WTO-CONSISTENCY OF THE UYGHUR FORCED LABOR PREVENTION ACT (UFLPA): THE RE-EMERGENCE OF THE PROCESS-PRODUCTION METHODS (PPM) REGULATIONS

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ABSTRACT

Since the Uyghur Forced Labor Prevention Act (hereinafter "UFLPA") began to be enforced by the US Customs and Border Protection (CBP) since June 21, 2022, there are about 6,000 detention cases of the "rebuttable presumption" on the use of forced labor in Xinjiang and elsewhere. In addition, the scope of enforcement of the UFLPA is expanding into cutting edge technologies including electric vehicles. In addition, the European Union has also introduced a legislative proposal to ban the trade of products using forced labor regardless of origin.

Under the World Trade Organization (hereinafter "WTO") system, prohibition of products using forced labor may be subject to two kinds of analysis: 1) whether the use of the forced labor may constitute a qualifier to distinguish products not using forced labor under General Agreement on Tariffs and Trade (hereinafter "GATT") Articles I and XI; and 2) whether the prohibition of products using forced labor may still be justified under the general exceptions under Article XX of the GATT 1947. These issues lead to the analysis on the issue of Process-

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Production Methods (hereinafter "PPM").

There have been numerous GATT and WTO dispute settlement cases on PPM issues in the context of environment and animal safety issues. However, the existing jurisprudence has not led to the full resolution of the PPM issues. Meanwhile, there is no WTO jurisprudence on products using the labor practices inconsistent with the ILO standards.

The prohibition of forced labor is clearly prohibited under the International Labour Organization (hereinafter "ILO") Conventions No. 30 and 105, and therefore, the UFLPA's import prohibition against goods using forced labor may be justified under the ILO Conventions, and therefore, justified under GATT Article XX(a). However, such non-product-related PPM may not pass the "necessity" test under GATT Article XX(a) and the Chapeau of the GATT XX. However, the author is of the view that application of PPM regulation in the "forced labor-free" labeling or GATT XX general exceptions may require further international consensus and research, regardless of whether they fall under the WTO auspices or somewhere else.

KEYWORDS: *WTO, GATT, forced labor, PPM, UFLPA*

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I. INTRODUCTION

The international community has established prohibition of forced labor as a serious human rights violation since early 20th century. First, the International Labour Organization (hereinafter "ILO") adopted the Convention against Forced Labor in 1930.[1] In this Convention, "forced or compulsory labor" is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,"[2] except for any work or service for compulsory military service, normal civic obligations, supervised work in prison, or emergency works.[3] The Convention against Forced Labor also made it clear that "the illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are

[1] Int'l Labour Org. [hereinafter ILO], *Convention Concerning Forced or Compulsory Labor, 1930 (No. 29)* (June 28, 1930), https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.
[2] *Id.* art. 2(1).
[3] *Id.* arts. 2(2)(a)-(e).

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really adequate and are strictly enforced."[4] In addition to the ILO Convention No. 29 above, the ILO adopted conventions against forced labor including the 1957 Convention on Abolition of Forced Labor,[5] making it clear that the members of the ILO cannot use forced labor:

> (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
> (b) as a method of mobilising and using labour for purposes of economic development;
> (c) as a means of labour discipline;
> (d) as a punishment for having participated in strikes;
> (e) as a means of racial, social, national or religious discrimination.

The United Nations also provided for prohibition of slavery and compulsory labor under Article 4 of the Universal Declaration of Human Rights (UDHR).[6]

In conjunction with the development of the rules against forced labor in the international community, countries like the United States have also adopted laws to prohibit the trade of products using forced labor since the adoption of Section 307 of the US Tariff Act of 1930, which led to the adoption of the Uyghur Forced Labor Prevention Act (hereinafter "UFLPA"). Also, other countries including the United Kingdom,[7] Canada,[8] and Australia[9] have adopted laws to ban forced labor in supply chains, despite using different tools including border measures and supply chain due diligence. In addition, the European Union (hereinafter "EU") also proposed the Regulation to investigate and prohibit production within the EU and import of products from abroad using forced labor in February 2022.[10] Therefore, one may argue that the prohibition of forced labor has attained status of customary international law based on the international rules as well as state practice.[11]

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[4] *Id.* art. 25.
[5] ILO, *Convention Concerning the Abolition of Forced Labor, 1957 (No. 105)*, (June 25, 1957), https://normlex.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105.
[6] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).
[7] Modern Slavery Act 2015, c. 30 (UK).
[8] Fighting Against Forced Labour and Child Labour in Supply Chains Act, S.C. 2023, c. 9 (Can.).
[9] Modern Slavery Act 2018 (Austl.).
[10] *Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union market*, COM (2022) 453 (Sept. 14, 2022); European Commission Press Release IP/22/5415, Commission Moves to Ban Products Made with Forced Labour on the EU Market (Sept. 14, 2022).
[11] However, while slavery may have attained the status of *jus cogens*, there are still debates about whether prohibition of forced labor (not including slavery) should be regarded as *jus cogens* in

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This paper will focus on the World Trade Organization (hereinafter "WTO")-consistency of the UFLPA and the issue of Process-Production Methods (hereinafter "PPM") trade measures. First, the term PPMs refers to "processes and production methods and is defined as the way in which products are manufactured or processed and natural resources extracted or harvested."[12] Earlier in the 2000s, the discussions around PPM often took place in trade and environment discussion. However, after the enactment of the UFLPA, the issue of the PPM also became subject to the discussion on trade and human rights. The UFLPA governs "the production process taking place in the country of origin",[13] i.e., China, without reference to a specific product, regardless of where the final product is manufactured. Therefore, such measures may be called "non-product-related PPM," i.e., "methods and techniques used to produce goods and services that may have an impact on the environment, human health, or animal welfare, but are not directly related to the physical characteristics or quality of the product itself,"[14] which may be subject to review under the WTO rules.

Based on this, the author is of the view that UFLPA's import prohibition is a non-product-related PPM trade regulation which needs review of two issues: 1) whether the non-product-related PPM under the UFLPA is justified under General Agreement on Tariffs and Trade (hereinafter "GATT") Article I:1, and 2) if not, whether such measures may be justified under GATT XX(a), (b) and the chapeau. Based on this premise, Section II will describe the UFLPA and the enforcement records. Section III will provide analysis of the UFLPA "as such" from the WTO law perspective. Section IV will discuss the options for the WTO members for interpretation/clarification of the GATT XX. Then Section V will discuss whether there are "Less Trade Restrictive" Alternatives to the UFLPA. The author refrains from analyzing the UFLPA "as applied" in this paper, as there is no case with sufficient information to analyze the WTO-consistency of the UFLPA "as applied."

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international law. Int'l Law Comm'n, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), with commentaries, U.N. Doc. A/77/10, at Conclusion 23 (2022).

[12] Org. for Econ. Coop. & Dev. [hereinafter OECD], Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures, at 7, OECD Doc. OCDE/GD(97)137 (1997), https://one.oecd.org/documentt/ OCDE/GD(97)137/en/pdf.

[13] *Id.* at 19.

