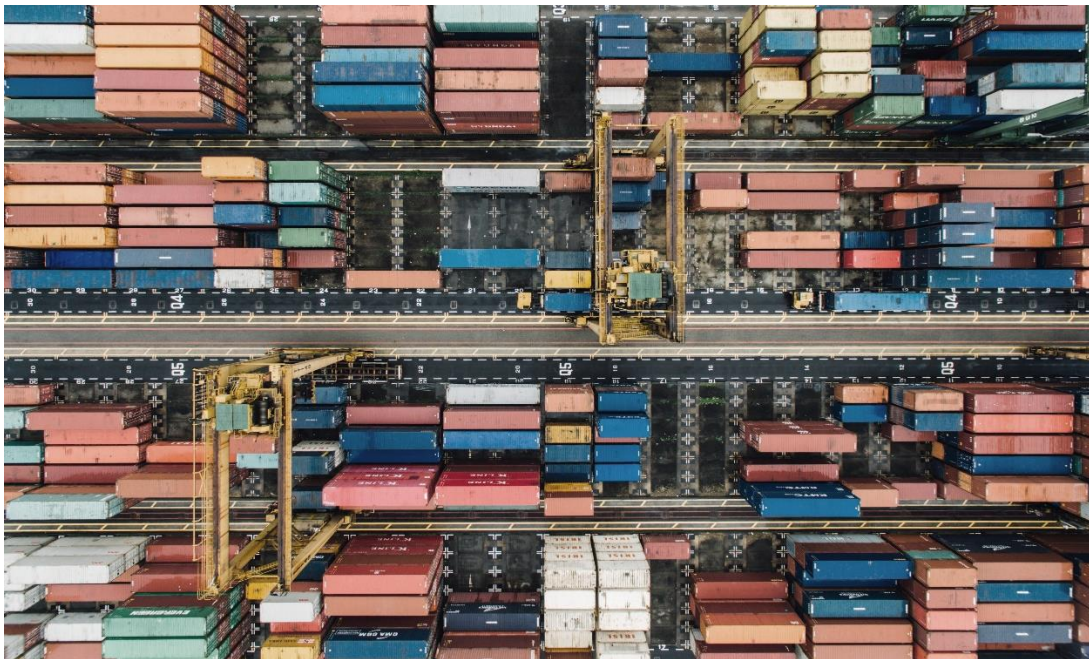


# ***Towards an EU import ban on forced labour and modern slavery***



Discussion paper

commissioned by the Greens/EFA Group in the European  
Parliament

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## **Executive Summary**

**The European Parliament has called for a new EU instrument that allows for import bans on products related to severe human rights violations such as forced labour or child labour.** This tool could be a **complementary** measure to the EU legislation on corporate human rights and environmental due diligence along supply chains which is currently being developed.

Around 25 million people are estimated to be in forced labour around the world. The products they make often land in the European market, and so we unwillingly consume and contribute to this exploitation. A case in point: there are credible reports of human rights abuse against Uyghurs, including forced labour and re-education camps, in the Xinjiang Uyghur Autonomous Region in China. More than 80 international brand-name corporations have been reported to allegedly profit directly or indirectly from Uyghur forced labour in their supply chains.

Countries like the US have tools at their disposal to do stop those products from landing in their market, while we in Europe still lack such tools. In fact, in early January 2021, three countries announced measures to prevent or stop imports linked to forced labour from the Xinjiang region in China - namely the US, Canada and the UK. The US announced that it would use its Tariff Act to **block imports** of all cotton and tomato products from the Xinjiang region of China over forced labour concerns; Canada announced that as part of its actions to address the Xinjiang human rights abuses, it will also **prohibit imports** of goods produced wholly or in part by forced labour; while the UK announced measures to prevent its businesses from being involved in human rights violations in Xinjiang.

The EU on the other hand, just weeks before had rushed to conclude an investment agreement with China which includes very limited, and wholly unenforceable human rights and labour rights provisions.

Nevertheless, the EU is ahead of these other countries in other ways: it is currently developing a proposal for a law on corporate human rights and environmental due diligence. This landmark law is expected to introduce requirements for all companies operating in the EU to take steps to prevent and address human rights and environmental harm along their value chains. The law should also give victims possibility to bring companies to court in Europe when harm occurs. However, certain products stemming from severe human rights violations should not enter the EU market at all. Therefore, in addition to this upcoming due diligence law which is focused on company behaviour, a related instrument that focuses on products is needed, allowing for restrictions or bans.

The import ban instrument would be a **complementary measure** to the upcoming EU due diligence law, giving the EU an additional tool to guarantee that no products being sold in the EU are tainted with grave human rights abuses. It would allow us **to immediately stop goods at our borders** when we have reasonable suspicion that they are made with forced labour. The onus would then be on the company in question to prove that this is not the case, or to take action to remedy the situation on the ground before these products are allowed in again.

Experience from the US shows that such bans can be extremely effective and lead quickly to remedy for workers. However, we need to learn from the lessons of the US approach regarding the things that have not worked so well: we need to do it in a more transparent, remedy-centred way, that focuses on the impacts for people, and is not a hidden protectionist tool. Conditionality for the lifting of bans or easing of restrictions should always be that companies take measure to improve the situation on the ground; in this regard the remediation of victims should always be prioritized. The instrument needs to be therefore carefully designed and applied.

