

POLICY BRIEF

Supply chains, international trade and human rights

1. Introduction

In recent years policies have been developed in democratic countries, particularly in the US and the EU, to address human rights abuses in other countries.

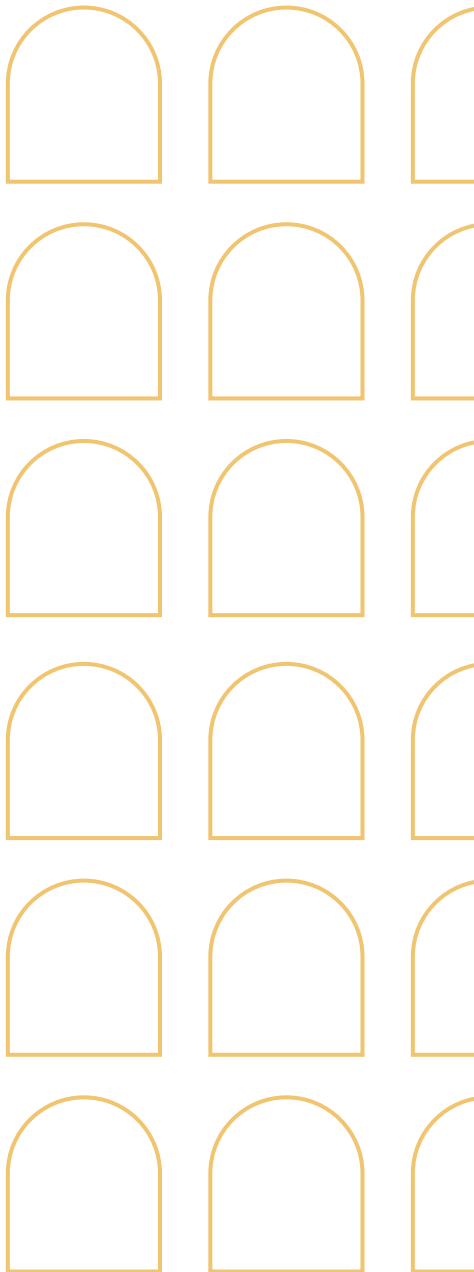
Although the issue of international human rights violations has traditionally been addressed under international frameworks, such as the UN or the ILO, governments do not necessarily build on these frameworks to develop policies to deal with human rights violations abroad. Instead, they often use unilateral trade measures, such as import bans and export controls, to address human rights issues. Domestic legislation to increase transparency regarding human rights violations in supply chains has also been developed in many jurisdictions.

The complexity and diversity of policies to address human rights violations pose challenges to business and governments. Against this backdrop, this paper attempts to help them understand the development of these policies by providing a framework to systematically map them. The framework categorises various policies in three groups based on their approaches to human rights violations: the trade policy approach, the economic sanctions approach and the human rights due diligence approach. The trade policy approach, for instance, includes import bans and export restrictions, the economic sanctions approach includes prohibitions of transactions and investment limitations, and the human rights due diligence approach makes human rights due diligence mandatory.

The development of these policies to address human rights violations is likely to be accelerated given that they have been promoted in various

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contexts, including conflicts between democratic regimes and authoritarian regimes, aims to ensure that human rights are respected along whole supply chains, the sustainable development goals (SDGs)/ ESG¹ and level playing fields. These policies are also likely to be facilitated by international coordination in various fora. At the same time, governments have different factors to take into account, such as geopolitical concerns, when they design policies to address human rights violations. WTO rules also affect the development and implementation of trade measures to address human rights violations.

It is therefore important for business and governments to closely follow and analyse the policies and factors affecting their development and operation to ensure their international competitiveness.

2. The development of policies to address human rights violations

Although policies to address human rights abuses in other countries have been in place for a long time, they have been developing rapidly in democratic countries in the last five years, particularly in the US and the EU. For example, on principle the US bans imports of products produced in the Xinjiang Uyghur Autonomous Region. On the other hand, the EU has strengthened export restrictions on cyber surveillance technology. In addition, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), of which Japan is a member, includes labour-related rules.

