified product." WORLD VISION CAN., *supra* note 122, at 9.

134. *See generally What is the Harmonized System (HS)?*, WORLD CUSTOMS ORG., https://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx (last visited Sept. 7, 2024).

135. POTTS, *supra* note 129, at 15.

136. *Id.* at 16.

137. Appellate Body Report, *EC—Asbestos, supra* note 115, ¶ 109.

138. POTTS, *supra* note 129, at 16–17.

the product to human health" to be "pertinent in an examination of 'likeness'" and evaluated this under the "criteria of physical properties, and of consumers' tastes and habits."[139] Furthermore, this analysis can by extension be applied to products made with forced labor, as they implicate consumers' tastes and habits despite having similar physical properties and end uses. As demonstrated in *EC — Asbestos*, in considering individual criteria to determine likeness, any single criterion may be sufficient as determined on a case-by-case basis.[140] As such, consumer tastes and habits concerning products made with forced labor may be sufficient to find that a product made with forced labor is unlike a product made without forced labor, if adequate data could be produced on the differences in tastes and habits.

For the following sections on non-discrimination between like products, the Article will proceed as though products made with and without forced labor *are* like one another; this is merely to support a more robust analysis and should not be taken to indicate a belief or conclusion on those grounds.

C. *Non-Discrimination Between Like Products of Different Foreign Origin*

If two products are like one another, GATT Article I principles prohibit discrimination between them on the basis of national origin.[141] The relevant text of Article I:1 is as follows:

> [W]ith respect to *all rules and formalities in connection with importation and exportation*, and with respect to *all matters referred to in paragraphs 2 and 4 of Article III*,* any *advantage, favour, privilege or immunity* granted by any contracting party to any product originating in or destined for any other country *shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*[142]

In short, any favorable treatment granted for a product originating in one country must be applied to like products originating in any other country. Key elements of this rule include (1) the measures covered; (2) whether they are like products (which we will assume for this analysis), and; (3) whether there is discriminatory treatment.

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139. Appellate Body Report, *EC—Asbestos*, *supra* note 115, ¶ 113.

140. *See id.* ¶¶ 101–02; *see also* Appellate Body Report, *Japan—Alcoholic Beverages II*, *supra* note 128, at 22 (affirming case-by-case approach in determining the application of like product).

141. GATT, *supra* note 92, art. I.

142. *Id.* art. I:1 (emphasis added).

Measures must be sensitive with respect to their "design, structure, and expected operation"[143] and their impact on "competitive opportunities"[144] to meet the requirements of non-discrimination with respect to products of foreign origin.

This clearly puts the UFLPA at odds with the most favored nation (MFN) principle because by design it does not grant the same treatment to products originating in the XUAR as it does to other regions. There are certainly reasons that the U.S. Congress singled out that region as presenting a greater risk for goods produced with forced labor, as noted above, and those reasons are relevant to the consideration of the exceptions provided in the GATT, discussed further below. However, while those exceptions may permit otherwise inconsistent laws as being justifiable or defensible, the UFLPA is nevertheless inconsistent with Article I.

Generally, RTAs (like the USMCA) are inconsistent with the MFN principle. Nonetheless, the GATT contains an exception for RTAs under Article XXIV,[145] because these agreements have been viewed as vehicles for trade liberalization.[146] Although Article XXIV requires that RTAs eliminate tariffs and restrictive regulations on substantially all trade, it allows parties to apply tariffs, restrictions, and GATT-inconsistent measures imposed under specified GATT articles "where necessary" (i.e., under Article XI and Article XX).[147] The forced labor ban, as stipulated under the USMCA, requires only that parties "prohibit the importation of goods into [their] territory from other sources produced in whole or in part by forced or compulsory labor."[148] The plain language and design of the measure as required under the USMCA makes no distinction between products originating from one foreign country versus another. The words "other sources" do not specifically designate a particular region or country; therefore, it is compatible with MFN.

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143. *See* Panel Report, *EC—Seal Products*, *supra* note 109, ¶ 7.597; *see also* Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.95 n.1019, 5.96, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter Appellate Body Report, *EC—Seal Products*] (upholding the Panel's finding in *EC—Seal Products*).

144. Appellate Body Report, *EC—Seal Products*, *supra* note 143, ¶¶ 5.87–5.93

145. *See* GATT, *supra* note 92, art. XXIV.

146. *See* ROBERTO V. FIORENTINO ET AL., THE CHANGING LANDSCAPE OF REGIONAL TRADE AGREEMENTS: 2006 UPDATE 26 (2007), https://www.wto.org/english/res_e/booksp_e/discussion_papers12a_e.pdf.

147. GATT, *supra* note 92, art. XXIV:8(b).

148. USMCA, *supra* note 20, art. 23.6.1.

Since the details of implementation were not stipulated under the USMCA, domestic governments had flexibility on how to craft import bans and thus may have violated the principle of non-discrimination even though the plain text in the RTA does not. In Canada, implementation has been achieved by amending the Custom Tariff, adding that "[g]oods that are mined, manufactured or produced wholly or in part by" forced labor or prison labor are prohibited from entering Canada pursuant to tariff item No. 9897.00.00 of the Customs Tariff.[149] Under the Custom Tariff, any importation of goods classified under tariff item No. 9897.00.00 is prohibited,[150] with no exception, making the measure universal and compatible with the MFN principle.

However, the Canadian government is currently debating Bill S-204, which goes beyond the obligations of the USMCA to call for an outright prohibition on the importation of goods produced wholly or in part from Xinjiang.[151] By discriminating against a specific region in a foreign country in this way, Canada may readily find itself in violation of the MFN principle. It is also more susceptible to arguments of violation than the UFLPA, for example, because of the lack of procedural due process that would be available under Bill-S204; the model of UFLPA (which creates a rebuttable presumption based on extraordinary evidence and heightened risk of forced labor in the XUAR) is more compatible with WTO obligations and less discriminatory, in part because it allows for redress.

In the EU Regulation, the designed application of the import ban is universal.[152] There is no distinction made between products originating from one foreign country as opposed to another, which meets the requirements for compatibility under MFN. It is possible that in its future application, the behavior of different competent authorities within the Member States of the EU might give rise to questions of de facto discrimination between different countries, but this is impossible to assess prior to implementation. Additionally, the Regulation is designed with a risk-based approach (Article 14), which could help circumvent the issue.[153] This is in line with international best practice in other areas[154] and means simply that countries should dedicate the most resources to the areas of greatest risk.

149. CAN. BORDER SERVS. AGENCY, *supra* note 62.

150. Customs Tariff, S.C. 1997, c. 36 (Can.).

151. Bill S-204 (Can.), *supra* note 79.

152. *E.U. Regulation Approved Text*, *supra* note 85, arts. 1, 3.

153. *Id.* art. 14.

154. For example, in respect of assessing countries' effectiveness in combating money laundering, the Financial Action Task Force encourages countries to adopt a risk-based

D. *Non-Discrimination Between Like Foreign and Domestic Products*

Article III concerns non-discrimination "behind the border" between products originating in another country as compared with domestic products.[155] The relevant text of Article III:4 is as follows:

> The *products of the territory of any contracting party imported* into the territory of any other contracting party shall be accorded *treatment no less favourable* than that accorded to *like products of national* origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use . . . .[156]

In short, products from other countries must be treated no less favorably than products produced domestically. Key elements of this rule include whether the products being compared are "like" products, as addressed above, and whether the imported products are being discriminated against in comparison to the like domestic products. The language used for this discrimination analysis in Article III cases is that of "less favorable treatment."

