

Doing Business in Xinjiang

Import Bans in the Face of Gross Human Rights Violations against the Uyghurs

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Abstract

The involvement of business actors in gross human rights abuses and international crimes is not a new phenomenon, as exemplified by the Holocaust or the Rwandan genocide. Nowadays, many European and US-based companies doing business in China, specifically in the Xinjiang province where Uyghurs are persecuted, may be connected to severe human rights abuses. The current business and human rights legal framework, which has developed to include human rights due diligence laws and civil litigation, may not be robust enough for preventing companies from doing business in the region, and punishing them when they do and become connected to abuse. We contend that this framework could be strengthened so as to enhance corporate accountability in the face of gross, state-orchestrated human rights abuses in the region. We consider specific laws that the United States and the European Union have adopted to address this situation, namely the 2022 US Uyghur Forced Labor Prevention Act and the EU Proposal for a regulation on prohibiting products made with forced labour on the Union market.

Keywords: business and gross human rights abuses, Uyghurs, forced labour, import bans, criminal liability, US Uyghur Forced Labor Prevention Act.

1 Introduction

The participation of business actors in gross human rights abuses, which may constitute international crimes, has a long history. The colonisation of India by the East India Company;¹ German corporations using slave labour during the Second World War;² Western companies selling arms, computers and vehicles to the Apartheid regime;³ media companies inciting racial hatred during the Rwandan genocide⁴ and companies trad-

ing conflict minerals from Sierra Leone illustrate such involvement.⁵

Nowadays, companies doing business in China, specifically in the so-called region of ‘Xinjiang’, may also be connected to gross human rights abuses. Respect for human rights in China generally has been a concern for a long time. An important literature documents the involvement and possible complicity of foreign companies in these human rights violations. In a report published in 2009, Amnesty International drew attention on ‘the human rights challenge’ faced by corporations with business activities in China. They underlined, among other issues, the bad working conditions⁶ and the use of forced labour⁷ or child labour⁸ in Chinese factories. Freedom of speech is also regularly violated which is another challenge for corporations.⁹ In the past few years, media attention has focused on the Uyghurs and other Muslim minorities, who have been living in the Northwest of China, deprived of their most basic rights.¹⁰

In this article, we focus on the Uyghur situation for two reasons. First, the serious human rights abuses, already labelled as genocide,¹¹ are directly orchestrated by China, which is not just any state. China is the second biggest economy in the world and is at the heart of global supply chains.¹² Responses from other States and from companies themselves cannot ignore that fact. Second, we note a well-documented connection between this re-

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1 E. Erikson, *Between Monopoly and Free Trade: The English East India Company, 1600-1757* (2014).

2 United Nations War Crimes Commission, 1949.

3 2d Cir., *Khulumani v. Barclay National Bank Ltd*, 2007.

4 ICTR, Appeals Chamber, *Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze v. The prosecutor*, 2007.

5 Truth and Reconciliation Commission of Liberia, 2009; Court of Appeal in ‘s-Hertogenbosch, *The Public Prosecutor v. Guus Kouwenhoven*, 2017.

6 Amnesty International, ‘Doing Business in China: The Human Rights Challenge’, 2009:12. Accessible at: https://www.sinoptic.ch/textes/eco/2009/2009_Amnesty.Switzerland_Guidance.on.doing.business.in.China.pdf.

7 *Ibid.*, at 20.

8 *Ibid.*, at 28.

9 In 2007, a lawsuit was filed against Yahoo in California because of the company’s role in the imprisonment of journalists and human rights defenders; Business and Human Rights Resource Center, Yahoo! lawsuit (Re China), 2007, www.business-humanrights.org/en/latest-news/yahoo-lawsuit-re-china/; J. Nolan, ‘The China Dilemma: Internet Censorship and Corporate Responsibility’, 4(1) *Asian Journal of Comparative Law* (2009), <https://ssrn.com/abstract=1402442>.

10 S. Roberts, *The War on the Uyghurs: China’s Internal Campaign against a Muslim Minority* (2020).

11 BBC, ‘US: China Committed Genocide against Uighurs’, 20 January 2021, www.bbc.com/news/world-us-canada-55723522; BBC, ‘Canada’s Parliament Declares China’s Treatment of Uighurs “genocide”’, 23 February 2021, www.bbc.com/news/world-us-canada-56163220; Newlines Institute for Strategy and Policy, *The Uyghur Genocide: An Examination of China’s Breaches of the 1948 Genocide Convention* (2021), at 1-51; Reuters, *French Parliament Passes Motion Condemning China “genocide” against Uyghurs* (2022).