[14] Andreas Oeschger & Elisabeth Bürgi Bonanomi, *PPMs Are Back: The Rise of New Sustainability-Oriented Trade Policies Based on Process and Production Methods*, IISD (Apr. 14, 2023), https://www.iisd.org/articles/policy-analysis/ppms-rise-new-sustainability-oriented-trade-policies-process-production-methods.

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II. UYGHUR FORCED LABOR PROHIBITION ACT

A. Background

The United States have adopted laws to prohibit the trade of products using forced labor. In 1930, Section 307 of the US Tariff Act of 1930 explicitly empowered Secretary of the Treasury to prohibit importation of "All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions."[15] The same provision defined "forced labor" as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily," and added that it includes child labor.[16]

Since the adoption of Section 307 of the Trade Act of 1930, there had not been many instances of enforcement of Section 307 until the 1990s.[17] However, as China's export to the United States increased, the US government began to increase withhold-release order (hereinafter "WRO") for a while.[18] Then, the US Customs and Border Protection (hereinafter "CBP") began to issue more WROs from 2016 onwards.[19] In addition, President Trump signed the Uyghur Human Rights Policy Act of 2020 (UHRPA) on 17 June 2020 into law.[20] The law directs various government agencies to periodically report situations of the human rights violations to Congress, as well as impose sanctions against Chinese officials and individuals who are responsible for carrying out torture, prolonged detention without charges and a trial, cruel and inhumane treatment, or degrading treatment of ethnic minorities, including Uyghur and Kyrgyz groups.[21]

However, the US Congress considered that it needed a law to impose "importation limits on goods produced using forced labor in China, especially the Xinjiang Uyghur Autonomous Region (hereinafter "XUAR")." As a result, the US Congress adopted UFLPA[22] in December 2021, on the basis of which the CBP began enforcement actions after 22 June 2023.

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[15] 19 U.S.C. § 1307, para. 1.
[16] *Id.* para. 2.
[17] *Section 307 and Imports Produced by Forced Labor*, CONG. RSCH. SERV. 1, 2 (Oct. 25, 2023), https://crsreports.congress.gov/product/pdf/IF/IF11360.
[18] *Id.*
[19] *Id.*
[20] Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648 (2020) [hereinafter UHRPA].
[21] *Id.* sec. 6.
[22] Uyghur Forced Labor Prohibition Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021) [hereinafter UFLPA].

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The UFLPA makes it clear that it is the policy of the United States "to strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930."[23] In addition, the UFLPA emphasizes the coordination between the US, Canada and Mexico under Article 23.6 of the USMCA,[24] and the United States will address "gross violations of human rights in the Xinjiang Uyghur Autonomous Region" through bilateral and multilateral diplomatic channels and all authorities "including visa and financial sanctions, export restriction, and import controls."[25] Also, since 21 June 2022, the UFLPA supersedes the WROs related to products imported from XUAR.[26]

B. Prohibition of Imports Against Goods from XUAR Under the UFLPA

The most important provision of the UFLPA is Section 3, governing the "rebuttable presumption" against "any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China or produced by an entity on the lists under Section 2(d)(2)(B)" that "(1) the importation of such goods, wares, articles, and merchandise is prohibited under section 307 of the Tariff Act of 1930 (19 U.S.C. 1307); and (2) such goods, wares, articles, and merchandise are not entitled to entry at any of the ports of the United States."[27] In such cases, the Commissioner of the US CBP prohibits importation of such products unless the Commissioner determines that 1) the importer of record fully complied with the guidance and 2) completely and substantively responded to all inquiries by the CBP to "ascertain whether the goods were mined, produced, or manufactured wholly

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[23] *Id.* sec. 1(1).

[24] Agreement between the United States of America, the United Mexican States, and Canada art. 23.6, Nov. 30, 2018, 134 Stat. 11, 57 I.L.M. 1152:

> 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.
> 2. To assist in the implementation of paragraph 1, the Parties shall establish cooperation for the identification and movement of goods produced by forced labor as provided for under Article 23.12.5(c) (Cooperation).

[25] UFLPA sec. 1(6).

[26] U.S. CUSTOMS & BORDER PROT. [hereinafter U.S. CBP], U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS 7 (2022).

[27] UFLPA sec. 3(a).

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or in part with forced labor." In addition, the CBP must be satisfied that the products subject to the enforcement action are "not mined, produced, or manufactured wholly or in part by forced labor," with clear and convincing evidence, in order to release the products.[28] If the CBP makes such decision, the CBP must submit a report with evidence within 30 days after such a decision.[29] The CBP may issue an implementing regulation with further details of the enforcement action.[30]

The import prohibition under the UFLPA may apply to the following cases: 1) the products from XUAR in China; 2) the products incorporating the products from XUAR, regardless of the origin of the final products; 3) the products manufactured by the companies on the UFLPA Entity List; or 4) the products incorporating the products manufactured by companies on the UFLPA Entity List, regardless of the origin of the final products. In any of the four cases, the import prohibition does not apply to like products from other countries or other companies.

C. US Government's Enforcement Strategy and Document Submission Requirements

1. US Government's Obligation for Enforcement Strategy[31] — Section 2 of the UFLPA provides that the US government will establish the Forced Labor Enforcement Task Force (hereinafter "FLETF") to develop the enforcement strategy of the UFLPA after receiving public comments within 30 days of the enactment and conducting hearings within 45 days after the close of public comments.[32] The FLETF's hearing will include testimonies regarding the measures to identify the supply chain routes for goods using forced labor and other measures to prevent such goods from entering the United States.[33] The FLETF's enforcement strategy includes 1) a comprehensive risk assessment of importing goods mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China (PRC); 2) comprehensive description and evaluation of China's measures to persecute and impose forced labor against ethnic minorities including Uyghurs, Kazakhs, Kyrgyz or Tibetans, as well as building list of entities working with the Xinjiang Autonomous Region governments and their products with a view to develop enforcement plans; 3) recommendations for US CBP for enforcement actions; 4) description of the CBP's UFLPA enforcement plan to ensure that no goods in violation of

[28] UFLPA sec. 3(b).
[29] UFLPA sec. 3(c).
[30] UFLPA sec. 3(d).
[31] U.S. CBP, *supra* note 26, at 13-15.
[32] UFLPA sec. 2(a)-(c).
[33] UFLPA sec. 2(b)(2).

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Section 307 of the Tariff Act of 1930 can enter the US ports and/or airports; 5) description of additional resources necessary for the US CBP for effective enforcement; 6) guidance for importers related to compliance with the UFLPA; and 7) plans for coordination and collaboration with nongovernmental organizations and private sector entities for implementation of the strategy.[34] The FLETF must develop the strategy and submit the first version of the strategy report within 180 days after the enactment date, and then submit the subsequent versions of the strategy report annually to the congress.[35]

Moreover, Section 4 of the UFLPA provides that the US Secretary of State must report the US' strategy "to promote initiatives to enhance international awareness of and to address forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China" within 90 days after the enactment date of the UFLPA.[36] However, the US State Department did not issue such a report. Separately, the UFLPA provides that the US president must impose sanctions against the entities identified by the report of torture, and other human rights abuse under Section 6 of the Uyghur Human Rights Policy Act, as amended by the UFLPA.[37]

2. Type and Nature of Information Which May Be Required by the CBP[38] — The CBP's Operational Guidance provides for a list of information which may be relevant to help the CBP's enforcement activities. There are two types of documentation that the importer may have to submit to the CBP, depending on the issues to prove.