**In this paper, we examine different options for an EU mechanism.** In particular, we consider whether the import bans could be introduced via:

- EU foreign policy, i.e. the new EU Human Rights Sanctions mechanism
- amending our Free Trade Agreements and other trade mechanisms
- a new Internal Market instrument
- a new instrument with a trade legal basis

A brief examination of each option's pros and cons leads to the conclusion that **a new EU instrument with a trade legal basis** would be preferred.

Such instrument could draw heavily on previous instruments such as the Regulation protecting intellectual property rights. A deeper evaluation and analysis of what works well and what doesn't (e.g. the absence of remediation required) in the US Tariff Act can lead to more detailed options for an EU approach.

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*“Too many products are being sold in the EU based on exploitation of people and the environment outside our borders.*

*While the EU is taking steps forward to create new due diligence rules for corporations to respect human rights and environment throughout their supply chains, we need to consider additional tools that allow for decisive action in cases of severe human rights violations.*

*Although we cannot always control companies' behaviour, nor address all human rights concerns around the globe, we can and should stop products at our borders from coming in when they are made through forced labour and require the importers to show evidence that the situation is addressed.”*

**MEP Anna Cavazzini**

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## **Introduction**

The European Union has an explicit human rights mandate<sup>1</sup> and sees itself as a global player. Increasingly, the European Parliament has asked the European Commission to table a proposal for an instrument for an import ban for goods linked to severe human rights violations such as forced labour or child labour.<sup>2</sup>

This paper briefly explains similar systems that exist in the US and elsewhere. It will then explore options for such a system to be developed at EU level, aiming to provide elements for discussing further political options.

## **Existing human rights-based import bans**

### **United States**

In the US, section 307 of the Tariff Act (19 U.S.C. § 1307) has banned the importation of goods linked to forced labour since 1930.<sup>3</sup> Specifically, it prohibits the importation of all goods and merchandise mined, produced, or manufactured wholly or in part in any foreign country by forced labour, convict labour, or/and indentured labour under penal sanctions, including forced child labour. The agency tasked with implementing the law, US Customs and Border Protection (CBP), rarely applied and enforced the ban until quite recently. This is at least in part because for most of its history, the law included a significant carve out called the “consumptive demand loophole” which allowed goods made with forced labour into the U.S. if domestic production of the good was not sufficient to meet domestic demand. The United States Congress closed this loophole in 2016, and since that time enforcement efforts have increased substantially. (See also Annex I)

### **Canada and Mexico**

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<sup>1</sup> See especially articles 2, 3, 5 and 21 of the Treaty on European Union (TEU) and article 205 of the Treaty on the Functioning of the European Union (TFEU)

<sup>2</sup> See e.g. European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements (2009/2219(INI)), available at [https://www.europarl.europa.eu/doceo/document/TA-7-2010-0434\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-7-2010-0434_EN.html), Parliamentary question on the ban on the import into the EU of products manufactured in Laogai camps (E-002019-13), available at [https://www.europarl.europa.eu/doceo/document/E-7-2013-002019\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-7-2013-002019_EN.html), Motion for a Resolution on the import of goods into the European Union produced in the People's Republic of China at forced labour camps generally known by the name Laogai (2013/2708(RSP)), available at [https://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/inta/re/1001/1001885/1001885en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/re/1001/1001885/1001885en.pdf), European Parliament resolution of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility (2015/2038(INI)), available at [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0298\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0298_EN.html), Parliamentary question on EU ban on imports of goods produced using slavery (E-003922/2019), available at [https://www.europarl.europa.eu/doceo/document/E-9-2019-003922\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2019-003922_EN.html) and European Parliament resolution of 17 December 2020 on forced labour and the situation of the Uyghurs in the Xinjiang Uyghur Autonomous Region (2020/2913(RSP)) available at [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0375\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0375_EN.html)

<sup>3</sup> Until the Trade Facilitation and Enforcement Act, the 1930 law had little practical effect given that an exemption existed for products that the United States could not or insufficiently, make, the so-called consumptive demand. See also Annex I

Under the 2018 United States–Mexico–Canada Agreement (USMCA), each country is required to put measures in place to prohibit the importation of goods manufactured wholly or in part by forced or compulsory labor. In the event that no adequate Regulation is passed, this could even delay the USMCA's entry into force. While the U.S. already has such system in place, this requirement means that both Canada and Mexico now have to ensure they establish appropriate regulatory and administrative infrastructure for the enforcement for the prohibition of forced or compulsory labour.<sup>4</sup>

In 2012, Canada had already adopted a narrower provision allowing the custom authorities to block goods which are manufactured or produced wholly or in part by prison labour.<sup>5</sup> More recently, lawmakers introduced a Canadian version of the Modern Slavery Act<sup>6</sup> which amends the Custom Tariff, wholly excluding goods from entering Canada if they are manufactured by forced labour or child labour. At this stage, it is unclear whether Mexico is contemplating similar legislation.

### **Between a protectionist measurement and a human rights tool**

The US Tariff Act and its recent application are sometimes seen as an extension of other (foreign) policy objectives. For example, the majority of Withhold Release Orders (WRO's) recently being issued are against Chinese companies. Of the 13 WRO's issued in 2020, 9 were destined for Chinese companies, all of them situated in Xinjiang and linked to the Uyghur internment camps. Next to these WRO's, two were issued against Malaysian companies and two against Taiwan-owned distant water fishing vessels.

