Responsible Contracting Project

RCP Policy Brief

Forced Labor Trade Bans and HRDD: Why Responsible Contracting Matters

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Executive Summary and Recommendations

This Policy Brief analyzes the relationship between import bans designed to block goods made with forced labor from entering the United States (US) and European Union (EU) markets and international commercial contracts. Specifically, it reviews Section 307 of the 1930 US Tariff Act, the 2022 Uyghur Forced Labor Prevention Act (UFLPA), and the 2024 EU Forced Labour Regulation (EUFLR or the Regulation) and addresses the key question: How can principles of responsible business conduct in international supply contracts help companies to comply with or prevent infractions of forced labor bans? It makes two central arguments and offers recommendations in relation to each argument for companies.

1. To avoid violating forced labor bans, companies should carry out effective human rights due diligence (HRDD) to identify, prevent, mitigate, and remediate instances of forced labor in their supply chains.

    a. The text of the EUFLR indicates the Regulation should be interpreted in light of other legislation, including the EU Corporate Sustainability Due Diligence Directive (CSDDD or the Directive). As such, it is advisable that companies seeking to avoid violating the EUFLR undertake comprehensive HRDD, as set out in the CSDDD.

    b. While neither the Tariff Act nor the UFLPA mention HRDD in their texts, evolving practice and government-issued guidance counsels that the best way to avoid violating the Tariff Act or the UFLPA is to carry out HRDD, which, at its core, is about prevention of adverse human rights impacts, including forced labor.

    c. Rights holder-focused remediation, a key element of HRDD, helps to avoid and lift trade bans. While remediation is not explicitly contemplated in the Tariff Act or the UFLPA, US practice is trending towards requiring remediation that, even if it does not result in the restitution of stolen wages to victims, at the very least removes forced labor indicators from the importing company's supply chain. In the EU, the relationship between the EUFLR and other corporate sustainability laws in effect requires companies to undertake rights holder-focused remediation both to avoid and to lift import bans.

    d. According to the CSDDD and widely accepted standards, such as the United Nations Guiding Principles on Business & Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines), disengagement or exit because of adverse human rights impacts should be pursued only as a last resort. The EUFLR reflects these standards. Applying this exit-as-a-last-resort principle to forced labor is not always straightforward, however. In this regard, private-sector forced labor and state-sponsored forced labor need to be treated differently. In the latter case, where it is harder to mitigate risks and to remedy or prevent the recurrence of forced labor, disengagement and responsible exit will often be the right path forward. In the former case, where it is more possible to conduct effective HRDD, the last-resort principle should hold.

2. Responsible contracts are critical for effective HRDD and provide tools for companies hoping to ameliorate the risk of forced labor in their supply chains and avoid enforcement under forced labor bans.

a. Commercial contracts are essential components of risk management. Companies routinely use their contracts to implement and enforce their human rights and environmental (HRE) policies across borders. However, as we have explained elsewhere, traditional, risk-shifting contracts are not fit for purpose when it comes to supporting effective HRDD.[2] To be effective, contracts should operationalize a shared-responsibility approach to protecting human rights and, more specifically, protecting workers from forced labor.

b. Responsible contracts operationalize the shared-responsibility principles enshrined in the UNGPs and the OECD Guidelines. The three core principles of responsible contracting are:

   i. Responsible allocation of risks and obligations (risk-sharing, not risk-shifting): The buyer and the supplier commit to working together to address human rights problems as they arise.

   ii. The buyer commits to engage in responsible purchasing practices that support the protection of human rights. The supplier commits to doing the same in contracts with its own suppliers and subcontractors.

   iii. The buyer and the supplier commit to prioritizing rights holder remediation ahead of traditional contract remedies such as order cancellation, suspension of payments, or contract termination. And, if termination or disengagement becomes necessary to prevent harm, then exit will be responsible, meaning that measures will be taken to mitigate the adverse impacts of termination.

   Aligning contracts with these principles facilitates trust, transparency, dynamic communication, and cooperation, all of which are critical for effective HRDD.

3. Companies wanting to reduce their exposure to trade ban enforcement while increasing the resilience of their supply chain should:

   i. Implement HRDD processes across their operations and supply chains.

   ii. Familiarize themselves with the core responsible contracting principles and work with legal counsel to integrate these principles into their contracts as part of their HRDD.

   iii. Review the table below to understand how responsible contracts enable effective prevention and remediation, which can (1) reduce the risk that

[2] Sarah Dadush, Daniel Schönfelder & Michaela Streibelt, *What the EU Corporate Sustainability Due Diligence Directive (CSDDD) Says About Contracts* N.Y.U. J. L. & Bus. (forthcoming, Spring 2025); Sarah Dadush, Daniel Schönfelder & Bettina Braun, *Complying with Mandatory Human Rights Due Diligence Legislation through Shared-Responsibility Contracting: The Example of Germany's Supply Chain Act (LkSG)*, Contracts for Responsible and Sustainable Supply Chains: Model Contract Clauses, Legal Analysis, and Practical Perspectives, (Susan Maslow & David Snyder eds., ABA Business Law Section, 2023); Sarah Dadush, *Prosocial Contracts: Making Relational Contracts More Relational*, 85 LAW & CONTEMP. PROBS. 153 (2022); David V. Snyder, Susan A. Maslow & Sarah Dadush, *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply chains, Version 2.0*, 77 Bus. Law. 115 (2022). For the RCP Toolkit, click here.

an investigation would escalate and result in the issuance of a ban (pre-ban) and (2) expedite resolution after a ban has been issued (post-ban).

<table>
<tr><th>Phase of Action</th><th colspan="2">Human Rights Due Diligence (HRDD)</th><th>Responsible Contracts</th></tr>
<tr><td rowspan="2">Pre-Ban: Before investigation launched and ban is issued</td><td>EU Forced Labor Regulation</td><td>US Tariff Act & UFLPA</td><td rowspan="2">Traditional contracts incentivize suppliers to hide problems by making them solely responsible for upholding human rights and environmental (HRE) standards and by prioritizing traditional remedies, such as order cancellations, suspension of payments, and termination.

Responsible contracts foster trust and transparency and enable prevention by:

• Committing the parties to work together to address forced labor risks as they arise; and

• Committing the buyer to support the supplier via responsible purchasing practices.

Responsible contracts support effective remediation by:

• Setting out a roadmap for remediation; and

• Placing human rights remediation ahead of traditional contract remedies.</td></tr>
<tr><td>Conducting effective preventive measures as part of HRDD can:

• Reduce the occurrence of forced labor, thus reducing the risk of enforcement.

• Potentially prevent escalation of investigation when forced labor is indicated.

• Allow imports to continue.

Conducting effective remediation measures as part of HRDD can:

• Potentially prevent escalation of investigation if forced labor is indicated; and

• Allow a company to continue to import even if the goods were found to have been made with forced labor.</td><td>Conducting effective preventive measures as part of HRDD can:

• Reduce the occurrence of forced labor, thus reducing the risk of enforcement.

Conducting effective remediation measures as part of HRDD can:

• Effective remediation will not impact enforcement, as tainted goods cannot enter the US market, regardless of remediation efforts. However, remediation may help to expedite a ban modification as discussed below.</td></tr>
</table>

Phase of Action	Human Rights Due Diligence (HRDD)		Responsible Contracts
Post-Ban: After ban is issued	**Conducting effective remediation to eliminate forced labor indicators and address rights holder grievances can:** • Lead to the authorization to resume shipping and importing of goods into the EU.	**Conducting effective remediation to eliminate forced labor indicators and address rights holder grievances can:** • Expedite the modification or lifting of a WRO with respect to future shipments. (Goods that have been sized because they're made with forced labor are never allowed into the US).	• Same as above.