Two features of policies to address these recent human rights violations can be noted. First, the issue of international human rights violations has traditionally been addressed under international frameworks, such as sanctions based on UN Security Council resolutions and the ILO system. In recent years, however, countries have begun to invoke measures to address human rights violations on their own without necessarily relying on these international frameworks. Second, human rights violations in other countries are increasingly being addressed through trade policies, i.e. rules governing imports and exports of goods. In fact, in the trade ministers' statement on forced labour at G7 meeting in 2021 they stated that trade policy can be one of

the important tools in a comprehensive approach to address forced labour in global supply chains.²

The development of domestic regulations to address human rights issues in other countries can be attributed to a variety of reasons. For example, such regulations may be used by democratic states to put pressure on authoritarian states in their conflicts with such states over the international order. Such policies may also be used by democracies to ensure that the universal value of human rights is upheld not only in their own countries but also along whole supply chains in which their companies are involved. Similarly, these policies can contribute to the achievement of sustainable development goals and the promotion of ESG policies. Furthermore, such policies can have the objective of ensuring a level playing field between, for example, cheap products produced by violating human rights and clean homegrown products.³

Domestic regulations to address human rights issues are likely to be further developed in the future in various fora with different backgrounds and contexts. At the same time, there are various types of regulations to deal with human rights violations in different countries, and it is not easy to get a complete picture. Therefore, this paper provides a framework to map these measures which helps systematic understanding of each country's policies to address human rights issues.

The details of each approach are provided in the following sub-sections.

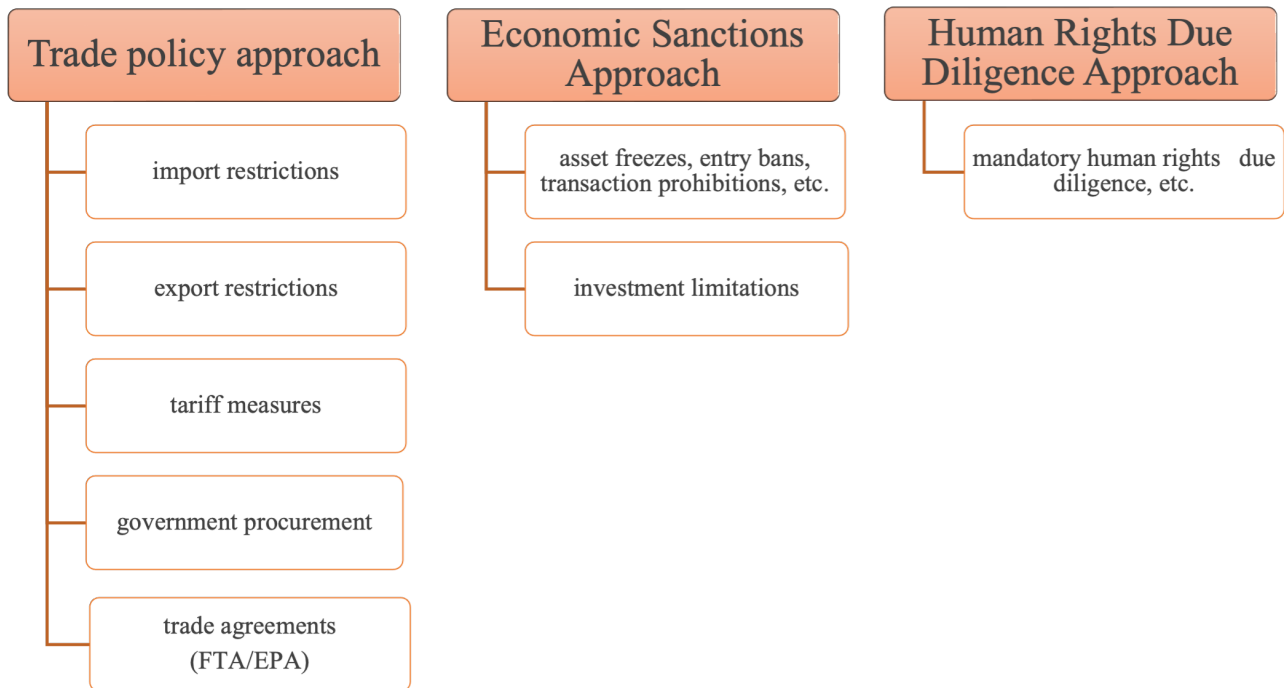
3. A framework to map policies to address human rights issues

The policies of countries to address human rights violations can be categorised in three large groups. The first is the trade policy approach, in which the subcategories are import restrictions, export restrictions, tariff measures, government procurement and trade agreements. The second is the economic sanctions approach and the last is the human rights due diligence approach.

