Tackling forced labour in supply chains

The potential of trade and investment governance

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▶ Introduction

Although provided for by numerous international treaties[1] and embodied in the United Nations Sustainable Development Goals,[2] the eradication of forced labour remains a major challenge.[3] According to the 2021 *Global Estimates of Modern Slavery*,[4] there were approximately 28 million people in forced labour in 2021, a higher number than the estimation of about 25 million people given for 2016 (ILO and Walk Free 2017; ILO, Walk Free and IOM 2022). More than three quarters of the cases of forced labour were imposed by private individuals, groups or companies, many of them operating in export-related sectors participating in supply chains (ILO et al. 2019; ILO, Walk Free and IOM 2022).

It is therefore unsurprising that the question of how to tackle forced labour in supply chains has gained increasing attention among scholars and policymakers in recent years (Feasley 2016; McGrath and Mieres 2017; Nolan and Bott 2018; Hok et al. 2020). This chapter aims to contribute to the debate by focusing on the potential of trade and investment governance, which is understood to include a variety of instruments at the State and international level, to address forced labour issues in supply chains. Trade governance instruments, such as import ban laws, trade preference schemes and trade agreements, have been in the spotlight of policy debates regarding forced labour in a number of countries. Similarly, forced labour-related provisions have increasingly been incorporated into investment governance instruments, which include international investment agreements as well as investment policies of the World Bank and other development finance institutions at the global, regional and national level. While these instruments

1 See, notably, ILO Forced Labour Convention, 1930 (No. 29); ILO Abolition of Forced Labour Convention, 1957 (No. 105); Art. 8 of the International Covenant on Civil and Political Rights; and Art. 6 of the International Covenant on Economic, Social and Cultural Rights.

2 UN General Assembly, Resolution 70/1, Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015), Para. 8.7.

3 Forced labour is defined in the ILO Forced Labour Convention, 1930 (No. 29) as encompassing “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” (Art. 2(1)). Some exceptions are set out in Art. 2(2) of the instrument.

4 The concept of “modern slavery” has been used to refer to “a set of specific legal concepts including forced labour, concepts linked to forced labour (i.e. debt bondage, slavery and slavery-like practices and human trafficking) and forced marriage”; at its core, “it refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power” (ILO, Walk Free and IOM 2022, 13).

can involve important economic leverage, little is known about the extent to which, and the conditions under which, they can contribute to effectively tackling the challenge of forced labour in supply chains (Pietropaoli, Johnstone and Balch 2021).

To help address this question, this chapter proceeds in four steps. Section 3.1 provides an overview of what is known about the incidence and root causes of forced labour in supply chains. Against this backdrop, section 3.2 examines how forced labour-related provisions have been integrated into trade and investment governance instruments. Section 3.3 then turns to analysing the circumstances under which trade and investment governance instruments can contribute to addressing forced labour in an effective manner – that is, in a way that tackles the underlying causes of forced labour and has a long-lasting impact. It does so by drawing on two case studies – the rubber glove sector in Malaysia and the cotton sector in Uzbekistan. Section 3.4 concludes by offering some broader reflections on the conditions under which trade and investment governance instruments can contribute to lasting change regarding forced labour in supply chains.

3.1 Trends regarding forced labour in supply chains

3.1.1 Identifying and measuring forced labour in supply chains

The 2021 *Global Estimates of Modern Slavery* indicate that, in 2021, 27.6 million people were "in situations of forced labour on any given day" (ILO, Walk Free and IOM 2022, 2). This absolute number translates, at the global level, to “3.5 people in forced labour for every thousand people” (ILO, Walk Free and IOM 2022, 2). Some 3.3 million children were victims of forced labour cases, making up 12 per cent of the total number of forced labour. Most forced labour situations occurred in the private economy: about 86 per cent of forced labour cases were inflicted by private actors (23 per cent of which were in forced commercial sexual exploitation (FCSE), and 63 per cent in the private economy in areas other than FCSE) (ILO, Walk Free and IOM 2022).

Detecting and measuring forced labour along the supply chain, especially when international trade is involved, pose significant challenges due to the complexity of the structure of the supply chain, typically characterized by different tiers that operate across borders (ILO et al. 2019). That being said, the ILO estimated that nearly half (48.7 per cent) of the total forced labour cases in the private economy in areas other than FCSE were found in export-related sectors: manufacturing (18.7 per cent), construction (16.3 per cent), agriculture and fishing (12.3 per cent), and mining and quarrying (1.4 per cent). The remaining cases were found in domestic work (16.6 per cent) and other services such as hospitality, transport, trade and social services (ILO, Walk Free and IOM 2022).

The global estimates also show that debt bondage occurred across sectors but was most prominent in export-oriented sectors; bonded labour was found in 43 per cent of the cases of forced labour exploitation in mining, 31 per cent in agriculture and 27 per cent in construction (ILO, Walk Free and IOM 2022). Another study mentions several specific industries where bonded labour can be found, including brickmaking, timber extraction, tobacco and garment manufacturing (UN Human Rights Council 2016). However, systematic and comprehensive data on the incidence and characteristics of forced labour in specific branches of economic activities and products are still lacking.

3.1.2 The root causes of forced labour in supply chains

Demand- and supply-side labour factors contribute to explaining forced labour in supply chains (LeBaron et al. 2019). Regarding labour demand, some common features of global supply chains, and supply chains in general, such as pressure on the price, cost and speed of production, can play a role in the use of forced labour in firms’ global supply chains, even if they do not inevitably lead to it (LeBaron 2021). Strong pressures regarding costs and prices can induce supplier companies to reduce labour costs in a way that augments the risk of forced labour through the abuse of workers’ vulnerability, for example with the imposition of illegal wage deductions, penalties or fines, as well as the withdrawal or non-payment of wages. Pressures on delivery time (for example, when suppliers need to complete orders in short production windows, or there are fluctuations in short-term demand) incentivize recourse to overtime, outsourcing of production, and use of informal labour contracting. All these practices increase the risk of forced labour in the supply chain (ILO 2012). Outsourcing of production and labour subcontracting can create greater complexity and a lack of traceability, and they may make oversight and accountability for labour standards difficult (LeBaron et al. 2019). Furthermore, transnational labour recruitment can increase the risk of forced labour, especially debt bondage, particularly when labour market intermediaries charge workers fees for their services (ILO et al. 2019; see also Gordon 2015).