The U.S. Customs and Border Protection (CBP), the government agency tasked with enforcement, enjoys wide discretionary powers to enforce the Act. It may or may not choose to issue a WRO and equally the scope of a WRO remains solely at the discretion of the CBP. This is especially apparent in the case of the recent WRO's linked to state sponsored prison labour in Xingjian Uyghur Autonomous Region which initially targeted 5 economic entities, while only recently this got expanded to the whole region for specific products (tomato and cotton).<sup>7</sup>

Hence the issuance of WRO's might not be sufficiently evidence-based, uniform and apolitical. The initiative of the US Congress for an annual report by the commissioner of the CBP is a critical first step toward greater transparency and accountability, and human rights groups have proposed additional measures for greater oversight, accountability and impact.<sup>8</sup>

Finally, the WROs under the US Tariff Act are a relatively blunt tool which simply stops goods at the border. Initially, this tool was developed in order to protect national companies from

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<sup>4</sup> It is unclear whether the US will pursue a similar course of action under other trade agreements, including TTIP or alternative agreement.

<sup>5</sup> See Canada Border Services Agency, available at <https://www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-6-eng.html>

<sup>6</sup> Bill S-216 (an updated version of the earlier tabled Bill S-211) demonstrates similarities with other Modern Slavery Acts in terms of reporting, but departs from its UK and Australian counterparts Slavery Acts as it also amends the Customs Code.

<sup>7</sup> CBP, Withhold Release Orders and Findings, available at <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings>

<sup>8</sup> Goodweave (2017), Closing the "Consumptive Demand Loophole": Amendment to the Tariff Act of 1930, available at <https://goodweave.org/closing-the-consumptive-demand-loophole-amendment-to-the-tariff-act-of-1930/>

competing against unfair trade practices abroad. Once a WRO is issued, authorities simply mandate no further import of the companies involved in forced labour practices.

There is hence no requirement to remediate harm and improve working conditions of the people involved in these cases. On the contrary, WRO's may have "devastating consequences for workers and local economies. For example, instead of dealing with the underlying forced labour issues, companies may shut down and lay off their workers, leaving workers in a worse situation".<sup>9</sup>

At the same time, as the Top Glove case demonstrates, (see also Annex II) the remediation that can be expected to the migrant workers in that case also indicates the potential positive effects WRO's can have on human rights. While the statute provides the option to simply block goods at the border, additionally the CBP can issue a "formal finding" which requires a higher level of evidence of forced labour and can result in the goods being seized (not just excluded from the US) or even to apply penalties.<sup>10</sup> Although these remedies are not necessarily human rights compatible, they have led in the Top Glove case to significant opportunities in terms of remediation for victims and provide a strong signal to other companies that do not comply with workers' rights.

For both Top Glove ownership and other (potentially) targeted entities, (regaining) access to the lucrative US market provides a significant incentive to remedy the situation on the ground. Although this has sparked increased interest by lawmakers and civil society to consider this as a tool to combat forced labour in the context of human trafficking, the definition of sufficient remedial steps remains discretionary, with limited space for input from rights holders or civil society. It also has to be noted that the law foresees for a civil course of action (a form of administrative liability) which puts victims and their networks partially in the driving seat of a procedure.

## **Towards an EU approach: options for EU action**

The EU has not yet put in place a similar instrument banning goods linked to severe human rights violations like forced labour or child labour, despite various calls from the European Parliament in this regard.<sup>11</sup> While the EU has on occasion established specific regimes which includes mechanisms that do render it possible to ban the import of specific goods which are produced from facilities or even territories or carried by specific vessels not conforming to a specific standard, none of them are comparable nor carry the broad mandate of the US Tariff Act. This section will explore in more detail some key considerations for such an EU approach.

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<sup>9</sup> Brundey A (2020) Using the masters tools to dismantle the masters house, available at: <https://corpaccountabilitylab.org/calblog/2020/8/28/using-the-masters-tools-to-dismantle-the-masters-house-307-petitions-as-a-human-rights-tool>

<sup>10</sup> CBP Fact Sheet: Forced Labor Procedures, available at <https://www.cbp.gov/trade/document/fact-sheets/fact-sheet-forced-labor-procedures>

<sup>11</sup> See Footnote 2

As mentioned above, the EU has a clear Human Rights mandate, and the Charter of Fundamental Rights provides the Union with a specific instrument on human rights outlining in greater detail the values of the European Union. While article 5 of the Charter explicitly states the prohibition of slavery and forced labour, it currently does not serve as a basis for EU trade or import policy. In result, the EU currently does not have any regime such as in the US to prohibit imports of goods made with forced labour or other severe human rights violations.

Looking at similar import bans, the development of a human rights-based import ban system in EU should be tailored to the EU's requirements under the WTO (see Annex III). As for the internal policymaking, this paper further explores different routes, namely being anchored on the EU's Common Foreign and Security Policy, the EU's trade policy or the European Single Market.

The European Union offers a diverse set of possibilities with regards to the enforcement of an import ban. In what follows below is a non-exhaustive summary of certain EU Regulations that can serve as an example in the view of implementing an effectively enforceable legislation mechanism for an EU import ban on products linked to forced labour or other severe human rights violations.

