Toward a new, sustainable economy?

The use of forced labour is increasingly prevalent in the production of goods and services that governments and companies regularly procure. Indiscriminate purchasing can inadvertently fuel human trafficking and forced labour. This was acutely demonstrated by the widely publicized case of forced labour in the operations of Top Glove, a medical glove manufacturer that sold billions of gloves to governments during the pandemic: in their rush to respond to a public health crisis, governments were unintentionally funding forced labour.

One of the most effective ways to disrupt and prevent human trafficking for forced labour is to eliminate the market for goods or services produced by trafficked people through informed and ethical purchasing. The concept is simple: to end force labour, we must stop paying for forced labour. To operationalize this concept, governments have increasingly been adopting laws to prevent human trafficking in supply chains.

Recent legislative initiatives to combat trafficking in human beings (THB) in supply chains are becoming more assertive, moving from non-binding principles and standards to hard laws. While voluntary-based initiatives still play an important role in setting normative standards to guide corporate and public sector behaviour, the emergence of hard law instruments is rapidly altering this global regulatory landscape. Laws against THB in supply chains can be broadly put into five groups: (1) import bans, (2) reporting laws, (3) disclosure laws, (4) due diligence laws, and (5) due diligence 'plus' laws.

The first group – **import bans** – comprises legislation which sets trade restrictions on goods manufactured by prohibited forms of labor. The United States (Section 307 of the Tariff Act of 1930) and Canada have laws and regulations that prohibit the importation of merchandise mined, produced or manufactured wholly or in part by forced labour.[1] Border protection authorities may issue orders detaining import shipments of goods suspected of violating the law, and can seize and forfeit the goods. Fines can be levied but have rarely been used so far.[2] In the US, to release the withheld goods importers must submit proof that the merchandise was not produced with forced labour. According

[1] Canada committed to prohibiting the importation of "goods that are mined, manufactured or produced wholly or in part by forced labour" under the Canada-United States-Mexico Agreement (CUSMA). This provision has been implemented through an amendment to the Customs Tariff (item 9897.00.00).

[2] Available at: https://laborrights.org/blog/202107/trade-subcommittee-hearing-global-challenged-forced-labor-supply-chains-strengthening.

to statistics published by the US customs and border authorities, shipments from at least 12 countries have been withheld in US ports under the law.[3]

Reporting laws normally require businesses to disclose a statement for each reporting period on the measures adopted for the prevention and remediation of certain types of human rights abuses in their direct operations and in the value chains. The Transparency in the Supply Chains Provision (section 54) of the UK Modern Slavery Act 2015 requires covered companies to prepare and publish an annual statement on the steps taken to assess and address modern slavery risks in their operations and supply chains. The Australian Modern Slavery Act 2018 sets similar reporting obligations, but it provides more detailed and mandatory requirements on the content and structure of statements.[4] Both the UK and Australian governments have created central repositories to make it easier for the public to find and compare statements submitted by companies. At the EU level, the Non-Financial Reporting Directive (Directive 2014/95) requires companies with at least 500 employees to prepare a statement containing information concerning the policies and due diligence processes undertaken to address environmental, human rights, labour rights, and anti-corruption risks.

Differently from reporting laws, **disclosure laws** do not seek to impose a direct reporting obligation upon private entities; rather they regulate disclosure of information about the human rights record of corporate actors held by governmental bodies. An example is the Brazilian "Dirty List" of slave labour. Twice a year, the Brazilian government publishes a list with the names of individuals and companies who have been convicted of subjecting workers to 'conditions analogous to slavery'.[5]

These two approaches create human rights disclosure regimes, but not a direct legal obligation to internalize human rights due diligence into corporate policies and practices. They are based on the threat of adverse reputational consequences and potential financial losses arising from investment, consumer and business decisions taken on the basis of the reported information.

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[3] Available at: https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings.

[4] Modern slavery statements under the Australian Modern Slavery Act 2018 should address, among other things, the following criteria: (i) the reporting entity's structure, operations and supply chains; (ii) modern slavery risks in the reporting entity's operations and supply chains (including those of subsidiary entities); (iii) actions taken (including by subsidiary entities) to assess and address those modern slavery risks, including due diligence and remediation processes; (iv) how the reporting entity assesses the effectiveness of actions taken; and (v) the process of consultation with subsidiary entities in preparing the modern slavery statement.

[5] Article 149 of the Brazilian Criminal Code provides the definition of 'labour analogous to slavery', which includes work in conditions of forced labour; excessive working hours; degrading conditions; and restriction of freedom through debt, isolation, confiscation of personal documents or manifest surveillance.