When considering whether there is less favorable treatment between imported and domestic products, the focus of the Appellate Body is on considering the equality of competitive opportunities. In *Japan — Film*, the Appellate Body affirmed the interpretation of the Panel in *US — Section 337* by outlining the criteria relevant to effective equality of competitive opportunities, focusing on the application of laws, regulations and requirements affecting sales, purchase, transport, distribution, and use of products.[157]

So, the question is: are imports treated less favorably than domestic products because of the forced labor import bans? This is closely related to the question of correlative domestic regulation, but there are also ways to construct legislation to address such concerns. For example, the EU Regulation specifically provides that it will apply equally to

approach. That is, not simply treating all possible sources of money-laundering the same, but assessing which sources actually pose the most risk to the country in question, based on its circumstances and vulnerabilities. The principle can be applied to bans on products made with forced labor - it is logical for countries to expand the most effort where the highest risks are.

155. GATT, *supra* note 92, art. III.

156. *Id.* art. III:4 (emphasis added).

157. Report of the Panel, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.11, L/6439 (adopted Nov. 7, 1989); *see also* Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.379, WTO Doc. WT/DS44/R (adopted Apr. 22, 1998).

imported products and products made in the EU (Articles 1 and 3),[158] meaning that the Regulation would treat products made with forced labor in the EU the same as those made with forced labor outside of the EU. Further, the fact that products found to have been made with forced labor are set to be destroyed under the Regulation (rather than re-exported) would indicate that the EU considers such products not to be acceptable anywhere.[159] In other words, the Regulation is not simply about keeping such products out of the internal EU market. Instead, it highlights an intention to eliminate products made with forced labor as broadly as possible.

The situation in the United States is more complex. While products made with forced labor are generally banned, the 13th Amendment to the U.S. Constitution includes an exception for punishment for crime, allowing goods produced with prison labor under certain conditions.[160] As a result, goods produced with prison labor, a form of involuntary labor, can legally exist in the U.S. economy under specific conditions.[161] In contrast, all foreign goods made with forced labor are prohibited from entering the United States. This discrepancy may create complications regarding the United States' national treatment obligations under GATT Article III.

E. *Non-Discrimination on the Basis of Procedure*

GATT Article X focuses on two central principles of the international trade system: transparency in existing trade regulations, and a uniform application of the regulations. Article X aims to enhance transparency and good governance, ensuring that importers have access to up-to-date, accurate information, and that administrative decisions can be challenged through a neutral system of appeals.[162] This is especially important for small businesses and traders, because they have fewer resources and cannot rely on a network of overseas trade missions to promote their interests.[163] Generally, if a Member State wishes to institute an import ban, they must ensure transparency of the measures

158. *E.U. Regulation Approved Text*, *supra* note 85, arts. 1, 3.

159. *Id.* pmbl., cl. 53.

160. U.S. CONST. amend. XIII.

161. *See* Robin McDowell & Margie Mason, *Prisoners in the US are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, ASSOCIATED PRESS (Jan. 29, 2024), https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6f0eb4747963283316e494eadf08c4e.

162. *See generally* GATT, *supra* note 92, art. X.

163. *See* U.N. Econ. Comm'n for Eur., *Article X*, TRADE FACILITATION IMPLEMENTATION GUIDE, https://live-tfignew.pantheonsite.io/suggested-itineraries/creating-trusted-partnership/publication/article-x/ (last visited Sept. 7, 2024).

attached. Specifically, Article X:1 requires that trade-relevant information be published and made available promptly in a manner accessible to third parties (i.e., exporters and importers).[164] This trade-relevant information includes laws, regulations, rulings, judicial decisions of general application, amendments to relevant laws and regulations, and international trade policy which are in force with any other governments (i.e., RTAs). Under Article X:2, an import ban can only be enforced if such information is published prior to application.[165] Article X:3(a) requires all WTO Members to administer all laws, regulations, rulings, and judicial decisions in a uniform, impartial, and reasonable manner.[166] Article X:3(b) further stipulates that Member States should have tribunals in place, or administrative procedures that allow for the review and remedy of administrative actions.[167] One example is the appeal process for a WRO under Section 307 of the U.S. Tariff Act, which provides importers with a consistent forum for review of administrative action.[168]

The TBT Agreement also sets out procedural requirements for regulations that follow similar principles. For example, under Article 5, positive assurance of conformity may be required (i.e., if the measure requires importers to affirm that the products conform to the requirements that ban the importation of products made with forced labor).[169] If required, Members must ensure that foreign products are not treated any less favorably with respect to the conformity procedure,[170] and that conformity procedures are not applied more strictly than necessary.[171] Other requirements include that conformity procedures must be completed as expeditiously as possible,[172] that anticipated processing periods should be communicated and details of any incompatibility with conformity given out,[173] that information requests not be overly

164. Promptly is not an absolute concept. Assessment of promptness is a case-by-case examination of whether the measure was published quickly and without undue delay. Panel Report, *European Communities and Its Member States—Tariff Treatment of Certain Information Technology Products*, ¶ 7.1074, WTO Doc. WT/DS375/R WT/DS376/R WT/DS377/R (adopted Sept. 21, 2010); *see also* GATT, *supra* note 92, art. X:1.

165. GATT, *supra* note 92, art. X:2.

166. *Id.* art. X:3(a).

167. *Id.* art. X:3(b).

168. 19 U.S.C. §1307.

169. TBT Agreement, *supra* note 93, art. 5.

170. *Id.* art. 5.1.1.

171. *Id.* art. 5.1.2.

172. *Id.* art. 5.2.1.

173. *Id.* art. 5.2.2.

burdensome,[174] that confidentiality be respected,[175] and that fees be equitable.[176] Fundamentally, the provisions relate to communicating the relevant information for exporters and importers, not maintaining an unduly burdensome process, and not discriminating against foreign products by means of such processes.

Under the TBT, special consideration must also be given to developing countries. This is not to suggest that products made with forced labor in a developing country should be acceptable. However, while products made with forced labor might originate from both developing and developed countries alike, account should be taken for the fact that the procedural burdens of conformity requirements for an import ban are likely to be more difficult for importers from developing countries.[177] Addressing this element must not take the form of discrimination as between countries, but rather should be focused on ensuring that (for example) the evidentiary requirements for an administrative procedure are flexible and account for these differences.[178]

Relevant regulations, laws, and procedures for the UFLPA are all publicly available and published online on the CBP website.[179] The CBP has issued the U.S. Customs and Border Protection Operational Guidance for Importers, which provides CBP's interpretation of the UFLPA and other applicable laws and regulations enforced by CBP.[180] The document is publicly available on the CBP website, fulfilling requirements under GATT X:1.[181] The UFLPA Entity List is also updated periodically with notice in the Federal Registrar.[182] These two actions ensure that the United States fulfills its obligations under GATT X:2. The fact that the UFLPA applies only to imports from the XUAR does not violate Article X:3(a). The Panel in *Argentina – Hides and Leather* noted that Article X:3(a), "by its terms, calls for a uniform, impartial and reasonable administration of trade-related regulations. Nowhere does it refer to Members or products originating in or destined for certain Members' territories . . . ."[183] As long as the procedure

174. *Id.* art. 5.2.3.

175. *Id.* art. 5.2.4.

176. *Id.* art. 5.2.5.

177. *Id.* art. 12.

178. *Id.* art. 12.8

179. *See* Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021).

180. *See* UFLPA GUIDANCE, *supra* note 51.

181. *Id.*; *see also* GATT, *supra* note 92, art. X:1.

182. *See, e.g.*, Notice on the Addition of Entities to the Uyghur Forced Labor Prevention Act Entity List, 87 Fed. Reg. 47777 (Aug. 4, 2022).