12 EU-ILO-OECD, *Responsible Supply chains in Asia – China*, <https://mneguidelines.oecd.org/EU-ILO-OECD-Responsible-Supply-Chains-in-Asia-CHINA.pdf>.

gion and prominent European and US-based companies. Studies have shown that well-known brands are linked to these human rights abuses through their supply chain.¹³ However, so far, few articles have been written on this topic.¹⁴ This lack of legal scholarship is particularly surprising considering that the Uyghur persecution has led to specific legislation, namely forced labour import bans.¹⁵

Since the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs), which is arguably the most authoritative international instrument in the area of business and human rights,¹⁶ States have mostly focused on disclosure laws and mandatory human rights due diligence (HRDD) laws.¹⁷ But other legislative responses are possible. In 2021, the United States enacted the Uyghur Forced Labour Prevention Act (UFLPA) in 2021 to help the Customs and Border Protection (CBP) enforce Section 307 of the Tariff Act, which prohibits the importation of goods made with forced labour into America and on the US market.¹⁸ Since then, other States have adopted or are considering adopting import bans. Conforming to the United-States-Mexico-Canada agreement, a trade agreement entered into force on 1 July 2020, Canada¹⁹ and Mexico²⁰ now prohibit the importation of goods made with forced labour into the countries and on their market. A similar prohibition could be introduced in Australia,²¹ in the United King-

dom²² and in the European Union.²³ In September 2022, the European Commission issued a proposal for a regulation on prohibiting products made with forced labour on the Union market.

In this article, we map the legislative responses to the Uyghur persecution in the United States and in the European Union and identify the main strengths and shortcomings of these responses to tackle State-imposed forced labour. As Deva pointed out, the Uyghur situation shows that the current business and human rights legal framework, focusing on disclosure and HRDD legislations is not sufficient in case of gross human rights abuses, especially when they are state-orchestrated.²⁴ States shall consider other options as part of their duty to protect under Pillar I of the UNGPs. We contend that this framework must be strengthened in the face of gross, state-orchestrated human rights abuses in the region, and we discuss the extent to which import ban legislation can reinforce this framework.

The article is organised as follows. We begin by giving an overview of the human rights abuses in the Xinjiang province and showing how companies can be involved in the Uyghur persecution (Section 2). Next, we map and evaluate recent legal initiatives that States have considered to prevent and sanction the involvement of business actors in the Uyghur persecution and which, from our perspective, could strengthen the current BHR framework, if they are correctly implemented.²⁵ In January 2022, the US Congress passed the *Uyghur Forced Labour Prevention Act* which aims to ban imports from the region. Because the US import ban is the only one in place, and even if the literature on its effectiveness is limited,²⁶ we identify its main strengths and shortcomings. Here the goal is to learn from this experience as the European Union is now designing its own proposal (Section 3). In September 2022, the European Commission released a *proposal for a regulation on prohibiting products made with forced labour on the Union market*. This promising initiative could usefully complement the Corporate Sustainability Reporting Directive (CSRD) and the Directive Proposal on Sustainable Due Diligence (CSDDD). Disclosure laws and HRDD laws are not a panacea and must be reinforced when gross human rights abuses are at stake. The BHR framework must rely on a mix of legal measures (Section 4). We end with a brief conclusion (Section 5).

- 13 Australian Strategic Policy Institute, *Uyghurs for Sale* (March 2020); US Department of State, *Xinjiang Supply Chain Business Advisory, Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang* (2020 – updated 2021), at 1-36; Amnesty International, “Like We Were Enemies in a War” China’s Mass Internment, Torture and Persecution of Muslims in Xinjiang’, 2021:1-52.
- 14 R. Polaschek, ‘Responses to the Uyghur Crisis and the Implications for Business and Human Rights Legislation’, 6(3) *Business and Human Rights Journal* 567-75 (2021); A. Hellweger, ‘International Commercial Law and the US Uyghur Forced Labor Prevention Act’, 165(10) *Solicitors’ Journal* 24-27 (2022); A. Fruscione, ‘Article: The European Commission Proposes a Regulation to Ban Products Made with Forced Labour’, 18(3) *Global Trade and Customs Journal* 120-4 (2023).
- 15 European Parliament, *Trade-Related Policy Option for a Ban* (2022), at 7.
- 16 L.-C. Backer, ‘On the Evolution of the United Nations “Protect-Respect-Remedy Project”: The State, the Corporation and Human Rights in a Global Governance Context’, 9 *Santa Clara Journal of International Law* 37 (2011).
- 17 N. Bueno and C. Bright, ‘Implementing Human Rights Due Diligence through Corporate Civil Liability’, 69 *International & Comparative Law Quarterly* 789, 794 (2020); M. Krajewski, K. Tonstad & F. Wohltmann, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’ 6(3) *Business and Human Rights Journal* 550-8 (2021); S. Deva, ‘Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?’ 36 *Leiden Journal of International Law* 389 (2023).
- 18 Canada has also an import ban in place but this legislation suffers from a lack of enforcement, <https://gflc.ca/wp-content/uploads/2020/10/Forced-Labour-Import-Bans.pdf>.
- 19 Ropes and Gray, ‘Canada to Implement New Modern Slavery Reporting Requirements and Child Labor Import Ban – Slotting into Global Compliance by U.S.-based Multinationals’, 8 May 2023, www.ropesgray.com/en/newsroom/alerts/2023/05/canada-to-implement-new-modern-slavery-reporting-requirements-and-child-labor-import-ban#:~:text=As%20required%20by%20the%20United,having%20ties%20to%20forced%20labor.
- 20 Ropes and Gray, *Mexico Bans Imports Made with Forced Labor in Alignment with the USMCA*, 6 March 2023.
- 21 Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2022, No., 2022 (*Senator Steele-John*), A Bill for an Act to amend the *Cus-*

