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**Threatening Ill-Gotten Gains: Analyzing the
Effectiveness of a Forced Labor Import Ban
in the European Union**

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Abstract

Increased globalization, interconnected markets, and complex supply chains have produced unprecedented economic gains for multinational corporations. This economic boon has often come with a hidden human cost in the form of forced labor. Such immoral business practices can infect a company's output at any point in its supply chain. Without adequate government regulation, these cycles of exploitation and abuse will continue to harm millions of people around the world. The good news is that several countries have taken the affirmative step towards curbing forced labor abuses by implementing forced labor import bans—cutting human rights abusers off from their lucrative domestic markets and encouraging companies to take a closer look at their own supply chains. The European Union is not yet among these countries. In 2021, the European Parliament called for a forced labor import ban to be implemented, but, as of the writing of this paper, this call remains unanswered. This paper argues that a forced labor import ban is a necessary component of any human rights oriented trade policy and that, as a major import market and human rights leader, the EU should implement such a ban. In laying out the case for a forced labor import ban, this paper addresses current forced labor estimates and scholarship on this kind of policy intervention, outlines the EU's legal basis for implementing a ban, discusses the current policy landscape around the world, and considers how the EU can build upon existing models to address global forced labor abuses.

To note, on February 23, 2022, the European Commission adopted a new due diligence directive on corporate sustainability. This paper was finalized before the introduction of this new due diligence package and does not substantively address this change in the EU policy landscape.

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I. Introduction

At the close of the Berlin Conference in 1885, King Leopold II of Belgium went from being the constitutional monarch of a small, newly formed European nation to being the overlord of a vast swath of land a continent away.¹ As sole ruler of the Congo—and oftentimes the sole or majority shareholder of the various companies that were granted lands to exploit there—Leopold sought to extract as much treasure from his corporate colony as possible, regardless of the amount of blood spilled to get it.² Leopold’s regime in the Congo relied on brutality and intimidation to construct a pervasive system of exploitation and forced labor.³ As profits flowed back to Europe and the project was mischaracterized as a humanitarian mission to Western audiences, upwards of half the Congolese population perished under the yoke.⁴ It took the collective efforts of reformers like Edmund Morel and Roger Casement to uncover and document these human rights violations to shake global audiences from their ignorance of where their profits and everyday goods were coming from and how they were made.⁵ In the face of mounting public pressure, Leopold agreed to divest his interests in the colony and sell it to the Belgian Government after twenty-three years of personal control.⁶

History has a tendency of repeating itself. Profit driven enterprises and individuals have continued to prey upon vulnerable populations and forced labor regimes continued to supply the world from the shadows.⁷ Like Casement and Morel before, however, individuals and NGO’s

¹ ADAM HOCHSCHILD, *KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* 86 (1998).

² *Id.* at 87.

³ *Id.*

⁴ NAT. GEO., *Belgian King Established Congo Free State* <https://www.nationalgeographic.org/thisday/feb5/belgian-king-establishes-congo-free-state/> (last visited Mar. 31, 2022).

⁵ HOCHSCHILD, *supra* note 1, at 277.

⁶ NAT. GEO., *Belgian King*, *supra* note 4.

⁷ Elliott Brewer, Note, *Closed Loophole Investigating Forced Labor in Corporate Supply Chains Following the Repeal of the Consumptive Demand Exception*, 28 KANSAS J. OF L. & PUB. POL’Y 86, 87 (2018).

have taken advantage of new technologies to document instances of forced labor and shine a light on human rights abuses in the global supply chain. This time around, it is not one man behind the scenes orchestrating this exploitative system. It is the entire globalized economy.⁸

In response to revelations of the scope and pervasiveness of forced labor abuses, some states have embraced a new policy tool to ensure that goods tainted with the stain of human rights abuses cannot enter into circulation: forced labor import bans (import bans). The first mover in this space was the United States, closing the consumptive demand loophole of the Tariff Act of 1930 and vesting Customs and Border Patrol (CBP) with the authority to stop imports from entering the country if there is the suspicion of forced labor at any point in its supply chain.⁹ Other countries have or are expected to follow the US in implementing measures geared towards prohibiting imports produced through forced labor.¹⁰ These same prohibited products “often land in the European market,” thereby making the European Union a prime target—both for reform and profit minded individuals.¹¹ To stamp out forced labor abuses throughout the supply chain, it cannot continue to be profitable. As long as the EU remains open to products that are produced with forced labor, that system of exploitation around the world will persist. If Europeans do not want to “unwillingly consume and contribute to this exploitation,” then the EU needs to act accordingly.¹²

To its credit, the EU Parliament called for the introduction of an import ban on February 12, 2021, but, as of the writing of this paper, there has yet to be any movement on the part of the EU Commission in introducing such a policy.¹³ The Commission has expressed hesitancy about

⁸ *Id.*

⁹ *Id.* at 86.

¹⁰ BEN VANPEPERSTRAETE, TOWARDS AN EU IMPORT BAN ON FORCED LABOUR AND MODERN SLAVERY (1) (2021).

¹¹ *Id.*

¹² *Id.*

¹³ <https://www.business-humanrights.org/en/latest-news/european-parliament-calls-for-import-ban-on-forced-labour/>

introducing an import ban and suggested that there may be other means of dealing with the problem.¹⁴ While there are several potential policy levers for the EU to pull on, and there are several examples of previous EU interventions that map well, if imperfectly, onto the forced labor issue, an import ban is likely an important part of any cohesive trade policy. The aim of this paper is to evaluate the merits of introducing such a policy. Import bans of this kind are relatively new and represent a nascent area of trade law. This paper will argue that an import ban is a necessary component of any effective trade policy aimed at addressing forced labor throughout the supply chain and will proceed in the following steps. First, it will lay a foundation on forced labor in the global supply chain and current scholarship on the utility of import bans—really addressing the question of why this proposal is worthy of consideration. Next, it will explain the legal basis for the EU to implement an import ban, address concerns regarding the World Trade Organization (WTO), and chart the history of analogous policies the EU has implemented in the past. Then, it will discuss the current policy landscape, taking special care to evaluate the revised US Tariff Act of 1930 and global events that necessitate greater harmonization between the EU and US. Finally, it will assess how the EU should address the forced labor issue and how the EU could build upon the US import ban model.