(a) Documentation That the Imported Goods and Their Inputs Are Sourced Completely from Outside Xinjiang and Have No Connection to Entities on the UFLPA Entity List —

- Supply Chain Tracing Information
  - Evidence Pertaining to Overall Supply Chain
  - Detailed description of supply chain including imported merchandise and components thereof, including all stages of mining, production, or manufacture;
  - The role(s) of the entities in the supply chain, including shippers and exporters: for example, CBP will need to determine whether a supplier is also a manufacturer;
  - For entities in the supply chain, identify any relationships in

[34] UFLPA sec. 2(d).
[35] UFLPA sec. 2(e); The FLETF submitted "the Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China" to the Congress on 17 June 2022, and published updates for 2023 on 1 August 2023. *See Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China*, HOMELAND SEC. (Aug. 1, 2023), https://www.dhs.gov/uflpa-strategy.
[36] UFLPA sec. 4(a).
[37] UFLPA sec. 6.
[38] U.S. CBP, *supra* note 26, at 13-15.

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accordance with 19 C.F.R. § 152.102(g);
  - A list of suppliers associated with each step of the production process, including names and contact information (addresses, email addresses, and phone number);
  - Affidavits from each company or entity involved in the production process.
- Evidence Goods Were Not Mined, Produced, or Manufactured Wholly or In Part in the Xinjiang Uyghur Autonomous Region
  - Evidence Pertaining to Merchandise or Any Component Thereof
  - Purchase orders
  - Invoice for all suppliers and sub-suppliers
  - Packing list
  - Bill of materials
  - Certificates of origin
  - Payment records
  - Seller's inventory records, including dock/warehouse receipts
  - Shipping records, including manifests, bills of lading (e.g., airway/vessel/trucking)
  - Buyer's inventory records, including dock/warehouse receipts
  - Invoices and receipts for all suppliers and sub-suppliers
  - Import/export records
- Evidence Pertaining to Miner, Producer, or Manufacturer
  - Evidence listed above pertaining to merchandise or any component thereof for raw materials.[39]
  - Mining, production, or manufacturing records
    - Documents should allow CBP to trace raw materials to merchandise mined, produced, or manufactured o Production orders
    - Reports on factory production capacity for the merchandise
    - Reports on factory site visits by the importer, a downstream supplier sourcing from this factory, or a third party
    - Evidence that the volume of inputs of component materials matches the volume of output for the merchandise produced
  - Any other evidence to demonstrate that a good was not mined, produced, or manufactured wholly or in part by forced labor.

(b) Documentations for Importers Arguing for an Exception to the UFLPA Presumption —

- Due Diligence System Information
  - Engagement with suppliers and other stakeholders to assess and

[39] Appendix A of the CBP Operational Guidelines provides for list of documents related to commodities with a high-risk of forced labor, including cotton, polysilicon and tomatoes. *Id.* at 16-17.

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address forced labor risk;

- Mapping of the supply chain and assessment of forced labor risks along the supply chain from raw materials to production of the imported good;
- Written supplier code of conduct forbidding the use of forced labor and addressing the risk of use of Chinese government labor schemes;
- Training on forced labor risks for employees and agents who select and interact with suppliers;
- Monitoring of supplier compliance with the code of conduct;
- Remediation of any forced labor conditions identified or termination of the supplier relationship if remediation is not possible or is not timely completed;
- Independent verification of the implementation and effectiveness of the due diligence system; and
- Reporting performance and engagement publicly on its due diligence system.

- Information on Supply Chain Management Measures
  - Internal controls to prevent or mitigate forced labor risk and remediate any use of forced labor identified in the mining, production, or manufacture of imported goods.
  - An importer should be able to demonstrate that documents provided are part of an operating system or an accounting system that includes audited financial statements.
- Evidence Goods Originating in China Were Not Mined, Produced, or Manufactured Wholly or In Part by Forced Labor
  - Supply chain map identifying all entities involved in production of the goods;
  - Information on workers at each entity involved in the production of the goods in China such as wage payment and production output per worker;
  - Information on worker recruitment and internal controls to ensure that all workers in China were recruited and are working voluntarily; and
  - Credible audits to identify forced labor indicators and remediation of these if applicable.

In both cases, the amount of information described under the CBP guidelines may be so extensive that the importer of the final product alone may not fully respond to the CBP's information request in time. In this regard, the importers, the exporters and their upstream suppliers must prepare the relevant documents sufficiently in advance, and they have to be prepared to submit the documents in advance.

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D. UFLPA's Duration and Enforcement Record

In addition, Section 6 of the UFLPA provides that provisions governing import prohibitions, diplomatic strategy and sanctions imposition are subject to an eight year sunset period or the date when the President of the US submits his/her determination to the congressional committee that China ceased its gross human rights violations against the ethnic minority groups in Xinjiang Uyghur Autonomous Region.[40]

Since the beginning of enforcement of the UFLPA in June 2022, there have been 9,791 cases of shipments withheld by the CBP, which is about 3.56 billion USD in total. Among those cases, 3,976 shipments were finally denied, and 4,573 shipments were released for circulation in the US. Among the shipments subject to the UFLPA, 4,856 shipments (2,916 shipments released, 1,271 shipments denied) were related to electronics, and 1,255 shipments (183 shipments released, 999 shipments denied) were related to industrial and manufacturing materials, while 1,823 shipments (521 shipments released, 1,074 shipments denied) concerned with apparel, footwear and textiles.[41] These sectors are related to the high priority sectors including cotton, tomato, and polysilicon products.[42]

III. WTO-CONSISTENCY OF THE UFLPA "AS SUCH"

Article I:1 of the GATT provides, "with 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, favor, 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."

A. "Rules and Formalities in Connection with Importation and Exportation"

Article I of the GATT requires most-favored-nation (hereinafter "MFN") treatment in respect of "rules and formalities in connection with

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[40] UFLPA sec. 6.

[41] U.S. CBP, *Uyghur Forced Labor Prevention Act Statistics*, https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics (last visited Sept. 18, 2024).

[42] *Id.*; On July 2024, FLETF added aluminum, polyvinyl chloride (PVC), and seafood to the list of high priority sectors. *Forced Labor Enforcement Task Force Adds Aluminum, PVC, and Seafood as New High Priority Sectors for Enforcement of Uyghur Forced Labor Prevention Act*, HOMELAND SEC. (July 9, 2024), https://www.dhs.gov/news/2024/07/09/forced-labor-enforcement-task-force-adds-aluminum-pvc-and-seafood-new-high-priority.