Furthermore, poverty, low levels of education and illiteracy, and migration are important supply side-related risk factors that determine people's vulnerability to forced labour (ILO 2014). Inequality and discrimination are also factors associated with forced labour (ILO Global Business Network on Forced Labour 2022). Poor populations have limited livelihood options, leaving them more likely to fall into debt bondage and to depend on their employers for housing, food or the employment of their relatives – situations considered by the ILO to be indicators of forced labour (ILO 2012, 2019 et al.). Several studies establish a significant correlation between illiteracy and a low level of schooling, and the risk of being subjected to forced labour (ILO 2014; LeBaron et al. 2019). Educated people are less likely to work in low-skilled manual labour and tend to have a better knowledge of their rights. Literate persons are able to read and understand their contracts and are more likely to recognize situations that involve risks of coercion or exploitation (ILO 2014). By contrast, migrants, who are less likely to know the local language and legal frameworks, are at greater risk than the general population of becoming victims of abuse due to their vulnerability and are more frequently found in forced labour situations (ILO 2012). Forced labour among migrant workers has been found to be more than three times higher than among non-migrant workers (ILO, Walk Free and IOM 2022).

In addition to these demand-side and supply-side factors, institutional factors also help to explain the prevalence and persistence of forced labour. These include policy and governance issues, such as deficient and insufficiently enforced domestic labour laws and policy frameworks. Other factors include lack of capacity among State institutions in terms of addressing forced labour and lack of coordination among relevant institutions. Addressing these issues thus plays an important role in combating forced labour in an effective manner (ILO et al. 2019).

▶ 3.2 The proliferation of forced labour-related provisions in trade and investment governance instruments

Over recent decades forced labour-related provisions have made inroads into numerous trade and (increasingly) investment governance instruments. For example, bilateral and regional trade agreements dealing with forced labour issues have proliferated (ILO 2019a; Marceau, Walker and Oeschger 2023; Corley-Coulibaly, Grasselli and Postolachi in this volume). As of February 2023, more than 80 of the 356 trade agreements that were in force and had been notified to the World Trade Organization (WTO) contained references to forced labour.[5] Furthermore, an increasing – albeit smaller – number of bilateral investment treaties encompass forced labour-related provisions.[6] Addressing States or companies, these instruments can involve a variety of policy levers, which range from monitoring and technical cooperation to dispute settlement and economic incentives (on these categories, see Aissi, Peels and Samaan 2018). This section maps the different regulatory approaches of trade and investment governance instruments and analyses the policy levers through which they can contribute to addressing forced labour in supply chain contexts. It thereby focuses on unilateral trade governance instruments and investment policies of development finance institutions, which will be of particular relevance to the case studies discussed in section 3.3.

3.2.1 Unilateral trade governance instruments

3.2.1.1 Import ban legislation

The idea of addressing forced labour through trade governance instruments is far from recent. Indeed, forced labour concerns were among the first labour issues addressed by trade governance instruments,[7] starting with the

5 See data available at the ILO's Labour Provisions in Trade Agreements Hub.

6 See Marx and Mattioli in this volume, who emphasise that forced labour-related provisions in bilateral investment treaties usually come with less vigorous implementation mechanisms than their counterparts in trade agreements.

7 Only provisions dealing with prison labour seem to predate forced labour-related provisions; see Charnovitz (1987).

US Tariff Act of 1930.[8] Section 307 of this Act prohibits the importation of "[a]ll 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".[9] The provision covers the entire supply chain and exercises economic leverage directly at the firm level. To the present day, this provision has continued to be implemented by the US customs authorities, since 2003 embodied by the Customs and Border Protection (CBP) agency. Acting on its own initiative or in response to petitions from third parties, CBP can issue a "Withhold Release Order" to bar imported goods from entry into the United States if relevant information "reasonably but not conclusively indicates" that the good in question was made with forced labour.[10] If the suspicion is confirmed through a so-called "Finding", CBP can seize and initiate forfeiture proceedings for the goods in question (Syam and Roggensack 2020). Until 2016, Section 307 of the US Tariff Act was rarely used. From the entry into force of the provision in 1930 until the mid-1980s, only ten cases are reported where the import ban provision was actually enforced (Casey and Cimino-Isaacs 2022).[11]

In recent years, import bans have gained increasing traction as instruments for combating forced labour. In particular, the forced labour clause in the US Tariff Act has evolved from a law that remained mainly in the books into an instrument of significant practical relevance. A key factor in this regard was the lifting of the so-called "consumptive demand" clause by the US Congress in 2015,[12] which facilitated the adoption of import bans (Bell 2016). In addition to this, CBP has increased its institutional capacity for the enforcement of import bans, including by creating a dedicated forced labour division (Higgins 2023). Between 2016 and 2021, 38 enforcement actions were taken, as compared with 37 such actions in the 25 years before that (figure 3.1). While most import bans imposed have been company-specific, CBP has occasionally directed them at all products from a given domestic

8 Soon afterwards, other countries followed suit with similar measures. Notably, in 1931 Argentina allowed increased customs duties on products made with forced labour. Three years later, Spain amended its trade legislation, extending the concept of dumping to cover "prison or forced labour" (Charnovitz 1987, 570).

9 19 US Code § 1307. In this regard, the statute's definition of forced labour follows closely that of ILO Convention No. 29.

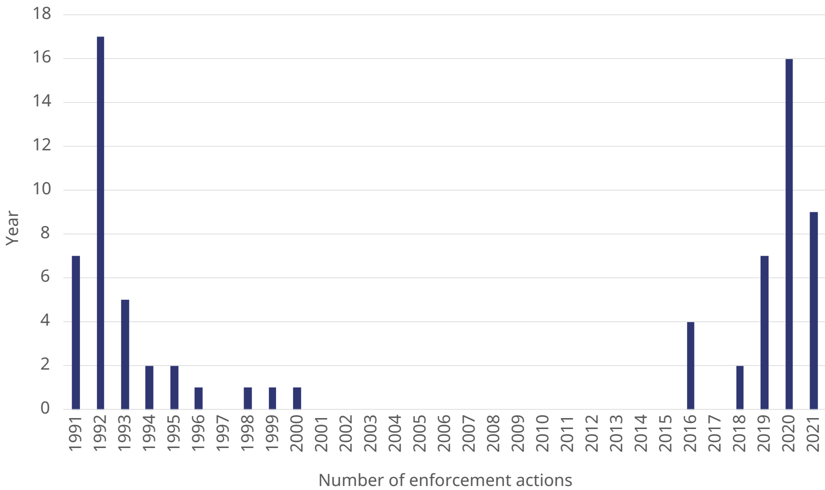
10 19 Code of Federal Regulations § 12.42(e).