The world is aware of the human rights abuses being perpetrated by companies throughout the global supply chain. With “[t]he majority of modern forced labor occur[ing] in the private sector,” governments have to step up to craft a regulatory approach that creates incentives for private actors to monitor their supply chains. The only way to do this is to threaten the profits the private sector has been earning on the backs of forced laborers—whether they perpetrated the abuse themselves or clung to ignorance over what occurred upstream in the

¹⁴ Mehreen Khan, *EU Urges Caution on any Ban on Imports Made with Forced Labour*, FIN. TIMES (Dec. 23, 2021), <https://www.ft.com/content/748a837b-ac51-4f2e-9a5d-3af780ec8444>.

supply chain. The EU has an important role to play in this fight. Though the EU has several policy options at its disposal and there is limited data regarding import ban effectiveness in curbing abuse, implementing such a ban should be a priority in any comprehensive trade package. An import ban would create a compatible standard with the US (thereby harmonizing incentives for businesses operating in two of the largest import markets¹⁵), honor EU stated commitments towards advancing human rights globally, and prevent entities from profiting from egregious labor violations.

II. Import Ban Overview

Before applying remedies, it is important to understand the problem. This section will lay the foundation of forced labor in the global supply chain and discuss the conceptual advantages of import bans generally.

A. Forced Labor Globally

The broadly accepted definition of forced labor is “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹⁶ While the nature of the practice makes it difficult to know exactly how many people are subjected to forced labor condition globally, the ILO estimated that approximately 24.9 million people worked under some form of forced labor regime in 2016.¹⁷ It is expected that this number has only grown since. One of the hallmarks of the current global economic system is a practice referred to as “global outsourcing,” where multinational

¹⁵ EUROSTAT, INTERNATIONAL TRADE IN GOODS (last accessed Feb. 21, 2022), [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=International_trade_in_goods#:~:text=The](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=International_trade_in_goods#:~:text=The%20(in%2020,%20US%20and%20EU%20together%20constituted%20nearly%2030%20of%20the%20global%20import%20market%20at%2016.2%25%20and%2013.1%25%20respectively);) (in 2020, US and EU together constituted nearly 30% of the global import market at 16.2% and 13.1% respectively); *see also* European Commission C 374/73, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy 2.2 (Sept. 16, 2021) (claiming that the EU is actually the biggest international trader and is deeply integrated economically with the rest of the world).

¹⁶ INTERNATIONAL LABOUR ORGANIZATION, CO 29 – FORCED LABOUR CONVENTION Art. 2.1 (1930).

¹⁷ INTERNATIONAL LABOUR ORGANIZATION, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 9 (2017).

corporations “subcontract their businesses to third parties in other countries.”¹⁸ Global outsourcing has “an annual growth rate between 12% and 26%” and “suppliers who use global outsourcing are particularly infamous for forced labor abuses.”¹⁹ If global outsourcing continues to grow at such a high annual rate—and there is no indication that it will not—then multinational corporations will only continue to find greater human rights violations occurring in their supply chains once they look under the surface.

While customary international law typically has limited practical effect on behavior, international norms dictate that multinational corporations have certain ethical obligations to society writ large.²⁰ The United Nations, among others, has noted the transformative effect corporations can have on the world, for better or worse. On the one hand, “transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth,” and on the other, “the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations.”²¹ As such, under the Norms on the Responsibilities of Transnational Corporations, “business enterprises shall not engage in nor benefit from . . . forced or compulsory labour.”²² It is clear that, despite these ethical obligations, corporations and other business enterprises cannot be trusted to self-regulate uses of forced labor in their supply chains. For example, “[m]ore than 80 international brand-name corporations have been reported to allegedly profit directly or indirectly from Uyghur forced labour in their supply chains.”²³ As

¹⁸ Brewer, *supra* note 7 at 87.

¹⁹ Brewer, *supra* note 7 at 87.

²⁰ *Id.* at 94 (emphasizing the importance of corporations knowing their suppliers and their practices in the fight against forced labor).

²¹ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²² *Id.* at C.3.

²³ VANPEPERSTRAETE, *supra* note 10, at 1.

will be explored later, the EU adheres to international norms to a greater degree than other jurisdictions, and thus has a responsibility to ensure that it is providing the correct incentives to corporations to comply with their international obligations.

B. Import Bans and Shaping Behavior

For the most part, countries have struggled to adequately regulate the behavior of multinational corporations operating in supply chains that span across the globe. While there have been some successful campaigns on the part of investors and consumers to influence company behavior, “the standards in this area have remained mostly voluntary” and “[t]he lack of mandatory regulation has led to inconsistent practice among firms, standards that are implemented in an *ad hoc* fashion, and weak incentives for changing behavior.”²⁴ Under current voluntary frameworks, “private parties responsible for implementing regulation lack direct government oversight” and many “firms may lack resources and expertise to locate and regulate their suppliers.”²⁵ This gap demands that countries “become more involved in efforts to promote supply chain transparency.”²⁶

Import bans can step into the vacuum left by voluntary standards and soft international law to create a framework that better incentivizes economic actors. By preventing imports produced by forced labor from entering into circulation, states can co-opt private actors to promote human rights norms abroad.²⁷ Threatening profits should enterprises fail to ensure that there is no forced labor in their supply chain provides a concrete incentive for compliance, creating a concrete framework companies must follow in exchange for market access.²⁸ In this

²⁴ Galit Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L.J. 419, 419-20 (2015).

²⁵ *Id.* at 454.

²⁶ *Id.*

²⁷ *Id.* at 420.