#### **a) Common Foreign Security Policy**

The EU's Common Foreign and Security Policy (CFSP) include restrictive measurements such as sanctions. Governments of non-EU countries, as well as companies, groups, organisations, or individuals can be subject to sanctions, including restrictions on imports and exports. Previously, these measures were country based, and targeted 14 countries. Recently, the EU adopted Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, in analogy with the US Magnitzky act of 2012 though with some significant differences compared to it.

The new horizontal sanction regime marks a clear direction in the combat of global human right violations. This may provide opportunities in terms of further evolvement of the regime into a broader sanction regime, or alternatively, the political momentum for further deepening of the regimes may not at all be there in the foreseeable future.

However, the CFSP is characterized by a quite cumbersome and complex decision-making procedure driven by the European Council,<sup>12</sup> which will restrict the specific sanctions to a limited number of high profile cases of serious human right violations, providing limited recourse for individual complaints, a high evidentiary standard and being subordinate to broader foreign policy objectives.

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<sup>12</sup> The Commission has put forward a proposal inviting the European Council to take more decisions by qualified majority voting. This would make the CFSP able to engage in more fast and effective decision-making, though this would still not solve the limited capacity of the available sanction instruments of the CFSP that mainly aims at tackling specific individuals rather than also including companies or/and whole sectors. Available at <https://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-more-efficient-decision-making-in-cfsp>

## **b) Amending existing Trade mechanisms**

Some authors suggest embedding a human rights-based import ban in trade agreements or trade regimes.<sup>13</sup> Indeed, trade mechanisms increasingly offer the possibility of introducing import sanctions when being non-compliant with set labour standards by the European Union, although currently only on the level of a country, or a specific product or tariff line within the trade relations of that country.

However, both the presence, language and the material scope of different human rights clauses, or in the case of Trade and Sustainable Development (TSD) chapters, may vary across the trade relations of the EU, due to the different negotiations and political processes. In the case of Free Trade Agreements (FTAs) a suspension of the trade agreement might be considered when the 'essential elements' clause on human rights is violated. However, so far, the EU has not activated the clause to suspend trade preferences under any of its trade agreements resulting in the ban of specific products.<sup>14</sup> Similar to the human rights clause, TSD chapters have had limited influence in respect of enforcement possibilities.<sup>15</sup>

Similarly, the General Scheme of Preferences (GSP) for developing countries proposes a withdrawal mechanism of the trade preferences in case of violations of the Conventions in Annex 8 A or B (depending on the system of the beneficiary country). Like the FTAs, and despite withdrawal mechanisms put in place, these are rarely used in reality.<sup>16</sup> Furthermore, when applied, these prove lengthy, as the recent investigation and subsequent withdrawal of EBA preferences for Cambodia demonstrated to take 18 months between the start of the procedure and the entry into effect of the withdrawal of the tariff preference.

Suggestions on the introduction of targeted sanctions have been put forward in order to target only tariff preferences of an economic sector or individual exporter/company instead of the immediate withdrawal of tariff preferences for a whole country.<sup>17</sup> Nevertheless, current enforcement provisions of the different trade regimes diverge in substance and procedure. The human rights dimension focusses clearly on the respect of human rights by the trading country (FTAs) or beneficiary country (GSP) itself, and sanctions are tailored at country level or specific product or tariff lines. Inserting a ban relative to products made by forced labour would require significant adaptation (and institution building) to allow for sanctions on specific economic actors. Given that such amendments should happen across several trade regimes, there is an additional challenge of alignment across trade relations,

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<sup>13</sup> See Richardson B, Harrison J & Campling L (2017) Labour Rights in Export Processing Zones with a focus on GSP+ Beneficiary Countries, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603839/EXPO\\_STU\(2017\)603839\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603839/EXPO_STU(2017)603839_EN.pdf) and Portela C (2018) Enforcing Respect for Labour Standards with Targeted Sanctions, available at <http://library.fes.de/pdf-files/bueros/singapur/14689.pdf>

<sup>14</sup> EPRS (2019) Human rights in EU trade agreements The human rights clause and its application, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS\\_BRI\(2019\)637975\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf)

<sup>15</sup> Hradilova K & Ondrej S. (2018) Sustainable Development Chapters in the EU Free Trade Agreements: Searching for Effectiveness. *Journal of World Trade* 52 (6)

<sup>16</sup> See footnote 739, Marx A, Bright C, et al. (2019). Access to legal remedies for victims of corporate human rights abuses in third countries. Study requested by the European Parliament, DROI committee, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf), p118

<sup>17</sup> Marx A, Bright C, et al. (2019). Access to legal remedies for victims of corporate human rights abuses in third countries. Study requested by the European Parliament, DROI committee, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf), p118



and it would risk leading to a non-uniform model of enforcement which is contingent on the negotiating history of the GSP and each individual FTA.

Embedding such a mechanism within the specific trade regimes, bilateral, multilateral or unilateral would also generate difficulties for similar enforcement. The different trade regimes, and their respective human rights clause, TSD chapter or Annex 8 of the GSP Regulation vary amongst themselves in substantive scope, possibility for non-state actors to raise issues, procedure to follow etc. A human rights-based import ban would however benefit from a more streamlined horizontal process independent of the specific trade regime and its provisions.