toms Act 1901, and for related purposes; Moulislegal, ‘Modern Slavery and the Supply Chain – From Reporting on Risks to Destroying Effectuated Products’, 8 March 2023, <https://moulislegal.com/knowledge/modern-slavery-and-the-supply-chain-from-reporting-on-risks-to-destroying-affected-products/>.

- 22 Governing Forced Labour in Supply Chains, ‘Literature Review: Forced Labour Import Bans’, 5 January 2023, <https://gflc.ca/wp-content/uploads/2020/10/Forced-Labour-Import-Bans.pdf>.
- 23 *Ibid.*; <https://gflc.ca/wp-content/uploads/2020/10/Forced-Labour-Import-Bans.pdf>.
- 24 Deva, above n. 17, at 1.
- 25 European Commission, ‘Questions and Answers: Prohibition of products made by forced labour in the Union Market’, 2022, https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_5416.
- 26 Governing Forced Labour in Supply Chains, above n. 22, p. 2.

2 Doing Business in the Xinjiang Province

While there have been long-standing tensions in the region between the Uyghurs who seek autonomy and Chinese authorities who want to keep control over it, the situation has deteriorated in recent years.²⁷ Accurately documenting human rights violations in the Xinjiang province is difficult due to a lack of publicly available data and various restrictions.²⁸ Nevertheless, several reports based on testimonies, satellite imagery and leaked government papers have revealed that the People's Republic of China (PRC) government, since at least 2017, has intensified its persecution of Muslim minority groups living in the Xinjiang area.²⁹ For example, we note reports about internment camps where the Uyghurs live in inhuman conditions,³⁰ are tortured or subjected to other cruel, inhuman or degrading treatment,³¹ including, allegedly, forced organ harvesting.³² Severe violations of human rights have also been carried out outside the camps, notably through massive surveillance of the Uyghurs through facial recognition cameras, homestays by government agents who live with families and access their personal communications.³³ The Uyghurs have also suffered from restrictions on freedom of religion in their daily lives. Many traditional practices in Islam such as wearing a veil, having a beard, praying regularly or avoiding alcohol and pork meat seem to be considered as 'extremist' under Chinese laws.³⁴ Many mosques and other Islamic sacred sites have been destroyed.³⁵ Muslim minorities have also been forced to work and exposed to other labour abuses in factories located in the Uyghur territory and in other regions of China. Credible evidence suggests that the PRC government has facilitated the mass transfer of Uyghurs from their land to factories across China where they are forced to work.³⁶ Some States have labelled these practices as 'genocide'.³⁷

Thus, while doing business in China was already complex for Western companies from the perspective of meeting the corporate responsibility of respecting human rights as defined in the UNGPs, the Uyghur situation makes it even more challenging. In July 2020, the US Departments of State, Treasury, Commerce and Homeland Security released a document showing that companies can be involved in the Uyghur persecution in various ways. Business actors can participate in the Uyghur persecution by supplying 'commodities, software, and technology to entities engaged in such surveillance and forced labor practices'.³⁸ In this regard, some US technology companies – such as Microsoft, Dell or IBM – were suspected of supplying China with equipment and software for monitoring populations in the Xinjiang province.³⁹ Business actors can also be linked to the Uyghur persecution by

“assisting or investing in the development of surveillance tools for the PRC government in Xinjiang, including tools related to genetic collection and analysis”;⁴⁰ or by “aiding in the construction and operation of internment facilities used to detain Uyghurs and members of other Muslim minority groups, and/or in the construction and operation of manufacturing facilities that are in close proximity to camps and reportedly operated by businesses accepting subsidies from the PRC government to subject minority groups to forced labor”.⁴¹

But above all, business actors can be involved in the Uyghur persecution through their supply chains by sourcing

goods from Xinjiang, or from entities elsewhere in China connected to the use of forced labor of individuals from Xinjiang, or from entities outside of China that source inputs from Xinjiang.⁴²

As previously mentioned, forced labour is not only located in the Xinjiang province. The government has facilitated the transfer of Uyghurs to factories across China which makes the situation even more challenging for companies supplying goods from this country. The Australian Strategic Policy Institute has identified eighty-two well-known brands in a variety of sectors, suspected to benefit indirectly from Uyghur forced labour through their supply chains. Forced labour is a major concern for companies in the textile sector. Around 80% of China's cotton is produced in the Xinjiang province, representing around 22% of the global market in 2018-2019.⁴³

27 A. Kriebitz, 'The Xinjiang Case and Its Implications from a Business Ethics Perspective', 21(3) *Human Rights Review* 250 (2020).