²⁸ See IRENE PIETROPAOLI ET AL., EFFECTIVENESS OF FORCED LABOUR IMPORT BANS 6 (Dec. 2021).

sense, “[d]omestic supply chain-related regulation is an avenue by which home states can potentially set . . . human-rights related norms for third-party suppliers and their host governments.”²⁹ The transformative potential of regulations of this kind could extend beyond shaping corporate behavior, they could “also serve as an alternative to international law for shaping the behavior” of state actors.³⁰ Import bans could, as long as there is sufficient buy in from home countries, completely transform the way that business interests and human rights interact.³¹ Soft international law has done little to eradicate endemic issues of forced labor, perhaps it is time to adopt new policy tools like domestic supply chain regulations in the form of import bans in its stead.

There are a few concerns with this framework that are worth noting. From the onset, the practice of “outsourcing regulation to companies . . . raises accountability concerns when private actors are performing functions that are fundamentally public.”³² It should be noted, however, that this is already happening but with even less accountability. By adopting voluntary measures, governments abandon the necessary oversight of corporate behavior and allow companies to self-regulate practices that can have extreme negative externalities (i.e., pervasive forced labor in their supply chains). Adopting a mandatory scheme like an import ban with accompanying due diligence requirements admittedly retains an element of corporate self-regulation, but it is wholly distinct because there are tangible repercussions for non-compliance, cohesive standards applied across companies, and, most importantly, more government oversight. Another potential issue to be raised is due to the fact that there is very little data to extrapolate from, thereby making it

²⁹ Sarfaty, *supra* note 24, at 420.

³⁰ *Id.*

³¹ *See Id.* at 426 (arguing that multinational companies can have a more immediate effect on local regions and home states can transmit human rights norms abroad through these companies).

³² *Id.* at 421

difficult to anticipate the effectiveness and unintentional impact of policies like an import ban.³³ While understanding of the long-term consequences of import bans is still in its infancy, this is not reason enough to abandon implementing said policies, especially when “tried and true” methods of changing behavior are not nearly effective enough in curbing human rights abuses. Sanctions, for example “result in some meaningful behavioural change in the targeted country in about 40% of cases” and “narrower bans on the sale of luxury goods and sectoral sanctions have a lower success rate at about 20%.”³⁴ In such company, a nascent policy choice with great potential represents an appealing alternative, and governments would be negligent in their duties to not even consider it.³⁵ Further, the experience of existing import bans already show potentially promising results—this point will be explored further in Section III in the US context—but in the meantime, it appears that companies are willing to respond to allegations quickly when threatened with or subject to withhold release orders (WROs).³⁶ One last issue is just the sheer scope of import bans subjecting companies to scrutiny along every link of their supply chain.³⁷ Supply chain due diligence is a complicated undertaking, and “there is not a one-size-fits-all approach for all companies” as many chains “may involve multiple tiers of outsourcing.”³⁸ Such challenges actually represent an opportunity for governments however, to become more involved in regulating multinational corporations. Sufficient government support can help bridge the due diligence compliance gap currently seen among business entities, even those that profess interest in complying yet lack the resources or knowledge to do so.³⁹

³³ PIETROPAOLI, *supra* note 28, at 6 (noting that “it is not yet clear how sustainable the impacts of an import ban may be in the longer-term”).

³⁴ *Id.* at 5.

³⁵ *Id.* at 7.

³⁶ *Id.*

³⁷ Sarfaty, *supra* note 24, at 434.

³⁸ *Id.*

³⁹ *Id.* at 423.

There are, of course, challenges inherent to nascent areas of law. Experimenting with new policies risks unintended consequences and ineffective solutions, but these are not reasons in of themselves to not regulate to solve important issues. Furthermore, import bans, where they currently exist, appear to be working (subject to improvement, of course) and should be fully embraced by the EU, especially given the potential transformative power they can have. The EU has the power and expertise to lead the charge against forced labor.

III. EU Legal Basis for an Import Ban

Because the EU occupies a middle ground between being a state and an international organization, it is of particular importance that there is a solid legal basis for any policies it implements that binds its member states. This section will thus proceed in three parts. The first will cover the various principles and legal bases the EU could use as a basis for an import ban, the second will address concerns regarding challenges coming from the WTO, and the third will trace comparable policies that EU has embraced in the past. Although import bans of this kind are a relatively new policy option, similar ones have been embraced by the EU to address concerns ranging from conflict metals to individualized global sanctions regimes.

A. EU Principles

A preliminary question worth discussing is under what legal basis the EU can implement an import ban. While there are multiple answers to this question, it is less straightforward than one might expect. As such, several avenues will be discussed in turn, and though there may not be one completely authoritative law or provision to point to, the sum of these different options renders a clear answer that such a policy would fall within the EU's purview.

The EU has adopted “an explicit human rights mandate and sees itself as a global player” in addressing human rights abuses.⁴⁰ Because forced labor and slavery are arguably among the worst human rights abuses, the EU’s commitment to and adoption of international human rights principles is a good place to start. The seminal piece of human rights literature, the UN Declaration on Human Rights (UDHR), “plays an important part in guiding EU external policies and is a useful reference for the way in which the EU conceives fundamental rights.”⁴¹ Although “the EU Treaty does not explicitly mention the Declaration,” the EU has still adopted “strict observance and development of international law, including respect for the principles of the UN Charter.”⁴² The core of the UDHR can be found in Article 21 of the Treaty on European Union as well, as “EU external policies should promote the universality of human rights—the core of the Declaration.”⁴³ As such, the UDHR’s provision against slavery or servitude and the EU Convention on Human Rights’ prohibition on slavery and forced labour should both be considered to be guiding principles of EU policy aimed at eradicating these issues not just within the jurisdiction of the EU but globally.⁴⁴ There are further justifications related to the EU’s adoption of customary international law, including the UN Norms on the Responsibilities of Transnational Corporations, the ILO Convention No. 29, and the Convention on the Abolition of Slavery all provide further support for the EU to enact an import ban to protect human rights and disincentivize forced labor abuses abroad.⁴⁵ The Convention on the Abolition of Slavery in

⁴⁰ VANPEPERSTRAETE, *supra* note 10, at 3.

