

## CHAPTER FIVE

### POLICY AS A ONE-LEGGED STOOL: U.S. ACTIONS AGAINST SUPPLY CHAIN FORCED LABOR ABUSES

Forced labor is on the rise worldwide, with migrant workers and local communities falling victim to exploitative trafficking and labor practices. These practices sometimes catch the headlines, as evidenced by stories of abuse of migrant workers building the 2022 World Cup stadiums in Qatar.<sup>1</sup> But, far more often, the labor and suffering of migrant workers go unnoticed.

Forced labor — or the subset of forced labor that is the focus of this Chapter — exists in a particular web of overlapping legal jurisdictions and moral responsibilities. Demand from U.S. consumers drives U.S. companies to outsource production to the Global South, where wages and costs are low but risk of labor abuses runs high. Additionally, multinational corporations (often with ties to former colonial powers) return to extract resources and commodities from resource-rich areas in Africa and Asia. In those corners of the world, shadowy networks of farmers, middlemen, and recruiters drive systems that traffic vulnerable human beings, including children, to work in the production or extraction of goods destined for consumption in wealthy Western markets. These actors may operate in climates where local law enforcement structures are not able to take action to prevent forced labor. But the fact that these products make their way into global supply chains, managed by transnational corporations and destined for the supermarkets of North America, has led many to argue that pathways for justice can and should be found in the court systems of Western states.<sup>2</sup> The instances of forced labor upon which this Chapter focuses are perpetrated by non-U.S. persons outside of U.S. territory, but extraterritorial avenues inside the U.S. court system have nevertheless allowed corporate nexuses in the United States to confer jurisdiction to bring claims or use federal policies against rights abuses abroad.

This Chapter proceeds in three sections. Section A sets out, firstly, to explain the worldwide problem of forced labor in global supply chains and, secondly, to argue that the United States, the world's largest economy, has a moral duty to victims of forced labor. Section B points to

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<sup>1</sup> *E.g.*, Emily Mae Czachor, *EU Condemns Qatar over Alleged Human Rights Abuses Ahead of World Cup*, CBS NEWS (Nov. 24, 2022, 2:41 PM), <https://www.cbsnews.com/news/eu-condemns-qatar-alleged-human-rights-abuses-2022-world-cup> [<https://perma.cc/5439-3S6N>]; Becky Sullivan, *Why Qatar Is a Controversial Host for the World Cup*, NPR (Nov. 18, 2022, 10:21 AM), <https://www.npr.org/2022/11/18/1137204271/qatar-world-cup-controversies> [<https://perma.cc/U3K6-N3UE>].

<sup>2</sup> *See generally, e.g.*, MARTINA E. VANDENBERG, HUM. TRAFFICKING PRO BONO LEGAL CTR. & THE FREEDOM FUND, *ENDING IMPUNITY, SECURING JUSTICE: USING STRATEGIC LITIGATION TO COMBAT MODERN-DAY SLAVERY AND HUMAN TRAFFICKING* (2015).

one erstwhile mechanism for accountability for these rights abuses — private civil claims in U.S. federal courts. Recent restrictions of extraterritorial causes of action and overall difficulties in showing supply-chain connections in court have spelled the demise of the Alien Tort Statute<sup>3</sup> (ATS) and will, this Chapter predicts, soon close the door on civil claims for forced labor under the Trafficking Victims Protection Reauthorization Act of 2003<sup>4</sup> (TVPRA). Without these avenues to bring claims before U.S. courts, victims of international labor abuses are beholden to others to drive policy and compliance with labor standards. Section C turns to U.S. foreign and public policy actions against forced labor abroad. Canvassing the many avenues for increasing use of the federal toolkit against forced labor, this section argues that U.S. foreign policy can play a crucial role on the world stage in enforcing labor standards. However, such action will always be dependent on — and subservient to — greater American political and diplomatic interests. A brief conclusion surveys the impacts of these changes on victims of rights abuses throughout the world.

#### A. *Forced Labor and Moral Duties*

1. *“They Sold Us Like Animals, But We Are Not Animals — We Are Human Beings.”*<sup>5</sup> — There are over twenty-seven million individuals currently estimated to be caught in conditions of forced labor around the world.<sup>6</sup> These individuals work in industries ranging from textiles to high-tech manufacturing to deep-sea fishing.<sup>7</sup> The International Labor Organization defines 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.”<sup>8</sup> Forced labor is a “broad category” that falls short of chattel slavery or modern forms of slavery — its “essence is coercion rather than ownership but arguably a less intense coercion than in the case of servitude.”<sup>9</sup>

The United States is also by far the world’s largest importer of products at risk for being produced with forced labor.<sup>10</sup> The Walk Free

<sup>3</sup> 28 U.S.C. § 1350.

<sup>4</sup> Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, and 22 U.S.C.).

<sup>5</sup> Kate Hodal et al., *Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK*, THE GUARDIAN (June 10, 2014, 7:05 AM) <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour> [<https://perma.cc/H3QA-EJWY>].

<sup>6</sup> U.S. DEP’T OF LAB., 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 3 (2022). This number has grown by several million within the past half decade. *Compare id.*, with WALK FREE FOUND., THE GLOBAL SLAVERY INDEX 2018, at ii (2018).

<sup>7</sup> See WALK FREE FOUND., *supra* note 6, at iv.

<sup>8</sup> Convention Concerning Forced or Compulsory Labour art. 2(1), *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932).

<sup>9</sup> HOLLY CULLEN, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF CHILD LABOR 23 (2007). Some definitions of forced labor may even involve labor relations near-universally accepted, such as military conscription of adults. *See id.*

<sup>10</sup> *See* WALK FREE FOUND., *supra* note 6, at iv.

Foundation's Global Slavery Index cites laptops, computers, and mobile phones; garments; fish; cocoa; and sugarcane as the top five products at risk of production through modern slavery imported into G20 countries.<sup>11</sup> The United States's combined total of these imports is \$144 billion.<sup>12</sup>

Forced labor is endemic throughout the world, especially in countries where high-value exports are produced and that contain areas of high poverty and social instability. In Côte d'Ivoire, cocoa farming faces an "epidemic of child labor."<sup>13</sup> On rural cocoa plantations, boys as young as eleven spend their days in hard manual labor, without schooling, medical care, or access to their families.<sup>14</sup> Many of these children hail from neighboring Burkina Faso and are brought by coordinated traffickers across the border to Côte d'Ivoire on the promise of work.<sup>15</sup> On small farms in the Ivorian forest, these boys produce and process cocoa that flows into the U.S. market for some of the world's largest chocolate producers.<sup>16</sup>

In Xinjiang, China, the pervasive repression of the Uyghur ethnic minority group has included forced labor practices. Reports by the U.S. government, the U.N. Office of the High Commissioner of Human Rights (OHCHR), and advocacy groups have shown the prevalence of forced labor in an overall system of ethnic repression that includes placing Uyghurs in "Vocational Education Training Centers" (VETCs), where they are sent through a program of Sinicization.<sup>17</sup> The OHCHR report states that Uyghur detainees are forced, as part of their "graduation process," to work within the VETCs without the possibility of refusal.<sup>18</sup> The U.S. Department of Labor (DOL) estimates that the number of such workers reaches one hundred thousand.<sup>19</sup> Government forces have additionally sent Uyghurs to work in factories in other provinces of China in "labor transfer programs."<sup>20</sup> And, prior to the

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), <https://wapo.st/cocoa-child-laborers> [https://perma.cc/C9PC-6UBP].

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See* Off. of the U.N. High Comm'r for Hum. Rts., *OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, ¶¶ 120–121 (Aug. 31, 2022); HUM. RTS. WATCH, "BREAK THEIR LINEAGE, BREAK THEIR ROOTS": CHINA'S CRIMES AGAINST HUMANITY TARGETING UYGHURS AND OTHER TURKIC MUSLIMS 10, 13, 34–35 (2021); *Against Their Will: The Situation in Xinjiang*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/ilab/against-their-will-the-situation-in-xinjiang> [https://perma.cc/WU8T-DSBY].

<sup>18</sup> Off. of the U.N. High Comm'r for Hum. Rts., *supra* note 17, ¶ 121.