11 While the early 1990s saw an increase of enforcement actions over previous years, between 2000 and 2015 only one enforcement action was adopted (see figure 3.1).

12 The clause had precluded enforcement of the forced labour clause in cases in which the goods in question were not produced in the United States "in such quantities [...] as to meet the consumptive demands of the United States" (original version of Section 307 of the US Tariff Act).

sector or region.[13] Furthermore, in 2021, new US legislation established a special import ban regime for the Xinjiang Uyghur Autonomous Region of China by subjecting all goods exported from that region to an import prohibition unless the company could show that its goods had *not* been made with forced labour (Alon 2022).

▶Figure 3.1 Number of enforcement actions under the US Tariff Act, 1991–2021



Source: CBP “Withhold Release Orders and Findings List”.

Furthermore, several other actors have adopted, or are considering the adoption of, import bans on goods made with forced labour. Further to a specific legal requirement in the United States–Mexico–Canada Agreement (USMCA),[14] Canada amended its domestic customs legislation in 2020 to ban the importation of “goods mined, manufactured or produced wholly or in part by forced labour” (Pellerin, Scheitterlein and Farrell 2021).[15] A similar legal instrument was adopted by Mexico in 2023 (Morales 2023). In 2022 the European Commission proposed legislation to prohibit products made with forced labour in the European Union (EU) market, which would cover

13 This occurred, for example, in the case of cotton products from Turkmenistan in 2018 (Natta 2021).

14 The USMCA obliges State parties to “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” (Art. 23.6(1)).

15 The legal provision quoted is contained in Customs Tariff, S.C. 1997, c. 36, Ch. 98, Item No. 9897.00.00.

imported goods, as well as goods produced in the EU for exports or domestic consumption (EC 2022). Import ban legislation has also been introduced in the Australian Parliament (Hurst 2022).

3.2.1.2 Trade preference programmes

Since the 1980s, forced labour-related provisions have also been included in unilateral trade preference programmes. The United States started this trend by integrating a labour provision into its Generalized System of Preferences (GSP) (Alston 1993),[16] as well as into several regional preference schemes, such as the Caribbean Basin Initiative and the African Growth and Opportunity Act (AGOA). These programmes allow the withdrawal of tariff preferences of a beneficiary country if the latter is found to have not taken appropriate action to protect certain labour rights, including forced labour (Perez-Lopez 1988; Siroën 2013).[17] Cases in which trade preferences were withdrawn for forced labour-related reasons include Mauritania in 2018, under AGOA, and Thailand in 2019, under the US GSP (USTR 2018, 2019).

Since 1994, the EU has also included forced labour-related provisions in the withdrawal clauses of its trade preference programmes (Waer and Driessen 1995). Furthermore, such provisions have featured, since 2001, in the EU GSP "Special Incentive Arrangement" (GSP+) (Dispersyn 2003). This arrangement provides additional tariff preferences to countries that have ratified a list of international conventions, including ILO Conventions Nos 29 and 105 dealing with forced labour, and are taking steps towards their implementation.[18] Unlike its US counterpart, the EU GSP refers specifically to ILO Conventions when defining the relevant State obligations (Stolzenberg 2019). The clause was activated in relation to forced labour for the first – and so far only – time in a case concerning Myanmar (Kryvoi 2008).

16 The legal basis for the US GSP expired at the end of 2020 and has not been renewed by the US Congress; for this reason, it has not been in effect since 1 January 2021 (Wong 2022).

17 In addition, an innovative approach that involved compliance incentives at the company level and regular factory-level monitoring, including forced labour concerns, was adopted for the US trade preference programme for Haiti (Hornbeck 2011; Blackett 2019).

18 The current withdrawal clause and special incentive clause are contained in Art. 19(1)(a) in conjunction with Annex VIII, Part A, and Arts 9–16, Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No. 732/2008.

3.2.2 Investment policies of development finance institutions[19]

Forced labour concerns have also been addressed in the investment policies of numerous development finance institutions (DFIs).[20] This includes institutions operating at the global level, such as the World Bank, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) (IFC 2012; MIGA 2013; World Bank 2017); and regional DFIs, such as the African Development Bank (AfDB), the Inter-American Development Bank (IDB) and the European Bank for Reconstruction and Development (EBRD) (AfDB 2023; IDB 2020; EBRD 2019). In addition, some subregional DFIs (such as the Black Sea Trade and Development Bank and the Nordic Development Fund) and cross-regional DFIs (such as the Asian Infrastructure Investment Bank) have included forced labour concerns in their investment policies, albeit usually in a less detailed manner (Yifeng 2018). Furthermore, forced labour requirements have also been adopted by a number of national DFIs (Penfold 2004). In addition to the US International Development Finance Corporation (DFC 2020), these include 15 European DFIs that have committed to applying the IFC's Performance Standards on Environmental and Social Sustainability, among other standards.[21]

Such labour safeguards require borrowers, public or private, from DFIs to abide by certain labour-related obligations in the course of the investment project concerned. Forced labour has been a key concern, and most DFIs with a labour safeguard address it, often drawing on the ILO's definition of the concept (Yifeng 2018; Ebert 2020). Many DFI labour safeguards also require borrowers to take certain steps to ensure that their contractors abide by the relevant labour requirements (see, for example, IFC 2012; EBRD 2019;

19 This section is partly based on Ebert (2018 and 2020).

20 For the purposes of this chapter, the term "development finance institution" is defined as covering public institutions that invest in private or public sector projects in low- or middle-income countries, usually with the aim of fostering development or other public objectives. For a similar definition (though limited to the private sector), see the Association of European Development Finance Institutions (EDFI).