1 Environmental, social and governance.

2 *G7 Trade Ministers' Statement on Forced Labour* (22 October 2021)
<https://www.gov.uk/government/news/g7-trade-ministers-statement-on-forced-labour-annex-a>

3 In Japan, such policies are also sometimes discussed as part of an 'economic security' policy.



a. The trade policy approach

i. Import restrictions

Import restrictions to address human rights violations are measures that prohibit imports of products produced with forced labour or other means.

The United States already has such a system in place. U.S. import restrictions on human rights violations cover products from all countries,⁴ but in recent years the U.S. has stepped up enforcement against products produced with human rights violations in the Xinjiang Uyghur Autonomous Region of China. Most recently the Uyghur Forced Labor Prevention Act was passed at the end of last year, and beginning on 21 June 2022 on principle products produced in the Xinjiang Uyghur Autonomous Region are prohibited from being imported. This has a significant impact on business as imports of products from the Xinjiang Uyghur Autonomous Region are prohibited unless the importer can prove the non-existence of forced labour, instead of U.S. Customs finding the possibility of forced labour being used to produce the product and suspending imports of the product. To comply with the Act, businesses will be forced to identify the source of parts and raw materials in detail and ensure in practice

that their supply chains do not include products from Xinjiang.

On the other hand, Europe has not yet introduced a system of import restrictions on the grounds of human rights violations. However, in February 2022 the Commission officially announced that it was preparing a new legislative initiative which will effectively prohibit products made using forced labour, including forced child labour, being put on the EU market.⁵

In Japan, there is no such system of import restrictions.

ii. Export restrictions

Export restrictions are measures restricting exports of products to certain countries, regions or companies when there is a risk that the exported goods may be used to violate human rights.

In the U.S., the Export Administration Regulations on Dual-Use Items originally provided for consideration of possible human rights violations in the destination country in certain cases when granting export licenses. In recent years, the regulations have been revised to strengthen responses to human rights violations in destination countries. For instance, the regulations were revised in October 2020 by the Bureau of Industry and Security (BIS),

⁴ The Tariff Act of 1930 (United States Code, Title 19, Chapter 4).

⁵ European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery*, COM(2022) 66 final.

an agency in charge of export controls, to take into consideration when assessing export licence applications risks that crime control equipment and related technology and software (CC-controlled items) will be used in violations or abuses of human rights.⁶ The BIS has also added public bodies and companies involved in human rights abuses of Uyghurs and in Myanmar to the list of entities the exports of which are prohibited on principle (Entity List).⁷ These include government agencies responsible for human rights violations and companies providing goods such as products to be used for cyber surveillance to those agencies.

In the EU in September 2021, cyber-surveillance items⁸ were added to the export control regulations on dual-use items⁹ to restrict their export to countries where they may be misused to violate human rights.

Japan, on the other hand, has not yet introduced a system to restrict exports on the grounds of human rights violations.

iii. Other trade measures

Other trade policies to address human rights issues include the following measures.

- **Generalised Preferential Tariffs (GSP tariffs)** are tariff rates lower than the general tariff rate which are applied to imports of products originating in developing coun-

tries. The US and the EU consider respect for human rights as a condition for granting GSP tariffs to developing countries.¹⁰

- **Government procurement** can also contribute to preventing human rights violations in supply chains. For instance, the US federal government requires businesses contracting with government agencies to ensure that they are not involved in human rights violations.¹¹
- **Labour chapters of Free Trade Agreements** have also been used to address human rights issues. For instance, the CPTPP requires its parties to comply with ILO Core Labour Standards.¹²

b. The economic sanctions approach

Another approach is to impose economic sanctions on individuals and entities that violate human rights. While such sanctions used to be imposed on the basis of UN Security Council resolutions, in recent years governments have also imposed sanctions of their own.

Notably, the US has actively imposed economic sanctions because of human rights abuses. There are two types of US economic sanctions: (a) entry bans, asset freezes and trade bans on specially designated nationals (SDNs), such as persons and entities involved in human rights violations in Xin-

6 Federal Register, 85 FR 63007 “Amendment to Licensing Policy for Items Controlled for Crime Control Reasons” (October 6, 2020). <<https://www.federalregister.gov/documents/2020/10/06/2020-21815/amendment-to-licensing-policy-for-items-controlled-for-crime-control-reasons>>, EAR §742.7(b)(1). This originally stipulated that the BIS generally considered licence applications favourably unless there is evidence that the government of the importing country may have violated internationally recognised human rights.