I. Introduction

An alarming 17.3 million individuals globally are exploited in private sector supply chains, alongside 3.9 million subjected to forced labor imposed by states.[3] Import bans that stop goods made with forced labor from entering a particular market are one type of regulatory measure that governments have taken to address this enormous problem. This Policy Brief reviews import bans in the United States (US) and the European Union (EU), including Section 307 of the 1930 Tariff Act (Tariff Act), the 2022 Uyghur Forced Labor Prevention Act (UFLPA), and the 2024 EU Forced Labour Regulation (EUFLR or the Regulation). Companies that directly or indirectly, knowingly or unknowingly, use forced labor in their goods, risk seeing those "tainted" goods seized at the border.

The US has taken this path with the US Trade Facilitation and Trade Enforcement Act, which amended Section 307 of the Tariff Act, and with the UFLPA. The Tariff Act prohibits the import of goods that are produced in whole or in part using forced labor.[4] The UFLPA is a

[3] ILO, Global Estimates of Modern Slavery: Forced Labor and Forced Marriage.

[4] Although the Tariff Act primarily targets private sector use of forced labor, the CBP issued a Withhold Release Order (WRO) against all cotton produced in Turkmenistan in 2018, noting the government's complete control over

specific application of the Tariff Act that establishes a rebuttable presumption of forced labor for products with a nexus to the Xinjiang Uygur Autonomous Region of China (XUAR) and/or from a list of prohibited entities due to allegations of state-sponsored forced labor against Uyghurs, Kazakhs, and other members of Muslim minority groups in the region.

In 2024, the EU adopted the EUFLR, which applies a country-agnostic approach to forced labor but also extends to exports. The EUFLR introduces specific considerations for state-imposed forced labor. For instance, when prioritizing products for investigation, authorities must consider, among other factors, whether the products are suspected to be made with state-imposed forced labor.[5] State-imposed forced labor warrants differential treatment because it is much harder to stop or remediate; accordingly, allegations of state-sponsored forced labor also have a lower evidentiary burden, making it easier for authorities to find a violation. Neither the EU nor the US regime consider the size of the importing company. In other words, unlike with the EU Corporate Sustainability Due Diligence Directive (CSDDD), all companies, no matter how large or small, sophisticated or unsophisticated, are subject to the bans.

We advance **two central arguments** in this Policy Brief:

First, to avoid violating forced labor bans, companies should carry out effective HRDD to identify, prevent, mitigate, and remediate instances of forced labor in their supply chains. Even though the Tariff Act, UFLPA, and EUFLR contain no explicit HRDD requirement, they should be interpreted to encourage and provide incentives for companies to address human rights risks through comprehensive and iterative HRDD. This is particularly the case for companies that are subject to multiple regulatory regimes, e.g., companies that are subject to both forced labor bans and due diligence laws. HRDD is a dynamic, ongoing process whereby companies identify, prevent, mitigate, account for and, where appropriate, remediate potential or actual adverse human rights impacts in their supply chain.[6] The EU's recently passed CSDDD makes HRDD a legal requirement for large companies doing business in the EU.

The dominant note of HRDD is prevention, which is, after all, the best form of risk management. If nothing bad happens, there is nothing to fix. However, prevention sometimes fails and bad things like forced labor occur. That is when two other key aspects of effective HRDD kick in: remediation and responsible exit. As defined in the UNGPs, human rights "remediation or remedy" refer to: "both (a) processes of providing remedy for an adverse human rights impact, and (b) the substantive outcomes that can counteract, or make good, the adverse impact. These outcomes may take a range of different forms, such as apologies, restitution, injunctions or guarantees of non-repetition."

While remediation is not expressly required in the US trade-related provisions, US Customs and Border Protection agency (CBP) guidance since 2017 and current practice indicates that companies hoping to have a WRO modified or lifted must, at the very least, remove the forced labor indicators from the supply chain (note that this is distinct from restorative forms of remediation that make rights holders whole, as discussed in further detail below). The EUFLR

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the cotton industry. See for more information: https://www.cottoncampaign.org/turkmenistan. Also, Section 321(b) of the Countering America's Adversaries Through Sanctions Act (2017) presumes that all goods made in whole or in part in North Korea were made with forced labor in violation of Section 307; in 2022, CBP detained goods from two Chinese companies for using North Korean labor. See for more information: https://www.cbp.gov/newsroom/national-media-release/cbp-enforces-countering-americas-adversaries-through-sanctions. A majority of Tariff Act enforcement actions, however, have addressed forced labor in the private sector.

[5] Article 14 (2) (a) EUFLR.

[6] *See* UN Guiding Principles on Business and Human Rights; OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

gives implementing HRDD a central role in the investigations around import bans and—consistent with the CSDDD, the UNGP and the OECD Guidelines—this includes remediation and responsible exit. Such an interpretation is also supported by the Recitals.

Across the EU and US trade legislation, we then have three ways to address forced labor:

1) Elimination of forced labor indicators: Here the focus is on ceasing the forced labor and removing indicators of forced labor that exist now.
2) Prevention: Here the focus is on taking measures to prevent future instances of forced labor from occurring, e.g., implementing effective monitoring or remediation systems.
3) Remediation: Here the focus is on making forced labor victims whole, for example through restitution, apologies, and other restorative remedies.

Although prevention and remediation are ideal, this may not always be possible in practice, particularly in the context of state-sponsored forced labor. In these instances, companies should focus on exiting responsibly by taking appropriate measures to mitigate the impact of disengagement on adversely-affected individuals.

We acknowledge that HRDD regimes and trade sanction regimes are in a degree of tension with each other because HRDD is an obligation of means ("best efforts") while trade bans in the US and the EU context are generally obligations of results ("strict liability"). Companies subject to both regimes can reconcile their risk-management systems and processes, including their contracts, by implementing effective HRDD so that they can (a) adhere to the requirements of the CSDDD, which will allow them to more effectively (b) prevent forced labor in their supply chains, (c) access the information they need to respond to investigations of trade violations, and (d) show that they have provided remedy. In other words, our argument is that companies that are subject to both regimes should prioritize effective HRDD as that is the best strategy for avoiding, and the best defense against accusations of, trade violations.

Second, responsible contracts can play a vital role in supporting HRDD by encouraging trust and transparency in the supply chain relationship. Commercial contracts are critical vehicles for carrying out HRDD across supply chains. Companies routinely use their contracts to implement their human rights and environmental (HRE) policies across borders. However, as RCP has explained elsewhere, traditional, risk-shifting contracts are not fit for purpose when it comes to supporting effective HRDD.[7] To be effective, contracts should operationalize a shared-responsibility approach to protecting human rights and, in particular, protecting workers from forced labor. Responsible contracts operationalize the shared-responsibility principles enshrined in the UNGPs and the OECD Guidelines. Aligning contracts with these principles facilitates trust and transparency, two critical currencies for identifying, preventing, and remediating adverse impacts occurring in the supply chain. In other words, when properly implemented, responsible contracts can help companies to adhere to legal requirements and avoid violating forced labor bans (*see* table above to understand how responsible contracts help companies implement effective prevention and effective remediation to reduce the risk of enforcement pre-ban and expedite resolution post-ban.

We proceed as follows: In Sections II and III, we review the US and EU trade bans,[8] examining how private-sector and state-sponsored forced labor are addressed differently in each legislative regime. We also discuss the role of remediation and responsible exit in situations of state-

[7] *See* note 2 above.

[8] Note that we discuss the US trade bans first in each section because they were passed first in time and have a longer history of implementation.

sponsored forced labor. Section IV shows how the core responsible contracting principles can help companies prevent and address violations of the Tariff Act, UFLPA, and EUFLR regimes. Section V concludes.