21 This group comprises 15 DFIs that have joined the EDFI, namely the United Kingdom's British International Investment; the Belgian Investment Company for Developing Countries (BIO); the Italian CDP Development Finance and the Italian Society for Enterprises Abroad (SIMEST); the Spanish Development Finance Corporation (COFIDES); the German Investment Corporation (DEG); the Finnish Finnfund; the Dutch Entrepreneurial Development Bank (FMO); the Danish Investment Fund for Developing Countries (IFU); the Norwegian Norfund; the Development Bank of Austria (OeEB); the French Proparco; the Swiss Investment Fund for Emerging Markets (SIFEM); the Portuguese Corporation for Finance and Development (SOFID); and the Swedish Swedfund (see EDFI 2019).

AfDB 2023).[22] In addition, under some IFI labour safeguards, borrowers must screen their supply chain for problems regarding forced labour and, where apparent, take action to remedy them – or, if this is to no avail, switch to other suppliers.[23]

A key element for the implementation of DFI safeguards is due diligence requirements (Bradlow and Naude Fourie 2020). Closely related to the concepts of risk analysis and management (Spedding 2008), the due diligence component often includes an assessment of the project to be carried out by the borrower through which compliance issues can be detected and addressed. In addition, the DFI's staff are typically obliged to undertake their own risk assessments.[24] On this basis, the borrower prepares an action plan which the DFI and the borrower are required to monitor throughout the project (Ebert 2020).

In addition, a number of DFIs at the global and regional level have created accountability mechanisms that usually enjoy a degree of autonomy from the institution's operative management (Bradlow 2005). The mechanisms allow persons who claim to be adversely affected by a specific investment project funded by a DFI to file a complaint alleging a breach of the DFI's investment policies.[25] The oldest of these accountability mechanisms is the World Bank's Inspection Panel. Created in 1993, the Inspection Panel examines complaints by groups or individuals. Upon receipt of a complaint, the Panel conducts an eligibility screening and issues a recommendation to the World Bank's Board of Executive Directors as to whether or not to proceed with a fully fledged investigation (World Bank Inspection Panel 2022). If the Board grants its approval, the Panel examines the merits of the complaint. On this basis, the Panel prepares a final report whose follow-up is overseen by the Board and can involve an action plan prepared by the World Bank's management (Wong and Mayer 2015). In addition to such investigation mechanisms, DFI accountability mechanisms often encompass a mechanism for the amicable resolution of the dispute between the complainant and the

22 The World Bank additionally requires borrowers to "incorporate the requirements of this ESS [Environmental and Social Standard] into contractual agreements with such third parties, together with appropriate noncompliance remedies" (World Bank 2017, 35).

23 Often these obligations are mostly limited to issues of forced labour, child labour and occupational health and safety (see, for example, IFC 2012; MIGA 2013; World Bank 2017; AfDB 2023).

24 For the case of the World Bank, see Desierto (2020).

25 Such DFIs include the World Bank, IFC and MIGA, as well as AfDB, EBRD and IDB (Gunaydin and Park 2023).

borrower concerned (Bradlow 2005).[26] A case in point is the Compliance Advisor Ombudsman (CAO) relating to the IFC and MIGA (CAO 2021), which has, among other things, facilitated the settlement of a dispute involving allegations of forced labour in the Uzbek cotton sector (CAO 2022).[27]

▶ 3.3 Trade and investment governance instruments as part of broader supply chain governance efforts regarding forced labour: Insights from two case studies

Section 3.2 has shown that forced labour clauses in trade and investment governance may involve various policy levers that can be used to address forced labour issues in supply chain contexts. However, even where these clauses are activated, it is not clear that they will necessarily lead to positive effects regarding forced labour.[28] This raises the question as to the conditions under which trade and investment governance instruments can contribute to addressing forced labour in an effective manner. Scholars have emphasized that the effectiveness of transnational governance mechanisms in bringing about change on the ground depends not only on their institutional design but also on how they engage with the local regulatory context in which they are applied (Bartley 2011). Against this backdrop, an argument can be made that labour provisions in transnational governance mechanisms are likely to be most effective in the long term when they both harness and strengthen the regulatory capacity of other relevant actors – especially the State (see along these lines Kolben 2015). This underscores the importance of understanding the interactions between trade and investment governance instruments and other regulatory layers at the domestic and international level.

26 In 2020 the World Bank Dispute Resolution Service was created, which was combined with the Inspection Panel to form the World Bank's Accountability Mechanism (IBRD and IDA 2020).

27 For further details, see section 3.3.2.

28 Indeed, such economic sanctions may, in some cases, lead to negative, not positive, effects for the workers concerned, for instance by driving workers out of employment and into even more precarious conditions (see, for example, Maupain 2005).

The remainder of this section explores how these dynamics have played out in two specific cases, namely the rubber glove sector in Malaysia and the cotton sector in Uzbekistan. It analyses how trade and/or investment governance instruments were activated to address forced labour and traces the pathways through which these instruments contributed to change on the ground. In doing so, the case studies aim to assess the interactions of these instruments with other mechanisms of supply chain governance and inquire into the complementarities of different instruments that may have facilitated tackling instances of forced labour.

3.3.1 The case of the Malaysian rubber glove sector

3.3.1.1 The issue at hand

Driven by (among other things) technological innovations introduced by local firms and targeted industrial policies, Malaysia has transformed itself from a raw rubber producer into the global leader in rubber glove production (Kawano 2019; Lebdioui 2022). With a 53 per cent share of the world's supplies in 2021,[29] the rubber glove industry now constitutes one of Malaysia's most successful resource-based manufacturing sectors, generating employment for about 72,000 workers in 2019 (Hutchinson and Bhattacharya 2020). As a result of the COVID-19 pandemic, exports of Malaysian rubber gloves increased dramatically in 2020 and 2021 (by 100.4 per cent and 57.5 per cent, respectively), but also contracted sharply at the end of the pandemic (by 66.9 per cent in 2022) (ILO 2023).

Malaysia has ratified several international treaties outlawing forced labour,[30] which is also prohibited by several domestic laws, including Article 6 of the Federal Constitution and Section 90B of the Employment Act.[31] Notwithstanding, forced labour has been an issue of concern for some time in the Malaysian rubber glove industry (Coffey 2015), as it has been in certain other Malaysian key industries, such as palm oil and electronics

29 This applies to non-surgical rubber gloves; see the relevant page at the Observatory of Economic Complexity (OEC).

30 These include the ILO Forced Labour Convention, 1930 (No. 29) and the Protocol of 2014 to the Forced Labour Convention, 1930, among others (ILO 2023). While Malaysia has also ratified the Abolition of Forced Labour Convention, 1957 (No. 105), it denounced this convention in 1990; see the ILO's Information System on International Labour Standards.