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importation". The import prohibition under Section 3 of the UFLPA governs the US CBP's authority regulating the customs clearance process of products suspicious of using forced labor. Therefore, it clearly constitutes the "rules and formalities in connection with importation" under Article I:1 of the GATT.[43]

With respect to the term "advantages," the UFLPA may be interpreted to grant "advantages" under GATT Article I:1, by providing favorable import opportunities for products not using forced labor in customs clearance procedure.[44] In the *EC — Seal Products* case, the Panel explained that:

> The term 'advantage' in Article I:1 is broad and applies to all matters referred to in paragraphs 2 and 4 of Article III of the GATT 1994. Article III:4 applies in turn to all 'laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use [of a product].' The EU Seal Regime is undoubtedly a 'law or regulation' within the meaning of Article III:4 of the GATT 1994 and therefore, the measure also falls within the scope of Article I:1 of the GATT 1994.[45]

In this regard, the UFLPA, especially Article 3 of the UFLPA may constitute "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, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country" under article I:1 of the GATT.

B. "Like Product" Analysis—Process-Production Method (PPM) Issues

1. Criteria for Determining "Like Products" Under GATT Article I — The most important analysis related to the UFLPA may be whether the products using forced labor in any level of the supply chain are "like products" with those products not using forced labor. WTO Panel reports and Appellate Body reports have repeatedly explained that the analysis to find like products under Article I of the GATT requires case-by-case analysis, with four general criteria:

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[43] Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.189, WTO Doc. WT/DS27/R (adopted Sept. 25, 1997) [hereinafter *EC — Bananas III* Panel Report]; Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.342, WTO Doc. WT/DS366/R (adopted May 20, 2009).

[44] *EC — Bananas III* Panel Report, *supra* note 43, ¶ 7.239.

[45] Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.595, WTO Doc. WT/DS400/R (adopted June 18, 2014).

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> (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 behavior – in respect of the products; and (iv) the tariff classification of the products.[46]

The author will discuss whether the products using forced labor may be considered as "like products" under the WTO jurisprudence in the subsequent section.

2. UFLPA as a PPM Trade Measure — Section 3(a) of the UFLPA makes it clear that the CBP would apply a presumption that "any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China or produced by an entity on [UFLPA Entity List]" are prohibited under the Section 307 of the Tariff Act of 1930, and therefore they are not entitled to entry at any ports in the United States. Therefore, the UFLPA governs "the production process taking place in the country of origin",[47] i.e., China, without reference to a specific product, regardless of where the final product is manufactured. Such measures may be called "non-product-related PPM," i.e., "methods and techniques used to produce goods and services that may have an impact on the environment, human health, or animal welfare, but are not directly related to the physical characteristics or quality of the product itself."[48]

Such non-product-related PPM regulation may need analysis under the general criteria of "likeness" under GATT Article I. For example, cotton shirts made with cottons from XUAR destined for the US, using forced labor and cotton shirts made with cottons without using forced labor may have identical physical characteristics, and the same end-uses, and the same tariff classification before the CBP, except for the fact that cotton from XUAR was harvested and processed with forced labor, which may affect consumer perception which prefers more "sustainable" and "socially responsible" products without using forced labor.

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[46] Report of the Working Party, *Border Tax Adjustments*, ¶ 18, L/3464 (Dec. 2, 1970), GATT B.I.S.D., at 1, 3; Panel Report, *United States — Certain Measures Affecting Imports of Poultry from China*, ¶ 7.425, WTO Doc. WT/DS392/R (adopted Oct. 25, 2010) [hereinafter *US — Poultry (China)* Panel Report]. (Citing *e.g.*, Report of the Panel, *EEC — Measures on Animal Feed Proteins*, ¶ 4.2, L/4599 - 25S/49; Report of the Panel, *Japan — Taxes on Alcoholic Beverages I*, ¶ 5.6, WT/DS11/15/Add.1 (adopted January 12, 1998); and Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 6.8, WTO Doc. WT/DS2/R (adopted May 20, 1996); Appellate Body Report, *Japan — Taxes on Alcoholic Beverages II*, at 21-22, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996)).

[47] OECD, *supra* note 12, at 19.

[48] Oeschger & Bonanomi, *supra* note 14.

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Turning to the WTO jurisprudence, among the criteria presented above, consumer perception was not considered to be important until the Appellate Body in the *EC — Asbestos* case emphasized that the general criteria in the Border Tax Adjustment Working Party Report made it clear that the analysis of likeness requires case-by-case analysis, and "the different criteria are interrelated." [49] The Appellate Body also explained that consumer perceptions may influence the use of the products, and therefore, the analysis requires review of relevant evidence, with no particular order or priority among the different criteria.[50] As a result, the Appellate Body outlined the proper approach to determine "likeness" as follows:

> It is our view that, having adopted an approach based on the four criteria set forth in Border Tax Adjustments, the Panel should have examined the evidence relating to each of those four criteria and, then, weighed all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue could be characterized as "like".[51]

Against this background, can the use of forced labor in supply chain of the product affect consumer perceptions? The answer may be yes. First, before the enactment of the UFLPA, the US Congressional-Executive Commission on China (CECC),[52] the US Department of Labor,[53] and the United Nations the Office of the High Commissioner for Human Rights (OHCHR)[54] published reports about the human rights situation in Xinjiang. In addition to governments and international organizations, schools in the US and the UK also published reports about the human rights situation in XUAR,[55] which led to the enactment of the UFLPA as well as setting high priority sectors. Second, the UFLPA and the Operational Guidance made it clear that cotton, tomatoes and polysilicon from Xinjiang would be the high priority sector for enforcement of the UFLPA, while the US government and

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[49] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 102, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) [hereinafter *EC — Asbestos* Appellate Body Report].

[50] *Id.* ¶¶ 102-03.

[51] *Id.* ¶ 109.

[52] CONG.-EXEC. COMM'N ON CHINA, GLOBAL SUPPLY CHAINS, FORCED LABOR, AND THE XINJIANG UYGHUR AUTONOMOUS REGION (2020).

[53] *Against Their Will: The Situation in Xinjiang,* US DEP'T LAB., https://www.dol.gov/agencyes/Ilab/against-their-will-the-situation-in-xinjiang (last visited June 24, 2024).

[54] *OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, U.N. HUM. RIGHTS OFF. OF THE HIGH COMM'R (Aug. 31, 2022), https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region.

[55] *See, e.g.*, *Laundering Cotton: How Xinjiang Cotton in Obscured in International Supply Chains*, SHEFFIELD HALLAM UNIV., https://www.shu.ac.uk/helena-kennedy-centre-international-justice/research-and-projects/all-projects/laundered-cotton (last visited June 24, 2024).

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Congress has discretion to expand the high priority sectors. Third, the UFLPA made it clear that the any products using products from XUAR or produced by companies included in the UFLPA Entity List may not be cleared at the port due to the presumption of forced labor, which makes the downstream users and importers unable to use such products in their supply chains, while giving consumers strong awareness of the human rights situation in the Xinjiang. As a consequence, import prohibition of products from XUAR or products made by the companies in the UFLPA Entity List may be considered to be "unlike" the products from other parts of the world under the GATT Article I:1, based on the evidence of consumer perception.