⁴¹ Ionel Zamfir, European Parliamentary Research Service, *The Universal Declaration of Human Rights and its Relevance for the European Union 2* (Nov. 2018).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Universal Declaration of Human Rights, Art. 4; European Convention on Human Rights, Art. 4.

⁴⁵ Norms on the Responsibilities of Transnational Corporations, *supra* note 21; INTERNATIONAL LABOUR ORGANIZATION, *supra* note 16, Arts. 1.1, 25, 26.1 (while the EU is not a member of the ILO, its constituent Member States are and the ILO Convention on Forced Labor is a broadly applied document in considering global labor rights and therefore could fall under the customary international law category); and 21.1 and 21.3 (although the Convention does not create new legal obligations, it is still an important guidepost in considering state and business responsibility in curbing slavery and forced labor practices).

particular supports the international impact goals of an import ban, specifically by noting that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations”, and “home States [should] take steps to prevent abuse abroad by business enterprises within their jurisdiction.”⁴⁶ There is clearly a plethora of international standards and agreements the EU could use to justify the use of an import ban.

Although customary international law and human rights treaties are useful, they have rarely been enough to spark concrete government policy. For example, “[w]hile article 5 of the Charter [of Fundamental Rights] states the prohibition on slavery and forced labour, it currently does not serve as a basis for EU trade or import policy.”⁴⁷ While it potentially could, it would be prudent to look for other sources to bolster the legality of an import ban. The discussion paper commissioned by the Greens and EFA Group in the EU Parliament proposing an import ban outlined several options and weighed the merits of each.⁴⁸ These include relying on “the EU’s Common Foreign and Security Policy [CFSP], the EU’s trade policy or the European single market.”⁴⁹

Beginning with the CFSP, it “include[s] restrictive measurements such as sanctions” that can subject “[g]overnments of non-EU countries, as well as companies, groups, organisations, or individuals” to “sanctions, including restrictions on imports and exports.”⁵⁰ While on paper, the CFSP seems an ideal avenue for justifying an import ban, it “is characterized by a quite cumbersome and complex decision-making procedure driven by the European Council” meaning

⁴⁶ Zamfir, *supra* note 41, at 1, 3-4.

⁴⁷ VANPEPERSTRAETE, *supra* note 10, at 6.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

that it would “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.”⁵¹ Given the complexity of global supply chains and the foreign policy implications for targeting certain regions where forced labor is suspected of being a major issue (like Xinjiang), the restraints inherent to the CFSP render it an ineffective place to base an import ban policy.

EU trade policy represents another avenue for implementing an import ban but is limited by a more piecemeal approach. As the discussion paper notes, “[s]ome authors suggest embedding a human-rights based import ban in trade agreements or trade regimes.”⁵² This, however, could result in variations in policy dependent on the trading partner and “would risk leading to a non-uniform model of enforcement.”⁵³ The benefit of implementing an import ban in the style of the US Tariff Act is that it would cover forced labor issues wherever they occur. Having to rely on clauses inserted into trade agreements with specific partner countries would severely limit enforcement and would delay implementation because of the need to negotiate new agreements with nations. Further, while the EU does have clauses to suspend trade preferences in several of their trade agreements, “the EU has not activated the clause to suspend trade preferences under any of its trade agreements resulting in the ban of specific products.”⁵⁴ This option would simply be too slow and risk uneven enforcement, undermining the effectiveness of an import ban.

This leaves implementing an import ban under the EU’s authority over the European single market. This is the most fruitful option for effective implementation and enforcement.

⁵¹ *Id.*

⁵² *Id.* at 7.

⁵³ *Id.* at 7-8.

⁵⁴ *Id.* at 7.

While the EU probably could not rely on its harmonizing authority under TFEU 114 because the Netherlands is currently the only state with legislation banning products produced with child labor, “[a] standalone Regulation could be envisaged under article 207 TFEU itself to model and adapt a ‘Europeanised’ version of the US Tariff Act.”⁵⁵ Such an “instrument could provide for coherent definitions of forced labour and modern slavery or even broader human rights violations across different trade regimes” incorporating international instruments like the ones described earlier in this section.⁵⁶ This is the best option because it establishes a uniform policy for the EU and prevents goods produced with forced labor from entering into free circulation in any given Member State—closing any backdoors into the broader European market. In this way, the EU can ensure that it legislates in accordance with the subsidiarity and proportionality principles as well.⁵⁷ The EU is better equipped to dictate import standards than any individual Member State to prevent companies from being treated differently in different Member States and, as long as the import ban is focused on preventing forced labor imports, implementation should be proportional to its stated purposes.⁵⁸

All of the above can serve as bolstering factors in defending the implementation of an import ban. The best place to base an import ban would be under the EU’s authority to regulate the internal market, but the support of customary international law, the CFSP, and overall trade policy would lend further legitimacy to the new trade regime.

B. The WTO

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 9.

⁵⁷ *Commission Proposal for a Regulation of the European Parliament and of the Council Setting up a Union System for Supply Chain Due Diligence Self-Certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict-Affected and High-Risk Areas*, at 29, COM (2014) 111 final (Mar. 5, 2014).

⁵⁸ *Id.*

The EU, naturally, subscribes to a robust theory of multilateralism. As a bloc, the EU is repeatedly the most interested major trading entity that continues to subscribe to, take seriously, and adhere to WTO rules.⁵⁹ Proponents of an import ban noted that “the development of a human rights-based import ban system in the EU should be tailored to the EU’s requirements under the WTO.”⁶⁰ There appears to be a level of anxiety regarding compliance with WTO rules, but these fears are misplaced and should not dissuade policymakers from adopting an import ban.⁶¹

To begin, an import ban would likely pass muster under WTO rules. Article XX(b) provides an exception for restrictions of trade that are “necessary to protect human, animal or plant life or health.”⁶² Guided by the chapeau of Article XX, requiring that measures are not applied in an arbitrary or unjustifiably discriminatory manner in countries where similar conditions exist and do not constitute a disguised restriction on trade, it would be easy to argue that an import ban is permissible under WTO rules.⁶³ While import bans remain untested by WTO rules, a challenge has not yet been brought against the US in response to their enforcement of the Tariff Act.⁶⁴ It is therefore conceivable that a challenge will not even be brought against an EU import ban regime.