II. Forced Labor in the Private Sector

1. The Tariff Act

The Tariff Act is enforced through Withhold Release Orders (WROs), which can be imposed by the CBP on evidence that "reasonably, but not conclusively" shows that the goods were made in whole or in part with forced labor (thus violating Section 307). Once a WRO is imposed, and for as long as the CBP investigation is underway, any goods that have been detained and any additional shipments of the same product may not enter the country. The importer can re-export the goods that have been seized or contest the WRO by showing that the goods were not made with forced labor. If the importer cannot show that the detained goods are free of forced labor and CPB finds conclusive evidence of forced labor, then it can issue a Finding. A Finding is made public in the Customs Bulletin and the Federal Register. CBP can also seize the detained goods, commence forfeiture proceedings, and levy fines against the company for noncompliance.[9]

1.1. Role of effective HRDD, in general

Although passed in 1930, Section 307 of the Tariff Act began to be enforced in earnest after the closure of the "consumptive demand" loophole in 2015.[10] In 2017, CBP issued guidance to importers, requiring them to exercise "reasonable care" when bringing goods into the country, which meant that importers were expected to understand where their goods were made, have in place some risk mitigation measures, and deploy internal and external audits to ensure ongoing compliance with this requirement.[11] More recent and comprehensive guidance refers importers to the Department of Labor's (DOL) Comply Chain page, which outlines a "social compliance system" comprised of eight steps: Engage Stakeholders and Partners, Assess Risks and Impact, Develop a Code of Conduct, Communicate and Train Across Your Supply Chain, Monitor Compliance, Remediate Violations, Independent Review, Report Performance and Engagement. In short, to show that goods were not made with forced labor, an importer needs to have access to information from within and visibility into its supply chain.

As should be clear from the overview of the CBP and DOL guidance above, CBP encourages importers to undertake an iterative HRDD process prior to and over the course of their import activities. Where importers suspect but cannot confirm the presence of forced labor (prior to the issuance of a WRO), they may choose to stop importing and conduct due diligence to ensure that forced labor is not present. By doing so importers can, should the CBP inquire, more confidently represent that their imports do not violate the Tariff Act.

How responsible contracting can help: As explained above, because responsible contracts commit the parties to work together to address forced labor risks, they foster more trusting and cooperative relations between buyers and their suppliers. This can give the buyer visibility into

[9] Fines can be based on the domestic value of the merchandise or, alternatively, two to four times this amount in cases of negligence and gross negligence, respectively. 19 U.S.C. § 1592. *See* https://www.cbp.gov/trade/forced-labor/frequently-asked-questions.

[10] The consumptive demand loophole allowed importers to overcome the ban on the import of goods made with forced labor if they could show that U.S. market demand for the product outweighed domestic supply. In practice, the consumptive demand exception shallowed the rule until it was closed in 2015.

[11] Informed Compliance Publication on Reasonable Care (2017)

the supply chain and access to the information necessary for them to respond to (defend against) a CBP investigation. To reiterate, if goods have been detained and an investigation is afoot, the only way for the importer to get the goods "in" is to show they were not made with forced labor; without access to information, there will be no way to respond to the investigation and the goods will never be allowed to enter the US market. HRDD (and, by extension, responsible contracts) may well involve increased costs for importers, including, in some cases, abstaining from continued shipping and carry the economic loss that entails if they identify forced labor in their supply chain and working with their supplier(s) to address the issue (versus "cutting & running"). However, this investment is beneficial on the back end as it should enable the importer either to avoid investigations altogether or, at a minimum, to better respond to investigations, which could stop investigations from escalating to a ban.

In stark contrast, contracts that place all the responsibility on the supplier for HRE problems, expect perfection, and, wielding the immediate termination stick over suppliers' heads, incentivize deception and non-disclosure. For example, in a traditional contracting posture, a buyer may be tempted to shift the risk for compliance to a supplier and contractually obligate the supplier to bear any costs associated with a trade ban, including replacing the goods and covering the cost of spoiled merchandise, delayed delivery, and fines. While this may seem to protect the buyer, it actually may increase the buyer's risk of costly disruptions in the supply chain, because forced labour issues are less likely to be proactively addressed. Risk-shifting to the supplier incentivizes the supplier to cover up potential forced labor concerns. When these are uncovered at the last minute, the buyer must deal with supply chain instability that will not only delay attempts to clear detained goods but could also affect other products the buyer is trying to sell in the United States, as well as its reputation.

1.2. Role of remediation, in particular

Although remediation is not required in the text of the Tariff Act, the CBP's policy in practice is that it will not modify or lift a WRO (let alone a Finding) until the forced labor indicators are removed.[12] The Remedy Project, in its analysis of CBP enforcement cases, notes that while the CBP claims that it "will not modify or revoke [a WRO] unless all forced labor indicators are remediated", the CBP guidance documents name but do not define the term "remediation." In practice, CBP uses the term 'Remediation' to describe the process of removing the 11 ILO indicators of forced labor rather than providing remedies (e.g. compensation) to affected rights holders.[13] In other words, using our terminology above, the CBP appears to be using "remediation" to refer primarily to eliminating forced labor indicators, although actions undertaken by companies sometimes include prevention and remediation (see case study below).

As CBP practice evolves, the guidance around prevention and enforcement seems to be moving toward a more robust concept of remediation. Drawing on DOL's Comply Chain tool, companies are encouraged to set up a robust social compliance system with provisions for immediate corrective action, including timelines for remediation and responsive measures, such as contract termination, for suppliers that fail to participate in remedial efforts.

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[12] For example, on September 19, 2023, CBP lifted a WRO against Supermax Corporation Bhd. and its wholly owned subsidiaries because the company demonstrated that it had "taken steps to remediate the forced labor indicators identified in its supply chain." On August 14, 2024, CBP lifted a WRO against Taiwanese flagged fishing vessel, Yu Long, because it had "taken numerous actions to remediate forced labor indicators within its fishing process," celebrating the modification as evidence of the "impact of CBP's enforcement efforts in driving remediation and eliminating forced labor from supply chains."

[13] Additionally, it is not always clear what evidentiary standard CBP applies to decide that indicators of forced labor have been removed. Advocacy organizations continue to monitor the substance of corporate remedial efforts, at times expressing concern that remediation is only forward-looking (getting rid of the forced labor indicator), as opposed to retroactive (making the rights holder whole).

In line with the UNGPs, the DOL's Comply Chain tool highlights the importance of a worker-driven approach, which ensures a more accurate understanding of labor conditions, often uncovering issues not evident through surface-level audits or reports.[14] Companies are expected to provide transparent, public reporting on social compliance measures *and* remediation efforts to demonstrate their commitment to ethical labor practices.[15]

Case study: In July 2020, CBP issued a WRO against Malaysian disposable glove maker, Top Glove. Soon after the WRO was issued, Top Glove retained Impactt Limited*, a UK-based human rights consultancy, to assess the presence of the ILO's forced labor indicators within their operations, propose Corrective Action Plans (CAPs), and monitor Top Glove's implementation of the CAPs on a quarterly basis from August 2020 to August 2021. The WRO was elevated to a Finding in March 2021, meaning that CBP found conclusive evidence of forced labor and that Top Glove was not able to import *any* gloves into the US. In April 2021, Impactt's reporting showed that Top Glove had made progress in eliminating indicators of systemic forced labor in its direct operations and had repaid recruitment fees in excess of $36.3 million to 12,676 current and eligible former workers. In September 2021, CBP modified the Finding, allowing the renewed import of disposable gloves by Top Glove. Top Glove's remediation process was transparent and multi-pronged, including elimination of the forced labor indicators, preventative measures to reduce future incidence of forced labor, and remediation. After an initial slow start (which led to the escalation from WRO to Finding), the company swiftly implemented of Impactt's recommendations, which included payments to migrant workers directly employed by Top Glove, the establishment of an independent grievance mechanism, and continuous public reporting on corrective actions. These actions were apparently instrumental in remediating the identified forced labor and allowing the company to resume import of the goods.[16]

How responsible contracting can help: As explained above, responsible contracts place remediation ahead of traditional contract remedies, such as suspension of payments, cancelation of orders, and contract termination. They set out a roadmap for eliminating forced labor indicators and promoting prevention and remediation. As the Top Glove example highlights, providing remedy was critical for modifying the Finding and allowing the company to resume importing goods into the US. Furthermore, the type of transparency demonstrated by Top Glove with respect to its remediation efforts, which was also critical for modifying the Finding, would be better supported by responsible contracts than traditional contracts that incentivize suppliers to hide, rather than disclose and address, problems.