<sup>19</sup> *Against Their Will: The Situation in Xinjiang*, *supra* note 17. DOL links the following goods produced in China to forced labor: gloves, hair products, polysilicon, textiles, thread, yarn, tomato products, and fish. *Id.*

<sup>20</sup> HUM. RTS. WATCH, *supra* note 17, at 35; *see also* Off. of the U.N. High Comm'r for Hum. Rts., *supra* note 17, ¶ 121.

enactment of the Uyghur Forced Labor Prevention Act<sup>21</sup> (UFLPA), which halted imports from Xinjiang to the U.S. market, sixteen percent of cotton clothes sold in the United States contained cotton sourced from Xinjiang.<sup>22</sup>

In Thailand, the fishing industry is a hotbed of forced labor.<sup>23</sup> A 2018 Human Rights Watch report examined stories of migrant workers in the Thai fishing industry who were kept on fishing ships without pay and under conditions of extreme physical abuse for years on end.<sup>24</sup> And *The Guardian* reported in 2014 the stories of men “bought and sold like animals and held against their will” on Thai fishing boats — sharing horrific stories of abuse and murders in slavery-like conditions.<sup>25</sup> The forced laborers on these boats were largely migrants from Myanmar (Burma), Cambodia, and Laos, who traveled to Thailand seeking higher-paying work, often on the advice of a local agency or trusted community member.<sup>26</sup> Too often, however, migrants land in the control of exploitative “brokers,” who trap them in debt bondage or sell them directly to ship captains or owners, who force them into inhumane work conditions on deep-sea fishing vessels.<sup>27</sup> Men interviewed by the *New York Times* and other media outlets described horrific environments on board, including insufficient food, unhygienic conditions, and beatings and sadistic punishment of those who disobeyed the captains.<sup>28</sup> The labor from these ships leads directly to the global supply chain: forced laborers catch fish that is sold as fishmeal to shrimp farmers or to canneries that process it for pet food.<sup>29</sup> Major U.S. retailers like Costco and Walmart then buy those products for import into the United States.<sup>30</sup>

<sup>21</sup> Act of Dec. 23, 2021, Pub. L. No. 117-78, 135 Stat. 1525 (codified in scattered sections of 19 and 22 U.S.C.).

<sup>22</sup> Alexandra Stevenson & Sapna Maheshwari, “Escalation of Secrecy”: Global Brands Seek Clarity on Xinjiang, N.Y. TIMES (May 29, 2022), <https://www.nytimes.com/2022/05/27/business/cotton-xinjiang-forced-labor-retailers.html> [<https://perma.cc/4LT3-PLA6>].

<sup>23</sup> See WALK FREE FOUND., *supra* note 6, at 103. Several news agencies and human rights organizations have undertaken investigations of the Thai fishing industry. See, e.g., HUM. RTS. WATCH, HIDDEN CHAINS: RIGHTS ABUSES AND FORCED LABOR IN THAILAND’S FISHING INDUSTRY 1 (2018), <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry> [<https://perma.cc/D8ZD-V29N>]; Kate Hodal & Chris Kelly, *Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns*, THE GUARDIAN (Oct. 19, 2022, 12:25 PM), <https://www.theguardian.com/global-development/2014/jun/10/sp-migrant-workers-new-life-enslaved-thai-fishing> [<https://perma.cc/4658-MZZK>]; Ian Urbina, “Sea Slaves”: The Human Misery that Feeds Pets and Livestock, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> [<https://perma.cc/5ZZC-FFNN>]. These and other reports “sparked an international outcry.” VANDENBERG, *supra* note 2, at 2.

<sup>24</sup> See HUM. RTS. WATCH, *supra* note 23, at 1, 15–16.

<sup>25</sup> Hodal et al., *supra* note 5.

<sup>26</sup> See HUM. RTS. WATCH, *supra* note 23, at 17–18, 30–31.

<sup>27</sup> *Id.* at 78–79.

<sup>28</sup> See *supra* note 23.

<sup>29</sup> See Hodal et al., *supra* note 5; Urbina, *supra* note 23 (“The United States is the biggest customer of Thai fish, and pet food is among the fastest growing exports from Thailand . . .”).

<sup>30</sup> See Hodal et al., *supra* note 5.

The three sectors mentioned above provide just a small window into the scale and breadth of forced labor worldwide. Migrants also work under horrible conditions in mining, domestic work, construction, agriculture, and other areas across all of the countries of the world.<sup>31</sup>

2. *Those in Glass Houses Shouldn't Buy Fish.* — The victims of forced labor described in the above section reside far outside the territorial confines of the United States. But, with the United States's large number of imports, victims' fates are fundamentally tied to the demands and whims of American consumers: our insatiable appetite for Mars Halloween candy, Patagonia vests, and frozen shrimp stir-fries helps construct the webs of demand, power, and money that bind millions across the globe in conditions of abject servitude and misery.<sup>32</sup> This Chapter offers, as a premise, that the Western countries that drive the demand for such goods — chief among them the United States — should hold some moral (if not strictly legal) responsibility for the human rights abuses fostered in their production. This concept is not new: the sense of moral obligation to the workers who toil to produce one's commercial goods has been observed on the domestic and international stages and has, to some degree, permeated public consciousness.<sup>33</sup> This Chapter argues that such a moral duty should implicate U.S. policy and foreign relations, even if not directly implemented into U.S. legislation or legal doctrine.<sup>34</sup> Even if tacit, this fundamental conception (from a rights-based framework) of moral duty to the millions of individuals whose slavery and subjugation is a direct result of U.S. market forces can be a powerful tool for shaping policy. Civil society, victims' groups, and progressive lobbyists can and should use morality-based arguments to push for increasing U.S. action on forced labor.

Moreover, these duties are also, to some extent, recognized within the international legal system. On a state-to-state level, and in the vernacular of international law, some human rights scholars argue that the United States owes a moral or principle-based human rights obligation (even absent binding provisions in treaty or custom) to those across the world who contribute to the U.S. economy.<sup>35</sup> These obligations, referred

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<sup>31</sup> See WALK FREE FOUND., *supra* note 6, at 104.

<sup>32</sup> See Whoriskey & Siegel, *supra* note 13; Stevenson & Maheshwari, *supra* note 22; Hodal & Kelly, *supra* note 23.

<sup>33</sup> See, for example, the work of Corporate Accountability Lab, a Chicago-based advocacy group fighting for the recognition of the United States's role as a demand-generator for forced labor. *Combating Forced Labor*, CORP. ACCOUNTABILITY LAB, <https://corpaccountabilitylab.org/combating-forced-labor> [https://perma.cc/3L2M-CC7M].

<sup>34</sup> Indeed, this Chapter assumes that a suggestion that any U.S. actor or consumer should have a *legally cognizable* duty to the laborer who creates products far across the world would not find wide acceptance within the United States.

<sup>35</sup> Wouter Vandenhoe & Mark Gibney, *Introduction: Transnational Human Rights Obligations*, in *LITIGATING TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS* 1, 3–4 (Mark Gibney & Wouter Vandenhoe eds., 2014).

to as “transnational human rights obligations,” attach to all parties *other* than the domestic state government.<sup>36</sup>

This is partially because, as Professors Mark Gibney and Wouter Vandenhoeve have noted, “the ability of [s]tates and other actors to impact human rights far from home — both positively and negatively — has never been clearer.”<sup>37</sup> Under such a theory, legal principles to address the roles and responsibilities of states, corporations, and other international actors are needed to create a globalized system of response to forced labor.<sup>38</sup> Even if victims of forced labor are not within the territorial jurisdiction of a given state, an international consensus suggests that it is the responsibility of each state to combat the practice.<sup>39</sup>

Where there are rights, there should be remedies. It has been stated above that the human rights of millions around the world are being violated, in horrific and dehumanizing ways, in part due to pressure from the U.S. markets and consumer base. The vast majority of direct perpetrators of these human rights abuses (ship captains, foremen, brokers, smugglers, plantation owners, factory bosses, manufacturing executives, and others) are far outside the jurisdiction of U.S. courts. But items produced through forced labor make their way into U.S. supply chains through U.S. persons, companies, and subsidiaries. These entities — including giants like Nestlé and Apple<sup>40</sup> — aid and abet the human rights abuses in their supply chains when they buy and import materials produced using forced labor.

The following sections outline the powers of government and advocates to address forced labor through the U.S. legal and administrative system, ultimately arguing that the United States should leverage this system to address the moral responsibilities that the United States rightly owes to these individuals. Section B surveys the erstwhile promise of a private right of action for extraterritorial human rights abuses, and section C summarizes actions taken on a federal policy level.

### *B. The Private Right of Action: Hope, Challenges, Demise*

*1. The Promise and Peril of a Private Right.* — Those seeking to find recourse for their injuries in the courts of the United States face some hope of action but ultimately, this Chapter argues, ever-decreasing potential for justice. In the United States, two statutes primarily apply to the victims of forced labor abroad: the ATS, which provides a civil cause of action for those injured by tort by a non-U.S. person, and the

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<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *See id.* at 1, 5 (detailing different principles).

<sup>39</sup> *See id.* at 4–5.

<sup>40</sup> *See* Whoriskey & Siegel, *supra* note 13; Jacob Zinkula, *23 Major Brands Suspected of Illegally Sourcing Products Made by Forced Labor in China*, BUS. INSIDER (Dec. 17, 2022, 7:15 AM), <https://www.businessinsider.com/companies-brands-china-supply-chains-illegal-forced-labor-2022-12> [<https://perma.cc/Z559-WWZS>].