7 With regard to human rights abuses against Uyghurs, for instance, Federal Register, 84 FR 54002 “Addition of Certain Entities to the Entity List” (October 9, 2019); 85 FR 34503 “Addition of Certain Entities to the Entity List; Revision of Existing Entries on the Entity List” (June 5, 2020); 85 FR 44159 “Addition of Certain Entities to the Entity List; Revision of Existing Entries on the Entity List” (July 22, 2020); and 85 FR 83416 “Addition of Entities to the Entity List, Revision of Entry on the Entity List, and Removal of Entities From the Entity List” (December 22, 2020). With regard to human rights abuses in Myanmar, Federal Register, 86 FR 13179 “Addition of Entities to the Entity List” (March 8, 2021).

8 “Dual-use items specially designed to enable the covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems.” Regulation (EC) No. 2021/821, Article 20 (2).

9 Regulation (EC) No 2021/821

10 However, in the U.S. GSP tariffs expired in January 2021.

11 Federal Acquisition Regulation 22.1703(a).

12 CPTPP, Art. 19.3.1. However, in order for failure to comply with ILO Core Labor Standards to be regarded as a violation of the CPTPP, a party must demonstrate that the other party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the parties (Chapter 19, footnote 4).

jang or Myanmar;¹³ and (b) restricting investment in Chinese companies. For instance, on 3 June 2021 the U.S. Treasury Department announced a prohibition of U.S. investments in a Chinese company developing surveillance technology that facilitated serious human rights abuses.¹⁴

In 2020 the EU enacted a Global Human Rights Sanctions regime. As a result, the EU enacted Uyghur-related sanctions in March 2021, together with the US, Canada and the UK.¹⁵

On the other hand, Japan's economic sanction system cannot invoke sanctions because of human rights violations.

c. Human rights due diligence

The last category of policies to address human rights violations is human rights due diligence, in which companies are encouraged or required to conduct due diligence to identify and analyse adverse human rights impacts relating to corporate activities in order to avoid or mitigate them to meet their corporate responsibilities. These policies include regulations requiring companies to disclose human rights due diligence they have undertaken and directly mandating them by law to conduct human rights due diligence. They are often accompanied by penalties. Europe has seen much progress in this area, for instance:

- regulations that encourage or require companies to engage in human rights due diligence have already been introduced in the UK and France;
- in 2021 Germany and Norway passed laws that require companies over a certain size to have human rights due diligence in place;
- in February 2022 the European Commission published a proposal for a Directive on Corporate Sustainability Due Diligence. The directive stipulates mandatory due diligence on human rights and environment issues for EU companies and foreign companies pro-

viding goods and services to the EU above a certain size.

- In the US, although there are no human rights due diligence regulations at the federal level, companies are still required to conduct human rights due diligence in certain situations.
- Importers are obligated to pay reasonable care to ensure that there is no forced labour in supply chains.¹⁶
- Disclosure of conflict minerals is mandated by the Dodd-Frank Act.
- At the state level, California's Supply Chains Transparency Act requires companies subject to the law to disclose information regarding their efforts to eradicate human trafficking and slavery in their supply chains.

On the other hand, Japan currently has no human rights due diligence regulations as hard law.

4. Future developments

The policies to address human rights violations described in section 3 are likely to be further developed in the future. This section discusses three factors that might affect the development of these policies: international collaboration; compatibility with WTO agreements; and geopolitical and economic concerns.

a. International collaboration

In addition to the policies that countries have independently introduced to address human rights violations, international coordination of these policies should be further promoted among democratic states.

In fact, since the second half of 2021 international coordination has been strengthened in various fora.

13 For instance, U.S. Department of the Treasury, "Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Executive Order" (July 31, 2020) <<https://home.treasury.gov/news/press-releases/sm1073>>

14 Executive Order 14032 of 3 June 2021 (86 FR 30145) <<https://www.federalregister.gov/d/2021-12019>>

15 <https://www.consilium.europa.eu/en/press/press-releases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-around-the-world/>

16 CBP, "An Informed Compliance Publication. What Every Member of the Trade Community Should Know About: Reasonable Care" (September 2017). <<https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/icpres-care2017revision.pdf>>.