From a broader theoretical perspective, even if the WTO rules posed a challenge to implementation of an import ban, the EU should still proceed with implementing an import ban. The WTO’s authority over most major trading jurisdictions has severely waned in recent years. The “WTO’s rules are widely abused or flat-out ignored” and “the whole appeals process has

⁵⁹ See VANPEPERSTRAETE, *supra* note 10, at 16.

⁶⁰ *Id.* at 6.

⁶¹ Khan, *supra* note 14 (noting that Brussels signaled that it will be stepping away from explicit trade bans out of fear that they could be seen as discriminatory trade measures).

⁶² VANPEPERSTRAETE, *supra* note 10, at 16 (noting that “Article XX(b) can be interpreted to cover policy concerns such as forced labour”).

⁶³ *Id.*

⁶⁴ *Id.*

been placed in suspended animation.”⁶⁵ The rules of the WTO are outdated and have not kept up with the modern economy.⁶⁶ The European Economic and Social Committee (EESC) has admitted that the WTO is out of step with modern trade rules as “modernizing the World Trade Organization is the top priority.”⁶⁷ Recognizing the limitation that the EU is “statute bound to the multilateral rule-based system of trade,” it is still worth arguing that the EU should not allow the rules of an increasingly defunct institution prevent them from instituting a policy that could have a far reaching beneficial impact in ending forced labor practices.⁶⁸ As long as the WTO is being held hostage, the EU is handicapping itself by holding itself to standards the rest of the world is ignoring.

C. Comparable Existing Policies

While the EU does not have a policy that is comparable to the US import ban regime, it would be a mischaracterization to claim that implementing an import ban is uncharted territory for the EU. There are already “mandatory standards in some sectors and [the EU] actively promotes the effective implementation of international standards on responsible business conduct.”⁶⁹ These include limited import bans, implementation of a global human rights sanctions regime, and specific due diligence requirements for companies operating in conflict zones.

The EU already has multiple limited import bans in place. From covering “products from areas at risk of deforestation” to “a law on batteries that forces companies to assess human rights

⁶⁵ Jeffrey Schott, *The WTO is Dead ... Long Live the WTO*, MILKEN REVIEW (May 4, 2020), <https://www.milkenreview.org/articles/the-wto-is-dead-long-live-the-wto>.

⁶⁶ *Id.*

⁶⁷ European Commission C 374/73, *supra* note 15, at 1.3.

⁶⁸ VANPEPERSTRAETE, *supra* note 10, at 16.

⁶⁹ EUROPEAN UNION EXTERNAL GUIDANCE, GUIDANCE ON DUE DILIGENCE FOR EU BUSINESSES TO ADDRESS THE RISK OF FORCED LABOUR IN THEIR OPERATIONS AND SUPPLY CHAINS 3 (July 12, 2021).

risks in their supply chains.”⁷⁰ Additionally, “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” targets products that could be used for future human rights abuses.⁷¹ Furthermore, “specific import bans equally exist on the internal market such as the EU Timber Regulation and the procedures against Illegal, Unreported and Unregulated Fishing” serve as additional proof that import bans are already being used in the EU.⁷² There are, of course, distinctions between what is currently in place and what is being proposed. Existing regulations focus on specific products from specific sectors or for specific purposes; the proposed import ban is aimed at every product and every sector as long as there is some evidence that forced labor exists in the supply chain. This is certainly a shift but not so extreme as to render the proposed import ban unfamiliar to EU policy makers, and the plethora of examples further supports the idea that import bans—even if different than those currently in place—can work under EU law.⁷³

An import ban, in order to be effective, needs to be able to shape behavior beyond the borders of the EU. It also needs to be able to target behavior that occurs outside of Europe. Again, such goals are well within the scope of existing EU policy. The analogous policy targeting abuses abroad was based off the Global Magnitsky Act:

In December 2020, the Council of the European Union adopted a Magnitsky-style framework, which establishes a global human rights sanctions regime. It provides the EU with a legal framework to target natural and legal persons, entities and bodies responsible

⁷⁰ Khan, *supra* note 14.

⁷¹ VANPEPERSTRAETE, *supra* note 10, at 8.

⁷² VANPEPERSTRAETE, *supra* note 10, at 10.

⁷³ CHRISTOPHER CASEY ET AL., *Section 307 and Imports Produced by Forced Labor 1* (Dec. 27, 2021) <https://crsreports.congress.gov/product/pdf/IF/IF11360> (outlining the process by which individual products are targeted under the US regime, which bears similarity to the limited import bans on specific products already in place in the EU).

for, involved in or associated with serious human rights violations (including slavery), regardless of where these might have occurred.⁷⁴

While this is a sanctions framework, the principles underlying it still lend support to the EU adopting an import ban premised on the goal of curbing forced labor abuses in the global supply chain.

The policy that tracks closest with what an import ban is trying to accomplish originated in October 2010 when “the European Parliament passed a resolution calling for the EU to legislate along the lines of the US ‘conflict minerals’ law.”⁷⁵ Like the current situation, the EU was considering adopting a policy akin to the US Dodd-Frank Act and its disclosure requirements for certain businesses with potential conflict minerals in their supply chains.⁷⁶ At issue in this instance were tin, tantalum, tungsten, and gold originating from conflict regions in Africa, specifically the Democratic Republic of Congo, and the complete lack of due diligence among companies.⁷⁷ After a public consultation, and weighing various options, the European Commission published an impact report that came to the conclusion that a voluntary due diligence and reporting option was the most fitting given the circumstances, opting against a mandatory regime or an import ban akin to a forced labor import ban in instances where minerals were suspected of originating from conflict mines.⁷⁸ While this may suggest that import bans or other mandatory trade regimes are less effective in shaping corporate behavior at first glance, there are two points that suggest that voluntary measures were insufficient to deal with issues arising from conflict minerals. First, in January 2021, a new Regulation entered into force that

⁷⁴ PIETROPAOLI, *supra* note 28, at 5.