TVPPRA, which provides a cause of action for trafficking and forced labor. However, two developments in the doctrine of U.S. law make application of U.S. human rights statutes to the situations of victims of forced labor abroad challenging.

First, U.S. law applies a wide presumption against extraterritoriality.<sup>41</sup> Statutes apply outside the territory of the United States only if Congress has given a “clear, affirmative indication” that it intends the statute to do so.<sup>42</sup> The prevailing test for whether a statute applies extraterritorially was set out in *RJR Nabisco, Inc. v. European Community*.<sup>43</sup> This two-step test first asks whether the statute has given “affirmative indication that it applies extraterritorially.”<sup>44</sup> If the first step is not met, the statute may still apply to extraterritorial conduct if the conduct that is the “focus” of the statute occurred within the United States.<sup>45</sup>

Secondly, the factual circumstances inherent in many situations of supply chain forced labor may make it difficult for a plaintiff to obtain a grant of jurisdiction or establish nexus to a U.S. corporate defendant. Plaintiffs, who were potentially the victims of trafficking and forced labor in a shadowy and nebulous supply chain stretching from the countries of their mistreatment to U.S. supermarket shelves, may struggle to substantiate a chain of knowledge or joint venture between their immediate abusers in the production of materials and the ultimate U.S. corporation bringing goods to market.<sup>46</sup> U.S. corporate entities can, therefore, continue to offer consumers products that were produced in industries rife with forced labor without risking civil liability in U.S. courts, absent a smoking gun of knowledge or support for forced labor practices.<sup>47</sup>

The following sections chart the rise and (potential) demise of the two human rights statutes apposite to forced labor victims and forecast additional challenges arising in cases winding their ways through federal courts.

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<sup>41</sup> *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (stating that a presumption exists that U.S. law “governs domestically but does not rule the world”); *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (“Absent clearly expressed congressional intent to the contrary, federal laws [are] construed to have only domestic application.” (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010))).

<sup>42</sup> *RJR Nabisco*, 579 U.S. at 339.

<sup>43</sup> 579 U.S. 325.

<sup>44</sup> *Id.* at 337. This indication may be implied by statutory context. *Id.* at 340 (“[A]n express statement of extraterritoriality is not essential.”); see also *Morrison*, 561 U.S. at 265 (stating that the given statute need not expressly contain a provision reading “this law applies abroad”).

<sup>45</sup> *RJR Nabisco*, 579 U.S. at 337.

<sup>46</sup> Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. ONLINE 1, 3–4 (2021).

<sup>47</sup> See *id.* at 3 (“[T]he opacity of the global supply chain structure has created a shield of liability for [multinational corporations] that profit from forced labor.”).

2. *The ATS*. — The ATS provides federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>48</sup> The ATS was enacted by the First Congress in 1789, but the modern era of ATS litigation began with the 1980 precedent-setting Second Circuit decision *Filartiga v. Pena-Irala*.<sup>49</sup> In *Filartiga*, a case involving two Paraguayan nationals suing a former Paraguayan official for the torture and killing of one of their family members, the court construed the ATS as allowing the claims of non-U.S. nationals against other nonnationals for offenses in violation of customary international law.<sup>50</sup> Following *Filartiga*, dozens of ATS suits were filed in courts across the country challenging rights abuses around the world.<sup>51</sup> The Supreme Court’s first interpretation of the ATS, in *Sosa v. Alvarez-Machain*,<sup>52</sup> confirmed the *Filartiga* approach.<sup>53</sup> Following *Sosa*, despite an ever-increasing stream of cases using the ATS as the basis for jurisdiction over extraterritorial harms, the Court narrowed its interpretation of extraterritoriality writ large.<sup>54</sup> And the Court dealt the ATS the first of several blows in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>55</sup> which read the presumption against extraterritoriality into the statute and denied jurisdiction over the case because the claims did not sufficiently “touch and concern” the United States.<sup>56</sup>

The Supreme Court’s 2021 decision in *Nestlé USA, Inc. v. Doe*<sup>57</sup> further limited the scope of the ATS, particularly in cases concerning forced labor in U.S. supply chains. The *Nestlé* plaintiffs were six citizens of Mali who alleged that, as children, they had been transported to Côte d’Ivoire to work in horrific conditions on cocoa bean plantations.<sup>58</sup> The plaintiffs brought suit against Nestlé and Cargill under the ATS, alleging that the companies, which ultimately purchased cocoa beans made with plaintiffs’ forced labor, had aided and abetted human rights abuses.<sup>59</sup> Nearly all of the conduct in question (forced labor and child slavery) undisputedly occurred in Côte d’Ivoire, and the Court ruled

<sup>48</sup> 28 U.S.C. § 1350.

<sup>49</sup> 630 F.2d 876 (2d Cir. 1980). See Tyler R. Giannini, *Living with History: Will the Alien Tort Statute Become a Badge of Shame or Badge of Honor?*, 132 YALE L.J.F. 814, 815, 817 (2022).

<sup>50</sup> *Filartiga*, 630 F.2d at 878; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 588–89 (2002).

<sup>51</sup> See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 7 & n.61 (2022).

<sup>52</sup> 542 U.S. 692 (2004).

<sup>53</sup> See Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT’L L. 1329, 1335–36 (2013).

<sup>54</sup> In 2010, the Court decided *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), which applied the presumption against extraterritoriality more extensively. See *id.* at 255.

<sup>55</sup> 569 U.S. 108 (2013).

<sup>56</sup> *Id.* at 124–25.

<sup>57</sup> 141 S. Ct. 1931 (2021).

<sup>58</sup> *Id.* at 1935; Appellants’ Opening Brief at 5–6, *Doe 1 v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) (No. 10-56739).

<sup>59</sup> *Nestlé*, 141 S. Ct. at 1935.



that the “mere corporate presence” of U.S. defendants in Côte d’Ivoire did not warrant extraterritorial application of the ATS.<sup>60</sup> *Nestlé* was met with dismay by human rights activists, who worried that the Court’s restrictive ruling could shut the door on future human rights litigation in U.S. courts.<sup>61</sup> The ATS had long been “one of the most important tools for pursuing justice for human rights victims in the United States,”<sup>62</sup> but the Court’s *Nestlé* decision severely limited its scope, especially for future cases involving forced labor in extraterritorial supply chains.<sup>63</sup> After *Nestlé*, it is difficult to see how the complicated chains of causation and nexuses that often characterize supply chain forced labor could ever meet the jurisdictional bars the Court has read into the ATS.

3. *The TVPRA*. — The TVPRA<sup>64</sup> has been held up as a possible substitute for the ATS post-*Nestlé* on forced labor claims.<sup>65</sup> The TVPRA has seen limited success thus far in federal litigation attempting to bring claims on behalf of extraterritorial forced labor victims. In a small series of cases, victims of industrial rights violations have been unable to tie their abuses to the conduct or knowledge of U.S. corporations or entities. And, with the current Court’s conservative influence on the doctrine of extraterritoriality, current cases winding their way through the courts may result in the repudiation of the TVPRA’s extraterritorial effect.

<sup>60</sup> *Id.* at 1937 (quoting *Kiobel*, 569 U.S. at 133).

<sup>61</sup> *E.g.*, Giannini, *supra* note 49, at 836 (“[T]here are good reasons to be pessimistic about future human rights cases that might come before the current Court.”); Charles Szymanski, Essay, *The Window Closes: Nestle, Inc. v. Doe and the Lost Promise of the U.S. Alien Tort Statute as a Means of Enforcing International Labor Law*, DIRITTI LAVORI MERCATI INT’L, no. 1, 2022, at 29, 32 (stating that *Nestlé* “all but foreclosed the use of the ATS” to combat labor abuses); David J. Scheffer, *The Supreme Court Denied a Child Labor Claim Against U.S. Firms: What to Know*, COUNCIL ON FOREIGN RELS. (June 25, 2021, 9:42 AM), <https://www.cfr.org/article/supreme-court-denied-child-labor-claim-against-us-firms-what-know> [<https://perma.cc/DP2J-GXCV>].

<sup>62</sup> Oona A. Hathaway, *Nestlé USA, Inc. v. Doe and Cargill, Inc. v. Doe: The Twists and Turns of the Alien Tort Statute*, 2020–2021 AM. CONST. SOC’Y SUP. CT. REV. 163, 163 (2021).

<sup>63</sup> See Elizabeth Pollman, *The Supreme Court, 2020 Term — Comment: The Supreme Court and the Pro-business Paradox*, 135 HARV. L. REV. 220, 224 (2021).

<sup>64</sup> The TVPRA is a reauthorization of the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, which did not include a private right of action. *See id.* The TVPRA has been itself reauthorized several times, most recently in January 2023. *See, e.g.*, Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (“2005 TVPRA”); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (“2008 TVPRA”); Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117-347, 136 Stat. 6199.