- 2022 G7 Leaders' Communiqué included the commitment to collaborate on the implementation of and compliance with international standards on human rights, environment and labour in global supply chains, accelerate joint efforts to address forced labour in global supply chains, and strengthen compliance with international standards on business and human rights.¹⁷
- In the EU-US Trade and Technology Council, both sides "intend to promote together and in an inclusive way the protection of fundamental labour rights, including by combatting the scourge of forced and child labour, with each side using relevant trade policies and tools, including FTAs and unilateral measures."¹⁸
- An Export Controls and Human Rights Initiative was launched at the Democracy Summit in the US in December 2021. This initiative was participated by the U.S., Australia, Denmark and Norway, and supported by Canada, France, the Netherlands and the UK. It facilitates a common policy among participating countries on export restrictions on technology that could be used for surveillance and cyber attacks resulting in human rights violations.

b. Compatibility with WTO agreements

Although this paper has shown that governments have developed unilateral measures to address human rights violations in recent years, they cannot be designed or implemented without limits. If they have an effect on international trade, World Trade Organisation (WTO) trade agreements will apply to them. In fact, China has raised the issue of U.S. measures to restrict imports of products from the

Xinjiang Uygur Autonomous Region as a violation of WTO rules.¹⁹

Compatibility with WTO agreements becomes an issue regarding restrictions on imports and exports of goods, as the General Agreement on Tariffs and Trade (GATT), for instance, prohibits restrictions on export and imports.²⁰ At the same time, measures prohibited under the GATT can be justified if, for instance, they are necessary to protect public morals or they relate to products produced with prison labour.²¹ Governments can therefore argue that the purpose of their import bans or export restrictions is to prevent their citizens from contributing to or relating to human rights violations abroad through their immoral purchases or sales of products. Governments can also claim that the imported products they block were produced in a prison-like facility, such as a concentration camp in which Uyghurs are said to be detained. In these cases, however, governments are required to demonstrate that their measures are 'necessary' to achieve the objective of protecting public morals²² or provide sufficient evidence that the products were made in a prison-like facility. These measures are also required to not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries in which the same conditions prevail.²³

Therefore, other governments and companies could make complaints based on WTO rules when a government develops and implements measures to restrict exports and imports even when their purpose is to address human rights violations.

c. Geopolitical and economic concerns

Other factors should also be taken into account when a government considers introducing measures. For instance, in contrast to the US and the EU, Japan has implemented few of the policies to

¹⁷ G7 Leaders' Communiqué, 28 June 2022.

¹⁸ EU-US TTC Inaugural Joint Statement, 29 September 2021.

¹⁹ Ministry of Commerce (MOFCOM) spokesman Gao Feng. <http://j.people.com.cn/n3/2021/1210/c94476-9931269.html>

²⁰ GATT Art. XI.1

²¹ GATT Art. XX (a) or (e).

²² The WTO Appellate Body has stated that a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure, and then, in most cases, a comparison between the challenged measure and possible less trade-restrictive alternatives should be undertaken (Appellate Body Reports, *EC-Seal Products (2014)*, paras 5.169 and 5.2124).

²³ GATT Art. XX.

address human rights violations discussed in this paper. However, as a country belonging to the democratic group, Japan may be requested to take some kind of actions to coordinate with the US and the EU in the future. Nevertheless, the geopolitical situation, notably Japan's geographical proximity to China compared to the US and the EU, would be a serious factor to be considered because introducing measures might lead to geo-political tension.

The economic impacts of policies, in particular of economic sanctions, could also be a factor to consider. As has been seen in the context of sanctions imposed on Russia because of its invasion of Ukraine, governments are struggling to balance the effectiveness of sanctions against Russia and their impact on the lives of their citizens.

Additionally, whether there are sufficient resources, such as ones for information gathering, to enforce measures should also be considered before developing them.

Therefore, careful consideration should be given to what measures should be introduced.

5. What should business do?

When policies on human rights violations are rapidly being developed in various countries, it is important for companies to map out where and what regulations are being developed. In this regard, they can get ahead of the curve not only by understanding the content of regulations after they are developed but also by understanding in advance the concerns of stakeholders and trends in discussions in parliaments and governments. To this end, it is necessary for companies to establish internal systems to collect and analyse such information affecting their business in a timely manner and reflect this in their corporate strategies.

At the same time, for instance, if a company doing business in China attempts to comply with U.S. import regulations that restrict imports of products from Xinjiang, it risks being subject to countermeasures by the Chinese government or being faced with a boycott in the Chinese market. Companies will therefore be forced to make a strategic response to the policies of each country while also anticipating the reactions of the other country's government and market.

Furthermore, although the various policies on human rights violations differ in content, what they all have in common is that companies are required to identify, eliminate and prevent human rights viola-

tions in their supply chains. Therefore, it is important for companies to implement human rights due diligence in supply chains to be prepared for any regulations that may be made.

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