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[14] The United States-Mexico-Canada Trade Agreement (USMCA) entered into force on June 1, 2020, [replacing the North American Free Trade Agreement]). Chapter 23 of the USMCA outlines the duties of each signatory to uphold labor rights, including to monitor for forced labor. Under Article 23.6, each State "shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor." The United States has already implemented this provision in the 1930 Tariff Act. HRDD and worker-centered provisions are embedded in the USMCA, including in the Rapid Response Mechanism, established to resolve allegations of worker rights violations at worksites and promote freedom of association and collective bargaining.

[15] *See* CTPAT, Stopping Forced Labor in the Supply Chain.

[16] The CAPs included making remediation payments to migrant workers who had paid recruitment fees to third-party agents to work at Top Glove. In addition, from September 2020 to July 2021, Impactt implemented a helpline for workers to verify remediation actions and raise any other concerns in a confidential manner.

2. The EU Forced Labour Regulation, as applicable to forced labor in the private sector

The EUFLR prohibits the import, export, or trade of products made with forced labor within the EU.[17] This applies to all stages of the supply chain, including the extraction, harvesting, production, and manufacturing processes.[18]

The enforcement of the EUFLR occurs in three stages. First, authorities—either the Commission or competent authorities in EU Member States—initiate a preliminary investigation based on third-party submissions or other available information regarding a potential violation of Article 3.[19] During this stage, the authorities may request information from importers regarding their HRDD to determine whether there is a "substantiated concern" of forced labor.[20] If the authorities find a substantiated concern, they proceed to the second stage—the "investigation" itself.[21] However, if no substantiated concern is found, or if the reasons that led to its existence have been eliminated, enforcement ceases.

A key distinction from the US is that in the EU, goods are not detained at the border during investigations. Companies can continue trading until the authorities make a final decision. The ban is enforced only at the third and final stage, when authorities determine that a product has been placed on the market, made available, or exported in violation of Article 3 and formally adopt a decision to that effect.[22] At this stage, companies are required to withdraw and dispose of products made with forced labor within a specified timeframe.[23] Unlike in the US, EU companies cannot re-export banned goods, as the ban applies to both imports and exports.[24] If a company fails to comply with a decision, enforcement is carried out by the lead competent authority in collaboration with customs authorities, and additional penalties may apply to non-compliant companies.[25]

There are different procedures for having a ban lifted, depending on the type of good. For goods of strategic or critical importance to the EU market, authorities may, instead of issuing an order to dispose of the product, allow detention at the border for a defined period—at the company's expense—while the company demonstrates the elimination of forced labor. If successful, the goods can then be released.[26] For all other types of products, the company can seek to have the decision revoked by proving that the products are no longer made with forced labor. If successful, the decision is revoked, and the company may resume importing or exporting the products.[27]

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[17] Articles 2 (7) and 3 EUFLR.

[18] *Ibid.*

[19] Article 14 (3) EUFLR.

[20] Article 17 (1) EUFLR. As per Article 2 (16) EUFLR, a substantiated concern means there is a reasonable indication, based on objective, factual, and verifiable information, that forced labor was likely used in the production of a given product.

[21] Article 18 EUFLR.

[22] Article 20 EUFLR.

[23] Article 20 (4)(b) and (c) EUFLR.

[24] Article 20 (4)(a) EUFLR.

[25] Articles 28-30 and 37 EUFLR.

[26] Article 20 (5) EUFLR.

[27] Article 21 EUFLR.

2.1. Role of effective HRDD, in general

While the text of the EUFLR does not impose an obligation for companies to conduct HRDD, companies seeking to avoid trade bans or lift existing ones are expected to demonstrate they are carrying out effective HRDD. This indirect requirement is evident from the EUFLR's provisions on company HRDD during investigations, the relationship between EUFLR and other EU and/or Member State laws, and its emphasis on HRDD as reflected in the recitals and in the obligation for the European Commission to issue guidelines on specific aspects of HRDD aspects.[28] Each of these aspects is addressed in turn below.

First, corporate due diligence plays a crucial role in the preliminary phase of investigations, during which the relevant authorities request information on the actions taken by companies to identify, prevent, mitigate, eliminate, or remediate risks of forced labor in their operations and supply chains.[29] This includes due diligence measures companies may have taken concerning the products under review, in line with the applicable EU legislation (e.g., the CSDDD), due diligence guidelines from the UN, OECD, ILO, and/or forthcoming guidelines from the European Commission.[30] The relevant authorities are instructed not to pursue an investigation if (based on the information available, including HRDD evidence submitted by companies) they determine that no substantiated concern of forced labor exists ***or*** that the original concerns have been addressed through HRDD measures.[31] In other words, even if forced labor indicators were initially present, companies that can demonstrate they have taken effective action to eliminate these indicators and provide remedy to rights holders, will be considered EUFLR-compliant. Therefore, under the EUFLR, HRDD serves as a key criteria for determining whether forced labor risks warrant imposing trade restrictions.[32]

Second, the EUFLR does not impose new due diligence requirements on companies already covered by the CSDDD or by national HRDD laws in the EU Member States.[33] Since these existing frameworks emphasize ongoing, effective HRDD, discourage irresponsible exit, and require that disengagement only be pursued as a last resort,[34] it is unlikely that the EUFLR establishes an (entirely) strict liability regime. Doing so would undermine the principle of legal certainty for economic actors who would be forced to navigate conflicting standards addressing the same issue of forced labor in supply chains. Moreover, given the prevalence of forced labor at tier-n of supply chains, requiring entirely forced-labor-free supply chains from the outset would be neither realistic nor proportionate.[35]

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[28] Article 11 EUFLR.

[29] Article 17 (1) EUFLR.

[30] Article 17 (1) (a,b,c) EUFLR.

[31] Article 17 (5) EUFLR.

[32] This interpretation is further supported by Recital 5 of the EUFLR, which emphasizes the role of HRDD: "The Union promotes due diligence in line with international guidelines and principles established by international organisations, including the ILO, the OECD and the United Nations (UN), to ensure that forced labour does not find a place in the supply chains of undertakings established in the Union."

[33] Article 1(3) EUFLR stating "This Regulation does not create additional due diligence obligations for economic operators other than those already provided for in Union or national law."

[34] See, for example, CSDDD Articles 10 (6) and 11 (7) on Responsible Disengagement and Article 12 on Remedy.

[35] Recital 26 EUFLR emphasises this general requirement of proportionality in EU law set out by Art. 5 (1) TFUE: "Competent authorities and the Commission should be guided by the principle of proportionality when implementing this Regulation. Competent authorities and the Commission should ensure, in particular, that all the measures and actions carried out during the preliminary phase of the investigation and during the investigation and those set out in the decision are suitable and necessary to achieve the desired purpose and do not impose an excessive burden on economic operators [companies]."