<sup>65</sup> This contention was even raised at the *Nestlé* oral arguments, when plaintiffs’ counsel Paul Hoffman stated: “[I]t is certainly true that the TVPRA is broader than the ATS claims that we are making in this case and that it . . . seems very likely that any case from 2008 on would use . . . the Trafficking Victim[s] Protection Act rather than the ATS in making these kinds of claims.” Transcript of Oral Argument at 55, *Nestlé* (No. 19-416) [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2020/19-416\\_6k47.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-416_6k47.pdf) [<https://perma.cc/25C6-NS4K>].

The TVPRA creates a civil cause of action for the victims of certain trafficking offenses.<sup>66</sup> Section 1595(a) provides that “[a]n individual who is a victim of a violation of” the predicate acts of peonage, slavery, and trafficking in persons “may bring a civil action against the perpetrator” in U.S. federal district court.<sup>67</sup> When the civil cause of action was first created, it did not explicitly authorize an extraterritorial scope to the law.<sup>68</sup> In subsequent reauthorizations, Congress amended the TVPRA to create extraterritorial grounds for trafficking occurring abroad.<sup>69</sup> The 2008 reauthorization created extraterritorial jurisdiction over “any offense (or any attempt or conspiracy to commit an offense)” named in several enumerated sections<sup>70</sup> of the TVPRA if the alleged offender is a U.S. national or lawful permanent resident,<sup>71</sup> or is present in the United States.<sup>72</sup>

Two sets of problems plague bringing accountability for victims of extraterritorial forced labor under the TVPRA. First, several fundamental issues posed by global supply chains may make it difficult for plaintiffs to prove the actus reus and mens rea of § 1595(a) when tracing liability from the human rights abuses abroad to a U.S. corporation. In *Ratha v. Phatthana Seafood Co.*,<sup>73</sup> the Ninth Circuit dismissed a case alleging that plaintiffs were victims of forced labor in the Thai fishing industry.<sup>74</sup> The court found that plaintiffs did not overcome the summary judgment burden because they failed to show that U.S. corporate defendants benefitted from a “venture” with the Thai fishing companies or that they knew or should have known of the conditions of forced

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<sup>66</sup> 18 U.S.C. § 1595; see also Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 109–10 (2006). The TVPRA exists to “fill [a] gap[]” in the antitrafficking and anti–forced labor enforcement landscape — allowing victims to reap restitution and compensation from forced labor offenders in cases where other criminal actions are unfeasible. See ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (2018).

<sup>67</sup> 18 U.S.C. § 1595(a). Section 1589 defines forced labor as “knowingly provid[ing] or obtain[ing] the labor or services of a person,” *id.* § 1589(a), by certain coercive measures or “knowingly benefit[ing] . . . from participation in a venture which has engaged in the providing or obtaining of labor or services by [coercive means], knowing or in reckless disregard of the fact,” *id.* § 1589(b).

<sup>68</sup> See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878.

<sup>69</sup> In 2006, Congress reauthorized the TVPRA to extend liability over the conduct of federal employees acting outside of the United States, see Trafficking Victims Protection Reauthorization Act of 2005 § 103(a)(1), 18 U.S.C. §§ 3271–3272, and in 2008, Congress extended the statute even further, see Trafficking Victims Protection Reauthorization Act of 2008 § 223(a), 18 U.S.C. § 1596.

<sup>70</sup> 18 U.S.C. § 1596(a).

<sup>71</sup> *Id.* § 1596(a)(1).

<sup>72</sup> *Id.* § 1596(a)(2).

<sup>73</sup> 35 F.4th 1159 (9th Cir. 2022).

<sup>74</sup> *Id.* at 1164–65.

labor perpetrated therein.<sup>75</sup> This evidentiary difficulty has been replicated in other cases currently being litigated. In *Coubaly v. Cargill, Inc.*,<sup>76</sup> another case concerning child slavery in the cocoa industry in Côte d'Ivoire, the defendants prevailed on their motion to dismiss in the D.C. District Court in June 2022, after the court failed to find subject matter jurisdiction and requisite causation under the TVPRA.<sup>77</sup>

Second, challenges have recently been raised on the extraterritorial application of the TVPRA's civil cause of action under § 1595(a). While previous cases and circuits assumed *ab initio* or for the sake of argument that the TVPRA applied extraterritorially,<sup>78</sup> high-profile cases before circuit courts have begun to challenge those notions. One recent, notable case was *Doe I v. Apple Inc.*,<sup>79</sup> which alleged that major U.S. corporations including Apple, Alphabet, and Microsoft are liable for forced labor violations under the TVPRA due to the treatment of workers in the Democratic Republic of the Congo (DRC) who produced cobalt, which ultimately made its way into lithium batteries.<sup>80</sup> In this case, the D.C. District Court held both that the harms perpetrated in the DRC were not traceable to the U.S. defendants<sup>81</sup> and also that the TVPRA did not have extraterritorial effect.<sup>82</sup> The argument over the TVPRA's extraterritoriality centers on the meaning of § 1596 — which explicitly grants extraterritorial application to sections of the TVPRA except for § 1595 (which provides the civil cause of action).<sup>83</sup> The possibility of a grant of certiorari in *Doe I v. Apple*, combined with the Court's entrenched conservative majority, may lead to further constraints on the power of existing human rights statutes like the TVPRA.

Ultimately, successive interpretations of human rights statutes by the Supreme Court have narrowed the range of cases that can feasibly be brought in U.S. courts against foreign traffickers or human rights abusers. While the path through U.S. courts is not completely foreclosed — especially for those whose rights abuses or trafficking occurred within

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<sup>75</sup> *Id.* at 1175. Two additional cases dealt with allegations that Nepalese workers were trafficked from Nepal to Iraq and subjected to conditions of forced labor working for a U.S. government subcontractor on a U.S. military base. Those two cases were both dismissed, with Judge Ellison finding that the amendment of § 1595 to provide for extraterritorial application did not apply retroactively to conduct that occurred before its enactment. *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1021 (S.D. Tex. 2015); *Adhikari v. KBR*, No. 16-CV-2478, 2017 WL 4237923, at \*5 (S.D. Tex. Sept. 25, 2017).

<sup>76</sup> No. 21-cv-386, 2022 WL 2315509 (D.D.C. June 28, 2022).

<sup>77</sup> *Id.* at \*8.

<sup>78</sup> *See, e.g., Ratha*, 35 F.4th at 1168 (“We therefore decline to decide whether § 1595 applies to foreign conduct because whether it does or not, we are left with the same result . . . . We will assume in this case that § 1595 applies extraterritorially and leave for another day the question of whether that assumption is correct.”).

<sup>79</sup> No. 19-cv-03737, 2021 WL 5774224 (D.D.C. Nov. 2, 2021).

<sup>80</sup> *Id.* at \*1–2.

<sup>81</sup> *Id.* at \*7.

<sup>82</sup> *Id.* at \*16.

<sup>83</sup> *See* 18 U.S.C. § 1596(a).

or into the United States — the ability for victims of labor abuses in supply chains to bring claims in the United States has all but disappeared in the post-*Kiobel* rollback.

### C. *The Public Policy Levers*

With the further narrowing of the ATS and limited success under the TVPRA, this section discusses public action taken on the part of governmental actors against forced labor. For decades, leaders in U.S. politics have called attention to the problems of poor labor standards and human rights abuses abroad, and enforcement options have increased recently. The policy options open to the U.S. government on a federal level are substantively different from the type of relief provided to individual plaintiffs in U.S. courts. The U.S. federal government acts not through individual indictments of corporate conduct but instead through an amorphous web of domestic statutes, agency discretion, and the foreign affairs powers of the executive. This section aims to demystify the levers available to the U.S. government.

The options presented below show the strength of the federal government in working to prevent extraterritorial forms of forced labor — but serious questions remain as to whether such avenues of enforcement are ultimately better suited than the courts to regulate the problem of worldwide rights abuses. While U.S. policies can alter the market forces driving forced labor around the globe, they are also beholden to the political and diplomatic agenda of the U.S. government. With power centralized in the discretion of the executive branch and removed completely from individual petitions through the courts, individualized arguments may be superseded by the political realities of the United States's role on the global stage.