### **c) A dedicated instrument using a Trade Legal Basis**

A standalone Regulation could be envisaged under article 207 TFEU itself to model and adapt an “Europeanised” version of the US Tariff Act. For example, the Regulation 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, could serve as inspiration as it provides for coherent definitions of goods which are exclusively or potentially used for these specific human rights violations. Nevertheless, the regulation is structured along intrinsic qualities of a specific product (e.g. can it be used exclusively or partially for torture or capital punishments), whereas the type of instrument desired here would need to look beyond the product itself and assess evidence on the production process (e.g. shrimp can be cultivated with or without forced labour).

#### **Instruments for Torture ban**

The anti-torture instruments Regulation, based on Article 207(2) of the Treaty on the Functioning of the EU, introduced a regulatory instrument in the fight against capital punishment and torture. This Regulation operationalizes aims set out in international and European human rights instruments<sup>18</sup>. Set out in Regulation (EU) 2019/125, it prohibits exports, transit and imports of goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. The Regulation was initially adopted as Regulation (EC) No 1236/2005 and was amended afterwards.

The Regulation provides for a prior authorization regime for goods (in annex III and III A) which is conditional on the knowledge of the supplier about the intended use and the prohibition of the transit of goods altogether (Annex II) and goods in case the transporter knows that the goods will be used for torture or capital punishment (again Annex III and IIIA). The Regulation also establishes a coordination mechanism for Member States' experts and the Commission to exchange information and to discuss questions of interpretation;

The regulation is based on the specific nature of the goods which are allocated to different annexes based on whether they are inherently abusive and thus should not be traded at all

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<sup>18</sup> See article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

or whether they can have legitimate uses in which case trade in these goods is subject to certain restrictions.<sup>19</sup>

The obligation of compliance is placed upon the exporters. The competent authorities in the Member States are responsible for the enforcement of the Regulation by laying down penalties on possible infringements that need to be effective, proportionate and dissuasive. These national penalties include both administrative and criminal sanctions such as fines or confiscation of goods by persons and entities alike.<sup>20</sup>

A new and dedicated instrument could provide for coherent definitions of forced labour and modern slavery or even broader human rights violations across different trade regimes. For the normative scope, reference can be made to international instruments such as specific ILO conventions and specific UN instruments.<sup>21</sup>

Procedurally, any system should abide by the due process constraints by WTO (see more in Annex III) as well as the due procedural rights under the European Charter of Fundamental Rights of the European Union. This would include the rights to be heard before any decision that could negatively affect the concerned importer and the right to good administration in general. In that sense, the standard of proof and who bears the responsibility of that proof should be in relation with the policy objective of banning goods made by forced labour. In comparison, while US Tariff Act mandates a reversal of the burden of proof to the concerned importer to secure the release of their goods, the system does not make it excessively difficult either.

In this light, Regulation 608/2013<sup>22</sup> concerning customs enforcement of intellectual property rights offers an interesting template on customs border procedures, as it satisfies the necessary internal and external constraints, while allowing the detention or suspension of release of goods which are suspected of infringing an intellectual property right.<sup>23</sup>

The implementation and enforcement of the ban could be complemented and facilitated by monitoring by civil society organisations, but in order to do that in an efficient way, it is necessary for third parties to have improved access to customs data. This would mean for instance a requirement that companies that import goods into the EU disclose the name and address of the manufacturers to customs authorities and publicly as well.

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<sup>19</sup> Annexes II, III and IV of the Report from the Commission on the review of Regulation (EU) 2019/125, available at [https://ec.europa.eu/fpi/sites/fpi/files/documents/com\\_2020\\_343\\_f1\\_report\\_from\\_commission\\_en\\_v2\\_p1\\_1089601.pdf](https://ec.europa.eu/fpi/sites/fpi/files/documents/com_2020_343_f1_report_from_commission_en_v2_p1_1089601.pdf)

<sup>20</sup> *ibid*

<sup>21</sup> Specifically Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Social Economic and Cultural Rights, ILO Forced Labour Convention, 1930 and ILO Abolition of Forced Labour Convention, 1957

<sup>22</sup> See also the predecessor Regulation 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, as it provides for a simpler and more straightforward text and procedure which could be helpful when considering a standalone instrument.

<sup>23</sup> See especially the articles 17 to 23 which lay out procedural steps which can be considered similar to the Withhold and Release Orders under the US Tariff Act.

Finally, given that the bulk of the legwork will still remain by national customs authorities, it would be advisable to provide some role for the Commission to ensure coherent application of the rules.<sup>24</sup>

### **Intellectual Property Rights Enforcement Regulation**

The Intellectual Property Rights (IPR) Enforcement Regulation provides (revised and) harmonized procedural rules for customs authorities to enforce intellectual property rights framework, based upon articles 114 and 118 of the TFEU.

Regulation 608/2013 replaces previous regulation 1383/2003 and specifies the range of IP Rights and infringements that are covered, contains provisions for (IP) right holders on how to ask protection to customs, determines procedures for customs to follow in case of identification of goods suspected of infringing an IPR, provides provisions for cooperation and exchange of information between customs and right holders and includes measures to ensure that the interests of legitimate traders are protected.