183. Panel Report, *Argentina—Hides and Leather*, *supra* note 101, ¶¶ 11.67–11.68.

applies uniformly within the region, it is fine for purposes of Article X, but, as noted above, may raise questions under Article I (MFN). Lastly, UFLPA meets U.S. obligations under GATT X:3(b). Pursuant to 19 C.F.R. Part 174, importers that receive an exclusion notice may file an administrative protest.[184] If protest is denied in whole or in part by the Center Director,[185] it can be appealed to the Commissioner of Customs at CBP Headquarters.[186] The protest process provides for administrative review under GATT X:3(b).[187] The importer, following administrative exhaustion, can then appeal to the Court of International Trade, followed by the U.S. Court of Appeals for the Federal Circuit, providing for the impartial judicial review requirement.[188]

USMCA Chapter 7 addresses Customs Administration and Trade Facilitation,[189] and Articles 7.2-7.4 ensure compatibility with GATT X:1. Article 7.2 requires that importation procedures, existing laws and regulations, and current custom duties be available and published online.[190] Article 7.3 (Communication with Traders) and 7.4 (Enquiry Points) ensures that importers have a consistent method of inquiry and a way to communicate with the customs administration.[191] GATT X:2 does not need to be analyzed under the USMCA, as it requires domestic implementation, which is necessarily inapplicable to foreign imports. Finally, USMCA Article 7.15 (Review and Appeal of Customs Determinations) ensures that parties to the Agreement provide "effective, impartial, and easily accessible procedures for review and appeal of administrative determinations on customs matters."[192] This means that any person with a customs administration issue has access to administrative appeal and "quasi-judicial or judicial review or appeal of the determination or decision made at the final level of an administrative review."[193] Thus, USMCA Article 7.15 ensures compatibility with the obligations of GATT X:3(a)-(b).

As the EU Regulation is yet to be implemented, it is difficult to anticipate all procedural issues that might arise, but at this stage, the design of the procedural framework can be observed for purposes of compatibility analysis. While the Regulation applies uniformly to all EU

184. UFLPA GUIDANCE, *supra* note 51, at 10.
185. 19 C.F.R. § 174.23.
186. 19 C.F.R. § 174.26.
187. *See* GATT, *supra* note 92, art. X:3(b); *see also* UFLPA GUIDANCE, *supra* note 51, at 8–10.
188. 19 C.F.R. § 174.31.
189. USMCA, *supra* note 20, art. 7.
190. *Id.* art. 7.2.
191. *Id.* arts. 7.3–7.4.
192. *Id.* art. 7.15.1.
193. *Id.*

Member States, each Member State will be responsible for implementing it through competent authorities (e.g., a customs department).[194] Chapters III and IV set out in detail the procedural requirements of the investigation and decision-making processes.[195] Information sharing between competent authorities of the Member States in the EU (Articles 6 and 7) is also designed to limit procedural burdens and ensure consistency in approach and decisions.[196] The Regulation also provides for assistance to micro- and small- and medium-sized enterprises (MSMEs), recognizing that they "can have limited resources and ability to ensure that the products they place or make available on the Union market are free from forced labor."[197] As the Regulation suggests that the Commission issue guidance on due diligence for MSMEs, taking into account their size and economic resources, this is yet another instance of how the EU Regulation is even more narrowly tailored than existing import bans to conform to WTO obligations.[198] While it is yet to be seen how these provisions will play out in practice, their design is likely to be compatible with GATT and TBT procedural requirements if passed in the current form.

F. *Non-Discrimination in the TBT Agreement*

For the purposes of the TBT Agreement, a technical regulation is defined as a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory . . . ."[199] The essence of an import ban on products made with forced labor is that such a product is to be differentiated from other goods being imported by virtue of the process by which it was produced. It does not lay down characteristics of a particular product, but the process by which any product is made or produced, by reference to a definition of what constitutes forced labor. Compliance with such a ban is certainly mandatory. It is therefore likely that a ban on products made with forced labor falls under the definition of a regulation for the purposes of the TBT Agreement. It is therefore necessary to assess such a measure's compatibility with the TBT Agreement.

194. *E.U. Regulation Approved Text*, *supra* note 85, pmbl., cl. 24, 26–27.

195. *See id.* chs. III–IV.

196. *Id.* art. 6–7.

197. *Id.* pmbl., cl. 32, art. 10.

198. *Id.*

199. TBT Agreement, *supra* note 93, annex 1.1 (emphasis added).

Non-discrimination under the TBT Agreement follows the same principles as those set out above for the GATT. Under Article 2.1, discrimination between foreign products (the MFN rule) and between foreign and domestic products (the national treatment rule) is prohibited. The two principles are contained in one clause, as follows:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded *treatment no less favourable* than that accorded to *like products of national origin and to like products originating in any other country.*[200]

A key issue to understanding this Article is whether a difference in treatment "stem[s] exclusively from legitimate regulatory distinctions."[201] The WTO case of *US — Clove Cigarettes* is instrumental to interpreting that idea; there, the Appellate Body found:

> [W]here the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze *whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction* rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, *the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed*, in order to determine whether it discriminates against the group of imported products.[202]

This is very similar to the standard of the GATT non-discrimination articles with respect to design and structure described above, although the interpretation here includes language not associated with the GATT articles (like "legitimate regulatory distinction" and whether the regulation is "even handed").

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200. *Id.* art. 2.1 (emphasis added).

201. Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements—Recourse to Article 21.5 of the DSU by Canada and Mexico*, ¶ 5.47, WTO Doc. WT/DS384/AB/RW, WT/DS386/AB/RW (adopted May 29, 2015).

202. Appellate Body Report, *US—Clove Cigarettes*, *supra* note 109, ¶ 182 (emphasis added).

Elements of the EU Regulation outlined above indicate that it is designed to be even handed, and not to discriminate between foreign producers or between foreign and domestic producers. Further, through provisions encouraging information-sharing and public information dissemination for MSMEs, the Regulation seeks to reduce the burden on all exporters equitably.[203] It is also clear that the EU considers the Regulation to address a legitimate regulatory distinction. For example, the section of the Explanatory Memorandum on impact assessment opens by stating: "The issue to be addressed—forced labour—is in direct opposition to the respect for human dignity and the universality and indivisibility of human rights as laid down in Article 21 of the Treaty on European Union."[204] The rationale of the Regulation—that forced labor is an affront to human dignity and must be stopped—is thus clearly set out, and no provision spares domestic producers from the same standards as foreign producers.

IV. Defenses if, and to the Extent That, Forced Labor Bans Are Incompatible with WTO Law

Exceptions are available under the GATT if a measure is otherwise found to be incompatible with the substantive and procedural obligations of market access and non-discrimination. Those exceptions are covered by two provisions: Article XX (General Exceptions) and Article XXI (National Security Exceptions).[205] It is highly unlikely that a ban on products made with forced labor could be relevant to national security; therefore, only Article XX is considered below.

If an exception available under Article XX is met, any incompatibility with the obligations of the GATT is deemed justified or defensible.[206] To pass through the general exceptions under GATT Article XX, at least one of the clauses from (a) to (j) must be satisfied, as well as the opening paragraph of Article XX (referred to as the "*chapeau*").[207]

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203. *See E.U. Regulation Approved Text*, *supra* note 85, pmbl., cls. 32–35, art. 10.

204. *E.U. Forced Labor Ban Proposal*, *supra* note 87, at 8; *see also id.* at 5–9.

205. *See* GATT, *supra* note 92, arts. XX, XXI.

206. For GATT exceptions the burden of proof is on the respondent. Mona Paulsen, *The Curious Case of US Self-Judging, Part 2*, Int'l Econ. L. & Pol'y Blog (Jan. 30, 2023), https://ielp.worldtradelaw.net/2023/01/the-curious-case-of-us-self-judging-part-2.html.