*i. Federal Powers Toolkit.* — Congress has enacted a wide variety of statutes that allow the United States to exercise its influence abroad on the issue of forced labor. These levers are instances of “economic statecraft”: policies that seek to drive change in the behavior of another country by influencing, directly or indirectly, that country’s economic well-being.<sup>84</sup> Whereas the courts have frowned upon the extension of private claims against corporations and bad actors, the same limitation does not constrain the congressional and executive branches. Statutory provisions, enacted as far back as the 1930s, delegate power to the executive branch and its agencies to act extraterritorially against forced labor abuses. The power of U.S. agencies such as the DOL, the Department of Homeland Security (DHS), the Department of Commerce, and the Department of the Treasury is stunning in its breadth and influence on global markets, and — purposefully or not — federal enforcement has risen as avenues for private claims have

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<sup>84</sup> See generally DAVID A. BALDWIN, *ECONOMIC STATECRAFT* (1985).

dried up. The power of the Executive stretches outside the territorial boundaries of the United States in a way that the court system is hesitant to allow private citizens to challenge. Through trade policy, import restrictions, sanctions regimes, and export restrictions, the U.S. government (acting through the Executive and its agencies) can exert incredible amounts of damage and pressure on foreign governments or companies. By denying access to U.S. markets (or, conversely, by dangling the prospect of preferential access to those markets), shutting off assets and access to financial systems, and forbidding access to certain crucial U.S.-produced goods, the Executive wields vast power over extraterritorial entities. This power, vested in the Executive by Congress, makes up the legislation-based toolkit of the United States in the fight against extraterritorial forced labor.

(a) *U.S. Trade Policy*. — The United States is the world’s largest importer of goods, with over \$2.5 trillion worth of goods brought into the country in 2019.<sup>85</sup> This power on the world stage means that the United States’s trade policy can disproportionately impact the behavior of exporters and companies across the world. Under U.S. trade law, the Office of the U.S. Trade Representative (USTR) and executive branch are empowered to make certain trade decisions based on human rights standards and the presence of forced labor.

The first mechanism for conditioning trade on standards of labor is the U.S. Generalized System of Preferences<sup>86</sup> (GSP). The GSP was introduced in the Trade Act of 1974,<sup>87</sup> and it created a system through which the United States can extend preferential trade treatment to certain developing countries, in exchange for specified conditions.<sup>88</sup> According to the USTR’s website, the GSP intends to “provide opportunities for many of the world’s poorest countries to use trade to grow their economies and climb out of poverty.”<sup>89</sup> One of the provisions to determine whether a country can qualify for the GSP benefits is “a prohibition on the use of any form of forced or compulsory labor.”<sup>90</sup> The President determines which countries are eligible for GSP dependent on the recommendation of the USTR, which itself is dependent on a government committee review, including public hearings and a public comment period.<sup>91</sup>

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<sup>85</sup> *Countries & Regions*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT, <https://ustr.gov/countries-regions> [<https://perma.cc/7PA2-8JPT>].

<sup>86</sup> 19 U.S.C. § 2462; *Generalized System of Preferences (GSP)*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT, <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> [<https://perma.cc/6W6J-XFYZ>]; MICHAEL TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 717 (4th ed. 2013).

<sup>87</sup> Pub. L. No. 93-618, § 502, 88 Stat. 1978, 2066 (codified at 19 U.S.C. § 2462).

<sup>88</sup> See *Generalized System of Preferences (GSP)*, *supra* note 86.

<sup>89</sup> *Id.*

<sup>90</sup> OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, U.S. GENERALIZED SYSTEM OF PREFERENCES: GUIDEBOOK 17 (2020).

<sup>91</sup> *Id.* at 9.

Other region-specific statutory bases allow the United States to give trade preferences to certain countries contingent on labor standards. The Caribbean Basin Economic Recovery Act of 1983<sup>92</sup> conditioned trade with seventeen Caribbean nations partially on their compliance with international labor standards.<sup>93</sup> The Omnibus Trade and Competitiveness Act of 1988<sup>94</sup> likewise allowed the Trade Representative to investigate reports of international labor standards violations and, if substantiated, authorize countermeasures including trade restrictions.<sup>95</sup> And the African Growth and Opportunity Act of 2000<sup>96</sup> (AGOA) allowed duty-free access to U.S. markets on certain products for sub-Saharan African countries that meet certain standards, such as the “protection of internationally recognized worker rights, including . . . a prohibition on the use of any form of forced or compulsory labor.”<sup>97</sup>

Effectiveness of the GSP and regional trade preferences regimes is mixed. GSP countries are subject to annual review, and the USTR conducts additional eligibility review upon requests from civil society or government groups when concern exists that countries are not meeting GSP eligibility criteria.<sup>98</sup> Labor groups in the United States such as the AFL-CIO have filed petitions and public comments to the USTR regarding designations of countries with poor labor standards, in many cases urging the U.S. government to suspend GSP or AGOA benefits.<sup>99</sup> In some cases, as with Eswatini in 2015 and Mauritania and Thailand in 2019, the United States has partially or fully suspended benefits under the AGOA or GSP.<sup>100</sup> But in others, the AFL-CIO has filed comments and attended hearings alleging gross violations of international labor

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<sup>92</sup> 19 U.S.C. §§ 2701–2707.

<sup>93</sup> *Caribbean Basin Initiative (CBI)*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT, <https://ustr.gov/issue-areas/trade-development/preference-programs/caribbean-basin-initiative-cbi> [<https://perma.cc/5BCH-LFDY>].

<sup>94</sup> 19 U.S.C. §§ 2901–2906.

<sup>95</sup> TREBILCOCK ET AL., *supra* note 86, at 717.

<sup>96</sup> Pub. L. No. 106-200, 114 Stat. 251 (codified as amended in scattered sections of the U.S. Code).

<sup>97</sup> 19 U.S.C. § 3703(1)(F).

<sup>98</sup> One example of this is the GSP de-designation in 2019 of India and Turkey, for reasons unrelated to worker rights. See *United States Will Terminate GSP Designation of India and Turkey*, OFF. U.S. TRADE REPRESENTATIVE, EXEC. OFF. PRESIDENT (Mar. 4, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/march/united-states-will-terminate-gsp> [<https://perma.cc/E46E-K3S5>].

<sup>99</sup> See *Raising Labor Standards Through Trade Preference Programs*, AFL-CIO, <https://aflcio.org/raising-labor-standards-through-trade-preference-programs> [<https://perma.cc/59FH-SWSN>].

<sup>100</sup> See *id.*

norms in countries that retain preferential U.S. trade benefits theoretically contingent on abiding by such labor standards.<sup>101</sup>

Crucially, however, the GSP is currently not active.<sup>102</sup> The bill authorizing the GSP program lapsed in the end of calendar year 2020,<sup>103</sup> and though talk of reauthorization has been constant in Congress, the GSP has not yet been reactivated.<sup>104</sup> The GSP had previously lapsed on multiple occasions when authorizations fell behind the expiry date, and past reauthorizations extended the coverage of the program retroactively to the date of its lapse.<sup>105</sup> In 2022, both the House and Senate passed bills that included the renewal of the GSP, but the trade provisions from the two bills were never reconciled into a piece of passed legislation.<sup>106</sup> As recently as September 2022, however, lawmakers introduced legislation that would reauthorize the GSP retroactively to its date of expiration in December 2020.<sup>107</sup> Accordingly, as of writing, the GSP is not an active tool being used to fight against labor abuses abroad.

(b) *The Tariff Act.* — U.S. trade statutes forbid the import of goods produced with forced labor through the Tariff Act of 1930.<sup>108</sup> Section 307 of the Act prohibits the import of goods into the United States that have been manufactured, in whole or in part, by forced labor.<sup>109</sup> DHS's Customs and Border Protection (CBP) is empowered to commence investigations into goods that are suspected to have been produced with forced labor.<sup>110</sup> In cases where such forced labor has been determined, federal authorities are permitted to seize goods, and importing entities can face criminal investigation.<sup>111</sup> The effectiveness of section 307 grew in 2015, when Congress removed a loophole that allowed importers to

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<sup>101</sup> *Id.* The AFL-CIO has filed such briefs in the cases of Georgia and Kazakhstan, which both retain GSP benefits. *Id.* Eswatini, which lost its AGOA eligibility in 2015, had its benefits reinstated on the condition that it improve its labor practices. *Id.* However, the AFL-CIO filed an additional petition in 2019, attesting that those standards had not been met. *Id.*; see AFL-CIO, PUBLIC COMMENT TO THE AFRICAN GROWTH AND OPPORTUNITY ACT IMPLEMENTATION SUBCOMMITTEE (2019), <https://aflcio.org/sites/default/files/2019-10/FINAL%202019%20AFL-CIO%20Swaziland%20AGOA.pdf> [<https://perma.cc/KZN8-DJWV>].

<sup>102</sup> LIANA WONG, CONG. RSCH. SERV., RL33663, GENERALIZED SYSTEM OF PREFERENCES (GSP): OVERVIEW AND ISSUES FOR CONGRESS 1 (2022).

<sup>103</sup> *Id.*

<sup>104</sup> See John B. Brew & Dmitry Bergoltsev, *Lawmakers in Washington Propose Bill for Allowing Retroactive GSP Benefits*, LEXOLOGY (Sept. 21, 2022), <https://www.lexology.com/library/detail.aspx?g=62209117-ofaf-46db-b1cd-1977d661c1c4> [<https://perma.cc/C5KX-7HH5>].

<sup>105</sup> WONG, *supra* note 102, at 33–34.

<sup>106</sup> Brew & Bergoltsev, *supra* note 104.