More specifically, the regulation sets out a common procedure for all kinds of IPR infringements falling within the scope of the regulation. It set out the conditions for customs action where goods are merely suspected of infringing IPRs and also sets out measures to be taken against goods that have been found to infringe IPRs. In addition, it also improves the availability of information to custom authorities to make such an assessment and ensures that information can be shared between custom authorities through a central database.

#### **d) Internal Market instrument**

Finally, specific import bans equally exist on the internal market such as the EU Timber Regulation (EUTR) and the procedures against Illegal, Unreported and Unregulated (IUU) Fishing. The EUTR sets out mandatory procedures for those trading in timber within the EU including a prohibition on placing illegally harvested timber and products derived from illegal timber on the EU market. Regulation 1005/2008 aims to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. This Regulation comprises a catch certification scheme, provisions on port state control, mutual assistance and the establishment of a Community alert system, an EU IUU vessels list and a list of non-cooperating third countries.

Both Regulations (EUTR and IUU) provide interesting insights on how to implement such a system accordingly and might further complement any approach on the exchange of information between national authorities, provide a common risk assessment for specific regions as well as a public list similar to the US Withhold and Release Order list. However, caution should be made as both Regulations are based on respectively a treaty article protecting the Environment and an article laying the basis for the Common Agricultural Policy. Both may provide insufficient basis for an intervention logic protecting human rights across different economic sectors.

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<sup>24</sup> See for example articles 31 to 33 of the Regulation.

A more general cross-sectoral instrument on the internal market could be based on article 114 TFEU which would allow “measures for the approximation” (also known also as harmonisation) of national rules regarding the establishment and functioning of the internal market. This is the same basis as the Regulation 608/2013. However, with currently only the Netherlands having adopted legislation that allows for the banning of products made with child labour,<sup>25</sup> it remains to be seen whether this would provide for sufficient basis.

## **Conclusion**

The idea to ban specific products that are at odds with overriding policy commitments of the EU like environmental protection or protection from torture is not new to the EU policy toolbox. However, an EU regime, similar as the US Tariff Act, banning products made by severe human rights violations like forced labour is missing to this day.

While the other regimes which ban products might offer an appealing introduction, they quickly run into problems as they would require a different intervention logic or even a different treaty basis. Rather than amending other policy domains, it would thereby be advised to develop a specific Regulation with a trade legal basis establishing a mandate to withhold the release of goods which are suspected to be made or carried by forced labour.

Such instrument could be inspired by previous instruments such as the Regulation protecting intellectual property rights for the procedural part, as well as the Regulation banning instruments for torture for the substantive part. A deeper evaluation and analysis of what works well and what doesn't (e.g. the absence of remediation required) in the US Tariff Act can lead to more detailed options for an EU approach. Conditionality for the lifting of bans or easing of restrictions should always be that companies take measure to improve the situation on the ground; in this regard, the remediation of victims should always be prioritised. Bans should generally be targeted against individual companies or specific products where it has been proven there is abuse rather than entire sectors or countries, in order to minimize the potential for unforeseen adverse impacts for workers and communities on the ground.

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<sup>25</sup> See Wet Zorgplicht Kinderarbeid, available at <https://www.eerstekamer.nl/g370000/1/j9vkvfj6b325az/vl3khw8f3aoo/f=y.pdf> and for a FAQ/critique see MVO Platform, 2019, Update: Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law, available at: <https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>

<b>Instrument</b>	<b>Legal Basis</b>	<b>Advantages</b>	<b>Disadvantages</b>
Common Foreign and Security Policy	21 TEU	Existing Regime	Decisions are based on unanimity in the Council and proposed by Member States and High Representative Decisions are also subject to foreign policy and security considerations. Issues of widespread, systematic or otherwise of serious concern is a very high bar to meet.
Regulation (EU) 2020/1998 ("Magnitzky Act")	21 TEU		
Free Trade Agreements (FTAs)	207 TFEU	Some FTAs already propose specific sanctions	Great diversity of formulations and enforcement mechanisms between agreements, which makes it difficult to enforce.
Regulation 732/2008 (General System of Preferences - GSP)	207 TFEU	Has an enforcement procedure which covers human rights	System is designed to seek policy change at country level, and doesn't lend itself.
Regulation 2019/125 (Torture Ban Regulation)	207 TFEU	Provides for a ban on specific products	The regulation works with a specific list of products which can be exclusively or partially used for torture.
Regulation 608/2013 (IPR Protection)	114 and 118 TFEU	Provides robust and tested procedural rules as well as an accepted system of exchange of information between national customs authorities.	Deals with Intellectual Property Rights.
Regulation 995/2010 (EU Timber Regulation)	192 TFEU	Well-developed system capable of banning imports from specific products and vessels	Current Regulation is under environmental treaty basis which would pose difficulties to expand to Human Rights.
Regulation 1005/2008 (IUU Fishing Regulation)	43 TFEU	Well-developed system capable of banning imports from specific products and vessels	Current Regulation is under Common Agricultural Policy which would pose difficulties to expand to Human Rights.