31 On the limitations of the legal framework prior to 2022, see ILO (2019b).

(Wahab 2019; Raj-Reichert 2020). A shared characteristic of these industries is their strong reliance on migrant workers (Buckley et al. 2022), with estimates suggesting that migrants accounted for about 60 per cent of the workforce in Malaysia's rubber glove production in 2019 (Hutchinson and Bhattacharya 2020). Various factors, including a highly exploitative transnational recruitment industry, legislative gaps in migrant workers' protection and lax enforcement of labour laws, combined with entrenched corruption, have led to a situation where migrant workers are structurally vulnerable to forced labour (Ness 2021; Hwok Aun and Pereira 2023; for context see also Hoffstaedter and Missbach 2021). Documented cases in the rubber glove sector have involved phenomena such as debt bondage (often related to high recruitment fees), restricted freedom of movement (notably due to the retention of passports and other identity documents), substandard living conditions (in particular, with respect to accommodation), and intimidation and threats (Bengtsen 2019; Hughes et al. 2022). In part, these issues were exacerbated by the COVID-19 pandemic, which, among other factors, led to increased pressure on workers due to heightened global demand for rubber gloves (Bhutta et al. 2021).

3.3.1.2 Import bans under the US Tariff Act and remedial actions at the company level

Following reports of forced labour issues in the Malaysian rubber glove industry, the US CBP agency adopted six Withhold Release Orders (WROs) and one Finding against Malaysian producers between 2019 and 2022 (ILO 2023).[32] The first WRO concerning this industry, adopted in 2019 (Lim 2019), triggered only limited concern at the domestic level. Initially, many industry leaders and analysts did not anticipate significant adverse effects caused by the WRO for the Malaysian rubber glove industry, expecting instead that other Malaysian companies would fill any market gap that might result from the WRO (Aziz 2019).

The situation changed, however, when additional WROs were issued that affected a broader range of companies (see, for example, CBP 2021b, d, e). Furthermore, in one case, after a nine-month investigation into a key industry leader, CBP adopted a Finding that directed the seizure of relevant goods and commenced forfeiture proceedings (CBP 2021a). This – together with the fact that the enforcement measure occurred in the midst of the COVID-19 pandemic – sent a strong message to the business community that enforcement action against forced labour in the sector was a priority for

32 For further details, see CBP's "Withhold Release Orders and Findings List".

CBP (see also Murphy, Sitkowski and Kinsman 2021). The Malaysian Rubber Gloves Manufacturers Association estimated the cumulative loss to the industry in revenue from rubber glove exports resulting from the import bans at 3.6 billion Malaysian ringgit[33] (*Malay Mail* 2022).

These actions came on top of certain similarly aligned responses to the forced labour concerns by other actors. For example, the Government of Canada ended its public procurement contracts with one of the Malaysian companies concerned, and the Norwegian Government Pension Fund Global put the same company under a two-year observation (McGregor 2022; Salim 2022). Some of the companies also faced domestic proceedings due to the forced labour allegations (see, for example, Kamel 2020). These aligned responses, together with the prospective loss in US market share due to the import bans (Brudney 2020), arguably created a strong incentive for the companies concerned to implement changes.

Indeed, the Malaysian rubber glove companies concerned have taken substantial remedial action to achieve revocation of the relevant import bans. Notably, a number of companies affected by a CBP enforcement action have taken steps to reimburse the recruitment fees that workers had been required to pay (Thomas 2020; Ong 2022; Remedy Project 2023). In order to have the Finding against it revoked, one company disbursed remediation payments of more than US$30 million to the workers concerned (CBP 2021c) and created a fund with a volume of about US$5 million to settle any pending forced labour allegations. The company in question also changed its recruitment agencies, put in place new due diligence measures to prevent abuses during the recruitment process, and improved the housing situation of migrant workers (Remedy Project 2023). Other measures, taken by several companies, involved revising or adopting new human resources policies. In one case, this included a new grievance mechanism, an equal pay policy for migrant and Malaysian workers, and forced labour-related capacity-building for the company's human resources staff (Ong 2022).

At the time of writing, the improvements achieved had led CBP to modify or revoke its enforcement actions in five cases (CBP 2020, 2021c, 2023a, b, c). Furthermore, research suggests that some Malaysian rubber glove companies that were not subject to import bans also reimbursed recruitment fees, arguably in order to prevent the imposition of a WRO (Trueba and Staniland 2023). So far, in most cases no evidence of systematic adverse effects caused by the import bans on the workers of the companies subject to the bans has been reported (see also the case study in Remedy Project 2023). This may partly be due to the exceptional profit margins of the rubber glove sector

33 This corresponded to about US$770 million at the time of writing.

during the pandemic (Hutchinson and Bhattacharya 2021). That being said, the US Government Accountability Office, citing other US Government sources, reported that "as an unintended consequence of the September 2019 WRO for disposable rubber gloves produced in Malaysia, many workers' employment was terminated, which had a negative effect on workers facing exploitation" (United States, GAO 2021, 31).

3.3.1.3 Implications for broader policy efforts to tackle forced labour at the national level

Taking a broader perspective, CBP's enforcement action appears to have contributed to opening up space to tackle forced labour through targeted policy action. Key in this regard was reportedly the growing perception, among others by the Malaysian Government, that the forced labour problems in the Malaysian economy could decrease the trust of foreign business partners (Chu and Latiff 2021).

Importantly, the aforementioned enforcement actions concerning the Malaysian rubber glove sector coincided with similar developments in other industries in the country. Notably, CBP imposed two WROs and one Finding on Malaysian palm oil companies.[34] Before that, Malaysian rubber gloves had already been placed on the US *List of Goods Produced by Child Labor or Forced Labor* (United States, Department of Labor 2020). Similarly, Malaysia had been included on the Tier 3 list of the *US Trafficking in Person Report* for States "whose governments do not fully meet the TVPA [Trafficking Victims Protection Act]'s minimum standards and are not making significant efforts to do so" (United States, Department of State 2021).