<sup>107</sup> *Id.*

<sup>108</sup> 19 U.S.C. §§ 1202–1683.

<sup>109</sup> *Id.* § 1307; see also WALK FREE FOUND., *supra* note 6, at 108 (noting that the United States has implemented policies to “prevent the sourcing of goods or services linked to modern slavery” through the Tariff Act, which “allows the seizure of goods believed to be produced with forced labor”).

<sup>110</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-259, FORCED LABOR: CBP SHOULD IMPROVE COMMUNICATION TO STRENGTHEN TRADE ENFORCEMENT (2021) (describing the CBP's approach to enforcing section 307).

<sup>111</sup> WALK FREE FOUND., *supra* note 6, at 108–09.

skirt the Tariff Act's requirements if their products fulfilled a "consumptive demand" in the United States.<sup>112</sup>

The first step that CBP may take to enforce section 307 of the Tariff Act is the issuance of a Withhold Release Order (WRO). WROs are indications that "information *reasonably but not conclusively* indicates that merchandise [produced with forced labor] is being, or likely to be, imported into the United States."<sup>113</sup> An active WRO allows CBP officials to temporarily detain shipments of merchandise at U.S. ports of entry and request that an importer provide "sufficient evidence that the merchandise was not produced with forced labor."<sup>114</sup> Currently, there are fifty-six active WROs in place.<sup>115</sup>

If the CBP finds that conclusive evidence of forced labor *does* exist, it can issue a Finding of Forced Labor. A Finding goes beyond a WRO in that it does not simply authorize goods to be withheld at U.S. ports of entry pending evidence that the goods were produced with forced labor.<sup>116</sup> Rather, it assumes that the goods from a particular company or region *were* produced by forced labor and authorizes U.S. port authorities to seize the goods.<sup>117</sup> In late 2020, CBP issued its first Finding of Forced Labor in a supply chain in twenty-four years.<sup>118</sup> The Finding implicated stevia products produced by a Chinese company (Inner Mongolia Hengzheng Group Baoanzhao Agriculture, Industry, and Trade Co., Ltd.).<sup>119</sup>

However, section 307 of the Tariff Act has been applied inconsistently: provisions within the Act that create exceptions for goods where domestic production is insufficient to meet domestic demand have stymied efforts to crack down on forced labor in some industries.<sup>120</sup> WROs, while effective, can be evaded by importers, and discretion to initiate investigations into potential abusers rests with politically

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<sup>112</sup> CHRISTOPHER A. CASEY & CATHERINE D. CIMINO-ISAACS, CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 2 (2022).

<sup>113</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 110, at 9 (emphasis added).

<sup>114</sup> *Id.* at 9–10.

<sup>115</sup> *Withhold Release Orders and Findings List*, U.S. CUSTOMS & BORDER PROT. (Feb. 8, 2023), <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> [<https://perma.cc/A88W-BYF6>].

<sup>116</sup> *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 110, at 11.

<sup>117</sup> *Id.*

<sup>118</sup> Notice of Finding that Certain Stevia Extracts and Derivatives Produced in the People's Republic of China with the Use of Convict, Forced or Indentured Labor Are Being, or Are Likely to Be, Imported into the United States, 85 Fed. Reg. 66,574 (Oct. 20, 2020) [hereinafter 2020 CBP Finding]; Press Release, U.S. Customs & Border Prot., CBP Issues First Forced Labor Finding Since 1996 (Oct. 20, 2020, 12:00 PM), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-first-forced-labor-finding-1996> [<https://perma.cc/NY8L-YYLW>].

<sup>119</sup> 2020 CBP Finding, *supra* note 118.

<sup>120</sup> FRANZISKA HUMBERT, THE CHALLENGE OF CHILD LABOUR IN INTERNATIONAL LAW 320–21 (James Crawford & John S. Bell eds., 2009). *But see* WALK FREE FOUND., *supra* note 6, at 108 (stating that the United States is "fully implementing" section 307 of the Act).



appointed agency heads, which may leave the WRO process vulnerable to manipulation for political aims.

(c) *Targeted Federal Legislation.* — While long-existing legislation like the Tariff Act gives U.S. agencies broad powers to investigate forced labor abroad and seize or detain goods, some circumstances may call for more action than existing legislation provides for. In such cases, Congress may act to determine that the labor situation in a particular country or region is so egregious and verifiable that ad hoc legislation is necessary to combat the import of goods from that region into the United States.

Actions taken against Myanmar's ruling junta are an example of such extra legislative steps. Concerns grew in Myanmar in the 1990s that the ruling military junta was using forced labor and conscription of the population, particularly in the construction of public works.<sup>121</sup> In the early 2000s, the United States legislature targeted the ruling military junta in Myanmar with several sets of sanctions: these included the 2003 Burmese Freedom and Democracy Act<sup>122</sup> (imposing asset freezes and certain export bans) and the Burmese JADE Act<sup>123</sup> (banning import of certain gemstones).<sup>124</sup> Through these measures, the United States put additional penalties on the Burmese state above and beyond what was provided for in human rights and national security legislation. The sectors targeted by the laws were those that were determined to hit at the funding and maintenance of the military power.

The most recent, and most expansive to date, use of congressional powers to address forced labor is the UFLPA. The UFLPA delegates to agencies, namely the DOL and CBP, the power to block imports from Xinjiang, China, on the assumption that products manufactured wholly or in part in Xinjiang were created with forced labor of the Uyghur population.<sup>125</sup> It “establishes a rebuttable presumption that the importation of any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in [Xinjiang], or produced by certain entities, is prohibited by Section 307 . . . [and such goods] are not entitled to entry to the United States.”<sup>126</sup> Such goods are allowed entry into the United States only if CBP “determines that the importer of record has complied with specified conditions and, by clear and convincing

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<sup>121</sup> See HUMBERT, *supra* note 120, at 184; INT'L LAB. ORG., FORCED LABOUR IN MYANMAR (BURMA): REPORT OF THE COMMISSION OF INQUIRY 3 (1998); CULLEN, *supra* note 9, at 23.

<sup>122</sup> Pub L. No. 108-61, 117 Stat. 864 (codified at 50 U.S.C. § 1701 note).

<sup>123</sup> Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008, Pub L. No. 110-286, 122 Stat. 2632 (2008) (codified at 50 U.S.C. § 1701 note).

<sup>124</sup> Claire Buggenhoudt, *U.S. Trade Sanctions (World Trade Organization, Panel Report)*, in LITIGATING TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS: ALTERNATIVE JUDGMENTS, *supra* note 35, at 13, 13–14.

<sup>125</sup> *Uyghur Forced Labor Prevention Act*, U.S. CUSTOMS & BORDER PROT. (Feb. 24, 2023), <https://www.cbp.gov/trade/forced-labor/UFLPA> [<https://perma.cc/5WH8-QHQU>].

<sup>126</sup> *Id.*

evidence, that the goods, wares, articles, or merchandise were not produced using forced labor.”<sup>127</sup>

The UFLPA represents a significant step beyond the provisions of the Tariff Act on their own because it does not require a case-by-case finding of forced labor in the products produced by a specific company operating within Xinjiang.<sup>128</sup> While previous action against forced labor in China had entailed WROs and Findings against individual Chinese entities working in Xinjiang,<sup>129</sup> the UFLPA acts as a sort of blanket WRO for the entire region, imposing a presumption against the products ab initio. Such a move has drastic consequences for businesses and foreign governments whose goods may be prevented from entering the United States without costly disclosures and internal investigations. While the drastic steps taken in the UFLPA are not suitable for *all* instances of forced labor hotspots, the commitment shown by the United States in enacting the legislation can act as a model for forced labor prevention efforts in other countries, as well as deterrence in cases where the threat of targeted legislation in the United States may motivate a country to change its domestic practices.

(d) *Sanctions Authority.* — The President’s power to enact sanctions comes from acts designed to protect the national security of the United States,<sup>130</sup> chief among them the International Emergency Economic Powers Act<sup>131</sup> (IEEPA). While IEEPA was originally enacted to constrain the President’s nonwartime powers, successive interpretation has given the Executive “sweeping tools of economic warfare.”<sup>132</sup> Under IEEPA, the President may take economic actions in response to an “unusual and extraordinary threat” to the foreign policy, economy, or national security of the United States.<sup>133</sup> Powers under IEEPA are broad: the President can take a wide range of economic actions from seizing foreign property under U.S. jurisdiction to imposing trade embargos, import restrictions, and asset freezes.<sup>134</sup>

To date, Presidents have declared national emergencies under IEEPA in seventy-six cases, with the designations often pertaining to

<sup>127</sup> *Id.*

<sup>128</sup> See U.S. DEP’T OF HOMELAND SEC., STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE’S REPUBLIC OF CHINA: REPORT TO CONGRESS 7–8 (2022).

<sup>129</sup> See *Withhold Release Orders and Findings List*, *supra* note 115.