207. Note that this order of analysis has also been determined by DSB findings. WTO, WTO Analytical Index: GATT 1994 Article XX (DS reports) 76 (2023), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf (citing Appellate Body Report, *Indonesia—Importation of Horticultural Products, Animals and Animal Products*, ¶ 5.96, WTO Doc. WT/DS477/AB/R, WT/DS478/AB/R (adopted Nov. 22, 2017)).

A. *The List of Exceptions Available Under Article XX*

Article XX exceptions under which a forced labor import could fall include that they are: (a) "necessary to protect public morals"; (b) "necessary to protect human, animal or plant life or health"; or (e) that they relate "to the products of prison labor."[208]

Taking import bans in response to forced labor violations generally, clauses (a), protection of public morals, and (b), protection of human life or health, are the most natural fit. Clause (e), in relation to products of prison labor, may be applicable to a subset of forced labor products. It is important to note that to meet the requirements of clause (a) or (b), the measure in question must be "necessary" to achieve a relevant goal, which is determined through a balancing test both in law and in practice.[209] Factors relevant to finding that a measure is necessary include the importance of the values being pursued by the measure, the trade restrictiveness of the measure, the contribution of the measure to its objective,[210] and a comparison with reasonably available alternative measures.[211]

1. Does an Import Ban on Products Made with Forced Labor Fall Within Article XX(a)?

Article XX(a) relates to measures that are "necessary to protect public morals."[212] In *US — Tariff Measures*, the WTO Panel noted that Article XX(a) must be interpreted in accordance with the Preamble of the WTO Agreement and the spirit of the covered agreement.[213]

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208. *See* GATT, *supra* note 92, art. XX(a)–(b), XX(e).

209. Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.77, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016) [hereinafter Appellate Body Report, *Colombia—Textiles*]; Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 239–242, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [hereinafter Appellate Body Report, *China—Publications and Audiovisual Products*]; *see also*, Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 179, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter Appellate Body Report, *Brazil—Retreaded Tyres*] (discussing whether a measure is "necessary" in the context of GATT article XX(b)).

210. Appellate Body Report, *Colombia—Textiles*, *supra* note 209, ¶¶ 5.71–5.74; Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 209, ¶¶ 145, 178.

211. Appellate Body Report, *China—Publications and Audiovisual Products, supra* note 209, ¶¶ 239, 242; Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 209, ¶¶ 170, 181.

212. GATT, *supra* note 92, art. XX(a).

213. Specifically, "the desire of WTO members to contribute to 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.'" Further, the object and purpose of the covered agreements are focused on the principle of

Therefore, allowing any type or range of restrictive trade measures that may otherwise breach a complainant's WTO rights, simply on the basis of an assertion that they are necessary (rather than a demonstration by a respondent of the necessity of the measures) would be contrary to the Agreement.

The Appellate Body has held that the respondents (in this case, the country imposing the ban on goods made with forced labor) carry the burden of proving that the measure in question is "necessary to protect public morals" within the meaning of Article XX(a).[214] In so doing, the responding party may identify alternative measures and show how they cannot achieve the desired objective to demonstrate the measure's necessity, but it is not required to.[215] The responding party is not required to identify the entire "universe of less trade-restrictive measures" (as this would be an impractical and impossible burden).[216] Only when the complainant raises measures that, in its view, the responding party should have taken that are less trade-restrictive and reasonably available is the respondent required to address alternatives.[217]

In *US — Gambling*, the Panel interpreted "public morals" to "[denote] standards of right and wrong conduct maintained by or on behalf of a community or nation."[218] The Panel further noted that the concept of public morals differs and can vary in time and space for Member States.[219] This formulation of public morals was later adopted by other WTO Panels (e.g., *China — Publications and Audiovisual Products*).[220] It should be noted that the Appellate Body and Panels have given significant leeway to countries on issues of public morals.[221]

The Article XX(a) analysis proceeds in two steps.[222] The measure in question must (1) be "designed" to protect public morals; and (2) be

liberation of trade flows between WTO Members. Panel Report, *United States—Tariff Measures on Certain Goods from China*, ¶ 7.160, WTO Doc. WT/DS543/R (Sept. 15, 2020) [hereinafter Panel Report, *US—Tariff Measures (China)*].

214. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 309, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

215. *Id.*

216. *Id.*

217. *Id.* ¶ 311.

218. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.465, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).

219. *See id.* ¶ 6.461.

220. *See* Panel Report, *China—Publications and Audiovisual Products*, *supra* note 109, ¶ 7.759.

221. *See generally* Pelin Serpin, *The Public Morals Exception After the WTO Seal Products Dispute*, 2016 COLUM. L. REV. 217 (2019).

222. Appellate Body Report, *Colombia—Textiles*, *supra* note 209, ¶¶ 5.67–5.70.

"necessary" to protect such public morals.[223] With respect to the design of the measure, there must be a relationship between the GATT-inconsistent measure and the protection of public morals. This analysis proceeds with a threshold examination of the relationship between the measure in question and public morals. If the measure is incapable of protecting public morals, then there is no relationship between the measure and the protection of public morals. Therefore, further examination into the "necessity" prong of the analysis is unnecessary.[224] In contrast, if a relationship between the measure and the protection of public morals exists, then further examination to determine whether the measure is necessary is required under GATT Article XX(a).[225]

To determine whether a relationship between the measure and protection of public morals exists, "a panel must examine evidence regarding the design of the measure at issue, including its content, structure, and expected operation."[226] The Appellate Body noted that an express reference (within the text of a regulation) to an objective falling within the scope of "public morals" may not, by itself, be sufficient to meet the requirements of "design" under GATT Article XX(a).[227] In contrast, the absence of such an express reference to public morals may be found to have such a relationship, following an assessment of the design of the measure.

The United States, Canada, and Mexico can all justify their import bans under the public morals exception of GATT Article XX(a). On top of an argument that eliminating forced labor is simply part of the public morals for each society on normative grounds, Chapter 23 of the USMCA makes explicit reference to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)[228] and the ILO Declaration on Social Justice for a Fair Globalization (2008)[229] in obligating parties to adopt "statutes and regulations, and practices" that eliminate "all forms of forced or compulsory labor."[230] WTO Panels have recognized meeting international goals, agreements, and conventions as legitimate public moral objectives within the meaning of GATT Article XX(a).[231] For instance, in

223. GATT, *supra* note 92, art. XX(a).

224. Appellate Body Report, *Colombia—Textiles*, *supra* note 209, ¶ 5.68.

225. *See* GATT, *supra* note 92, art. XX(a).

226. Appellate Body Report, *Colombia—Textiles*, *supra* note 209, ¶ 5.69.

227. *Id.*

228. USMCA, *supra* note 20, arts. 23.1, 23.3.

229. *Id.* art. 23.2.1.

230. *Id.* art. 23.3.1(b).

231. *See, e.g.*, Panel Report, *Brazil—Certain Measures Concerning Taxation and Charges*, ¶ 7.563, WTO Doc. WT/DS472/R, WT/DS497/R (adopted Jan. 11, 2019).

Brazil — Taxation, the Panel found that the measure in question (the PATVD programme) could contribute to the objective of bridging the digital divide and promoting social inclusion.[232] These objectives have been shown to be "public moral" objectives within the meaning of Article XX(a).[233] Furthermore, the Panel noted that bridging the digital divide and promoting social inclusion are internationally recognized policy objectives under the United Nations Millennium Development Goals.[234] Overall, in the context of forced labor, it thus seems readily possible to invoke public morals under the ILO Declarations.