To maximize the effectiveness of disclosure-based legislations, some regimes may attach legal consequences to the failure to comply with the law. Last year, the UK government announced new measures to strengthen the Modern Slavery Act, including options for civil penalties for entities that fail to meet their obligations under the Act's transparency provisions.[6] In the case of the Brazilian Dirty List, companies and individuals added to the register face administrative sanctions, such as the prohibition from receiving public financing and from participating in public procurement.

The third and fourth groups of laws fall under the umbrella concept of **due diligence**, which in essence requires entities – governments or businesses – to undertake efforts to identify exploitation in their supply chains and address it. The third group of laws set out an explicit obligation for companies to exercise HRDD, but without establishing the liability that laws in group four contain. The **due diligence 'plus'** laws of group four go beyond the due diligence laws in group 3 by establishing civil or criminal liability provisions or creating redress avenues that can be accessed by affected individuals or groups, or their representatives, seeking remedies for breaches of the law or prompt corrective action by the bearers of the obligations.[7]

Due diligence laws, either from the third or the fourth group, can be very diverse in their legal design. The key difference between these laws are the elements included in their scope: industry sectors; human rights abuses; other violations (e.g. deforestation and environmental degradation); which companies are covered (e.g. size, number of employees, annual revenues etc.)[8]; the specific duties of covered entities including reporting requirements (e.g. obligation to publish a 'vigilance plan' under the French law or statements under the Dutch and Norwegian legislations); the institutional arrangements for supervision and enforcement; and the penalties for non-compliance.

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[6] The announcement is available at: https://www.gov.uk/government/news/new-tough-measures-to-tackle-modern-slavery-in-supply-chains. A legislative proposal introduced to the UK Parliament would make it an offence to supply false or incomplete information in the modern slavery statements, punishable with imprisonment or fines. Available at: https://bills.parliament.uk/bills/2892.

[7] The French Duty of Vigilance Law provides two possibilities for parties with standing to enforce the law. First, a party can serve the company a three-month notice for breach of the duty to publish a vigilance plan. Second, individuals may file civil liability claims if they believe that a company has failed to comply with the vigilance obligations and this has resulted in a damage which could have otherwise been prevented had the company complied with the law (Art. 58).

[8] For instance, the regulations of the UK Modern Slavery Act 2015 have set the minimum turnover threshold at £36m. The reporting obligations of the Australian law cover entities with a consolidated revenue of at least $100 million for the relevant reporting period. The obligations of the French Duty of Vigilance Law are mandatory for companies registered in France with 5,000 or more employees in the company and their direct/indirect subsidiaries also registered in France, or at least 10,000 employees in the company and their direct/indirect subsidiaries registered abroad.

Some laws cover only a very narrow set of rights violations or are sector-specific. For example, the Dutch Child Labour Due Diligence Act (2019) addresses a single issue: the prohibition of child labour. Norway's Transparency Act (2021) covers human rights and decent working conditions, but it does not expressly consider environmental issues. The EU Conflict Minerals Regulation applies to EU importers, smelters and refiners above an annual import volume of the minerals or metals.

The French Duty of Vigilance Law requires companies to exercise due diligence to identify and avoid violations of all internationally recognized human rights, violations of health and safety rights and environmental damage. The recently approved German Supply Chain Law also has a broad thematic coverage and allows NGOs and trade unions to bring companies to court on their behalf. It also establishes that companies must undertake corrective action where they become aware of trafficking and other human rights violations. Going further, it establishes a competent authority to enforce the law, a critical element that particularly reporting and disclosure laws are often missing.

Due diligence laws often do not spell out specific duties in detail. For some, this avoidance is important to ensure that the due diligence process does not become a box-ticking exercise, while others are concerned that overly generic obligations may lead to companies evading their responsibilities.[9] Therefore, the exact measures that companies must undertake to fulfil their legal obligations are highly context specific. They can include supply chain mapping; conducting on-the-ground inspections; requiring suppliers to engage with sector-wide or local sustainability initiatives; and seeking third party auditing or certification.

The shift toward mandatory due diligence is a welcome evolution and it indicates a recognition that corporate action can have a positive influence on the reduction of forced labour, but that meaningful action will not be broadly taken voluntarily or quickly enough for policy makers. Against this diverse legislative landscape, each state will need to define its own approach. However, as earlier laws against THB in supply chains are implemented, we need to learn from these laws, their impact, understand 'what works' better, and be ready to adjust, improve and harmonize these laws.

[9] Lise Smit et al, "Study on due diligence requirements through the supply chain", Directorate General for Justice and Consumers, European Commission, January 2020. Available at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.