<sup>130</sup> For a critical perspective on the overbreadth of the Executive’s national security powers, see Patrick Corcoran, Note, *Trade and Wars: Checking the President’s Overbroad Trade Sanction Authority*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 687 (2021).

<sup>131</sup> 50 U.S.C. §§ 1701–1707.

<sup>132</sup> HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 46–47, 80 (1990).

<sup>133</sup> 50 U.S.C. § 1701(a). For information about the context of IEEPA’s enactment, see KOH, *supra* note 132, at 46–48.

<sup>134</sup> Cf. KOH, *supra* note 132, at 122 (describing measures taken by President Carter under IEEPA in response to the Iranian hostage crisis). These broad powers under IEEPA have been held up in courts. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (upholding President Carter’s IEEPA actions against Iran); *INS v. Chadha*, 462 U.S. 919, 959 (1983).

situations in specific countries.<sup>135</sup> These include responses to situations in Bosnia and Herzegovina, Côte d'Ivoire, Cuba, Haiti, Iran, Iraq, Liberia, Libya, Myanmar, Nicaragua, Panama, Serbia, Sierra Leone, South Africa, Sudan, Zimbabwe, and more.<sup>136</sup> While many of the IEEPA designations have been in response to terrorism or conflict, more recent designations have focused on threats to elections, criminal networks, drug smuggling, and, relevant for the purposes of this Chapter, human rights abuses.<sup>137</sup>

IEEPA's use has been sweeping. One of the first declarations came in 1985 in response to the apartheid regime in South Africa<sup>138</sup> and was followed by invocations in Sudan,<sup>139</sup> Sierra Leone,<sup>140</sup> Myanmar,<sup>141</sup> and North Korea.<sup>142</sup> The regime of Global Magnitsky sanctions,<sup>143</sup> in part implementing IEEPA, targets human rights abuse perpetrators around the globe and has also been used to target perpetrators of forced labor.<sup>144</sup>

The sanctions authority of the President is useful in combatting grave forms of forced labor or human rights abuses that can credibly rise to the level of a national emergency or threat to U.S. foreign policy. The United States has used this authority several times in the past few decades, and sanctions designations of individuals or of certain industries could be an important tool to return to in the fight against forced labor abroad.

(e) *Export Administration Regulation.* — The Department of Commerce's Bureau of Industry and Security (BIS) is the government office responsible for implementation of the Export Administration Regulations<sup>145</sup> (EAR). BIS maintains an Entity List, which contains names of companies and foreign entities that are not allowed to be the recipient of U.S. exports. Such a restriction has potentially huge impacts, as the United States is a leading (or, in some cases, the sole) global

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<sup>135</sup> *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST. (Feb. 17, 2023), <https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act> [<https://perma.cc/6NFR-GPZ9>].

<sup>136</sup> *Id.*

<sup>137</sup> *See id.*

<sup>138</sup> Exec. Order No. 12,532, 3 C.F.R. § 387 (1985); CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, *THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE* 23–24 (2022).

<sup>139</sup> Exec. Order No. 13,067, 3 C.F.R. § 230 (1997).

<sup>140</sup> Exec. Order No. 13,194, 3 C.F.R. § 741 (2002).

<sup>141</sup> Exec. Order No. 13,651, 3 C.F.R. § 324 (2014).

<sup>142</sup> Exec. Order No. 13,722, 3 C.F.R. § 446 (2017).

<sup>143</sup> Exec. Order No. 13,818, 3 C.F.R. § 399 (2018).

<sup>144</sup> Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Accountability Act (July 9, 2020), <https://home.treasury.gov/news/press-releases/sm1055> [<https://perma.cc/FUM4-S7A2>].

<sup>145</sup> 15 C.F.R. § 730 (2022).

producer of important dual-use goods and technology.<sup>146</sup> Inclusion on the Entity List extends to activities “sanctioned by the State Department and activities contrary to U.S. national security and/or foreign policy interests.”<sup>147</sup>

In July 2020, the Department of Commerce added eleven companies to the Entity List that were implicated in China’s campaigns of human rights violations and forced labor in Xinjiang.<sup>148</sup> So far, the Xinjiang designations have been the sole time that entities have been invoked under the EAR in response to forced labor violations.<sup>149</sup> However, this move may open the door for future designations based not only on strict definitions of national security but also on more expansive interpretations of the United States’s vested interest in human rights and labor freedoms around the world.

2. *Other Measures.* — Other than the authority vested by Congress and carried out through the agencies, the federal government also has separate avenues to take action on forced labor. These include diplomatic pressure through the Executive’s foreign affairs powers, research and business-compliance initiatives under the powers of the DOL, and cross-agency task force initiatives to streamline and heighten compliance and cross-functionality.

(a) *Diplomatic Channels.* — Beyond the powers vested in the Executive through Congress, the President possesses their own foreign affairs powers. The Executive, qua executive, holds diplomatic and military authority. These authorities can be used alongside other statutory means to influence the behavior of foreign governments. Executive policies can include restricting foreign aid, putting controls on imports or exports, stopping access to U.S. or international financial systems, or even affecting other types of bilateral relations such as landing rights.<sup>150</sup> The Executive holds greatest control over bilateral relations such as diplomatic and military aid, landing restrictions, and U.S. exports.<sup>151</sup>

(b) *The Department of Labor.* — The DOL’s Bureau of International Labor Affairs (ILAB) functions as the government’s hub for research on

<sup>146</sup> Cf. Hideki Uno, *The Unintended Impacts of the U.S. Export Control Regime on U.S. Innovation*, CTR. FOR STRATEGIC & INT’L STUD. (July 25, 2022), <https://www.csis.org/blogs/perspectives-innovation/unintended-impacts-us-export-control-regime-us-innovation> [https://perma.cc/L4HB-YL4M]; BALDWIN, *supra* note 84.

<sup>147</sup> *CBC FAQs - Entity List FAQs*, BUREAU INDUS. & SEC., U.S. DEP’T COM., [https://www.bis.doc.gov/index.php/cbc-faqs/cat/36-entity-list-faqs-2#faq\\_282](https://www.bis.doc.gov/index.php/cbc-faqs/cat/36-entity-list-faqs-2#faq_282) [https://perma.cc/H3ZG-NB2S].

<sup>148</sup> Addition of Certain Entities to the Entity List; Revision of Existing Entries on the Entity List, 85 Fed. Reg. No. 44,159 (July 22, 2020).

<sup>149</sup> See Alison J. Stafford Powell et al., *BIS Adds Eleven Chinese Entities Implicated in Human Rights Abuses in Xinjiang to the Entity List*, BAKER MCKENZIE: SANCTIONS & EXP. CONTROLS UPDATE (Aug. 11, 2020), <https://sanctionsnews.bakermckenzie.com/bis-adds-eleven-chinese-entities-implicated-in-human-rights-abuses-in-xinjiang-to-the-entity-list> [https://perma.cc/QY45-DPWD].

<sup>150</sup> See BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* 2 (1988).

<sup>151</sup> *Id.* at 32–33, 63–65.

forced labor worldwide and is the “largest government agency in the world dedicated to improving global working conditions and countering labor abuses.”<sup>152</sup> This work has included the production of more than forty congressionally mandated reports on forced labor and human trafficking worldwide, and nearly two hundred publications.<sup>153</sup>

ILAB also produces a biennial report entitled the List of Goods Produced by Child Labor or Forced Labor.<sup>154</sup> These reports provide “actionable information” to other government agencies with authority over procurement or import and can serve to “help foreign governments build their capacity to end labor exploitation in their countries.”<sup>155</sup>

DOL also leads initiatives geared at business compliance and technical innovation. Its Comply Chain program released an app that is targeted at industry groups and companies “seeking to develop robust social compliance systems” for global supply chains.<sup>156</sup> ILAB also partners with the private sector, governments, worker organizations, and civil society to lead training and technical assistance programs abroad and, as of 2021, was funding fifty projects in nearly as many countries.<sup>157</sup>

(c) *Interagency Developments.* — The Biden Administration has commenced new initiatives to streamline and consolidate the existing agencies and units that work against forced labor. These initiatives include an effort to consolidate the interagency process for reporting implemented by the TVPRA under the banner of *The National Action Plan to Combat Human Trafficking*.<sup>158</sup> Efforts also include a DHS-led interagency Forced Labor Enforcement Task Force, which aims to consolidate and formalize processes for agencies including the State Department, DOL, and Department of Commerce to aid DHS’s antitrafficking measures.<sup>159</sup> An additional step is the creation within USTR of the office’s first-ever “focused trade strategy to combat forced labor.”<sup>160</sup>

<sup>152</sup> U.S. DEP’T OF LAB., *supra* note 6, at 6.

<sup>153</sup> See *Reports and Publications*, U.S. DEP’T LAB. <https://www.dol.gov/agencies/ilab/research-impact-evaluation> [<https://perma.cc/4A49-7GDK>].