28 Amnesty International, above n. 13, at 15.

29 A. Lehr and M. Bechrakis, 'Connecting the Dots in Xinjiang: Forced Labour, Forced Assimilation and Western Supply Chains', *A Report of the CSIS Human Rights Initiative, Center for Strategic and International Studies* 2019:1-44; V. Xiuzhong Xu, D. Cave, J. Leibold, K. Munro & N. Ruser, 'Uyghurs for Sale "Re-education", Forced Labour and Surveillance beyond Xinjiang', *Report n°26/2020* 2020.

30 European Parliament resolution of 19 December 2019 on the situation of the Uyghurs in China (China Cables) (2019/2945(RSP)) E.

31 Amnesty International, above n. 13, at 96.

32 European Parliament resolution of 12 December 2013 on organ harvesting in China (2013/2981(RSP)); *The Independent Tribunal into Forced Organ Harvesting from Prisoners of Conscience in China*, China Tribunal, 1er mars 2020.

33 Amnesty International, above n. 13, at 35.

34 *Ibid.*, at 27.

35 Australian Strategic Policy Institute, *Cultural Erasure. Tracing the Destruction of Uyghur and Islamic Spaces in Xinjiang* (2020).

36 US Department of State, above n. 13, at 2.

37 BBC, above n. 11; BBC, above n. 11; Newlines Institute for Strategy and Policy, above n. 11; Reuters, above n. 11.

38 US Department of State, above n. 13.

39 V. Weber and V. Verweris, 'China's Surveillance State: A Global Project – How American and Chinese Companies Collaborate in the Construction and Global Distribution of China's Information Control Apparatus', 2021, www.top10vpn.com/assets/2021/07/Chinas-Surveillance-State.pdf.

40 US Department of State, above n. 13.

41 *Ibid.*

42 *Ibid.*

43 Investor Alliance for Human Rights, An initiative from ICCR, Human Rights Risks in Xinjiang Uyghur Autonomous Region PRACTICAL GUIDANCE FOR INVESTORS (2020), at 5. The report is also accessible online: <https://>

Some major brands of the garment sector have been blamed for sourcing products from Chinese factories selling cotton products tainted with coercive labour.⁴⁴ Some of these brands such as Nike, C&A, State of the Art, Inditex or Uniqlo are even under investigation for *aiding and abetting* the Chinese government with its forced labour programme.⁴⁵ Forced labour is, however, not only a concern for companies in the textile/apparel sector. Other industries are at risks such as the solar energy sector. As mentioned by the US Departments of State, Treasury, Commerce and Homeland Security:

*mounting evidence indicates that solar products and inputs at nearly every step of the production process, from raw silicon material mining to final solar module assembly, are linked to known or probable forced labor programs.*⁴⁶

This is highly problematic considering that Chinese companies play a crucial role in the solar supply chains.⁴⁷ Importation of tomatoes by the food industry or of components used in the automotive and electronic industry could also be tainted with forced labour.⁴⁸ The Australian Strategic Policy Institute identified, for instance, Chinese factories using forced labour that could supply brands such as Apple.⁴⁹

In reaction, some States have passed laws or are considering passing laws aiming to avoid the importation of goods made with forced labour in the Xinjiang province.

3 The US Response

Several measures have been adopted in the United States to sanction and punish persons involved in the Uyghur persecution which create legal, reputational and economic consequences for companies.⁵⁰ The *Uyghur Human Rights Policy Act* was enacted in 2020.⁵¹ It authorises the US President to impose sanctions such as travel restrictions⁵² and assets freeze⁵³ against officials and entities responsible for human rights abuses in the Uyghur region.⁵⁴ Restrictions on exports to Chinese persons that are implicated in gross human rights abuses in the Uyghur region have also been adopted. The Bureau of Industry and Security of the US Department of Commerce has developed an *Entity List*, and foreign persons who are included on this list face restriction to access US goods. Many Chinese companies and Chinese officials responsible for human rights abuses in the Xinjiang province have been added to this list. For instance, in June 2021, five Chinese companies in the energy sector were added to the *Entity List* for utilising forced labour in the Uyghur land.⁵⁵ In July 2021, 14 companies in the IT sector were also added.⁵⁶ Doing business in violation of this prohibition may expose business actors to civil and/or criminal penalties.