In light of this situation, the Malaysian Ministry of Human Resources actively sought to establish a dialogue with the companies that faced forced labour import bans (*Reuters* 2022). Early on, in 2020, the Ministry had already created a taskforce on labour law and compliance for the rubber-related industry (*Malay Mail* 2020). Other national initiatives to combat forced labour appear to have evolved more or less independently of the import bans, but they may have benefited indirectly from the political momentum created by the bans and related developments. This is notably the case with the National Action Plan on Forced Labour (2021–2025), adopted by the Malaysian Government

34 See CBP's "Withhold Release Orders and Findings List". In addition, in November 2021 a major US home appliance company cut ties with a Malaysian supplier as a result of labour rights concerns, while the latter was at the time examined by CBP in relation to forced labour allegations (Ananthalakshmi 2021).

in 2021,[35] the ratification of the Protocol of 2014 to the ILO Forced Labour Convention in 2022 (Buang 2022), and several development cooperation projects implemented by the ILO.[36]

Furthermore, the import bans adopted under the US Tariff Act appear to have spurred on private initiatives to tackle forced labour in the rubber glove industry (Remedy Project 2023, 63). These include the creation of the Responsible Glove Alliance in 2022, an initiative by Malaysian rubber glove producers, which commits its members to specific due diligence and transparency requirements, among other things (Bengtsen 2022).[37]

3.3.1.4 Implications for forced labour governance

As illustrated by the above analysis, the import bans imposed by CBP can be considered a driver of change in the Malaysian rubber glove sector. This is in line with the findings of similar research in the area. Notably, a report by the Remedy Project, based on eight in-depth case studies in seven countries involving interviews with local stakeholders and workers, finds that forced labour import bans "have often been a catalyst to prompt rapid changes in industries that have been resistant to reform", including in Thailand and Taiwan, China (Remedy Project 2023, 14).

In addition to the economic leverage resulting from the import bans, a key factor in bringing about change in the individual cases in question may have been that CBP had been working actively with the companies concerned to improve the situation (Brudney 2020). Furthermore, several contextual factors may, in part, have accounted for the remedial actions undertaken, including the importance of the United States as an importer of Malaysian rubber gloves (Rahman, Shan and Morhalim 2021).

Importantly, the import bans imposed by CBP engaged with – and relied on – several other transnational governance mechanisms. In particular, CBP referred to the ILO Indicators of Forced Labour expressly in several of its public communications (see, for example, CBP 2021b and d). Furthermore,

35 This plan lays out a strategy to address forced labour in a systemic manner and to eliminate it by 2030 (Hwok Aun and Pereira 2023).

36 See, notably, the "Supply Chains for a Sustainable Future of Work" project (GLO/22/29/EUR), which addresses, among others, the Malaysian rubber glove sector. Other projects aim to strengthen the rights of migrant workers in Malaysia (see the "Protecting the Rights of Migrant Workers through Empowerment and Advocacy" project (MYS/15/01/USA/MYS/22/50/USA)) or the broader legal and institutional framework (see the "Support for Labour Law and Industrial Relations Reform in Malaysia" project (MYS/16/01/USA)).

37 For further information, see the Responsible Glove Alliance website.

CBP's enforcement action strongly relied on private auditors, which are contracted by a company subject to an import ban in order to ascertain whether it has sufficiently addressed the forced labour issues detected and should therefore have its import ban revoked (see, for example, Khalid 2022). This strong reliance on private auditors has been subject to criticism, however, because – among other factors – auditing companies had in several cases failed to detect the forced labour issues that had led to the import bans in the first place.

To strengthen the effectiveness of import bans in tackling forced labour, there appear to be some avenues that could be explored to link these bans more effectively with other relevant governance mechanisms and actors. In this regard, it has been suggested that CBP could more systematically request the views of local workers or civil society organizations on the situation (Remedy Project 2023). CBP could also require the companies concerned to allow other actors, including those from civil society, to independently verify progress made towards addressing the forced labour issues in question.

Furthermore, it is worth asking whether the momentum contributed to by the import bans could be more comprehensively harnessed to address some of the root causes underlying the forced labour issues at a company level. Especially where a series of companies in a given country are affected by import bans, a targeted government-to-government dialogue might help to tackle such structural issues. This might also reduce the risk of other companies becoming subject to such bans in the future. In the case of Malaysia, studies have pointed to a number of such root causes that could be addressed in this context. These include restrictions on migrant workers changing employers and unionizing, limitations in the regulation of private recruitment agencies, and capacity issues in labour inspectorates (Hwok Aun and Pereira 2023; ILO 2023; Wahab, Abd Murad and Shamsudin 2023). Linking import bans with targeted measures to strengthen the capacity of labour inspectorates to ensure compliance and of companies to address labour rights issues within their operations while reinforcing the role of trade unions in these processes might also help to address such root causes and facilitate a revocation of the import bans concerned. Finally, the reported unintentional adverse effects of an import ban on workers in a pre-pandemic case highlight the need to carefully consider the use of such measures in their specific context and to contemplate protective arrangements for vulnerable workers that may be affected (see also United States, GAO 2021).

3.3.2 The case of the Uzbek cotton sector

3.3.2.1 The issue at hand

Historically, Uzbekistan has been one of the world's largest cotton exporters. In the 1970s and 1980s Uzbekistan was the largest cotton exporter at the global level, accounting for a quarter of the world cotton trade (MacDonald 2012). In 2019 Uzbekistan was the sixth-largest cotton producer worldwide, employing more than 1.75 million people in cotton-picking (around 13 per cent of the total population aged 18–50 in the country) (ILO 2020).

After becoming an independent ILO Member in 1992, Uzbekistan ratified several ILO Fundamental Conventions, among them the ILO Forced Labour Convention, 1930 (No. 29) in 1992 and the Abolition of Forced Labour Convention, 1957 (No. 105) in 1997.[38] Forced labour is prohibited under Article 44 of the Constitution of the Republic of Uzbekistan and several provisions of the Uzbek Labour Code.[39] Despite these provisions, there were numerous reports concerning the use of forced labour – as well as child labour – in the Uzbek cotton sector (see, for example, Atayeva and Belomestnov 2010; Jurewicz 2015; McGuire and Laaser 2021). Similarly to other former Soviet republics, Uzbekistan's economy was for a long time centrally planned, involving so-called "centralized crops", which included the production of cotton and wheat (MacDonald 2012, 4). These two crops, in particular, were subject to State procurement quotas on the acceptance of which the right to utilize the land for agricultural purposes was conditional (MacDonald 2012). The local and provincial officials responsible for achieving the quotas faced strong incentives to meet the objectives (Cockayne 2021), leading to an environment conducive to forced labour and child labour (Republic of Uzbekistan 2020; see also Human Rights Watch 2017).