<sup>154</sup> E.g., U.S. DEP’T OF LAB., *supra* note 6.

<sup>155</sup> *Id.* at 6–7. Pursuant to Executive Order 13,126, the U.S. government also depends on ILAB’s *List of Products Produced by Forced or Indentured Child Labor* to ensure that public procurement does not support goods produced by forced labor. See Exec. Order No. 13,126, 3 C.F.R. § 195 (2000).

<sup>156</sup> *Comply Chain: Business Tools for Labor Compliance in Global Supply Chains*, U.S. DEP’T LAB., <https://www.dol.gov/general/apps/ilab-comply-chain> [<https://perma.cc/HTW7-65DE>].

<sup>157</sup> U.S. DEP’T OF LAB., *supra* note 6, at 9–10, 12.

<sup>158</sup> THE WHITE HOUSE, THE NATIONAL ACTION PLAN TO COMBAT HUMAN TRAFFICKING (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf> [<https://perma.cc/E6E5-P5QQ>].

<sup>159</sup> See *Forced Labor Enforcement Task Force*, U.S. DEP’T. HOMELAND SEC. (Jan. 24, 2023), <https://www.dhs.gov/forced-labor-enforcement-task-force> [<https://perma.cc/MBH6-9KM4>].

<sup>160</sup> Press Release, Off. of the U.S. Trade Representative, USTR Announces the Development of a Focused Trade Strategy to Combat Forced Labor (Jan. 25, 2022), <https://ustr.gov/about-us/policy->

3. *Critiques and Challenges.* — The U.S. system has, at least theoretically, two overlapping lenses for enforcing prohibitions on trafficking and forced labor abroad: private claims through the civil court system against corporations or individuals, and public policies that target the companies, entities, and countries that participate in or foster conditions of forced labor.

However, policies spearheaded by the federal government, and especially those falling under the discretion of the executive branch, are subject to several important limitations. The power of the executive branch — which applies its discretion through agency enforcement — is captured by the greater overarching political goals of the state. The discretionary actions of any individual agency — DHS in issuing WROs, Commerce in wielding EAR power, State in trading harsh words and enacting diplomatic pressure — are directly tied back to the policy aims of the Executive. The sitting President must, therefore, be confident answering for the extent of their forced labor policy to every corporation and foreign government affected by U.S. enforcement.

There is perhaps no clearer depiction of this dynamic than the ways in which recent enforcement has been focused around the Uyghurs. The situation of human rights abuses in Xinjiang is horrific, likely rising to the level of crimes against humanity or genocide,<sup>161</sup> and should be condemned by the greatest number of international actors possible. However, the restrictions on Xinjiang come as successive U.S. administrations accelerate their overall trade and geopolitical rivalries with China.<sup>162</sup> Moreover, the sectors in Xinjiang that regularly export to the United States are far from vital to the U.S. economy: in 2020, some key products for import were reportedly wind turbines, some chemicals, and holiday decorations.<sup>163</sup>

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offices/press-office/press-releases/2022/january/ustr-announces-development-focused-trade-strategy-combat-forced-labor [https://perma.cc/M5S9-BG3M].

<sup>161</sup> Cf. Press Release, Michael R. Pompeo, Sec’y of State, U.S. Dep’t of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html> [https://perma.cc/8HKV-6477].

<sup>162</sup> See Anshu Siripurapu & Noah Berman, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELS. (Dec. 2, 2022, 5:00 PM), <https://www.cfr.org/background/contentious-us-china-trade-relationship> [https://perma.cc/MX8D-6QUC]; cf. Ryan Hass, Commentary, *A Roadmap for U.S.-China Relations in 2023*, BROOKINGS INST. (Jan. 4, 2023), <https://www.brookings.edu/blog/order-from-chaos/2023/01/04/a-roadmap-for-us-china-relations-in-2023> [https://perma.cc/2BK6-74SU].

<sup>163</sup> Finbarr Bermingham, *China’s Xinjiang More than Doubled Its US Exports in 2020, Despite Trump’s Sanctions and Bans*, S. CHINA MORNING POST (Feb. 24, 2021, 4:43 PM), <https://www.scmp.com/economy/china-economy/article/3118656/xinjiangs-us-exports-more-doubled-2020-despite-trumps> [https://perma.cc/8CTP-5GDF]. The *South China Morning Post* also reported that cotton, the industry most targeted by the sanctions, was a minor good for direct export to the United States. *Id.* Rather, Xinjiang cotton “typically enters the garment supply chain elsewhere in China or Asia, at which point it can be difficult to trace.” *Id.*

Such politically driven enforcement is, one could argue, not a bad thing. After all, *some* enforcement is better than none. The rights violations perpetrated against the Uyghurs undoubtedly rise to the substantive level to be worthy of strong federal action. So, one might ask, why make the perfect the enemy of the good? One answer is that the good in this scenario is inadequate. When federal action to combat rights abuses remains, or appears to be, subservient to political tensions, it cheapens the value of the enforcement that *does* occur, opens the United States up to criticisms of empty actions, and gives bad actors a playbook for avoiding enforcement by cozing up politically to the United States.

Accordingly, federal policy — necessarily beholden to outside interests — must be supplemented by other, more independent mechanisms. Specific statutes under Congress's enacting power may be able to fill this gap. Congress could pass laws similar to the Burmese JADE Act that target labor abuses in the Thai fishing industry, West African cocoa plantations, or even the Gulf States' domestic abuses of migrant workers. However, Congress has been hesitant to act in recent years, preferring to take its direction from the executive branch. And, with the threat of near-total closing of extraterritorial forced labor claims in U.S. courts, there is no longer the risk that *any* corporate actor, much less ones friendly to the United States or beholden to its interests, will be forced to pay up and admit its role in labor abuses.

A federal system bolstered by the seat of world capital markets and the largest economy is one that wields enormous power. The United States, if it works with its allies to drive forceful policies that apply to rights-abusing states and corporations irrespective of politics, could take steps to fundamentally shift the problem of forced labor around the world. But such steps, implemented at a federal level, would require policy calculations that elevate the prevention of human rights abuses for non-U.S. citizens above the economic and political interests of the United States in its relationships with other states.

It is no wonder why the United States would not seek to make many of its closest political and economic relationships dependent on the dictates of human rights demands. But such is the reason for a multi-pronged government and approach. Allowing the United States to drive policy to the extent that it is comfortable, while simultaneously fostering an independent and robust accountability mechanism for corporate human rights abuses in the court system, is the only way to guarantee consistent action against this moral fault and prevent the abrogation of our moral duties. Otherwise, the entire system rests on unstable footing.

### *Conclusion*

The foregoing sections have laid out U.S. action against forced labor. The balance of power and options within the U.S. system is changing: as the courts move to read against extraterritoriality in human rights

statutes, the federal levers of foreign policy and economic sanctions gain greater use. One question, however, remains unanswered: what do these shifting policies mean for a victim of forced labor outside the United States?

This Chapter proffers several views: Firstly, the decline of private extraterritorial claims in U.S. courts deprives plaintiffs and victims of opportunities to have their voices heard and their claims litigated in our adversarial court system. That system has its drawbacks: Cases can stay in the court system for close to a decade at a time and come at an exorbitant cost. Victims and the NGOs that represent them rely on pro bono practices of large established law firms to shepherd the cases through the court system. And such a system gives the option to be plaintiffs only to an infinitesimal segment of the population of victims of forced labor.

But the court system also has important advantages that will be lost in an ecosystem driven only by U.S. foreign policy on a federal level. Court decisions impose binding precedents. The potential for binding precedents in U.S. courts that impose liability on corporations as a result of their business practices, business partners, or subsidiaries abroad could drive serious change in the way U.S. corporations operate. Court judgments also provide for damages (not envisioned under the federal policy levers) and give moral heft to the positions of victim plaintiffs.

As action shifts to the federal level, the possibility arises to paint with a much broader brush. The United States occupies enormous space and wields enormous power on the world stage: U.S. action can cripple the profits of a company accused of forced labor practices or suspend entire entities' access to markets and banking systems. If offenders throughout the world were put on notice that the United States was willing to take serious action akin to the UFLPA by targeting other products and supply chains, they may well reassess their labor and market practices.

But, as noted above, the U.S. federal system is also beholden to political interests. The United States may be more likely to go after its enemy states than its allies (no matter the presence of rights abuses). Federal policy is also not precedent setting; changes in administration politics and personnel could wipe out gains in combatting forced labor in one fell swoop.

What the world system needs is strong action from the United States that is applied consistently, apolitically, and forcefully. The best approach would be one that allows all three branches of the government to pronounce that forced labor in the U.S. supply chain is a human rights abuse that directly ties to the U.S. economy and should not be tolerated. Absent that reality, market forces will continue to drive deplorable and inhumane conditions for workers in some of the most destitute corners of the world.