With respect to the EU Regulation, it is also clear that the EU considers its citizens to have a moral objection to products made with forced labor. Clause 15 of the Preamble states that it is a "matter of public moral concern that products made with forced labour could be available on the Union market or exported to third countries without an effective mechanism to ban or withdraw such products."[235]

The second prong of the analysis concerns the "necessary" requirement under Article XX(a).[236] The Appellate Body has noted that, unlike the "design" requirement, the assessment of the necessity of a measure entails "a more in-depth, holistic analysis of the relationship between the measure and the protection of public morals," weighing and balancing "a series of factors, including the importance of the societal interests or value at stake, the contribution of the measure to the objective it pursues, and the trade restrictiveness of the measure."[237] It also noted that, in most cases, a comparison between the challenged measure and possible alternatives should be taken into account.[238]

Furthermore, the Appellate Body has announced that "whether a particular degree of contribution is sufficient for a measure to be considered "necessary" cannot be answered in isolation from an assessment of the degree of the measure's trade restrictiveness and of the relative importance of the interest or value at stake."[239] For instance, a measure making a limited contribution to protecting public morals may be justified under Article XX(a) in circumstances where the measure has "only a very low-trade restrictive impact."[240] In contrast, a measure

232. *Id.* ¶¶ 7.561–7.563
233. *Id.* ¶¶ 7.563–7.568.
234. *Id.* ¶ 7.563.
235. *E.U. Regulation Approved Text*, *supra* note 85, pmbl., cl. 15.
236. *See* GATT, *supra* note 92, art. XX(a).
237. Appellate Body Report, *Colombia—Textiles*, *supra* note 209, ¶ 5.70.
238. *Id.*; *see also* Panel Report, *US—Tariff Measures (China)*, *supra* note 213, ¶ 7.110.
239. Appellate Body Report, *Colombia—Textiles*, *supra* note 209, ¶ 5.77.
240. *Id.*

making a significant contribution to public morals may be found unjustifiable under Article XX(a) if the measure is highly trade restrictive.

As noted, the USMCA recognizes the ILO Declarations and the goal of "elimination of all forms of forced or compulsory labor."[241] As such, all three parties can invoke the public morals exception with reference to the ILO Declarations. However, the second prong of the analysis under "necessity" remains. The USMCA obligates parties to "prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor,"[242] which is necessary to the extent that it fills a specific gap in forced labor regulation (and issue of public morals) by allowing parties to address forced labor violations that did not occur in their own jurisdiction. On balance, since this does not occur in an unduly restrictive way (it adheres to standards of non-discrimination and due process, allows for methods of redress and review, etc.) and facilitates the goal of eradicating forced labor by filling a gap not otherwise accessible through domestic regulation, it should pass the balancing test. Furthermore, the U.S. Tariff Act and the Canadian Customs Tariff are necessary to achieve the obligations of the USMCA and are narrowly tailored. Measures that go beyond a simple import ban (including the UFLPA and additional domestic measures such the Canadian Bill S-211) can also be used to demonstrate that a ban is necessary, since further measures have been called for (and are needed) to achieve results beyond the foundational import ban.

The EU not only considers that its citizens believe products made with forced labor to be morally objectionable, but also that an import ban is necessary to address those concerns. Clause 16 of the Preamble notes that the import ban is designed to "complete the Union legislative and policy framework on forced labor."[243] As stated in the Explanatory Memorandum: "[t]he continued existence of forced labour illustrates the need for additional measures, also aimed at products, to prevent the placing and making available of products made with the use of forced labor."[244] The EU has affirmatively explained that the regulation "does not exceed what is necessary to attain its objectives."[245]

241. USMCA, *supra* note 20, art. 23.3.1(b).

242. *Id.* art. 23.6.1.

243. *E.U. Regulation Approved Text*, *supra* note 85, cl. 16.

244. *E.U. Forced Labor Ban Proposal*, *supra* note 87, at 2.

245. *Id.* at 5.

2. Does an Import Ban on Products Made with Forced Labor Fall Within Article XX(b)?

Clause (b) of GATT Article XX covers measures "necessary to protect human, animal or plant life or health."[246] As stated by the Panel in *US—Gasoline*, a respondent will have to establish the following two elements to satisfy clause (b):

> (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
>
> (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfill the policy objective.[247]

A Panel will analyze the design and structure of a measure, including any language associated with its objectives.[248] The overall analysis involves weighing and balancing the measure against what it seeks to achieve and how it seeks to do so, both in law and in practice.[249] Relevant factors include the importance of the values being pursued by the measure, the trade restrictiveness of the measure, the contribution of the measure to its objective,[250] and a comparison with reasonably available alternative measures.[251]

The legislative history from the Tariff Act and UFLPA indicate a concern with protecting domestic producers, but also with implementing bans on forced labor (and requiring supply chain due diligence) for the purpose of protecting human life and health from abuse.[252] The congressional hearings that preceded the UFLPA saw former detainees and human rights advocates testify to rampant human rights abuse in

246. GATT, *supra* note 92, art. XX(b).

247. Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WTO Doc. WT/DS2/R (adopted May 20, 1996) (emphasis added).

248. *See* Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 7.200–207, WTO Doc. WT/DS246/R (adopted Apr. 20, 2004).

249. *See* Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 209, ¶¶ 179, 182.

250. *Id.* ¶¶ 145, 179.

251. *Id.* ¶ 156.

252. 166 CONG. REC. H4657 (daily ed. Sept. 22, 2020); 167 CONG. REC. S4906 (daily ed. July 14, 2021).

the region's mass internment camps.[253] The repeal of the consumptive demand clause by the Trade Facilitation and Trade Enforcement Act of 2015 was announced as promoting a "leveled playing field for U.S. industry, but also as promoting an "increased ability to safeguard human rights and improve labor standards in the global supply chain through CBP's enhanced authority to address violations and prevent future abuses from forced labor."[254] In other circumstances, the resolution of a ban on a specific importer or industry has been accompanied by public emphasis on the mitigation of supply chain risk and improvement of working conditions.[255] The press releases that accompany WROs also highlight CBP's commitment to protecting human rights and international labor standards.[256]

While the EU Regulation is explicit in its moral condemnation of forced labor and the scale of the problem, it is less clear on how the measure is designed to protect human life or health. Of course, it may be inferred from the statements on moral condemnation and the scale of the problem, but the Explanatory Memorandum or text does not explicitly address a concern with what will happen to persons being subjected to forced labor if their labor is no longer required. For example, will they be forced into homelessness or other forms of slavery or oppression? As noted below, civil society organizations (CSOs) have highlighted this lack of attention to the ultimate fate of workers.[257] These risks are also highlighted by the impact assessment in the Explanatory Memorandum; the section begins by noting the moral

253. H.R. 6210, 116th Cong. §2(2) (2020); *Forced Labor, Mass Internment, and Social Control in Xinjiang, Hearing Before the Cong.-Exec. Comm. on China*, 116th Cong (2019) (statement of Nury Turkel, Chairman of the Board, Uyghur Human Rights Project), https://web.archive.org/web/20200912090154/https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/Turkel%20CECC%20Oct%2017%20Testimony_%2010152019%20version.pdf.

254. U.S. CUSTOMS & BORDER PROT., TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015: REPEAL OF THE CONSUMPTIVE DEMAND CLAUSE (2015), https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/Fact%20Sheet%20-%20Repeal%20of%20the%20Consumptive%20Demand%20Clause.pdf (last visited Nov. 3, 2024).

255. *See U.S. Lifts Ban on Malaysian Medical Glove Maker Amid Shortage*, REUTERS (Mar. 24, 2020), https://www.reuters.com/article/health-coronavirus-malaysia-gloves-idINL4N2BI07I.

256. *See, e.g.*, U.S. CUSTOMS & BORDER PROT., *CBP Issues Withhold Release Order on Central Romana Corporation Limited* (Nov. 23, 2022), https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-central-romana-corporation; U.S. CUSTOMS & BORDER PROT., *CBP Modifies Withhold Release Order on Certain Tobacco Imports from Premium Tobacco Malawi Limited* (May 24, 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-modifies-withhold-release-order-certain-tobacco-imports-premium.