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## **Annex I: the US approach**

Part of the limited enforcement throughout most of the US Tariff Act's history was due to a provision, which was in effect until 2016, stipulating that due to "consumptive demand"<sup>26</sup>, the issuance of a WRO was stopped in case the US did not produce enough of that single good for domestic demand.<sup>27</sup> The Trade Facilitation and Trade Enforcement Act (TFTEA) repealed this provision, and combined with increased capacity for administrative enforcement, a significant increase in the amount of WRO's issued was witnessed, namely from 38 in between 1991 and 2015 to 27 in the four years between 2016 and 2020. Of the 13 WRO's issued in 2020, 9 were against Chinese companies, all of them situated in Xinjiang and linked to the Uyghur internment camps. In addition, two were issued against Malaysian companies and two against Taiwan-owned distant water fishing vessels.

Under section 307, to start an investigation, the CBP can start from own information or receive a petition from anyone<sup>28</sup> showing 'reasonably but not conclusively' that (actual or expected) imports were made at least in part with forced labour. This even extends to imports that have not taken place but are expected to take place.<sup>29</sup> Any petition to CBP must contain at least, a) a full statement of the reasons for the belief, b) a detailed description or sample of the merchandise, and, c) all pertinent facts obtainable as to the production of the merchandise abroad.<sup>30</sup>

The CBP then investigates the credibility of the allegations, and if deemed appropriate ("reasonably but not conclusively") issue a WRO which detains goods at the border and effectively blocking entry into the United States. In addition to WROs CBP can issue something called a "formal finding." It requires a higher level of evidence of forced labour and can result in the goods being seized (not just excluded from the US) or even apply penalties.<sup>31</sup> The investigation remains largely non-public, which has been widely criticised. Some say this is in in large part intentional, as the lack of transparency helps to guarantee that section 307 is not used as a tool for trade restrictions.<sup>32</sup>

In the event U.S. customs issues a WRO against a foreign exporter, the domestic importing company can provide evidence that a detained shipment was not produced with forced labour and have 90 days to do so accordingly<sup>33</sup>. If the proof of 'admissibility' has not been considered convincing enough, appeal is still possible by filing a 'protest' of the decision to

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<sup>26</sup> The initial Act specified that it did not apply to goods that were not "mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States."

<sup>27</sup> Brundey A (2020) Using the masters tools to dismantle the masters house, available at: <https://corpaccountabilitylab.org/calblog/2020/8/28/using-the-masters-tools-to-dismantle-the-masters-house-307-petitions-as-a-human-rights-tool>

<sup>28</sup> There are no specific rules on standing, so this is therefore irrespective of that person being a business, an agency, or a private individual, whether a US citizen or not

<sup>29</sup> 19 C.F.R. § 12.42 (e), available at: <https://www.govinfo.gov/content/pkg/CFR-2011-title19-vol1/pdf/CFR-2011-title19-vol1-sec12-42.pdf>

<sup>30</sup> 19 C.F.R. § 12.42 (b)

<sup>31</sup> CBP Fact Sheet: Forced Labor Procedures, available at <https://www.cbp.gov/trade/document/fact-sheets/fact-sheet-forced-labor-procedures>

<sup>32</sup> See N.A. Kuplewatzky, 2016. An appeal for targeted regulatory protection of human rights

<sup>33</sup> CBP Factsheet, available at [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2.pdf)

'exclude' the imported goods. As a last resort, if the CBP denies the protest, further redress in the Court of International Trade is possible.<sup>34</sup> The statute equally provides for an annual report by the CBP, which should detail how many times in the past year goods made with forced labour were denied entry in the US market under section 307.<sup>35</sup>

Although most WROs have been issued against individual manufacturers/exporters, WRO's can equally be issued against international vessels, such as the WRO issued against the fishing vessel Da Wang in August 2020,<sup>36</sup> or against whole regions that produce a certain product linked to forced labour practices, such as the WRO against all Turkmenistan Cotton or products produced in whole or in part with Turkmenistan cotton, issued in May 2018.<sup>37</sup>

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<sup>34</sup> See S. Bell, 2016. The US Prohibition on Imports Made with Forced Labour: The New Law Is a 'Force' to Be Reckoned With

<sup>35</sup> Goodweave (2017), Closing the "Consumptive Demand Loophole": Amendment to the Tariff Act of 1930, available at <https://goodweave.org/closing-the-consumptive-demand-loophole-amendment-to-the-tariff-act-of-1930/>

<sup>36</sup> CBP (2020), CBP Issues Detention Order on Seafood Harvested with Forced Labor, available at <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-seafood-harvested-forced-labor-o>

<sup>37</sup> CBP Withhold Release Orders and Findings, available at <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings#>

## **Annex II: Two emblematic cases under the US Tariff Act: Top Glove & Hetian Taida Apparel**

A widely publicised WRO was issued against the world's largest rubber glove manufacturer, Top Glove Corp Bhd in Malaysia, following allegations of forced labour. The WRO is directed towards two of Top Glove's subsidiaries, Top Glove Sdn Bhd and TG Medical Sdn Bhd. Although issued before the SARS-Cov-19 pandemic, the actual import ban remained intact even in a context significantly increased demand of gloves for medical use. Although the WRO remains in place at time of writing, Top Glove said it expected to resolve the WRO by the end of 2020 and that it would remediate recruitment fees – as much as \$34 million (136 million ringgit) to be paid to 10,000 workers -- and would improve workers' accommodations.<sup>38</sup>

On the 30<sup>th</sup> of September 2019, the CBP issued a WRO against Hetian Taida Apparel, located in Xinjiang province. The Chinese government is allegedly violating human rights of the Uyghurs and other Turic-Islamic minorities.<sup>39</sup> The WRO concluded that forced labour was used within an internment and forced labour camp in China's Xinjiang province. The WRO also mentions that Badger Sport, formerly importing university logo goods from Hetian Taida Apparel, failed to perform any labour rights due diligence before placing orders. Badger also failed to disclose this information to its licensor universities, an additional violation of Badger's licensing obligations.