However, one may argue that the products using forced labor in XUAR may have affected physical characteristics of the final products which may be pending customs clearance in the US port. Still, the scope of the UFLPA is so wide that it affects "any level" of supply chain, which may make it more likely that it may not create visible physical characteristics of the final products. For example, if a Vietnamese solar panel maker uses solar cells based on polysilicon from China, but mixing polysilicon from XUAR and other parts of China to make the solar panels, can one exactly distinguish the physical characteristics of such solar panels from solar cells using 100% of polysilicon from other parts of China? Unless the Vietnamese solar panel maker self-discloses the origin of the polysilicon to make solar cells, it may be impossible to distinguish the solar panels in terms of physical characteristics, or the performance of such solar panels. In this regard, it may be appropriate to consider UFLPA as a non-product-related PPM measures, as it may not be possible to find any difference in physical characteristics of the final products entering into the US ports.

3. Does UFLPA Make the Products Using Forced Labor as "Like Products" Under GATT Article I:1? — The key issue of the products subject to the import prohibition under the UFLPA is that the law does not only prohibit imports of the goods manufactured in XUAR, but any products containing the goods manufactured in XUAR in any level of its supply chain which are also subject to the UFLPA's import prohibition without regard to the physical characteristics, customs classification and end-use of the final products.

In *EC — Asbestos* case, the Appellate Body considered that the health risks, i.e., carcinogenicity of chrysotile asbestos is not the same as the PCG fibers, and the "evidence relating to health risks may be relevant in assessing the competitive relationship in the marketplace between allegedly "like" products,"[56] and therefore, it reversed the Panel's finding. In addition, the Appellate Body explained that "evidence relating to consumers' tastes and habits would establish that the health risks associated with chrysotile

[56] *EC — Asbestos* Appellate Body Report, *supra* note 49, ¶ 115.

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asbestos fibers influence consumers' behavior with respect to the different fibers at issue."[57] In this case, the Appellate Body confirmed that the health risks of chrysotile asbestos affected the physical characteristics as well as consumer perception, and therefore, the Appellate Body reversed the Panel's finding that they were "like" products and therefore the EC's measures against chysotile asbestos violated GATT Article III:4.

Similarly, the measures under the UFLPA products using forced labor in Xinjiang or products manufactured by companies on the UFLPA Entity List may constitute "non-product-related" PPM regulation, and one may argue that 1) the UFLPA significantly affects consumer perceptions which may justify different treatment of the products subject to the UFLPA; or 2) that the UFLPA's non-product-related PPM measures does not justify the different treatment of such products in comparison to like products made without using forced labor in XUAR or by companies on the UFLPA Entity List, as the effects on consumer perception are not sufficient under the GATT Article I:1. In case 1), the UFLPA's import prohibition may be justified as it treats the different products differently. However, in case of 2), one will have to check whether the treatment against UFLPA-subject products constitute "less favorable treatment" in violation of the GATT Article I:1.

4. "Less Favorable Treatment" Against Like Products — Assuming that the products subject to the UFLPA are like products made to the products without using forced labor in XUAR or by companies on the UFLPA Entity List, the US must demonstrate that the UFLPA does not accord less favorable treatment against such products in comparison to like products from other countries under the GATT Article I:1 if it wants to make the UFLPA WTO-consistent.

GATT Article I:1 requires that "any advantage, favor, 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." In interpreting the provision, the Panel and the Appellate Body emphasized that it applies to ensure unconditional MFN treatment, and "prohibits discrimination among like products originating in or destined for different countries."[58]

In addition, the Appellate Body in *EC — Seal Products* case made it clear that "Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member."

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[57] *Id.* ¶ 122.

[58] Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, ¶ 84, WTO Doc. WT/DS139/AB/R, WT/DS142/AB/R (adopted June 19, 2000).

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Also, in *US — Poultry (China)* case, the Panel reviewed Section 727 of the Omnibus Appropriations Act of 2009 (hereinafter "AAA of 2009") which prohibited use of the USDA funds "to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China."[59] In this case, the Panel found that the funding prohibition under Section 727 of the AAA of 2009 applied only to China and therefore, China was denied the opportunity to export poultry products to the US despite their compliance with the same food safety standards. Therefore, the Panel found that Section 727 of the AAA of 2009 was inconsistent with the GATT Article I:1 by not extending the same advantage to China.

Based on the above cases, one may argue that the import prohibition under Section 3 of the UFLPA is also inconsistent with the GATT Article I:1 by denying unconditional MFN treatment, as it effectively denies entry of products suspected of using forced labor in XUAR to the United States, while products without such suspicion may enter the US without problem, thus resulting in serious discrimination against the products subject to the UFLPA import prohibition.

Therefore, unless the United States justifies the import prohibition under the UFLPA under the general exceptions under the Article XX of the GATT, the WTO Panel/AB may find that the UFLPA is inconsistent with the GATT Article I:1 as it discriminates among like products destined for the US due to the origin of the final products and/or the incorporation of the products from XUAR or by the companies on the UFLPA Entity List as inputs of the final products.

C. Whether the UFLPA Import Prohibition Is Consistent with the GATT Article XI

Article XI:1 of the GATT makes it clear that any import or export restrictions other than "duties, taxes or other charges" are prohibited under the WTO system. Such prohibition may include export restriction based on non-mandatory regulations which may still constitute a violation under the GATT Article XI:1.[60]

WTO and GATT Panels confirmed that GATT Article XI:1 covers widely any measures affecting importation of products, if it affects importation procedure or entry of goods crossing the borders. A GATT Panel found that import prohibition of yellowfin tuna and yellowfin tuna products which could not prove that they were not caught by fishing vessels of Mexico with purse seine nets in the Eastern Pacific Ocean was inconsistent with

[59] *US — Poultry (China)* Panel Report, *supra* note 46, ¶ 2.2.

[60] Report of the Panel, *Japan — Trade in Semi-Conductors*, ¶¶ 104-09, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.), at 116, 153-55 (1988).

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GATT Article XI:1.[61] In addition, a WTO Appellate Body report also confirmed, "Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported."[62] Moreover, The Panel in the *US — Shrimp* case found that the United States violated GATT Article XI by imposing an import ban on shrimp and shrimp products harvested by foreign vessels not certified by United States' authorities as using methods to keep incidental killing of sea turtles below certain levels under Section 609.[63]

As discussed earlier, Section 3 of the UFLPA prohibits imports of goods using forced labor in Xinjiang, which clearly affects import flow of goods under GATT Article XI:1. In addition, the scope of the UFLPA is so wide that any products incorporating the products subject to the UFLPA's import prohibition are subject to the same measures regardless of origin of the final products. Such a "blanket" import ban limits import of the products which may incorporate the products violating the Section 3 of the UFLPA, which may constitute violation of GATT Article XI:1. Therefore, unless the United States justifies the import prohibition under the UFLPA under the general exceptions under the Article XX of the GATT, the WTO Panel/AB may find that the UFLPA is inconsistent with GATT Article XI:1 as it imposes import restrictions other than "duties, taxes or other charges."

D. Whether the UFLPA May Be Justified Under GATT Article XX

As discussed above, we found that the UFLPA violates GATT Article I:1 and XI:1 by prohibiting 1) direct imports from the XUAR; 2) products manufactured by the companies on the UFLPA Entity List; or 3) products incorporating the goods banned by the UFLPA. However, as we know very well, such WTO-inconsistent measures may be justified under GATT Article XX (a)-(g), as long as the measures under the UFLPA "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."