Especially in the 2000s and the 2010s, concerns were raised from various quarters about the use of forced labour in the Uzbek cotton sector (Cockayne 2021). Prominent in this regard was the call for an international boycott of Uzbek cotton by Uzbek civil society activists, supported by the Cotton Campaign (UGF and Cotton Campaign 2013). Launched in 2010, the Uzbek Cotton Pledge was subscribed to by 331 companies.[40] Other relevant action included a number of complaints filed with OECD National Contact Points against wholesalers who bought Uzbek cotton, either directly or indirectly

38 For details, see the ILO's Information System on International Labour Standards.

39 The Labour Code of the Republic of Uzbekistan entered into force on 31 April 2023 in accordance with the Law of the Republic of Uzbekistan No. 798 dated 28 October 2022.

40 See the Uzbek Cotton Pledge for Companies on the Cotton Campaign website.

(ECCHR 2013) and the inclusion of Uzbek cotton on the US Government's list relating to the "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor" (United States, Department of Labor 2010).

The issue of forced labour in the cotton sector was also raised under several trade governance instruments. Notably, in 2011 the European Parliament rejected a proposal to extend a trade agreement with Uzbekistan to the textile sector because of concerns about forced labour in the country's cotton industry (EP 2011).[41] Already, in 2008, the United States Trade Representative had opened a workers' rights eligibility review under the labour provisions of the US GSP (USTR 2020), which could have resulted in the suspension of unilaterally granted trade preferences (see section 3.2.1.2 above). In addition, action was taken under two investment governance instruments, namely the investment policies of the World Bank and the IFC.

3.3.2.2 The complaint with the Compliance Advisor Ombudsman and implications for remedial action at the company level

In 2016 a complaint was filed with the CAO by a group of non-governmental organizations (NGOs) regarding different investment projects financed by the IFC in Uzbekistan. These projects related to an Uzbek cotton yarn company, where the aim was to support the expansion of a textile factory, and an Uzbek bank, with the objective of extending the bank's lending scope to micro, small and medium-sized enterprises, especially in remote parts of the country (CAO 2018). The complainants alleged, among other things, that forced labour was present in the yarn company's supply chains and that the bank had failed to undertake sufficient due diligence to prevent its financial services being used to fund forced labour-related business activities (CAO 2022).

Having found the complaint eligible, the CAO facilitated a "voluntary dialogue process" (CAO 2018, 11), which involved multiple meetings between the complainants and the two companies concerned. The dialogue between a group of complainants ("Group in Mediation") and the respondent bank led to the conclusion of a framework agreement and an interim agreement, in July and October 2019, respectively (CAO 2022). The agreed measures included the joint development of a grievance mechanism regarding possible forced labour in the bank's activities and forced labour monitoring undertaken by the complainants, following which the complainants considered the claims against the respondent bank resolved (Hamkorbank and Group in Mediation Human Rights Defenders 2020).

41 The European Parliament consented to the proposed Protocol in 2016 (EP 2016).

The dialogue between the Group in Mediation and the respondent cotton yarn company also resulted in a confidential interim agreement, concluded in November 2020 (CAO 2022).[42] This involved reviewing the recruitment processes related to the cotton-picking conducted by a key supplier of the company, telephone interviews with cotton-pickers, and monitoring of the supplier's feedback mechanism; these monitoring activities "did not reveal any cases of direct coercion of people to pick cotton in the 2020 cotton harvest" (IKT and Group in Mediation Human Rights Defenders 2021, 1). The parties agreed that, in 2021, another monitoring of the cotton harvest of the aforementioned supplier would be undertaken by the Group in Mediation and additional human rights organizations, which revealed "no systemic forced and child labor" (IKT and Group in Mediation Human Rights Defenders 2022). Subsequently, the parties closed the dispute resolution process and signed a cooperation agreement that provides for preventive measures to avoid forced labour and ensure "suitable labor conditions" regarding the supplier's activities, including through an improved feedback mechanism (IKT and Group in Mediation Human Rights Defenders 2022).[43]

3.3.2.3 The complaint with the World Bank Inspection Panel and implications for broader policy efforts to tackle forced labour

While the complaint to the CAO gave rise to rather specific remedial action at the company level, the complaint to the World Bank Inspection Panel had tangible implications for broader change at the national level. Already in 2013, three human rights organizations had filed a complaint with the World Bank Inspection Panel regarding the use of child and forced labour. The request concerned rural companies receiving financing under the World Bank-funded Rural Enterprise Support Project Phase II (Cotton Campaign 2013). According to the World Bank, this project aimed "to increase the productivity and financial and environmental sustainability of agriculture and the profitability of agribusiness … in seven regions" (World Bank 2016a, 1). The requesters argued that the project had detrimental effects on communities by contributing to "government orchestrated forced labour" within the Uzbek cotton industry and that the World Bank had failed to carry out an appropriate social assessment (Association for Human Rights

42 One complainant declined to participate in the dispute resolution process and three other complainants left the process at a later stage (CAO 2018 and 2022).

43 The parties also agreed to have the CAO monitor the implementation of the cooperation agreement (IKT and Group in Mediation Human Rights Defenders 2022).

in Central Asia, Human Rights Society of Uzbekistan "Ezgulik", and Uzbek-German Forum for Human Rights 2013, 1).

In a report of December 2013, the Inspection Panel held that "the Project is plausibly linked to the harms alleged in the Request, and that the Request raises important issues of harm and policy non-compliance" (World Bank Inspection Panel 2013, para. 101). While finding the complaint eligible, the Panel proposed that the decision on whether to conduct a full investigation should be deferred. This was supposed to allow sufficient time for the World Bank's staff to take the remedial action it had proposed in its response to the complaint (World Bank Inspection Panel 2013).