Restrictions on imports have also been adopted. Section 307 of the Tariff Act of 1930 prohibits merchandise produced in whole or in part by forced labour from being imported in the United States. The scope of this law is very broad. It applies to every importer and to products of any type and any origin.⁵⁷ Section 307 is implemented by the US CBP which has issued '*Withhold Release Orders*' (WROs) on certain goods suspected to be produced with forced labour in the Xinjiang province. For instance, in January 2021, the CBP issued a new WRO on all cotton products and tomato products from this area.⁵⁸ The CBP explained that it will not tolerate entrance of products made by using forced labour because it hurts '*American businesses that respect human rights and also expose unsuspecting consumers to unethical purchases*'.⁵⁹ In June 2021, a WRO was also issued on silica products from *Hoshine Silicon Industry Co., Ltd.*⁶⁰ Once the CBP has denied entry to those goods, they may be seized and forfeited, and civil penalties may be issued against the importer.

investorsforhumanrights.org/sites/default/files/attachments/2020-08/InvestorGuidanceonHRRisksXinjiang08.03.20.pdf; see also US Department of State, above n. 13, at 8.

44 Xinjiang Supply Chain Business Advisory, 'Risks and Considerations for Businesses and Individuals with Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses linked to Xinjiang, China' (2021), at 6, www.state.gov/wp-content/uploads/2021/07/Xinjiang-Business-Advisory-13July2021.pdf.

45 In this regard, in France, a criminal lawsuit was filed in April 2021 against four corporations – Uniqlo France, SMCP, Inditex and Skechers – from the textile sector. The complaint shows the existence of ties between these companies and entities from the Xinjiang province. In July 2021, an investigation was opened into the crime of concealment of crimes against humanity and forced labor – Art. 321-1 of the French Penal Code. It was dismissed in April 2023 on the ground that the public prosecutor lacked jurisdiction. A new lawsuit was filed in May 2023 and is ongoing at the time of writing (Le Monde, *Complaint Filed against French Fashion Groups over Uyghur Forced Labor*, 17 May 2023). Similarly, criminal lawsuits were brought against companies in Germany in September 2021, mainly in the textile sector. They were accused of *aiding and abetting* the Chinese government with its forced labour programme (ECCHR, 2021a). At the time of writing, the case is pending before the Federal Court of Justice (ECCHR, 2021a). In December 2021 in the Netherlands, a criminal complaint was also brought against Patagonia, Nike, C&A and State of the Art for allegations of complicity in crimes against humanity (ECCHR, 2021b).

46 US Department of State, above n. 13, at 8.

47 *Ibid.*, at 8 – The report mentions that "In 2020, PRC solar companies controlled 70 percent of the global supply for solar-grade polysilicon, and 45 percent was manufactured in Xinjiang. China also controls market shares of the downstream solar supply chain, including the production of wafers, solar cells, and solar panels. Some of the world's largest suppliers of solar panel materials and components reportedly have ties to U.S.-sanctioned XPCC".

48 Australian Strategic Policy Institute, above n. 13.

49 *Ibid.*

50 US Department of State above n. 13, at 2.

51 Uyghur Human Rights Policy Act of 2020.

52 Uyghur Human Rights Policy Act, 6/c.

53 *Ibid.*

54 Uyghur Human Rights Policy Act, 6/a.

55 US Department of State, above n. 13, at 22.

56 *Ibid.*

57 Global Trade Policy Blog, 'Measures Banning Products Made with Forced Labor: US, EU and UK Approach', 7 November 2022, www.steptoe.com/en/news-publications/global-trade-policy-blog/measures-banning-products-made-with-forced-labor-us-eu-and-uk-approach.html.

58 U.S. Customs and Border Protection, *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang* (2021).

59 *Ibid.*

60 US Department of State, above n. 13, at 22.

This system was later strengthened in order to help the CBP to enforce Section 307. In December 2021, President Biden signed the *UFLPA*.⁶¹ It aims to ensure that goods produced in violation of Uyghur rights do not enter the US market. It establishes a rebuttable presumption that goods manufactured or produced in the Xinjiang province, or goods produced by certain entities implicated in the forced labour programme outside of Xinjiang, are made using forced labour and shall not enter the United States. Whereas with Section 307, the CBP must establish that the product could have been made by forced labour, with the adoption of the *UFLPA*, the burden of proof is reversed and relies on the importers. The presumption applies unless it is shown that the goods were not produced by forced labour or that the *UFLPA* does not apply.⁶² To be eligible for an exception to the *UFLPA*'s presumption, companies must demonstrate that they use 'due diligence, effective supply chain tracing', and 'supply chain management measures' to ensure that they do not import any goods made wholly or in part with forced labour from the Xinjiang province.⁶³ Whereas there is no general mandatory HRDD law in the United States, this requirement incentivises companies to undertake a meaningful human rights due diligence process in an *indirect* way.⁶⁴ Section 307 and the *UFLPA* hold great potential. It has been shown in the past, though admittedly in a different context, that forced labour bans can have positive effects, as illustrated by the 'Top Glove' case.⁶⁵ In July 2020, the CBP issued a WRO against goods produced by Top Glove in Malaysia due to forced labour issues. To obtain the lifting of the ban, Top Glove took measures to address the problem, including reimbursement of approximately US\$36 million to around 13,000 workers.⁶⁶ The situation is, however, quite different in the Uyghur case. Unlike in Malaysia, it is not an isolated case of forced labour. In Xinjiang, forced labour is massively imposed by the State.⁶⁷ Thus, while the positive impact that forced labour import bans may have in this situation is unclear,⁶⁸ stopping purchasing and sourcing products