This 2-step analysis has been recognized by the previous Panel and Appellate Body reports. Therefore, the author applies the same provisions to see whether the Section 3 of the UFLPA to see whether they can be justified under GATT Article XX's general exceptions.

1. Whether the Objective of the UFLPA May Be Justified Under GATT

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[61] Report of the Panel, *United States — Restrictions on Imports of Tuna*, ¶¶ 5.17-.18, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.), at 155, 196 (1991).

[62] Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, ¶ 320, WTO Doc. WT/DS394/AB/R (adopted Feb. 22, 2012).

[63] Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.16, WTO Doc. WT/DS58/R (adopted Nov. 6, 1998).

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Article XX(a), (b) and/or (e) —

(a) GATT XX(a) — First, as explained by an Appellate Body report in *Colombia — Textiles* case explained that GATT Article XX(a) analysis requires a two-step analysis: 1) the measure must be "designed" to protect public morals; and 2) the measure must be "necessary" to protect such public morals.[64] We will begin with discussing the first element: Design and objective of the UFLPA.

WTO Panel and Appellate Body reports explained that the term "public moral" refers to "standards of right and wrong" and it may vary in different contexts. However, protection of human rights, as recognized by the international community may qualify as a "public moral" under GATT XX(a), as forced labor and slavery are prohibited under ILO Conventions No. 29 and 105, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[65]

Moreover, Section 1 of the UFLPA explains the policy objectives as follows:

- to strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930 (19 U.S.C. 1307), which prohibits the importation of all "goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by * * * forced labor";
- to lead the international community in ending forced labor practices wherever such practices occur through all means available to the United States Government;
- to actively work to prevent, publicly denounce, and end human trafficking including with respect to forced labor, whether sponsored by the government of a foreign country or not, and to restore the lives of those affected by human trafficking, a modern form of slavery;
- to address gross violations of human rights in the Xinjiang Uyghur Autonomous Region (XUAR).[66]

The prohibition of forced labor under the UFLPA may be captured by

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[64] Appellate Body Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.67, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016) [hereinafter *Colombia — Textiles* Appellate Body Report].

[65] International Covenant on Civil and Political Rights art. 8, Dec. 19, 1966, 999 U.N.T.S. 171. (General Assembly resolution 2200A (XXI)).

[66] UFLPA sec. 1(1)-(6).

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the scope of "public morals" under GATT Article XX(a). First, the UFLPA refers the definition of "forced labor" under ILO Conventions No. 29 and 105 and makes it clear that the purpose and objectives of the UFLPA is to "to strengthen the prohibition against the importation of goods made with forced labor" from China under Section 307 of the Tariff Act of 1930. In addition, prohibition of forced labor has been recognized as fundamental human rights under the International Covenant on the Civil and Political Rights (ICCPR). Therefore, the objective of the UFLPA to prohibit import of products using forced labor and slavery in XUAR may constitute a measure designed to protect and improve the condition of human rights in XUAR.

(b) GATT Article XX(b) — In order to justify the UFLPA's import prohibition, the US may also invoke GATT Article XX(b), for measures "necessary to protect human, animal or plant life or health." Fortunately for the US, the UN report published in August 2022 confirmed that there are "far-reaching, arbitrary and discriminatory restrictions on human rights and fundamental freedoms, in violation of international laws and standards" which would threaten the life and the livelihood of the ethnic minority in XUAR.[67] In addition, considering the international consent on the definition of "forced labor" in the absence of a multilateral trade agreement against forced labor, the UFLPA may constitute a necessary policy tool to "pressure" China's change of behavior.[68] As a result, the UFLPA may constitute a measure to protect lives of the ethnic minorities in XUAR, as they face great risks to their livelihood.

2. GATT Article XX(e) — GATT Article XX(e), in conjunction with the chapeau, provides "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (e) relating to the products of prison labor." As the GATT does not provide for the general exception for measures relating to "forced labor," the definition of "prison labor" needs to be addressed.

The ILO addresses the use of prison labor as a form of "forced labor" under the 1930 Convention on Forced Labor (No. 29).[69] Article 2(1) of the Convention defined forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily," which includes "involuntary" labor in prisons. However, "any work or service exacted from any person as a consequence of a conviction in a court of law" may not fall into the category of "forced labor" under the same Convention.[70] Therefore, the ILO

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[67] China Responsible for 'Serious Human Rights Violations' in Xinjiang Province: UN Human Rights Report, UN NEWS (Aug. 31, 2022), https://news.un.org/en/story/2022/08/1125932.

[68] Matthew Cline, *The Link Between Trade & Human Rights*, MINN. J. INT'L L., https://mi nnjil.org/2023/02/09/the-link-between-trade-human-rights/ (last visited June 24, 2024).

[69] ILO, *supra* note 1.

[70] *Id.* art. 2(2)(c):

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acknowledges that "free consent" is the key indicator to determine whether prison labor constitutes "forced labor" if the work does not fall under the exceptions under Article 2(2)(c) of the same Convention.[71]

If the term "prison labor" under GATT Article XX(e) means the same situation as the ILO Convention No. 29 Article 2(1),[72] the US may invoke GATT Article XX(e) to justify Section 3 of the UFLPA, based on the fact that the ethnic minority people from XUAR are incarcerated without a proper legal basis, lacking a fair trial as well as fair sentencing, and they are subjected to forced labor in "education camps."[73] However, as the meaning of "prison labor" is unresolved at the moment, the author considers that the applicability of GATT Article XX(e) is "too early to tell."

3. Whether the UFLPA May Be Found "Necessary" to Achieve Such Objectives — GATT Article XX(a) and (b) are clear that the general exception would apply if the measures to protect public morals (including human rights) must be "necessary" to do so. In this regard, the Appellate Body in *China — Publications and Audiovisual Products* case explained that:

> [D]etermining whether a measure is "necessary" involves a process of weighing and balancing a series of factors that prominently include the contribution made by the measure to secure compliance with the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports. The greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as

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> [A]ny work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.

Korean Act on Execution of Sentences and Treatment of Inmates also provides that the sentenced inmate may be required to work not exceeding 8 hours a day, 52 hours per week, while the persons who are sentenced to imprisonment without labor or misdemeanor imprisonment may voluntarily work at their request. *See* Hyeongui Jiphaeng Mich Suyongjaui Cheoue Gwanhan Beopryul [Act on Execution of Sentences and Treatment of Inmates] arts. 65-67 (S. Kor.).

[71] Micah Globerson, *Using Border Trade Adjustments to Address Labor Rights Concerns Under the WTO*, 3(1) LAB. & EMP. L.F. 48, 68 (2013).

[72] The author could not find sufficient support to the argument that the term "prison labor" is the same as the meaning of "forced labor" occurring in involuntary incarceration under the ILO Convention No. 29. Therefore, the author uses "if" sentence.

[73] Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN REL.S (Sept. 22, 2022, 11:30 AM), https://www.cfr.org/backgrounder/china-xinjiang-uyg hurs-muslims-repression-genocide-human-rights.