Third, the legislator seems to resolve this tension in favor of effective HRDD: the recitals emphasize the need for remediation[36] and responsible disengagement;[37] this is further supported by the provision that the European Commission must publish guidelines on the matter (such guidelines will provide guidance on HRDD, including best practices for bringing to an end and remediating different types of forced labor,[38] as well as on responsible disengagement).[39]

Finally, the legislator's focus on bringing forced labor to an end, remediating impacts, and promoting responsible disengagement seems to reflect a recognition of the limitations of tick box compliance procedures, which often fail to produce meaningful outcomes for rights holders.

As the Danish Institute for Human Rights points out, however, while EUFLR implementation and enforcement should not conflict with that of other legislations like the CSDDD, the EUFLR should also operate with a degree of independence from those other frameworks: the EUFLR should not create a "safe harbor" for companies that engage in due diligence but still fail to address underlying violations effectively.[40] Where violations occur and are identified, the obligations effectively harden into an obligation of results. Also of note, the Freedom Fund cautions against relying entirely on industry certifications or third-party audits during governmental investigations, as these mechanisms are often insufficient to address forced labor. As such, certifications should not preclude a finding of forced labor.[41] Similarly, regulators should not absolve companies of their duty to effectively address adverse human rights impacts[42] by relying on tick box due diligence processes alone.[43] The authors believe that it will require more than "cosmetic" HRDD to dispel "substantiated concerns" of forced labor under the EUFLR. To meet the effectiveness test for forced labor, HRDD measures must be adequate to identify and eliminate the indicators of forced labor and provide appropriate remedy to affected rights holders.[44] Responsible disengagement can be part of the HRDD process, but it should only be considered as a last resort.

How responsible contracting can help: Importers working to ensure compliance under the EUFLR, which clearly requires the same HRDD processes as the CSDDD, would benefit from

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[36] Article 11 (b); Recitals 3, 36, 45 EUFLR.

[37] Recitals 36, 59 EUFLR.

[38] Article 11 (a),(b) and Recital 36 EUFLR.

[39] Recitals 36 and 59 EUFLR.

[40] Danish Institute of Human Rights, Setting the Scene for an Effective Forced Labour Ban in the EU, November 2, 2023, p. 10: "The fact that the company exercises due diligence (voluntarily or to comply with the CSDD) should not prevent Competent Authorities from investigating and potentially sanctioning the violation – a key point not made sufficiently clear in the Draft Regulation of the Commission. In other words, the FL Ban should not provide a safe harbour for companies undertaking due diligence."

[41] Feedback on the European Commission's Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market, November 2022, p.3: ""given the well-researched and established shortcomings of third-party audits and similar measures, we strongly discourage placing any reliance on industry schemes, certification programs, multi-stakeholder initiatives, and third-party audits at any point in the pre-investigation, investigation, or enforcement process. In any event, those types of information should not be considered sufficient evidence to preclude a finding of a violation or to withdraw a finding."

[42] Article 3(o) defining "appropriate measures" as those "that are capable of achieving the objectives of due diligence by effectively addressing adverse impacts;" and 15 CSDDD requiring companies to " monitor the adequacy and effectiveness" of HRDD measures.

[43] Article 29(4) CSDDD. Formal diligence, without more, will not absolve a company of civil liability under the CSDDD.

[44] Targeted government guidance, which adapts broad human rights frameworks to specific industries and sectors, could support the realization of effective HRDD, as recently suggested by the NYU Stern BHR Center. *See* Cecely Richard-Carvajal, Setting Higher Standards: How Governments Can Regulate Corporate Human Rights Performance, p. 5 § 2.

the trust and transparency fostered by the shared-responsibility principles of responsible contracting. The EUFLR creates strong incentives for companies to develop and maintain a robust and responsive HRDD system. If authorities suspect forced labor, the company can head off a costly investigation by showing that its policies, processes, and outcomes are HRDD-aligned.

Responsible contracting operationalizes and supports effective HRDD processes, offering companies and their suppliers a roadmap for preventing, detecting, and addressing forced labor. Instead of placing the responsibility for compliance entirely on suppliers, which can encourage them to minimize or hide forced labor concerns when they arise, responsible contracting encourages the buyer and the supplier to work together to address forced labor risks as they emerge and requires the buyer to support the supplier in this endeavor, including through responsible purchasing practices. In short, responsible contracting encourages collaboration in the interest of prevention, which is crucially important for importers under the EUFLR.

2.2. Role of remediation, in particular

The EUFLR mentions bringing to an end,[45] eliminating[46] and remediating[47] forced labor impacts in several instances. Recital 36 defines remediation as the "restoration of affected persons or communities to a situation equivalent to or as close as possible to what it would have been had forced labor not occurred." Such remediation must be proportionate to the company's involvement in the forced labor, and may include financial or non-financial compensation to the affected individuals, as well as reimbursement for any costs incurred by public authorities for necessary remedial measures.[48] Further, Recital 3 underlines the importance of "the right to effective remedies" as a "human right" and as a "fundamental element" of "effective prosecution of crimes." Together, these provisions suggest that the EUFLR's approach to remediation aligns with that contained in the CSDDD and HRDD standards in general.

However, to clarify the exact role of remediation in the context of EUFLR, it is important to distinguish between two stages: situations where an importer's products are being investigated based on allegations of forced labor (pre-ban) and situations where a violation has been confirmed by the authorities and the company seeks to have the decision reviewed (post-ban).

In the pre-ban stage, evidence of a company's HRDD efforts, including the measures taken to bring forced labor to an end and remediate impacts, is crucial. Such evidence determines whether competent authorities will escalate an investigation beyond its preliminary phase.[49] Further, the failure by companies to provide such evidence in the course of investigations can be used by the competent authorities to establish a violation of Article 3 (Prohibition of products made with forced labour).[50] Conversely, a company that demonstrates that forced labor indicators have been identified and have been adequately remediated, can still import its products into the EU, even if those products are "tainted" by forced labor indicators. This is very different from the US Tariff Act, where tainted goods are never allowed in. In other words, in the EU, "tainted" products can

[45] Article 2 (3), 14 (4), 17 (1) EUFLR.

[46] Article 17 (5), 20 (5), 21 (3) EUFLR.

[47] Article 11 (b), 17 (1) EUFLR.

[48] Recital 36 EUFLR.

[49] Article 17 (5) EUFLR: "The lead competent authority shall not initiate an investigation [...] if [...] a substantiated concern has been eliminated, for instance due to, but not limited to, the applicable legislation, guidelines, recommendations or any other due diligence in relation to forced labour [...]being applied in a way that mitigates, prevents and brings to an end the risk of forced labour."

[50] Article 20 (2) EUFLR: "[...] The lead competent authority may establish that Article 3 has been violated on the basis of any other facts available where it was not possible to gather information and evidence pursuant to Article 17(1) [...]."

be "cleansed" through meaningful remediation for victims. This approach aligns with general HRDD requirements and reflects the legislators' intent to prioritize HRDD within the EUFLR.