257. *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made with Forced Labour on the Union Market*, ANTI-SLAVERY INT'L, (Oct. 11, 2022), https://www.antislavery.org/wp-content/uploads/2022/10/Joint-Statement-on-EU-FLI-10.22-v3-1.pdf.

opposition to forced labor, but then states that the issue is so urgent that it does not allow for a full impact assessment of the Regulation.[258] That being said, the impact assessment section then immediately refers to evidence collected in other impact assessments (including those associated with corporate sustainability due diligence and the Sustainable Product Initiative) which are part of what convinced the Commission that a separate impact assessment was unnecessary.[259]

If the measure does fall within the range of measures designed to protect human life or health, the question then becomes whether—after weighing and balancing the importance of the values protected, its trade restrictiveness, its contribution to the objective and reasonably available alternatives—the measure should be considered "necessary." While it's true that an import ban is by its nature highly restrictive, the narrowly tailored design of the measures reflect sensitivity to that fact, and an intent to craft measures that achieve the goal (of preventing products made with forced labor from entering a country) in a WTO-responsible way. There is no effective alternative to addressing forced labor violations that occurred in another jurisdiction that do not violate sovereignty, so if we accept that the goal of protecting human health and life is reasonably necessary and that this is an important element of doing so, then the bans should survive that balancing test.

As referenced in the language of the EU Regulation, the EU already has other initiatives designed to address forced labor but has elected to craft an import ban because those other initiatives are not enough.[260] However, given that the EU Regulation does not explicitly address the impact on human life or health in its text—as it does for public morals—it is harder to draw a strong connection between the import ban and protecting human life or health than to the public morals element. That is not to suggest that drawing such a connection is not possible; the EU could still make a strong argument that the import ban seeks to protect human life or health by complementing other initiatives that are more explicitly targeted at that goal.

3. Does an Import Ban on Products Made with Forced Labor Fall Within Article XX(e)?

Finally, clause (e) covers measures "relating to the products of prison labor."[261] The clause provides an opportunity for this narrow set of

258. *E.U. Forced Labor Ban Proposal*, *supra* note 87, at 8.

259. *See id.*

260. *See id.*, at 1–3; *see also E.U. Regulation Approved Text*, *supra* note 85, pmbl., cls. 5–10.

261. GATT, *supra* note 92, art. XX(e).

measures to pass the exception with a lower burden since clause (e) does not require the measure to be "necessary" to achieve the goal of preventing the importation of products of prison labor.[262] If an import ban relates to products made with prison labor, the country implementing the measure does not have to show that there were no reasonable alternatives to achieve the same goal, only that the measure is designed to and does in fact relate to prison labor. The question of what constitutes "prison labor" exactly, and how it should be distinguished from forced labor in general, is interesting but has not been addressed by the WTO. For now, it is sufficient to say that for a subset of goods which are produced with prison labor that is "forced," an import ban against products made with forced labor could use clause (e) to defend the measure with respect to that specific subset of products, rather than (a) and (b).

B. *Article XX* Chapeau

Even if a measure is found to fall within one of the exceptions listed in clauses (a) to (j), it must still meet the requirements of the Article XX *chapeau*. The text of the *chapeau* is as follows:

> 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 . . . .[263]

Key issues with understanding and analyzing whether a measure meets the requirements of the *chapeau* include (1) the difference between non-discrimination in the *chapeau* and non-discrimination in the substantive obligations like Article I (MFN) and Article III (National Treatment); (2) whether intent can be read into "arbitrary or unjustifiable"; and (3) whether "disguised restriction" is the same as "arbitrary or unjustifiable discrimination" or means something else.

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262. I.e., where some other clauses in Article XX, such as XX(a) and (b), begin with the word "necessary," clause XX(e) does not.

263. GATT, *supra* note 92, art. XX (emphasis added).

The *chapeau* was designed to prevent abuses of the exceptions set out in XX(a) to (j).[264] In *US — Shrimp*, the Appellate Body found that "a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members."[265] How the measure is applied can be discerned from the design, architecture, and revealing structure of a measure to establish whether it constitutes a means of arbitrary or unjustifiable discrimination where the same conditions prevail; "this involves a consideration of 'both substantive and procedural requirements' under the measure at issue."[266] In other words, guidance through the *chapeau* is a highly specific analysis.

1. Whether the Measure Constitutes a Means of Arbitrary or Unjustifiable Discrimination Where the Same Conditions Prevail

The Appellate Body in *US — Shrimp* broke down the question of whether a measure constitutes a means of arbitrary or unjustifiable discrimination where the same conditions prevail into three elements: (1) the application of the measure must result in discrimination; (2) the discrimination must be arbitrary or unjustifiable in character; (3) the discrimination must occur between countries where the same conditions prevail.[267]

As noted above, the discrimination standard is not a repeat analysis of discrimination under Article III:4: "To proceed down that path would be both to empty the chapeau of its contents and to deprive the exceptions in paragraphs (a) to (j) of meaning."[268] Whether a measure is unjustifiable will depend primarily on the "cause or rationale of the discrimination," though the effects of the discrimination may also be

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264. As stated by the Appellate Body in *United States—Standards for Reformulated and Conventional Gasoline*: The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) [hereinafter Appellate Body Report, *US—Gasoline*].

265. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 156, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998). [hereinafter Appellate Body Report, *US—Shrimp*].

266. Appellate Body Report, *EC—Seal Products*, *supra* note 143, ¶ 5.302.

267. Appellate Body Report, *US—Shrimp*, *supra* note 265, ¶ 150.

268. Appellate Body Report, *US—Gasoline*, *supra* note 264, at 23.

relevant.[269] Measures applied uniformly to all countries may still be discriminatory if they do not "allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries."[270] Some level of flexibility should be built into a measure for other parties to show that they can achieve the objective of the measure, even if they do so by slightly different means.

In the case of import bans on products made with forced labor, this could mean not being overly prescriptive with procedural and evidentiary burdens. In other words, there should be more than one way to show that a product is free from forced labor that considers the conditions in the country of production and import. Under the current model for WROs, for example, the standard is the same, but importers can establish that a product was made without forced labor in any number of ways, including through direct evidence and by providing documentation of adequate supply chain due diligence and working conditions.[271]

The framework for whether the "same conditions prevail" was set out by the Appellate Body in *EC — Seal Products*. As per the WTO Analytical Index:

> The Appellate Body explained that the identification of the relevant conditions must be understood by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation has been found. Furthermore, if a respondent considers that the conditions prevailing in different countries are not 'the same' in relevant respects, it bears the burden of proving that assertion.[272]

A country could argue that conditions are not the same on any number of common-sense grounds. These might include the nature and intensity of relevant labor laws, the prevalence of certain industries susceptible to forced labor abuse, the demographics of the workforce, etc.

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269. Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 209, ¶¶ 229–30.

270. Appellate Body Report, *US—Shrimp*, *supra* note 265, ¶¶ 164–65.

271. UFLPA GUIDANCE, *supra* note 51, at 13–17

272. WTO, WTO ANALYTICAL INDEX: GATT 1994 ARTICLE XX (DS REPORTS) 232 (2023), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf (citing Appellate Body Report, *EC—Seal Products*, *supra* note 143, ¶ 5.301).

2. Whether the Measure is a Disguised Restriction on International Trade

A "disguised restriction on international trade" and "arbitrary or unjustifiable discrimination" are related concepts which, according to the Appellate Body in *US — Gasoline*, "impart meaning to one another."[273] In elaborating, the Appellate Body stated:

> It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction,' whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.[274]

It appears that "taken under the guise of a measure formally within the terms of an exception" are the key differentiating words in this statement. It is therefore important that the objective of any import ban on products made with forced labor be clearly stated and that its operation in practice aligns with that stated objective. The more transparent (and more clearly aligned), the safer a provision will be on this front.