⁷⁵ *Commission Proposal*, *supra* note 57, at 9.

⁷⁶ *Id.* at 13.

⁷⁷ *Id.* at 20.

⁷⁸ *Id.* at 50.

replaced the existing voluntary framework with mandatory reporting requirements and to ensure that imported minerals are conflict free.⁷⁹ Second, the public consultation results indicate that the EU potentially overlooked solutions preferred by society at large in favor of business interests.⁸⁰ Trade organizations and companies strongly opposed any sort of mandatory measures, while “over 90% of NGOs and citizens [were] in favour of an obligation for business actors.”⁸¹ This indicates that there may have been undue regard for business preferences that could have convinced the Commission that voluntary measures would be sufficient. Based on the follow-up Regulation, they clearly were not.

Existing and prior EU policy choices further support the fact that the EU can implement an import ban to combat forced labor abroad, and indeed has the expertise to do so effectively. The EU can be a leader in this fight and retains the benefit of having a model for future legislation—the US Tariff Act of 1930.

IV. The Current Policy Landscape

The world is a tumultuous place. Recent events have rocked the foundations of the modern geopolitical system. Amidst the chaos, the first comprehensive forced labor ban has been operating in the US, and the importance of the transatlantic relationship between the EU and the US could not be understated. With human rights abuses and wanton aggression characterizing other major powers, the EU and US need to present a united front, and that includes issues of trade. The following subsections will highlight the importance of the EU-US relationship, trace

⁷⁹ European Commission, *Sustainable Development: Conflict Minerals: The Regulation Explained* (last accessed Mar. 29, 2022) <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/#:~:text=On%201%20January%202021%20a,are%20mined%20using%20forced%20labour.>

⁸⁰ *Commission Proposal*, *supra* note 57, at 54-55.

⁸¹ *Id.*

the implementation of the revised Tariff Act of 1930, and explain why the EU's trade relationship with China is untenable when it comes to human rights.

A. The Transatlantic Relationship

Despite the rising influence of other nations, “[t]he transatlantic relationship [continues to] defines the world economy.”⁸² According to the European Commission’s description of the US-EU trade relationship, the two “have the largest bilateral trade and investment relationship and enjoy the most integrated economic relationship in the world.”⁸³ While it is true that China overtook the US as the EU’s largest import source for goods, “the US remains the EU’s largest trade and investment partner by far.”⁸⁴ From an investment standpoint, “[t]otal US investment in the EU is three times higher than in all of Asia,” and “EU investment in the US is around eight times the amount of EU investment in India and China together.”⁸⁵ If considered as a proxy for the strength of and confidence in their relationship, it is clear that the EU and US see each other as safe and dependable bets based on this level of mutual investment. Against this backdrop, it is worth noting that the EESC emphasized “the strategic importance of deepening partnerships” with other trading partners in Asia and the Americas but singled out the US in particular.⁸⁶

The importance of the US-EU relationship extends beyond their integration. When considering the rest of the world’s trade relationships, “[e]ither the EU or the US is the largest trade and investment partner of almost every other country in the global economy.”⁸⁷ When “[t]aken together, the economies of both territories amount to more than 40% of the world GDP

⁸² EUR. COMM’N DIRECTORATE-GEN. FOR TRADE, *Countries and Regions: United States*, <https://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/> (last visited Jan. 28, 2022).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ European Commission C 374/73, *supra* note 15, at 1.12.

⁸⁷ EUR. COMM’N DIRECTORATE-GEN. FOR TRADE, *supra* note 82.

and more than 40% of global trade in goods and services.”⁸⁸ Sheer size is one of the most significant aspects of the transatlantic relationship. When considered in the light of import bans, “the market share the import ban affects” is likely to be one of the key influencing factors on the effectiveness of the policy.⁸⁹ The US alone is already a formidable choice, as being locked out of the lucrative American market would severely threaten a company’s bottom line. Being locked out of both the US and EU markets would be catastrophic. The influence each could exercise through its own trade policy is amplified multiple times over when they work in tandem. Harmonizing regulations “is essential for those that require global coordination—such as laws seeking to prevent human rights violations in corporate supply chains,” and “[i]t is also important in order to prevent companies from moving their business to unregulated regions.”⁹⁰ This is one of the main reasons the EU should adopt an import ban akin to the US model—it would threaten to cut off human rights abusers’ access to two of the largest markets, thereby threatening profits and incentivizing change.⁹¹ As Chloe Cranston, Business and Human Rights Manager at Anti-Slavery International put it, “As governments around the globe attempt to curb forced labour, we have encouraging news: import controls work,” and all countries should adopt sufficient measures to prevent companies from having a “dumping ground for forced labour products, and the best way to ensure that is to limit their market access through these measures.”⁹²

⁸⁸ *Id.*

⁸⁹ PIETROPAOLI, *supra* note 28, at 1.

⁹⁰ Sarfaty, *supra* note 24, at 447.

⁹¹ VANPEPERSTRAETE, *supra* note 10, at 4 (noting that Canada and Mexico have obligations under USMCA to adopt similar forced labor bans, which further extends the effect of such policies); Alexander Koty, *European Parliament Votes to Freeze the EU-China Comprehensive Agreement on Investment*, CHINA BRIEFING (May 27, 2021) (noting that the EU, US, UK, and Canada have all adopted measures to prevent goods produced with forced labor from Xinjiang).

⁹² END UYGHUR FORCED LABOUR, *Coalition Statement on European Commission’s Proposed Ban on Products Made with Forced Labour* <https://enduyghurforcedlabour.org/news/coalition-statement-on-european-commissions-proposed-ban-on-products-made-with-forced-labour/> (last visited Feb. 20, 2022).