Badger still denies the elaborate evidence of this forced labour practices. However, they did agree on taking remedial actions, amongst them a contribution of 300.000 USD to human rights organizations working to aid the victims of the Chinese government's abuses in Xinjiang province. With regards to this alternative solution, it is important to understand that full remediation, from a worker rights perspective, is not achievable in this case. According to workers' rights groups, "any attempt to aid and support the affected workers runs the risk of subjecting them to retaliation by the Chinese authorities. The best available substitute is for Badger to contribute to organizations working broadly to aid victims of the repression in Xinjiang."<sup>40</sup>

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<sup>38</sup> The Business Times (2020), available at: <https://www.businesstimes.com.sg/companies-markets/top-glove-to-pay-rm136m-in-remediation-fees-to-migrant-workers>

<sup>39</sup> Congressional-Executive Commission on China (2020) Staff Research Report: Global Supply Chains, Forced Labor, and the Xinjiang Uyghur Autonomous Region, available at <https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/CECC%20Staff%20Report%20March%202020%20-%20Global%20Supply%20Chains%2C%20Forced%20Labor%2C%20and%20the%20Xinjiang%20Uyghur%20Autonomous%20Region.pdf>; Zenz A (2019) Wash Brains, Cleanse Hearts': Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang's Extrajudicial Internment Campaign, Journal of Political Risk, 7 (11), available at <http://www.jpolrisk.com/wash-brains-cleanse-hearts/>; Ryan F, Cave D & Ruser N (2018) Mapping Xinjiang's 'Re-Education' Camps, Australian Strategic Policy Institute, available at <https://www.aspi.org.au/report/mapping-xinjiangs-re-education-camps>; Human Rights Watch (2019) World Report 2019: Events of 2018: China, available at <https://www.hrw.org/world-report/2019/country-chapters/china-and-tibet>

<sup>40</sup> Workers Rights Consortium (2020) WRC Factory Investigation Heitan Taida Apparel Co., LTD., available at <https://www.workersrights.org/factory-investigation/heitan-taida-apparel-co-ltd/>



## **Annex III: WTO compatibility**

The EU, much more than any other trading block, is by statute bound to the multilateral rule-based system<sup>41</sup> of trade. Any EU ban on imports linked with human rights abuses should be tailored to the rules under WTO, the successor of GATT. As a general rule, the WTO rules out trade restrictions. However, article XX from the predecessor GATT agreements clarify that such restrictions are permissible when the measure is “b) necessary to protect human, animal or plant life or health”, or falls under the more narrow sections allowing trade restrictions “e) relating to the products of prison labour” or “(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;”

Applying an article XX (b) exception is guided by the chapeau of the article, namely that such measures are not applied in a manner which would constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.<sup>42</sup> While the US Tariff Act has not as such been challenged, Mitro points out, that the two WTO Shrimp-Turtle decisions provide a more detailed framework for evaluating the use of article XX in general.<sup>43</sup>

Although the decisions interpret Article XX(g), it does shed some light on the broader substantive coverage of chapter XX. Human health (as under XX (b)) should be read in light of the “contemporary concerns of the community of nations”. This means that Article XX(b) can be interpreted to cover policy concerns such as forced labour, child labour etc. which are response on a broad international consensus, which can be captured by either universal instruments or widely ratified conventions established by the UN or the ILO. In such cases, a unilateral import ban will be likely to be considered an acceptable policy tool.<sup>44</sup> This stands in contrast of other deviations where such a broad consensus is not readily available,<sup>45</sup> and other measures are needed to substantiate WTO compliance.

Secondly, the two WTO Shrimp-Turtle decisions also provide some procedural guidance, of which perhaps issues related to transparency and the due process are most important. The lack of a forum to be heard, notification of review, a detailed explanation or an opportunity to appeal were identified in the Shrimp-Turtle I decision, characterizing the US actions as arbitrary discrimination. In comparison, section 307 does not show similar issues as the CBP allows for comments of foreign officials, adequate notice is given of decisions and there is an opportunity for review.<sup>46</sup> Any EU system banning specific imports on products made through child labour, forced labour or broader human rights violations should therefore align to international instruments in terms of definitions. The system should equally provide for due process for the affected operators.

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<sup>41</sup> See Article 21 (1) TEU

<sup>42</sup> Chapeau article XX GATT

<sup>43</sup> Mitro (2002) *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, American University Law Review, 51 (6), available at <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1151&context=aulr>

<sup>44</sup> It has to be noted that the “consumptive demand” clause of the Tariff Act before the TFTEA amendment would have been extremely difficult to conciliate with the preamble of GATT Chapter XX.

<sup>45</sup> E.g. cigarettes, asbestos or hormone-based meat.

<sup>46</sup> 19 C.F.R. § 12.42 (d) and (g)