Subsequently, the World Bank reportedly adopted a variety of measures to address the issue at hand. These ranged from adjusting the project documents to specifically require compliance with legal rules on forced labour and increased on-site supervision activities during the cotton harvest, to a comprehensive policy dialogue with the Uzbek Government, which resulted in several legal amendments to better tackle forced labour (World Bank Inspection Panel 2014). Importantly, the steps taken also included the creation of a mechanism for "third-party monitoring" of forced labour and a "feedback mechanism" for forced labour-related complaints (World Bank 2016b, 2). In light of the action taken by the World Bank, the Inspection Panel decided not to recommend a formal investigation (World Bank Inspection Panel 2014).

For the third-party monitoring, the World Bank turned to the ILO, which had previously gained experience with on-site monitoring in Uzbekistan during an earlier project on child labour (Tapiola 2022). Based on a memorandum of understanding with the World Bank, the project "Third-Party Monitoring of Child and Forced Labour in Cotton Picking in Uzbekistan" began in 2015 and ended in 2021 (ILO 2015; ILO n.d.). Going beyond the areas where the World Bank projects took place, the monitoring exercise covered ten of the Uzbek provinces and hence played an important role in assessing progress on forced labour at the national level (Tapiola 2022).

Simultaneously, in the context of a broader modernization agenda (Republic of Uzbekistan 2020) and arguably in response, in part, to the concerns raised in various international forums (Cockayne 2021), the Uzbek Government took several steps to improve labour conditions in the cotton industry. In recent years, Uzbekistan has implemented several reforms that reinforced the State's actions against child labour and forced labour, often in close dialogue with the ILO, the World Bank and other international organizations. Apart from legislative changes, these reforms included a significant increase in the number of labour inspectors (Tapiola 2022).

Despite a number of challenges, the ILO Third-Party Monitoring has observed a progressive decline in forced labour. In 2020 the ILO concluded that "no systemic or systematic forced labour was exacted through instructions and policies of the Government of Uzbekistan during the 2019 cotton harvest" (ILO 2020, 19). The same year, the US Government lifted its ban on Uzbek cotton (United States, Department of Labor 2019). In 2021 the independent monitors did not find "systemic, government-imposed forced labour organized by the central government in any of the areas monitored" (Uzbek Forum for Human Rights 2022a, 3). In March 2022 the Cotton Campaign called for the end of the global boycott of Uzbek cotton (Cotton Campaign 2022a).

3.3.2.4 Implications for forced labour governance

In the case of the Uzbek cotton industry, several investment and (to a lesser extent) trade governance instruments made various contributions to addressing forced labour. Notably, in the case pertaining to IFC projects, the intervention of the CAO led to a resolution of the project-specific forced labour issues alleged by the complainants. Meanwhile, the impacts of the complaint before the World Bank Inspection Panel moved beyond the project from which it had emerged and gave rise to broader policy action at the national level. In particular, the complaint led to third-party on-site monitoring of the Uzbek cotton harvest by the ILO (see also Cockayne 2021). This was important for the progress eventually made, as it facilitated data collection and provided an incentive to change the practices concerned. In this regard, the connection of the investment governance instruments with other governance mechanisms, notably at the ILO, turned out to be instrumental in translating the momentum created by the complaint into concrete change. In addition, some of the trade governance instruments invoked in this case – in particular, the threat of suspension of Uzbekistan's trade benefits under the US GSP – provided a broader incentive for the country to address the systemic forced labour issues in its cotton sector. This contributed to broader international pressure, including by multinational companies (Schaefer and Hauge 2023), which led to reduced "access to capital [and] export markets" for Uzbekistan, among other things (Cockayne 2021, 142). An additional incentive was created by the prospect of benefiting from the special preferences granted under the EU's GSP+ scheme, to which Uzbekistan was eventually admitted in 2021 (EC 2021).

Going forward, observers have pointed to the challenge of stabilizing the progress made and highlighted a risk of backsliding over time into forced labour at the local level (Uzbek Forum for Human Rights 2022b). The end of the ILO's monitoring project shifts more of the burden to buttress the reporting and addressing of relevant violations onto trade unions, and civil society actors more broadly (see also Cotton Campaign 2022b). In this regard, one of the key challenges is the effective realization of freedom of association despite some improvements at the country level, such as the revision of the Law on Trade Unions which was adopted in December 2019 (ILO 2021). In this context, continued use of available trade and investment governance instruments to monitor progress could contribute to the durability of the positive change attained thus far.

▶ 3.4 Conclusion

This chapter has aimed to shed light on the potential of trade and investment governance to effectively address forced labour issues in supply chains. Trade and investment governance instruments with forced labour-related provisions have proliferated in recent decades, ranging from import ban laws to investment policies of development finance institutions. As evinced by the two case studies, some of these instruments come with policy levers that can contribute to specific improvements at the company level and help to generate momentum for broader policy change. In doing so, the trade and investment governance instruments at hand did not operate in an institutional vacuum but interacted with a variety of other governance mechanisms.

Notwithstanding, the case studies also illustrate that trade and investment governance instruments are, on their own, unlikely to be able to address the root causes of forced labour in a given case. Rather, they highlight the importance of utilizing these instruments to enhance relevant legal and institutional frameworks, create the conditions for meaningful social dialogue and empower local actors for change. The scenarios analysed also show how important it is to address forced labour in conjunction with other labour rights issues that may render workers more prone to abuse, such as deficits in migrant worker protection and freedom of association.

The spread of forced labour clauses in trade and investment governance instruments gives rise to some broader issues. One relates to the coordination between instruments that may be applicable to a given situation. In light of the difficulty of obtaining reliable information about incidences of forced labour, institutionalized information-sharing across different instruments and actors could help to increase the effectiveness of trade and investment governance instruments (see, in a similar vein, EU–US Trade and Technology Council 2023). Furthermore, providing sufficient guidance for companies will be important to enable them to properly comply with relevant requirements (see also Schwarz et al. 2022), which could also help to mitigate potential negative business impacts. Another challenge is to determine how best to avoid unintended adverse effects of forced labour clauses in trade and investment governance instruments, especially in the case of instruments with significant economic leverage, such as import bans. One aspect of this relates to making sure that these instruments do not accidentally affect workers in a harmful manner, which may require close consultations with petitioners and other relevant workers' organizations (Pietropaoli, Johnstone and Balch 2021). Forced labour clauses in trade and investment governance instruments still constitute a field of regulatory experimentation, and further research will be necessary to understand more fully the effects of these instruments on workers and companies on the ground.

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