Post-ban, once a decision on forced labor is made with regards to a product, the importing company is required to "eliminate" forced labor to lift the existing ban. Unlike the pre-ban stage, which employs the terms "bring to an end" and "remediate", at the post-ban stage, the legislator introduces the term "eliminate" without providing a definition.[51] This ambiguity raises the question of whether "eliminate" refers solely to ending forced labor or ***also*** providing remedy to victims, as required by HRDD. We argue that the latter interpretation is correct. For consistency and coherence, the HRDD requirements under the EUFLR should be read to align with those of the CSDDD and established international frameworks, such as the OECD Guidelines and the UNGPs, all of which treat remediation for victims as a fundamental component of addressing human rights violations. Moreover, it would be nonsensical to demand a lower standard of conduct ("bringing to an end") after a ban has been imposed than the pre-ban standard, which includes both "bringing to an end" and "remediating." For victims, such a distinction would be arbitrary and potentially harmful. The effective protection of victims' right to remedy—explicitly emphasized in the EUFLR—should not hinge on the timing of regulatory action. In light of these considerations, the standard of conduct both before and after the imposition of a ban should be uniform: forced labor must be brought to an end, and victims must receive remedy.[52]

How responsible contracting can help: Effective remediation is essential under the EUFLR, which mandates the elimination, remediation, or cessation of forced labor. Responsible contracting serves as the "instruction manual" for buyer-supplier relationships, providing a clear roadmap for comprehensive remediation, alongside other critical components of HRDD. This roadmap includes processes to: expedite the removal of forced labor indicators; support preventative measures to address root causes of forced labor and reduce future occurrences; and ensuring remediation to rectify past harm and restore victims to a situation equivalent, or as close as possible, to what it would have been had forced labor not occurred. Crucially, responsible contracts prioritize human rights remediation over traditional contract remedies like payment suspensions, order cancellations, or termination, which can deter suppliers from disclosing violations for fear of losing business. By implementing responsible contracting principles and taking remedial measures, importers can potentially avoid costly investigations by demonstrating that they have remediated identified forced labor. This would allow them to continue importing. Even after an import ban has been imposed, embedding the remediation-first principle into the contract should facilitate swift resolution of investigations and a timely resumption of import activities.

III. State-Imposed Forced Labor

1. Uyghur Forced Labor Prevention Act (UFLPA)[53]

[51] Articles 20 (5) and 21 (3) EUFLR.

[52] The absence of an explicit reference to remediation in the post-ban context appears to be a technical oversight by the legislator, which will hopefully be addressed in the forthcoming European Commission guidance under Article 11(b). If left unresolved, this gap would significantly weaken the protections for victims of forced labor.

[53] UFLPA Enforcement Statistics. In 2024, CBP detained 9,791 shipments under the UFLPA, with 4,573 released. The combined value of these detained shipments was $3.56B. Over half fell under the electronics category (4856). Shipments from Malaysia continue to have the greatest detained shipment value ($1.55 billion) by country of origin with Vietnam following, as these are important transit countries for Chinese foods.

The UFLPA aims to protect the US market from products made with state-sponsored forced labor found to be prevalent in the XUAR. It accomplishes this by imposing a rebuttable presumption that any goods made in whole or in part in the XUAR are made with state-imposed forced labor and may not be imported.

1.1. Role of effective HRDD, generally

HRDD can come into play in the UFLPA context when the importer seeks an admissibility or an exception review. If CBP has intercepted goods because it suspects that products or components have a nexus to XUAR or prohibited entities, an importer has two options to obtain release: proving that there was no XUAR sourcing or proving production without forced labour.

They can apply for an admissibility review to argue that the UFLPA's rebuttable presumption does not apply to its imports, i.e., no components have such a nexus. Key elements of an admissibility review include comprehensive supply chain mapping—from raw material extraction to finished goods—and ongoing risk assessment as a tool to show that the imported goods and their inputs are sourced completely from outside XUAR and have no connection to the UFLPA Entity List.[54] Robust supply chain mapping and tracing is particularly important for goods within the priority sectors identified for enforcement—currently, apparel, cotton and cotton products, silica-based products including polysilicon, tomatoes and downstream products, aluminum, PVC, and seafood. Risk assessments should be conducted periodically and records kept of these, as CBP may request them after a detention.[55] Required documents will vary depending on the product's specific supply chain, but generally can include those that identify participating parties (i.e., contracts), records of payments and transactions (i.e., invoices, purchase orders), and transportation documentation and country of origin of raw materials (i.e., packing list, manifests).[56]

If CBP has detained a shipment of goods that does have a nexus to XUAR or a prohibited entity, an importer must demonstrate by "clear and convincing evidence" during an exception review that the goods were not made with forced labor (i.e., there should be an exception to applying the rebuttable presumption of forced labor). A successful exception review requires the importer to demonstrate that it has complied with all guidance regarding the UFLPA[57] and that forced labor is not present in its supply chain, notwithstanding the fact that there is a nexus to the XUAR. During an exception review, CBP will likely request information about the importer's due diligence system in general, and supply chain tracing in particular. CBP recommends adopting policies that reflect their commitment to international labor standards and operationalizing these policies so they can effectively prevent, identify, and mitigate forced labor. Grievance mechanisms are another essential component of a functioning due diligence system, allowing workers to report abuses. They must be bolstered by non-retaliation policies so workers can report without fear of reprisals. CBP has identified several elements that make up an effective due diligence system which can support an exception review.[58] To receive an exception, importers must provide documents that describe the complete supply chain at all stages of

[54] Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China; Operational Guidance for Importers, Section IV. B and D; *see also*, Best Practices for Applicability Reviews: Importer Responsibilities.

[55] Best Practices for Applicability Reviews: Importer Responsibilities.

[56] CBP has a FAQ page which lists the type of documentation an importer should submit.

[57] Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China, Section VI, Guidance to Importers.

[58] Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China, Section VI, Guidance to Importers.

sourcing and manufacturing, and include source information regarding all raw materials, components, and suppliers. Such documents can include an internal code of conduct, supplier contracts, employee training materials, third-party audit findings, and publicly available reports. While this type of information and documentation is particularly relevant for CBP to determine whether to grant an exception to the rebuttable presumption, much (if not all) of the same data is relevant when CBP assesses the credibility of the information provided during an applicability review (where CBP determines whether the UFLPA is applicable by assessing whether the components have a nexus to the XUAR or prohibited entities).[59]

By the end of October 2024, only three exception requests had been received and none had been granted. This may be because the companies were unable to obtain sufficient information to meet the clear and convincing standard required to rebut the presumption. In practice, the focus of company compliance programs has been to terminate supply relationships that might have a nexus to the XUAR and/or listed entities. We discuss the human rights-related concerns associated with such termination below. While responsible disengagement may be the best option in cases of state-sponsored forced labor, any HRDD-aligned preventative measures available will be more effective for "de-risking" supply chains by bringing forced labor into the view of importers and reducing the incentives for (existing and potential) suppliers to hide things from the importer to get and keep the contract.

How responsible contracting can help: Under the UFLPA's strict liability regime, where goods even partially produced in the XUAR are presumed to have been made with forced labor and banned (and exceptions are virtually unattainable), prevention is paramount. Responsible contracting, by fostering trust, cooperation, and transparency, offers importers a critical advantage in avoiding enforcement. Regular communication with suppliers provides deeper supply chain visibility, enabling timely and cost-effective preventive and corrective measures. Furthermore, importers who actively cooperate in HRDD processes in their supply chains, rather than shifting all responsibility for forced labor risks to their suppliers, encourage timely reporting of potential XUAR links, which allows for the implementation of preventative measures *before* enforcement actions occur.

1.2 Role of remediation, in particular

Enforcement efforts around the UFLPA have generally not addressed remediation, perhaps recognizing that it is unrealistic to expect a company to provide remedy while it is still operating in the region. This is the special challenge with state-sponsored forced labor. No company can realistically be expected to prevent, stop, or remediate it. In its Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China, the US Department of Homeland Security (DHS) notes that "[s]ome abuses, including PRC-sponsored forced labor, may be impossible to fully remediate" and "[c]orrective action in such cases may be limited to terminating the relationship with the supplier." It advises, however, that when importers find themselves at this juncture, they should "mitigate impacts on the workers, where possible, . . . by communicating and engaging with the supplier and workers on the decision and timeline for disengagement."[60] Exit should, in other words, be responsible--even where state-enforced forced labor is involved.