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"necessary".[74]

In addition, the Panel in the *US — Gambling* case also explained that the necessity test requires the "(1) importance of the societal interests and values that the measure is intended to protect, (2) the extent to which the challenged measure contributes to the realization of the ends pursued, and (3) the trade impact of the challenged measure, including 'whether a reasonably available WTO-consistent alternative measure' exists."[75]

In the *Brazil — Retreaded Tires* case, the Appellate Body confirmed that a WTO dispute panel must consider all relevant factors, including (1) "the extent of contribution to the achievement of a measure's objective"; (2) its trade restrictiveness; and (3) whether there is a less trade-restrictive alternative policy measure in order to determine the WTO-consistency of the measure at issue under GATT Article XX(b).[76] Similar to GATT Article XX(a), the key test is also whether there is a less-trade restrictive alternative.

The Appellate Body in the *Colombia — Textiles* case stated that "the more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as 'necessary'."[77] In case of the UFLPA, a WTO panel may find the UFLPA was reasonably enacted and enforced "to protect" public morals, based on 1) the overwhelming support in Congress for the UFLPA;[78] 2) strong public opinion on human rights violation including forced labor in China;[79] 3) the interest in the United States to combat forced labor in China; and 4) the evidence of human rights violation concerns in XUAR discussed by government and NGO reports.[80] In addition, one may point out that supply chains already move away from XUAR in response to the UFLPA. Therefore, one may note that the UFLPA's objective reflects an important

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[74] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 251, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [hereinafter *China — Publications and Audiovisual Products* Appellate Body Report].

[75] Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 6.492-.495, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).

[76] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).

[77] Appellate Body Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶ 5.71, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016) [hereinafter *Colombia — Textiles* Appellate Body Report].

[78] 167 CONG. REC. H7804-08 (2021); 167 CONG. REC. S9231 (2021).

[79] Laura Silver et al., *Most Americans Support Tough Stance Toward China on Human Rights, Economic Issues* (Mar. 4, 2021), PEW RSCH. CTR., https://www.pewresearch.org/global/2021/03/04/most-americans-support-tough-stance-toward-china-on-human-rights-economic-issues/.

[80] *E.g.,* Amnesty Int'l, *People's Republic of China: Gross Violations of Human Rights in the Xinjiang Uighur Autonomous Region*, AI Index ASA 17/18/99 (Apr. 21, 1999); *The Chinese Communist Party's Human Rights Abuses in Xinjiang*, U.S. DEP'T STATE, https://2017-2021.state.gov/ccpabuses/ (last visited Nov. 5, 2023).

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interest to address the grave human rights situation in XUAR and contributes to the achievement of such interest.

However, in order to prove the necessity of the UFLPA, the US must prove that there is no less trade-restrictive measures than Section 3 of the UFLPA. In this case, although the UFLPA's objective may be justified based on the WTO jurisprudence, WTO Panel and Appellate Body considered that the overall trade-restrictiveness of the border measures like import prohibitions under the UFLPA as "higher" than other measures, requiring that there is virtually no other policy choice but the import prohibition.[81] In contrast with the UFLPA, the EU's Proposed Regulation against Forced Labor requires the EU member States' competent authorities to take a risk-based approach to assess the likelihood of violation of the Proposed Regulation by an economic operator.[82] Then, the competent authorities may conduct investigations in order to establish the violation of the Proposed Regulation.[83] Upon finding the violation of the Proposed Regulation, the competent authorities must adopt (1) a decision to a prohibition to place or make the products concerned available on the Union market and to export them; (2) an order for the economic operators that have been subject to the investigation to withdraw from the Union market the relevant products that have already been placed or made available on the market; and (3) an order for the economic operators that have been subject to the investigation to dispose of the respective products in accordance with national law consistent with Union law.[84] In addition, the Proposed Regulation contains rules to ensure the rights of defense of the economic operators and other procedural safeguards. In this regard, the EU's Proposed Regulation provides for a less trade-restrictive alternative to achieve the similar policy objectives. Therefore, one may argue that Section 3 of the UFLPA may not be justified under GATT Article XX(a) and (b) based on the comparison to the Proposed Regulations by the EU.

4. GATT Article XX Chapeau — The Chapeau of GATT Article XX makes it clear that even if the measure at issue may be justified under specific subparagraphs, the measure should not be 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." In particular, the Appellate Body in the *US — Shrimp* case explained that a balancing test between the right of a member invoking

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[81] *China — Publications and Audiovisual Products* Appellate Body Report, *supra* note 74, ¶¶ 300-11; *Colombia — Textiles* Appellate Body Report, *supra* note 77, ¶¶ 5.95-.117; Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 7.607, WTO Doc. WT/DS472/R (adopted Jan. 11, 2019).

[82] *Proposal for a Regulation of the European Parliament and of the Council on Prohibiting Products Made with Forced Labor on the Union Market*, art. 4, COM (2022) 453 final (Sept. 14, 2022).

[83] *Id.* arts. 5-6.

[84] *Id.* art. 6(4).

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an exception under GATT Article XX and the duty of the same member to "respect the treaty of the other members" is required to interpret the chapeau of GATT Article XX.[85]

However, in case of the import prohibition under the UFLPA, the text of the Sections 1 and 3 of the UFLPA is clear that *it targets any products which are mined, produced, or manufactured wholly or in part in XUAR or manufactured by an entity on the UFLPA Entity List, regardless of the origin of the final products*.

The author is of the view that the object and purpose of the UFLPA, i.e., strengthening prohibition against the importation of goods made with forced labor including XUAR, may be justified under Articles XX(a), (b) or (e) of the GATT, if there is no less trade-restrictive alternatives. However, the author is also of the view such explicit import prohibition under Section 3 of the UFLPA may constitute an "explicit" restriction on international trade between the WTO members, as it explicitly targets "all goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in" XUAR or manufactured by an entity on the UFLPA. Therefore, the import prohibition under the UFLPA may not survive the challenge under the chapeau of the GATT XX.

In addition, another report points out that import prohibition like Section 3 of the UFLPA should be "non-discriminatory against goods of a certain geographical origin"[86] in order to avoid challenges under the Chapeau of GATT Article XX. For example, there are similar laws introduced in Canada[87], the European Union[88] and Australia[89] with similar objectives, i.e., prohibition of products using forced labor from XUAR and other countries. Unlike the UFLPA, the prohibition under the EU's proposal and the Australian bill cover both "economic operators from placing and making available on the Union market or exporting from the Union market products made with forced labor,"[90] regardless of products and country of origin. Such non-discriminatory application may be more helpful to mitigate the risk of incompatibility with the Chapeau of GATT Article XX. The author acknowledges that such laws may not be challenged "as such", and so the issue of "as applied" challenges still remains.

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[85] *US — Shrimp* Appellate Body Report, *supra* note 63, ¶ 156.

[86] Oeschger & Bonanomi, *supra* note 14.

[87] An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff, S.C. 2023, c 9 (Can.).

[88] *Proposal for a Regulation of the European Parliament and of the Council on Prohibiting Products Made with Forced Labor on the Union Market*, *supra* note 82.

[89] *Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2021*, PARLIAMENT OF AUSTL., https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1307 (last visited June 24, 2024). The bill passed the Australian Senate in 2021, but it could not pass the House of Representatives.

[90] *Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market*, *supra* note 10, arts. 1(1), 3.

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IV. INTRODUCING "INTERPRETATIVE DECLARATION" OF GATT XX?