Beyond the snowballing effect of harmonizing legislation, adopting compatible regulations ties the EU and US (and their other allies) closer together. This is incredibly important because of the rise of authoritarianism in other nations. Russia and China have both shown blatant disregard for human rights, and the strengthening of the Chinese-Russian alliance should raise warning flags for the rest of the world.⁹³ Already, China has not only supported Russia's invasion of Ukraine, but it has also worked to lessen the effects of economic sanctions on Russia.⁹⁴ The world is a dangerous place for democracies in the present moment, and the EU and US together can serve as a bulwark against aggressive authoritarian leaders. By harmonizing policies and preventing a united front, the EU and US maximizes the impact of their policies and creates a powerful alternative to authoritarian models.

In addition to the above, the people of the EU and US have shown a recent desire for punishing third-party nations for their human rights abuses and, more importantly, a new willingness to accept economic hardship in order to do so. Looking towards the sanctions enacted in the wake of Russia's invasion of Ukraine, "rare, bipartisan consensus exists on the issue of sanctions levied against Russia" in the US, with "[m]ost Americans, regardless of party, support[ing] these sanctions and nearly seven in ten favor them even if it means higher energy prices domestically."⁹⁵ In Europe, governments and businesses have often opposed imposing sanction on Russia for "concern for their own pocketbooks."⁹⁶ In response to the invasion of Ukraine, however, Europeans have quickly enacted sanctions on Russia in line with the US,

⁹³ David Leonhardt, *A New Axis*, N.Y. TIMES (Feb. 9, 2022) <https://www.nytimes.com/2022/02/09/briefing/china-russia-alliance.html>.

⁹⁴ *Id.*

⁹⁵ NPR/PBS NewsHour/Marist National Poll: *Bounce for Biden Following State of the Union*, MARIST POLL (Mar. 4, 2022) <https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-national-poll-bounce-for-biden-following-state-of-the-union-march-2022/>.

⁹⁶ Rick Noack & Kate Brady, *European Sanctions on Russia will Cost Europe*, WASHINGTON POST (Mar. 2, 2022) <https://www.washingtonpost.com/world/2022/03/02/europe-russia-sanctions-backlash/>.

disconnected key Russian banks from SWIFT, and “rallied behind what France’s foreign minister . . . called an ‘all-out economic and financial war’ against Russia.”⁹⁷ With the Europeans and Americans working together, Russia “has become an economic pariah,” showing how influential the transatlantic alliance can be when it flexes its economic muscles.⁹⁸ People want action in response to human rights violations, even if they occur hundreds or thousands of miles away.⁹⁹ Now it appears that consumers and businesses are willing to pay the price associated as well.¹⁰⁰

The EU and US, when working together, can have a tremendous impact on global economics. The way to truly threaten profits accrued through forced labor exploitation is to cut those products off from lucrative markets. In addition, current events necessitate that the transatlantic relationship remains strong against the rise of authoritarianism. People want action in response to human rights abuses, and the EU implementing an import ban akin to the US policy is a natural next step.

B. Section 307 Implementation

If the EU is serious about addressing forced labor in global supply chains, then the US is the natural model to follow. Not only would this move harmonize policies between two of the largest trading blocs (with all the benefits that brings), but the US model has proven its effectiveness. Tracing the implementation of the US import ban can shed light on the benefits of the policy.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Koty, *supra* note 91 (noting that in March 2021, the US, EU, UK, and Canada placed sanctions on Chinese officials based on alleged human rights abuses in Xinjiang).

¹⁰⁰ Brewer, *supra* note 7 at 97 (businesses may not be responding from a purely altruistic place and may be willing these steps to avoid reputational, and therefore economic, harms like Apple did in response to the Foxconn scandal).

The Tariff Act of 1930, from its conception, barred imports into the US that were “produced or manufactured wholly or in part by forced labor.”¹⁰¹ Enforcement of this provision, however, was made nearly impossible by what became known as “the consumptive demand exception,” which created a carve out for goods either not produced or not produced in sufficient quantities in the US—indicating the early protectionist, rather than human rights, focus of the original policy.¹⁰² As time marched on, the focus shifted from protectionism to opposing forced labor on human rights grounds, and the consumptive demand loophole was repealed in 2015.¹⁰³ This repeal has already had a significant impact on the enforcement of section 307. Since 2015, CBP has issued 36 WROs, in comparison to the 27 issued from 1990 to 2015.¹⁰⁴

Enforcement of section 307 follows a relatively straightforward path, despite the complexity of global supply chains. Generally, the CBP will receive a tip or allegation of forced labor in a company’s supply chain, and the CBP Commissioner launches an investigation if it appears warranted based on the received information.¹⁰⁵ If there is a reasonable indication of forced labor at work, then the CBP issues a WRO, and the affected company can either re-export the product, contest the finding, or remedy the issue in their supply chain.¹⁰⁶ It is important to note that “CBP needs to decide how far down a corporation’s supply chain it should investigate,” but the text of the statute and discretion granted to the CBP “suggests that even the smallest component of a good, at the lowest tier of a supply chain, is enough to prohibit the importation of the entire good if that component is produced with forced labor.”¹⁰⁷ The flexibility of the US import ban “allow[s] both specific and general bans to be introduced at the discretion of the

¹⁰¹ CASEY, *supra* note 73, at 1.

¹⁰² *Id.*

¹⁰³ Brewer, *supra* note 7 at 86.

¹⁰⁴ CASEY, *supra* note 73, at 2.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.*

¹⁰⁷ Brewer, *supra* note 7 at 86, 90.

enforcing authority,” enabling the US to respond to forced labor abuses as they appear quickly and efficiently.

Already, there are examples of the US policy working to prevent imports produced with forced labor and imposing the corrective incentives on business enterprises to behave in a more socially responsible way. A prime example of this is the case of Top Glove, a Malaysian producer of personal protective equipment subject to a WRO in 2020.¹⁰⁸ Not only did CBP prevent Top Glove’s tainted products from entering into circulation in the US and cut off their potential ill-gotten profits, but the threat of future WROs and the publicity of the case produced positive human rights outcomes for workers on the ground. Evidently, in 2020 and 2021, there was “[s]ignificant activity relating to the repayment of migrant worker recruitment fees . . . by major glove manufacturers in Malaysia.”¹⁰⁹ While the degree of “direct causal link” between the initial WRO and this shift in behavior is unclear, it is strongly suggested that there is a substantial connection between the two.¹¹⁰ And this makes intuitive sense, “[f]or 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,” and “the remediation that can be expected to the migrant workers in [the Top Glove] case also indicates the potential positive effect WRO’s can have on human rights.”¹¹¹

While there are promising case studies emerging, policymakers are still operating with a substantial knowledge gap. The human rights-oriented import ban is still a novel policy option, and there are concerns regarding unintentional effects on workers and local economies when

¹⁰⁸ PIETROPAOLI, *supra* note 28, at 7.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ VANPEPERSTRAETE, *supra* note 10, at 5.