tainted by forced labour from this region signals moral disapprobation and puts some pressure on China.⁶⁹ Some have shed light on the unintended consequences of forced labour import bans such as factories' closing that would put workers in worse conditions.⁷⁰ Tensions with climate change policies can also arise. As mentioned, China plays a significant role in the production of solar panels and the CBP seized many shipments of solar energy components. Reuters reported in 2022:

*"The level of seizures, which has not previously been reported, reflects how a policy intended to heap pressure on Beijing over its Uyghur detention camps in Xinjiang risks slowing the Biden administration's efforts to decarbonize the U.S. power sector to fight climate change".*⁷¹

This situation is problematic in the context of the energy transition.⁷²

Import bans have also been described as 'political instruments and protectionist trade measures rather than human rights tool'.⁷³ The *UFLPA* was introduced in the context of an ongoing trade war between the United States and China.⁷⁴ Some authors pointed out that most of the WROs issued by the CBP since 2015 have been directed against Chinese products whereas forced labour is endemic in other countries.⁷⁵ According to them, this lack of impartiality undermines the credibility of forced labour bans.⁷⁶ Consequently, 'a clear decision-making framework for imposing and lifting restrictions is essential for effective implementation'.⁷⁷

Despite its imperfections, the American model based on forced labour ban has been a source of inspiration for the EU which is now designing its own proposal. Much can be learned from the US experience.

61 H.R.1155 – Uyghur Forced Labor Prevention Act.

62 *Ibid.*

63 *Ibid.*

64 GFLC, above n. 22, at 4.

65 P. Bengtson, 'Debt Bondage Payouts Flow to Workers in Malaysia's Glove Industry', *The Diplomat*, 14 September 2021, <https://thediplomat.com/2021/09/debt-bondage-payouts-flow-to-workers-in-malysias-glove-industry/>; J. LaFianza, 'Threatening Ill-Gotten Gains: Analyzing the Effectiveness of a Forced Labor Import Ban in the European Union', *European Union Law Working Paper No. 60*, Stanford-Vienna Transatlantic Technology Law Forum, 2022, <http://law.stanford.edu/wp-content/uploads/2022/05/EU-Law-WP-60-LaFianza.pdf>; I. Pietropaoli, O. Johnstone & A. Balch, 'Effectiveness of Forced Labour Import Ban [Policy Brief]', *Modern Slavery and Human Rights Policy and Evidence Centre*, 2021, <https://modernslaverypec.org/assets/downloads/PEC-Policy-Brief-Effectiveness-Forced-Labour-Import-Bans.pdf>.

66 GFLC, above n. 22, at 2.

67 J. Cockayne, 'Making Xinjiang Sanctions Work: Addressing Forced Labour through Coercive Trade and Finance Measures', *The University of Nottingham*, 2022, www.xinjiangsanctions.info/wpcontent/uploads/2022/07/Making-Xinjiang-Sanctions-Work-FINAL.pdf.

68 GFLC, above n. 66.

69 J. Cockayne, *Making Xinjiang Sanctions Work: Addressing Forced Labour through Coercive Trade and Finance Measures* (2022).

70 Anti-Slavery International and European Center for Constitutional and Human Rights' position on import controls to address forced labour in supply chains June 2021, p. 4. Accessible online <https://www.antislavery.org/wp-content/uploads/2021/06/Anti-Slavery-International-ECCHR-Import-Controls-Position-Paper-1.pdf>; LaFianza, above n. 65, at 25.

71 Reuters, *Exclusive: U.S. Blocks More than 1,000 Solar Shipments over Chinese Slave Labor Concerns* (2022).

72 British Academy, 'The Energy of Freedom? Solar Energy, Modern Slavery, and the Just Transition', www.thebritishacademy.ac.uk/documents/4198/Just-transitions-energy-freedom.pdf.

73 T. Fanou, *Governing Forced Labour in Supply Chains, Literature Review: Forced Labour Import Bans* (2023); S. Shehadi and B. van der Merwe, 'Why Doesn't Forced Labour in Supply Chains Matter to Western Governments?' *Investment Monitor*, 2021, <https://www.investmentmonitor.ai/features/forced-labour-supply-chainswestern-governments/>.