Article IX.2 of the Marrakesh Agreement Establishing the World Trade Organization provides that the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the Multilateral Trade Agreements including the GATT.[91] In such cases, the Council for Trade in Goods will recommend the interpretation.[92]

Considering the existing jurisprudence which requires strict interpretation of GATT Article XX as discussed above, in particular the Chapeau, it may be useful to consider an "interpretation declaration" applicable in the context of the import restrictions against goods using forced labor and other human right issues. However, the same agreement requires that the decision to adopt an interpretation must be taken by a "three-fourths majority of the Members."[93]

As discussed above, the objective of GATT Article XX(a), (b), and (e) as well as the Chapeau to allow rooms to justify GATT-inconsistent non-product-related PPM regulations like measures against import of forced labor-based products may be legitimate. In addition, the three-quarters majority may be attained due to the "one country, one vote" system of the WTO, if the United States and the likeminded countries unite and persuade other members. From the United States' viewpoint, this may be an option to use the WTO to put pressure on China's human rights issues in XUAR. This may also be a good option to address the US' criticism of the WTO Appellate Body for "judicial activism"[94] and provide a way for the WTO members to "revitalize" the rulemaking and negotiating function of the WTO. At the same time, it is also possible that China may "mobilize" the developing country members to block adoption of such interpretations. However, if the US and other likeminded countries propose interpretations in general language without mentioning a particular country, China may not be able to object to the adoption of such an interpretation in the WTO General Council. If the US and the EU show willingness to do so before the WTO, it may also amount to a positive sign to reform and revitalize the WTO as a rulemaking and negotiating forum of international economic governance.

V. "LESS TRADE RESTRICTIVE" ALTERNATIVES TO THE UFLPA?

We found that the non-product-related PPM like the import prohibition

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[91] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, Art. IX.2, 1st sentence.
[92] *Id.* 2d sentence.
[93] *Id.* 3d sentence.
[94] U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 74-80 (2020).

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under the UFLPA may constitute violation of GATT Article I:1, and it may not be justified under GATT Article XX, as it imposes strict import prohibitions against products from the XUAR, products by companies on the UFLPA Entity List or any products which incorporate such products unless the exporter/importer rebuts the CBP's presumption. However, even if China or another complainant wins the case before the Panel, the US may simply choose to appeal the Panel report and put it in "limbo" by not appointing any of the Members of the Appellate Body.

In addition, there are some practical questions, including 1) whether the US will change the language of the UFLPA; and 2) whether the drafting techniques in the EU's Proposed Regulation or other countries' laws against forced labor may provide a less trade-restrictive alternative.

Regarding Question 1, the author is of the view that the WTO-inconsistency of the UFLPA will not change the position of the US. The US Department of Homeland security emphasized, "combating forced labor is a moral imperative, and the United States will remain diligent in standing up against these human rights abuses."[95] In addition, Alejandro N. Mayorkas, the Secretary of Homeland Security, also said that the enforcement of the UFLPA is a "moral imperative" and the US government would "continue to prevent goods produced by forced labor, particularly through the repression of ethnic minorities in China, from entering the United States."[96] However, when the eight year term of the UFLPA expires, the US Congress may review the effectiveness of the UFLPA and decide whether to renew it. This may be an opportunity for the stakeholders to influence the language of the successor legislation of the UFLPA.

Regarding Question 2, the author considers that the EU's Proposed Regulation may provide a less trade-restrictive alternative to the total import prohibition under the UFLPA. However, the author is still of the view that the EU's Proposed Regulation is not fully WTO-consistent alternative "as such," as the EU's Proposed Regulation also provides for import prohibition as well as disposal of products already on the EU market, which may still be more trade-restrictive than necessary. In addition, the issue of "as applied" challenges may remain unresolved unless there are actual enforcement cases.

Some people may propose "forced-labor-free" labeling as a less-trade-restrictive alternative. However, there is an issue of 1) whether an independent third-party organization may operate within China to investigate and report the situation in XUAR; and 2) whether such an independent third-

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[95] U.S. DEP'T HOMELAND SEC., 2023 UPDATES TO THE STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE'S REPUBLIC OF CHINA (2023).

[96] *Statement on First Anniversary of President Biden Signing the Uyghur Forced Labor Prevention Act into Law*, U.S. DEP'T HOMELAND SEC. (Dec. 23, 2022), https://www.dhs.gov/news/2022/12/23/statement-first-anniversary-president-biden-signing-uyghur-forced-labor-prevention.

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party organization is able to publish its findings to support the labeling. In practice, the Mintz Group, a US-based consultancy was raided by the Chinese government for corporate due diligence work in March 2023 under Chinese Counterespionage law.[97] Therefore, such labeling scheme may not be substantiated in reality and therefore, it may not constitute a less trade-restrictive alternative in practice.

VI. CONCLUDING REMARKS

In conclusion, the author is of the view that UFLPA's import prohibition is a non-product-related PPM trade regulation, subject to two arguments. First, if the non-product-related PPM under the UFLPA sufficiently makes the UFLPA-subject products not "like products" under GATT Article I:1, the case is closed, and the US may continue to impose the import prohibition without any concern about the WTO-inconsistency.

On the other hand, if the non-product-related PPM is not enough to justify the different treatments of UFLPA-subject products from the non-UFLPA-subject products, the UFLPA's import prohibition will constitute a violation of GATT Article I:1, and it cannot be justified under GATT XX(a), (b) and the Chapeau, as it is explicitly targeted to limit imports from a certain country and/or a product incorporating such products using forced labor.

However, the author considers that the US will not amend or repeal the UFLPA until the statutory eight year term, regardless of the WTO-inconsistency of the UFLPA. In addition, the author considers that the EU's Proposed Regulation or "forced-labor-free" labelling may not provide for a WTO-consistent alternative. In addition, because the US government and the US Congress consider the UFLPA as a "moral imperative," the UFLPA is guaranteed to survive for at least eight years since its entry into force.

Should we then tolerate such explicitly WTO-inconsistent measures like the UFLPA? The answer may be "yes and no." While everyone agrees the objective of the UFLPA to sanction China's human rights violation as "moral imperative" may be justified, they may not choose the same policy tool as the US, considering the importance of China in diplomatic and economic terms. In any case, countries may consider using non-product-related PPM trade regulations in cases like prohibition of forced labor in the supply chain. In this regard, one option within the WTO system may be to adopt an interpretation of GATT Article XX (a), (b), (e) and the Chapeau to justify the non-product-related PPM trade regulations on human rights issues.

In addition, the international community needs more discussion on how

[97] Engen Tham & James Pomfret, *Consultancy Firms in China Tested Limits Before Beijing's Crackdown*, REUTERS (May 15, 2023, 3:37 PM), https://www.reuters.com/world/china/consultancy-firms-china-tested-limits-before-beijings-crackdown-2023-05-15/.

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to design non-product-related PPM trade regulations in various areas concerning sustainability in the supply chain without "explicit" WTO-inconsistency as the UFLPA, in and out of the WTO. Although the relevance of the WTO is getting weaker because of the US-China trade tensions, the need for a forum for multilateral trade negotiations and rulemaking to restrict trade of products using forced labor still stands.

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