The EU Regulation is again a strong example of adherence to principles that suggest compatibility; its language is very clearly intended to be non-discriminatory. Furthermore, the fact that both domestic and foreign goods are set to be destroyed if they are found to have been produced with forced labor supports the conclusion that the regulation is not a disguised restriction on international trade. Similarly, the U.S. Tariff Act and Canada's import ban are explicitly general and non-discriminatory. In contrast, the legislative history of the UFLPA includes numerous negative references to China that extend beyond the issue of forced labor in the XUAR.[275]

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273. Appellate Body Report, *US—Gasoline*, *supra* note 265, at 25.

274. *Id.*

275. *See, e.g.*, Uyghur Forced Labor Prevention Act, H.R. 1155, 117th Cong. §§ 2(8)–(10) (2021) (as passed by House, Dec. 8, 2021).

C. *Defenses to Allegations of Breach of the TBT Agreement*

Defenses to the TBT Agreement operate differently from the GATT Article XX General Exceptions, as the TBT does not contain a separate exceptions clause, but rather builds exceptions into its articles, as demonstrated below. While they share conceptual similarities,[276] a breach of the TBT is unlikely to be defensible explicitly under GATT Article XX, but rather only under defenses within the TBT.[277]

1. Trade Restrictiveness and Legitimate Objectives

The TBT requires that measures be no more trade restrictive than necessary. In a way, this turns the GATT Article XX exceptions into an obligation, reversing the burden of proof. The text of TBT Article 2.2 is as follows:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations *shall not be more trade-restrictive than necessary to fulfil a legitimate objective*, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: *national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.* In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.[278]

Being not "more trade-restrictive than necessary to fulfill a legitimate objective" picks up the concepts that must be applied in Articles XX(a) and (b). TBT Article 2.3 also requires that a "[regulation] shall not be maintained if . . . [its] objectives can be addressed in a less trade-restrictive manner."[279] However, while Article 2.2 of the TBT specifically refers to "protection of human health or safety," it does not refer to the

276. *See* Senai W. Andemariam, *Can (Should) Article XX(b) GATT Be a Defense Against Inconsistencies with the SPS and TBT Agreements?*, 7 J. WORLD INV. & TRADE 519, 539 (2006).

277. *See* Simon Lester, *GATT Article XX as an Exception to the TBT Agreement*, INT'L ECON. L. & POL'Y BLOG (Aug. 8, 2014), https://worldtradelaw.typepad.com/ielpblog/2014/08/gatt-article-xx-and-the-tbt-agreement.html (suggesting that the Appellate Body is unlikely to find Article XX can be used as an exception to the TBT).

278. TBT Agreement, *supra* note 93, art. 2.2 (emphasis added).

279. *Id.* art. 2.3.

protection of public morals.[280] It is not a closed list; in defending a claim that a measure has breached the TBT, a country could therefore argue that protection of public morals is covered under "*inter alia*," but in general the protection of human health or safety is likely the stronger argument if available.

2. The Safe-Harbor Provision

Article 2.4 of the TBT requires that if a relevant international standard exists, measures must, with some exceptions, use them as a basis for their technical regulations. As set out in Article 2.4:

> *Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them*, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.[281]

This is important in the context of import bans on products made with forced labor because it can bring ILO standards into consideration. Of the fundamental ILO conventions, the United States has ratified the Abolition of Forced Labour Convention, 1957 (No. 105) (prohibiting forced or compulsory labor as a means of political coercion, labor mobilization or discipline, or as a means of discrimination) but not the Forced Labour Convention, 1930 (No. 29) defining forced or compulsory labor.[282] The EU recognizes conventions No. 29, its 2014 Protocol, and No. 105 as fundamental ILO conventions, and each of its Member States have ratified them.[283] These conventions are internationally recognized standards as defined by the TBT, being a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics

280. *Id.* art. 2.2. *Cf.* GATT, *supra* note 92, art. XX(a)–(b).

281. TBT Agreement, *supra* note 93, art. 2.4 (emphasis added).

282. *Ratifications for United States of America*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB11200:0::NO::p11200_country_id:102871 (last visited May 1, 2023).

283. *E.U. Regulation Approved Text*, *supra* note 85, pmbl., cl. 1.

> for products or related processes and production methods, with which compliance is not mandatory . . . .[284]

One implication of this is that, if an import ban on products made with forced labor is considered a regulation, then it should use the ILO standards to define what is captured under the definition of "forced labor." As noted above in Part II, the EU Regulation incorporates the definition of forced labor from ILO Conventions No. 29 and No. 105. Section 307 of the Tariff Act also uses this definition.[285] Although the USMCA does not incorporate definitions from ILO Conventions No. 29 and No. 105, it acknowledges obligations under the ILO Declaration on Rights at Work, including the duty to eliminate all forms of forced or compulsory labor.[286]

Further, if a regulation uses a relevant, already existing standard, the TBT provides a rebuttable presumption that the regulation does not create an unnecessary obstacle to international trade. It does require that the Member implementing the regulation be able to explain the justification for the measure, however. The relevant text of Article 2.5 is as follows:

> Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.[287]

Therefore, if an import ban is considered a regulation, and uses ILO standards in respect of forced labor to craft its text, it will be afforded the rebuttable presumption that it does not create an unnecessary obstacle to international trade and is thus compatible with the TBT Agreement. This would further lend weight to a conclusion that such measures should also be considered compatible with GATT and WTO

284. TBT Agreement, *supra* note 93, annex 1.2; *see also* WTO, WTO ANALYTICAL INDEX: TBT AGREEMENT – ANNEX 1 (DS REPORTS) 1 (2023), https://www.wto.org/english/res_e/publications_e/ai17_e/tbt_ann1_jur.pdf; TBT Agreement, *supra* note 93, annex 1.1 ("It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.").

285. 19 U.S.C. § 1307.

286. USMCA, *supra* note 20, arts. 23.1, 23.3.1(b).

287. TBT Agreement, *supra* note 93, art. 2.5.

requirements.[288] This is sometimes described as providing a "safe harbor."[289]

V. Observations on Compatibility and Characteristics of a Compatible and Defensible Measure

It is possible to craft a robust, compatible, and defensible import ban on products made with forced labor. Countries who wish to do so may learn from those who have done so already. Characteristics of a compatible and defensible measure include that the import bans are universally applicable, that they have analogous domestic components, that they are procedurally consistent, transparent, and flexible, and that they are necessary to their stated aims by complementing existing regulations while advancing the interest of public morals and human health. Ideally, they should be just one of many approaches to addressing forced labor.

Key takeaways from the above analysis suggest that the existing U.S., Canadian, and Mexican import bans, as well as the EU Regulation, are largely compatible with WTO obligations. The lessons drawn under each principle can further elucidate what characteristics help to make an import ban on products made with forced labor WTO-compatible, or if not compatible, defensible under relevant principles. High-level observations on the compatibility of each national ban are set out below, each of which inform the general characteristics of a defensible ban.

The U.S. import ban contained in Section 307 is compatible with WTO obligations on all relevant points. The ban applies universally to products from any country. There is a parallel domestic component in that forced labor is outlawed domestically (criminalized, with significant civil penalties attached). It is procedurally consistent and flexible in the methods of proof available for importers who wish to contest a WRO. It complements other measures in place to address forced labor including domestic criminal and civil codes, while also carving out a novel function in the overall pursuit of protecting public morals and human health.[290] There is room for debate as to whether products made wholly or in part with forced labor are "like" products that have

288. *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 109, ¶¶ 90–91; *see also* Panel Report, *EC—Seal Products*, *supra* note 109, ¶ 7.582; Lester, *supra* note 109.