74 *Ibid.*

75 Shehadi and van der Merwe, above n. 73.

76 Schwarz et al., 'External Policy Tools to Address Modern Slavery and Forced Labour', *European Parliament*, 2022, [www.europarl.europa.eu/thinktank/en/document/EXPO_STU\(2022\)653664](http://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2022)653664).

77 GFLC, above n. 22, at 2.

4 The EU Response: Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market

In March 2021, the European Union adopted sanctions (asset freeze, travel ban and restrictions on receiving any EU funds) against Chinese officials and entities involved in human rights violations in the Xinjiang province. To do so, the Council used the European Union's global human rights sanctions regime enacted in December 2020.⁷⁸ This system allows the European Union to impose sanctions on persons who are responsible for serious human rights abuses. Anyone who provides financial, technical or material support, or is otherwise involved in human rights abuses or associated with the perpetrators may also be targeted with restrictive measures which includes legal persons such as corporations.⁷⁹ This mechanism is a powerful tool to sanction business actors involved in the Uyghur persecution.

But more interestingly from a business and human rights perspective, the European Union announced that specific legislation will be adopted. In September 2022, inspired by the US model, and based on the European Parliament's Motion for a Resolution on the Human Rights situation in Xinjiang (2022), the EU Commission published a *proposal for a regulation on prohibiting products made with forced labour on the Union market*.⁸⁰

The proposal aims to prevent the circulation of goods made with forced labour on the European market. Article 3 declares that '*Economic operators shall not place or make available on the Union market products that are made with forced labour, nor shall they export such products*.' Like Section 307 in the United States, the scope of Article 3 is very broad. All economic operators, irrespective of size or sector, seem to be covered by the proposal. Article 2 states that economic actor '*means any natural or legal person or association of persons who is placing or making available products on the Union market or exporting products*'. Considering the seriousness of such abuses, all business actors shall be prohibited from using forced labour in their supply chains. This is in line with the UNGPs which emphasise that all business actors, regardless of their size, should respect human rights. The scope of the proposal remains, however, unusual in the European Union. So far, the European Union's BHR framework has mainly focused on the biggest companies. This is, for instance, the case of the CSRD or of the draft Corporate Sustainability Due Diligence Directive

78 Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.

79 Art. 3.

80 Restriction on import/circulation of prohibited products already exist in other areas in the EU (animal welfare policy, consumer protection law, environmental policy); See, European Parliament, *Trade-related Policy Options of a Ban on Forced Labour Products* (2022).

(CSDDD). In the proposal, the Commission only asks competent authorities to '*take into account the size and economic resources of the economic operators*' before deciding to launch an investigation⁸¹ but the prohibition to place goods made with forced labour on the market applies to all economic operators. Besides 'all economic actors', the proposal applies to every product, like Section 307 of the American Tariff Act. However, competent authorities shall follow a *risk-based approach*⁸² which means that they will have to focus their enforcement efforts on 'high-risks' products. The Commission will also release a database of forced labour risks in some geographic areas or sectors.⁸³ This database could help corporations identify their business relationships using, or susceptible to use, forced labour.

If there is a '*substantiated concern of a violation of Article 3*', competent authorities designated by Member States for carrying out the obligations set out in the regulation⁸⁴ will have the full power to investigate.⁸⁵ Whether an economic actor has implemented a forced labour due diligence process will be considered by competent authorities before initiating an investigation.⁸⁶ The Commission has planned to issue guidelines to help business actors conduct a proper HRDD process to eradicate forced labour from their operations.⁸⁷

At the end of their investigation, if it appears that Article 3 has been violated, competent national authorities can decide that the economic operator subjected to investigation must be prohibited from placing its goods on the European market or shall withdraw its products from the market.⁸⁸ A decision made by one authority must be enforced by competent authorities in other Member States.⁸⁹ At least 30 days shall be given to the economic operator to comply with the order.⁹⁰ Customs authorities will have to control whether they effectively comply. If the economic operator shows that it has eliminated forced labour from its supply chains – by adopting measures or by cutting its business relationships – competent authorities shall withdraw their decision for the future.⁹¹

As pointed out in an in-depth analysis requested by the European Parliament, this proposal could usefully complement the CSRD and the CSDDD.⁹² Overall, the proposal for a regulation on prohibiting products made with forced labour on the Union market would force EU-based companies to meaningfully address forced labour in their HRDD process. Otherwise, as it was mentioned by the Commission, withdrawal of goods from the mar-

81 Art. 5.

82 Art. 4.

83 Art. 11.

84 Art. 12.

85 Arts. 4-5.

86 Art. 4.

87 Art. 23.

88 Art. 6.

89 Art. 14.

90 Art. 7.

91 Arts. 6-6.

92 See, European Parliament, *Trade-related Policy Options of a Ban on Forced Labour Products* (2022), at 7.

ket could have significant financial consequences for them. Companies will bear the costs of disposing of the prohibited product which ‘will provide a strong deterrent and incentive for companies to comply’ and to eradicate coercive labour from their supply chains.⁹³ Taken together with the CSDDD, the proposal for a regulation on forced labour would be a step-up in terms of ensuring companies do carry out due diligence in relation to forced labour.