[59] Operational Guidance for Importers, Section IV. A-C, E.

[60] Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China.

2. EU Forced Labour Regulation, as applicable to state-imposed forced labor

The EUFLR adopts a less categorical approach to state-imposed forced labor than the UFLPA, which explicitly establishes a rebuttable presumption that all products from the XUAR, or from specific suppliers, are made with forced labor. This may, in the end, be a distinction without a difference, with both the EUFLR and the UFLPA achieving similar practical outcomes. We will know more on this once the European Commission's guidance is published, along with its forced labor database, which will provide indicative, non-exhaustive, evidence-based, and regularly updated information about forced labor risks, highlighting high-risk entries in specific sectors or regions,[61] including regions with state-imposed forced labor.[62]

The EUFLR prioritizes the review of products associated with large-scale or severe forced labor cases, especially when state authorities are implicated.[63] It imposes a lower evidentiary burden on state-sponsored allegations, allowing authorities to find a violation based on available facts, even without direct evidence (i.e., information collected in the field or through interviews). This lower threshold would apply, for example, when an importer/company or public authority impedes the investigation, in which state-imposed forced labor is implicated, during the preliminary investigation.[64]

In practice, we anticipate that these requirements will result in a significant overlap between the EU's forthcoming forced labor database and the DOL's annual Lists of Goods Made with Child Labor or Forced Labor, which detail products and regions associated with forced and child labor.

How responsible contracting can help: The EUFLR's treatment of state-sponsored forced labor has yet to be fully defined. Nevertheless, importers are strongly incentivized to implement robust HRDD to avoid sourcing from supply chains affected by state-sponsored forced labor. EU authorities can impose import bans based on a lower evidentiary threshold in cases of large-scale or severe forced labor, even relying on indirect evidence. By implementing clauses that require cooperation rather than termination on identified issues , companies weaken the incentives for suppliers to hide links in their deeper supply chains to state-imposed forced labour and therefore better mitigate the risks of involvement in state-sponsored forced labor, all of which can help reduce the risk of enforcement actions. In situations where state-sponsored forced labor is suspected, responsible contracting supports effective remediation where feasible and facilitates responsible disengagement and exit where remediation is not appropriate or possible.

IV. How Responsible Contracting Can Help: Alignment with the US and EU Frameworks

We have discussed the requirements imposed by forced labor-related trade bans in the US and the EU and now turn to the role of responsible contracts in meeting their obligations. Responsible contracts are critical for establishing a framework for prevention, investigation, and, where practicable, remediation under the Tariff Act, the UFLPA, and the EUFLR. While responsible contracts alone cannot prevent forced labor or satisfy all obligations required to avoid forced labor bans, they encourage trust and transparency, and enable effective prevention and remediation. The cooperative, shared-responsibility approach promoted by responsible

[61] Article 8(1), Recital 31 EUFLR.
[62] Article 8 (2) EUFLR.
[63] Article 14(2) EUFLR.
[64] Article 20(2)(e) EUFLR.

contracts gives them a distinct advantage over traditional contracts, which companies often use to simply shift risks and obligations to their suppliers, and which are inadequate to meet the standards of effective HRDD or address forced labor risks.[65]

1. Shared responsibility

Responsible contracting revolves around embedding shared-responsibility principles in the agreement, including committing the parties to work together to identify and address forced labor, committing the buyer to engage in responsible purchasing practices that can support the supplier's HRE performance and cultivate more trust and collaboration between the parties, and committing both parties to place human rights remediation ahead of traditional remedies. As such, responsible contracting can foster robust compliance with applicable trade sanction regimes.[66]

Responsible contracts commit the buyer and the supplier to each conduct their own due diligence and to share the results of their analysis to better identify and mitigate risk. Unlike traditional contracts with zero tolerance clauses that can leave companies unaware of forced labor issues until it is discovered by authorities—often leading to operational disruptions and reputational harm—responsible contracts provide a framework that encourages ongoing communication and support: they clearly define exit as a last resort, give the supplier a right to cure, and oblige the buyer, where appropriate, to support the supplier in eliminating the forced labor indicators.[67] This builds trust and transparency across the supply chain, because suppliers know that they do not risk being immediately terminated for telling buyers about risks and problems.

It is hard to overstate the benefit of a shared-responsibility approach in the context of regimes like the Tariff Act and the UFLPA that essentially operate on a strict liability basis. Open communication between buyers and suppliers will make supply chain mapping and tracing more comprehensive and more accurate, it will also bring to light potential forced labor risks more quickly. An importer that has had ongoing, robust communication with its suppliers will be in a much better position to determine internally, and to demonstrate to CBP's satisfaction, that its goods have no nexus to XUAR or prohibited entities. It is essential to differentiate between the XUAR-related production at Tier 1 and deeper in the supply chain (Tier N). For Tier 1,

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[65] In detail: Dadush, Sarah and Schönfelder, Daniel and Braun, Bettina, Complying with Mandatory Human Rights Due Diligence Legislation Through Shared-Responsibility Contracting: The Example of Germany's Supply Chain Act (LkSG) (March 3, 2023). Contracts for Responsible and Sustainable Supply Chains: Model Contract Clauses, Legal Analysis, and Practical Perspectives, ABA Business Law Section 2023, Rutgers Law School Research Paper, Available at SSRN: https://ssrn.com/abstract=4389817. For the CSDDD, see: Dadush, Sarah and Schönfelder, Daniel and Streibelt, Michaela, What the EU's Corporate Sustainability Due Diligence Directive Says About Contracts (July 08, 2024). Available at SSRN: https://ssrn.com/abstract=4888176 or http://dx.doi.org/10.2139/ssrn.4888176.

[66] Responsible Contracting Principles. See these principles in action in the draft European Model Clauses (EMCs), the U.S. Model Contract Clauses (MCCs 2.0), the Supplier Model Clauses (SMCs) (for apparel suppliers), and the Tea Model Clauses. All are available on the RCP's website at the Toolkit. Several firms, associations, and standard setters are already implementing this approach.

[67] See EMC 2: (a) Corrective Action Plan: If Supplier caused or jointly caused the actual Adverse Impact, Supplier shall, in consultation with adversely affected Stakeholders, prepare, share with Stakeholders, and implement a corrective action plan, the Corrective Action Plan, to remedy the actual Adverse Impact within a reasonable time. In situations where Supplier did not cause or jointly cause the actual Adverse Impact, Supplier shall cooperate in implementing any Corrective Action Plan that Buyer may develop. (...) (b) Buyer contribution: If Buyer jointly caused the actual Adverse Impact by failing to meet its HREDD Obligations, it shall contribute to remediation by providing adequate financial and non-financial assistance to support the preparation and implementation of the Corrective Action Plan, that is at least proportionate to its contribution. (c) Buyer obligations: Regardless of whether Buyer jointly caused the actual Adverse Impact, it shall provide adequate assistance, including expertise, financial, and technical assistance to prepare and implement the Corrective Action Plan. (...)

responsible contracting and traditional contracting often lead to the same outcome—termination of the relationship—but responsible contracting provides the supplier an opportunity to remedy the situation by (responsibly) relocating production away from the XUAR. Regarding Tier N issues, responsible contracting fosters stronger collaboration with Tier 1, because a Tier N issue will be treated not as a breach of contract that allows termination but as an issue to be addressed collaboratively, increasing the likelihood of addressing issues further down the supply chain.[68]

2. Responsible purchasing practices

Responsible contracting is also crucial for addressing forced labor in the private sector where there is greater scope for private actors to exercise their leverage. It recognizes that the actions of buyers in the supply chain can significantly impact the ability of suppliers to implement HRDD-aligned practices on the ground. Therefore, it implements responsible purchasing practices such as fair pricing, reasonable assistance, fair payment terms, transparent forecasting methodologies, avoiding overwhelming suppliers with questionnaires, and reasonable order modifications' among other things.[69] Key aspects include setting responsible prices that account for the costs of preventing forced labor and avoiding last-minute order changes that could incentivize poorly controlled subcontracting to sites where forced labor risks are prevalent. When buyers understand how their own practices affect the working conditions at supplier level, addressing forced labor becomes more straightforward: the roles and responsibilities of both parties are clarified, and the buyers are held accountable for their contributions to the occurrence of forced labor and are obliged to take steps to mitigate, cease, and remediate it.