289. *See* Aaron Lukas, *Safe Harbor or Stormy Waters? Living with the EU Data Protection Directive*, CATO Inst. (Oct. 30, 2001), https://www.cato.org/sites/cato.org/files/pubs/pdf/tpa-016.pdf (discussing the safe harbor framework).

290. *See supra* Section IV.A.

been produced domestically under fair labor conditions. There is a strong argument that such products are *not* like, which would avoid the WTO obligation not to discriminate between them. However, if such products are considered like, Section 307 and the WRO procedure are still likely compatible, or defensible if not.

The UFLPA (and CAATSA) present more of a potential issue for WTO compatibility than Section 307 of the Tariff Act. The primary issue is that, despite significant evidence that the XUAR has a severely heightened frequency and risk of forced labor abuse, establishing the rebuttable presumption for just one region violates the non-discrimination obligation of WTO rules under the MFN principle. That said, just because a piece of legislation violates non-discrimination under MFN does not mean that the discrimination is unjustified or arbitrary for the purposes of GATT exceptions. Here, in light of the intense, widespread, and unconscionable forced labor abuses in both North Korea and the XUAR, there is an argument that such legislation is entirely justified. Certainly, it is not arbitrary.

The USMCA appears to be compatible with WTO obligations. As an RTA, the USMCA falls under an MFN exception (GATT Article XXIV). U.S. implementation is governed by the Tariff Act, discussed above. Both Mexico and Canada's enforcement procedures appear to be compatible with WTO obligations. They are non-discriminatory in that they apply universally, regardless of a shipment's country of origin, and are procedurally transparent and consistent while allowing for flexible methods of proof. The import ban is also accompanied by a parallel domestic component in both cases; Article 5 of the Constitution of Mexico 1917 (Rev. 2015) states that "no one can be compelled to work or render personal services without obtaining a fair compensation,"[291] and Canada recently passed Bill S-211, which mandates supply chain monitoring and disclosure for many government institutions and private sector entities.[292] It remains to be seen whether making it illegal to use forced labor or establishing a domestic supply chain act is sufficient to meet national treatment obligations before a WTO Panel; the ban would be more easily defensible if Canada passed a general, internally applicable ban on commerce in goods made with forced labor.

The import bans also carve out a unique policy space to address goods specifically at the point of import and have an overall goal of protecting public morals and human health. Chapter 23 of the USMCA

291. Constitución Política de los Estados Unidos Mexicanos, art 5, Dario Oficial de la Federación [DOF] 05-02-1917 (Mex.).

292. Bill S-211 (Can.), *supra* note 78.

incorporates international standards, heightening compatibility through its reference to the ILO Declaration on Rights at Work for the definition of relevant labor laws (including "the elimination of all forms of forced or compulsory labor").[293] The cooperation provisions present no problems for compatibility; if anything, requiring that countries coordinate their approach through Cooperative Labor Dialogue (23.13), the establishment of a Labor Council (23.14), and by standardizing the process for Labor Consultations (23.17) means that any issues with non-discrimination or process can be resolved quickly and equitably, in a manner reasonably necessary against the backdrop of other law.[294]

The EU Regulation on goods made with forced labor is an example of a highly tailored ban that is compatible with WTO obligations. However, only its practical implementation can confirm how effective it is and whether any de facto discrimination issues arise. The purpose of the EU Regulation in combating forced labor (stemming from the EU's moral objection) is very clear. As noted above, the Regulation covers both imported and domestically produced products, is defined by reference to ILO fundamental labor conventions, follows a universal but risk-based approach to investigations,[295] provides for the destruction of violating products, and allows for information sharing and international cooperation. Further, the Explanatory Memorandum makes clear that the import ban is one of a range of measures designed to combat forced labor, and that the ban is necessary because the other measures are not sufficient alone. The EU Regulation has very strong prospects of being deemed compatible with WTO law. However, if it were not deemed compatible by a WTO Panel, it would stand a strong chance of being defensible under the relevant exceptions.

VI. Conclusion

The WTO and with it the rules-based trading system is in deep trouble. In December 2019, the United States' blockage of appointments to fill vacancies on the WTO's Appellate Body left it without a quorum to decide any new cases, opening the door to countries avoiding compliance with

293. USMCA, *supra* note 20, art. 23.1.

294. *See id.* arts. 23.12, 23.13, 23.17.

295. The regulation will apply universally and not target any particular region. The risk-based approach means that investigatory resources will be directly to where the greatest threats for products made with forced labor arise, which may change over time, providing flexibility to the regulation while not discriminating against a particular region in the text of the regulation.

rulings they do not like or find difficult to implement.[296] At its June 2022 Ministerial Conference, WTO members were able to reach an important but limited agreement to curb fishery subsidies that are contributing to depleting the world's supply of fish.[297] However, efforts to expand on that fisheries agreement, to write rules of the road for e-commerce and digital trade, and to agree on much-needed updates to its Agreement on Agriculture at its most recent Ministerial Conference in February 2024 failed, underscoring the difficulties in reaching consensus agreements among the broad and diverse countries that make up the WTO.[298] It is becoming increasingly clear that if the WTO is to remain relevant and to continue to serve as the keeper of the rules and the key transparency mechanism for countries and traders around the world, it must be able to deal with issues such as labor practices, climate change, digital inclusion, and global health concerns that have historically been at the periphery of the WTO's focus, if present at all.

As this Article makes clear, there are compelling reasons to use trade tools (among others) to address a number of these formerly tangential issues. The world simply may not be able to move far enough or fast enough in the fight against climate change unless trade tools are brought to bear. Similarly, the complexity of supply chains makes catching and stopping labor abuse, including the use of forced labor somewhere along the way, virtually impossible without the use of trade tools that can create powerful incentives for corporations to track their supply chains from beginning to end.

It is equally clear that imposing trade-related measures to address these critical issues is much better done in a WTO-consistent manner. Doing so leads to less cynicism about the trading system if the WTO is seen as willing and able to take these issues on board, and all those involved—governments, corporations, labor unions, NGOs and CSOs—are left with greater stability and predictability if everyone knows that the employed trade tools are being used consistently with the basic rules of the road.

In the area of addressing labor abuse, particularly that of the use of forced labor, this Article makes clear that strong trade tools—including

296. *See* Jennifer Hillman, *A Reset of the World Trade Organization's Appellate Body*, COUNCIL ON FOREIGN RELS. (Jan. 14, 2020), https://www.cfr.org/report/reset-world-trade-organizations-appellate-body.

297. WTO, Ministerial Decision of 17 June 2022, WTO Doc. WT/MIN(22)/33 (June 17, 2022).

298. *See* Council of Councils, *The WTO at a Crossroads: What the Failed Ministerial Conference Means*, COUNCIL ON FOREIGN RELS. (Mar. 6, 2024), https://www.cfr.org/councilofcouncils/global-memos/wto-crossroads-what-failed-ministerial-conference-means.

the very strong tool of import bans—can be deployed consistently with the WTO rules if done carefully and with a view of what makes a measure WTO compatible. Import bans that are designed and implemented in a non-discriminatory manner, with comparable rules applied to both domestically made and imported goods from anywhere in the world, should easily pass muster. Those that single out goods from a given country or region, such as recent bans on goods produced in Xinjiang, run a greater risk of being found to be inconsistent with the WTO's basic MFN principle, but can likely fit within the general exceptions for measures designed to protect public morals or human life if implemented fairly and transparently. This will require those imposing bans to permit importers a real opportunity to demonstrate that their goods were not made with forced labor. Given the need to ensure that the trading system takes on board the concerns of workers alongside those of consumers, governments, and civil society, governments should understand that they can deploy trade tools in their fight to combat labor abuses without compromising their commitments to their trading partners under the WTO rules. Hopefully, this Article has provided some of that reassurance.