The proposal is, however, perfectible. In the current draft, the burden of proof is entirely on the competent authorities who would have to establish that the good is made with forced labour. It is an important difference with the UFLPA.⁹⁴ For the EU Parliament, ‘this is a key element that may hinder the successful implementation of a forced labour products prohibition due to enforcement difficulties’.⁹⁵ Even if competent authorities have large powers to initiate an investigation and gather evidence,⁹⁶ it has been recommended to reverse the burden of proof, at least when goods are from countries with State-imposed forced labour like in the Xinjiang province. Importers would have to demonstrate that their products are free from coercive labour.

The proposal does not address the situation of victims’ either.⁹⁷ To address this shortcoming, a group of experts have recommended that the economic operator pay a fine⁹⁸ which can be used to fund remedial projects to assist affected workers.⁹⁹ Another option would be to require that companies implement appropriate remediation measures as a condition for lifting the ban.¹⁰⁰ It was also suggested that where a company was sanctioned by a competent authority under the draft regulation, it should be presumed that due diligence obligations established under the draft CSDDD were also breached.¹⁰¹ Whatever solution is adopted, it is crucial ‘to create a worker-centred Regulation’¹⁰² and the law must ‘be designed to incentivise the provision of remediation to workers trapped in forced labour’.¹⁰³ Here again, this will be difficult to achieve in a situation of State-imposed forced labour, and the future regulation will mainly be a tool to express moral disapprobation and put some pressure on China.¹⁰⁴

93 European Commission, above n. 25.

94 Global Trade Policy Blog, above n. 57.

95 See, European Parliament, above n. 92, at 8.

96 Art. 5.

97 BRIEFING Commission Proposal for a Regulation on prohibiting products made with forced labour on the Union market: The issue of remedies, 2023.

98 GreensEFA and *alii*, Progressing the proposed EU Regulation on prohibiting products made with forced labour: a model law, November 2022.

99 LaFianza, above n. 65.

100 BRIEFING Commission, above n. 97, at 10.

101 *Ibid.*, at 10.

102 A model law with the key elements for an EU Regulation to prohibit the import and export of products made or transported with forced labour, at 7, www.antislavery.org/wp-content/uploads/2022/11/2022.05-Forced-Labour_A-Model-Law_Updated-4.pdf.

103 *Ibid.*, at 7.

104 J. Cockayne, ‘Making Xinjiang Sanctions Work: Addressing Forced Labour through Coercive Trade and Finance Measures’, The University of Nottingham, 2022, www.xinjiangsanctions.info/wpcontent/uploads/2022/07/Making-Xinjiang-Sanctions-Work-FINAL.pdf.

The EU Proposal may raise another question that has not been addressed so far. Is the destruction of goods that have been withdrawn from the European market an acceptable solution?¹⁰⁵ Other options, such as giving them to charities, could also be explored.¹⁰⁶

5 Conclusion

In this article, we aimed to map the legislative response to the Uyghur persecution in the United States and in the European Union and specifically to explore the growing interest for forced labour import bans legislation. Overall, and even if the literature on the effectiveness of forced labour bans remains limited, due to the fact that fewer bans are currently in place and enforced, we contend that they make a compelling addition to disclosure and HRDD laws. European countries should use forced labour bans to strengthen their legal framework. Disclosure, HRDD and restrictions on imports and exports can usefully complement each other. The European Commission precisely recommended this two-pronged approach in its proposal for a regulation on prohibiting products made with forced labour on the Union market. Experience (Top Glove) shows that the type of measures included in the proposal could contribute to addressing forced labour and generally improving workers’ labour conditions. While this positive impact is more uncertain when faced with State-imposed forced labour, at least import bans send a strong message that some human rights abuses, because they are too severe, are no longer acceptable. They may also be used to pressure States.

Adopting legislation, however, is not enough. Once import bans are in place, competent authorities may face implementation challenges. To avoid those, they must be properly funded, and be in a position to work efficiently. In this regard, shifting the burden of proof, and asking companies to demonstrate they are *not* selling goods made with forced labour is an important requirement to include in legislation on import bans.

Forced labour import bans must be carefully designed to avoid being instrumentalised and used as ‘*political instruments and protectionist trade measures*’.¹⁰⁷ Relevant actors also need to understand the possible unintended consequences of import bans such as worsening the situation of workers, and the tensions they may create with other policy areas such as climate policy and the energy transition.

105 Art. 6.

106 See ABA – BALANCING BUYER AND SUPPLIER RESPONSIBILITIES Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0.

107 GFLC, above n. 22, at 2.