3. Remediation

When forced labor in the private sector is uncovered, buyers with a deep understanding of their supply chains and established relationships with suppliers are not only better able to implement targeted remediation measures but are also well-positioned to meet the enforcement expectations of frameworks like the DOL's Comply Chain program and the EU's CSDDD-aligned HRDD principles. Responsible contracting helps by providing a clear roadmap for remediation.[70]

As noted above, CBP generally requires evidence that forced labor indicators have been removed to modify or lift a WRO. There is some concern among advocates that the presence or absence of forced labor as a metric only requires importers to carry out remediation—to resolve the forced labor indicator. As discussed above, however, in practice the CBP has supported and publicly hailed efforts to obtain repayment of wages—a form of remediation that compensates the rights holder for the harm suffered. As shown, in the EU context, remediation clearly requires compensation to the rights holder. Robust communication, transparency, and prioritizing of remediation will allow importers to implement and demonstrate that they have acted in a timely fashion, which can expedite the lifting of a WRO.

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[68] In practice, companies tend to exercise caution when formulating language around forced labor issues in China, particularly in relation to the XUAR. The Chinese Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures, alongside the Law on Countering Foreign Sanctions, present significant challenges in directly phrasing contractual requirements on forced labor in the XUAR and engaging with suppliers at both Tier 1 and Tier N. These legal constraints create considerable obstacles for companies seeking to engage in responsible contracting while ensuring compliance with Chinese laws.

[69] Responsible Contracting Principles, see also SMC 3 on Buyers obligations.

[70] See EMC 2 as described in footnote 65.

4. Responsible exit

4.1. Responsible exit in cases of forced labor in the private sector

Responsible exit is generally seen as a corollary to remediation. With the right incentives, companies can be pushed to remediate first, pursuing termination only as a last resort. One fundamental question, therefore, is whether forced labor bans incentivize irresponsible exit contrary to HRDD. At first glance, such bans might be read to require supply chains be completely free of any of the ILO's indicators of forced labor, compelling companies to exit supplier relationships at any sign of forced labor running afoul of the bans. As explained above, however, both the EUFLR and the Tariff Act should be implemented in alignment with HRDD standards, which require continuous improvement focused on risk-prioritization, continuous stakeholder engagement, and effectiveness. In this approach, suspending or terminating a business relationship should be a last resort, pursued only when all other HRDD measures have failed or are unlikely to succeed, such as in cases of state-imposed forced labor.[71]

The EUFLR explicitly requires companies to focus on eliminating forced labor in specific products rather than simply switching suppliers.[72] It also mandates competent authorities to consider the potential consequences of disengagement, including impacts on affected workers, and encourages companies to adopt measures to mitigate those impacts and end forced labor.[73]

In the US context, where there is a reasonable suspicion of forced labor which would violate the Tariff Act and a WRO is imposed, importers currently must pause their imports until the suspicion is removed. There is no requirement to engage or remediate—unless the importer wishes to import the detained goods or continue to import in future. This is perhaps a key gap in US policy which arises out of the absence of HRDD legislation.[74] Nonetheless, private sector forced labor still allows for some remediation, which could help to lift a WRO. This is, however, highly unlikely in the state-sponsored context discussed below.

4.2. Responsible exit in cases of state-imposed forced labor

Trade law legislation focused on state-sponsored forced labor, like the UFLPA, is generally designed to influence corporate behavior by so significantly increasing the cost of doing business in certain jurisdictions that companies take their business elsewhere. On its face, this seems to be at odds with responsible contracting principles and with HRDD (generally and as set out in the CSDDD), which require that companies exit only as a last resort and take measures to mitigate the adverse impacts created by the exit.

The UFLPA and the sections of the EUFLR that focus on state-sponsored forced labor likewise sidestep the focus on remediation, acknowledging that remediation under conditions of state-sponsored forced labor is often challenging, if not impossible. A responsible contracting model

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[71] See, for example, UNGP Commentary to Principle 19, as well as Articles 10(6) and Article 11(7) CSDDD.

[72] Recital 48 EUFLR: "Changing one's supply chain, in the sense of relying on different suppliers, cannot be considered as a way to eliminate the forced labour regarding the product concerned."

[73] Recital 59 EUFLR: "The lead competent authorities should take into due consideration the risk of disengagement by economic operators who are either related to products or regions in the database, or who have had their product removed from the Union market, as well as the consequences on affected workers. Lead competent authorities should therefore, where appropriate, support economic operators in adopting and carrying out measures suitable and effective for bringing forced labour to an end. Responsible disengagement includes complying with collective agreements and articulating escalation measures."

[74] Note that the United States Government's National Action Plan on Responsible Business Conduct (NAP) makes clear the expectation businesses operating in the country follow the UNGPs and the OECD Guidelines. The NAP is not, however, enforceable by law and functions as a statement of principles.

recognizes that termination may be permitted and necessary under certain circumstances, for example, where a breach of an HRDD obligation has been identified and the party with the power to cure fails (or is likely to fail) to cure. The background conditions of state-imposed forced labor, where the controlling power of the state may make remediation impossible for companies, may be exactly the circumstance that justifies contract termination.

V. Conclusions

In this Policy Brief, we argue that companies looking to fulfill their obligations under the EUFLR, the Tariff Act, and/or the UFLPA should commit to comprehensive and robust HRDD processes. These processes should incentivize remediation but also allow responsible exit when the conditions of forced labor cannot effectively be addressed, as is often the case in situations of state-sponsored forced labor. Companies working to ensure that their policies (and policy implementation) are aligned with these laws should use responsible contracting principles to support HRDD processes, as these offer a solid framework for companies to identify, cease, and remediate forced labor risks within their supply chains. By sharing responsibility under a responsible contracting model, importers work with and support suppliers. This promotes trust and transparency, resulting in more comprehensive supply chain mapping and resilient HRDD processes across the supply chain. It bolsters a first line of defense by supporting effective prevention, which is, after all, the best type of risk management. Where forced labor is found, robust knowledge of the supply chain and relevant stakeholders allow companies to eliminate the conditions of exploitation and identify and make whole rights holders. Alternatively, if the forced labor is state-sponsored, the collaboration fostered in a responsible contracting framework can support responsible exit processes. In short, responsible contracting gives companies a second line of defense by promoting effective remediation and, where needed, responsible exit.[75]

[75] Companies may face the difficult decision of terminating or exiting the relationship with the supplier, if they determine that it is impossible to undertake the remedial steps they would attempt in cases of private sector forced labor. While termination of the contract without remediation at first looks to violate principles of HRDD, we conclude that in the instance of state-sponsored forced labor, where the state effectively renders impossible the opportunity to cure, termination serves an indirect preventative function. The uptake of responsible contracting principles, including termination, would create pressure on governments and reduce the likelihood of states resorting to or tolerating forced labor, especially if it leads to business isolation. Ultimately, the goal of disengagement in cases of state-imposed forced labor is not only to ensure that companies are not profiting from forced labor but also to send an action-backed message that contributes to reducing the global prevalence of such practices.