WROs are issued.¹¹² The fact of the matter is that more data needs to be collected before coming to a firm conclusion on whether and to what frequency a company would pull out of a region entirely to remedy forced labor allegations. That being said, a new policy with promising initial results should be implemented until proved to the contrary. The US implementation appears to have said promising results, and a similar policy should be approved by the EU in their fight against forced labor abroad.

C. China and the EU

It would be disingenuous to discuss EU trade policy and international goals without addressing the elephant in the room: China’s rising star in the EU. Although the US remains the EU’s largest trade and investment partner, China is not far behind and overtook the US “in 2021 as the largest EU import source for goods.”¹¹³ Amidst alleged human rights violations and unfair trade practices, the EU has been primarily focused on negotiating the EU-China Comprehensive Agreement on Investment (CAI).¹¹⁴ CAI and the situation in Xinjiang represent the two opposing influences in EU policies in regard to China. Both have to be understood to chart future EU trade policy—especially in regard to implementing an import ban.

CAI was too enticing an apple for the EU to resist. In 2015 and 2016, “American diplomats expressed fury that EU trade and legal officials failed to back Washington’s anti-Beijing position in a fight over whether China should be considered a ‘market economy’ in global trade terms.”¹¹⁵ At the same time, “EU trade officials brushed off concerns about mass detentions and forced sterilization in Xinjiang to conclude [CAI].”¹¹⁶ The EU abrogated its

¹¹² *Id.*

¹¹³ EUR. COMM’N DIRECTORATE-GEN. FOR TRADE, *supra* note 82.

¹¹⁴ Sarah Aarup, *Ban on Uyghur Imports Becomes EU’s Hot Potato*, POLITICO (Oct. 15, 2021), <https://www.politico.eu/article/uyghur-china-europe-ban-imports-europe-trade-hot-potato-forced-labor/>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

human rights responsibilities in response to alleged abuses, including forced labor, in Xinjiang, desperate to avoid “incur[ring] the wrath of Chinese President Xi Jinping.”¹¹⁷ The agreement, “over seven years in the making,” however, likely will not come into force any time soon.¹¹⁸ The reason? Xinjiang.

Tensions escalated between the EU and China when, in 2021, “the EU joined the US, UK, and Canada in placing sanctions on Chinese officials involved in alleged human rights violations in the region of Xinjiang,” and “the Chinese government responded by placing sanctions on a number of think tanks, scholars, and European Parliament politicians.”¹¹⁹ There are a number of reasons why the EU decided to finally act on news of human rights abuses out of Xinjiang, but one of them is simply based on the fact that “[t]here are no valid means for companies to verify that any workplace in the Uyghur Region is free of forced labour or to prevent the use of forced labour in these workplaces in line with human rights due diligence.”¹²⁰ The US was able to respond to the crisis by banning imports from Xinjiang with a rebuttable presumption that they had been created with forced labor, but the EU did not have this option at their disposal so used the policy options they had available.¹²¹ The EU Parliament could, however, threaten CAI, and suspended ratification of the agreement.¹²² The rejection of CAI was not limited to only Xinjiang and imposed sanctions, and members of Parliament stated that they

¹¹⁷ *Id.*

¹¹⁸ Koty, *supra* note 91.

¹¹⁹ *Id.*

¹²⁰ END UYGHUR FORCED LABOUR, *Call to Action on Human Right Abuses in the Xinjiang Uyghur Autonomous Region* <https://enduyghurforcedlabour.org/call-to-action/> (last visited February 20, 2022).

¹²¹ Jamie Bergin, *Uncertain Future for EU Proposed Ban on Products Made by Forced Labor*, IGLOBALNEWS (Oct. 21, 2021), <https://www.iglobenews.org/uncertain-future-for-eu-proposed-ban-on-products-made-by-forced-labor/>.

¹²² Koty, *supra* note 91.

“will take the human rights situation in China, including Hong Kong, into account when deciding whether to endorse the agreement or not.”¹²³

As the episode with CAI shows, dealing with China is a double-edged sword. While CAI would have allowed “European businesses [to] gain greater access to China’s . . . industries” and “China would commit to more stringent labor and sustainability standards,” dealing with the current regime is untenable from a human rights standpoint.¹²⁴ If the EU is to be a global leader in human rights, it cannot just look away when it is not economically advantageous for them to intervene. It is the wrong choice both politically and morally. Now that CAI is not being used as a carrot, the EU should adopt an import ban as a stick to punish human rights abusers and prevent them from profiting from abuse.

IV. Next Steps for the EU

Where does all of this leave the EU? While there are many compelling reasons for the EU to implement an import ban to fight against forced labor in the global supply chain, there is still resistance among some key policymakers. Furthermore, there are questions of whether the US model is appropriate for the EU and how it could be improved upon. In sum, however, an import ban must be a part of a broader regulatory regime targeting human rights abuses in the global supply chain in order to be effective, and the EU has to be a part of the solution instead of allowing the problem to persist.

Many of the arguments against implementing an import ban have already been addressed in this paper. Coming from the EU Commissioner for Trade, Valdis Dombrovskis, resistance to an import ban is founded on a handful of concerns. The first is that “[b]anning imports from

¹²³ European Parliament Press Release, MEPs Refuse Any Agreement with China Whilst Sanctions are in Place (May 20, 2021) <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-while-sanctions-are-in-place>.

¹²⁴ Koty, *supra* note 91.

entering the EU would not automatically prevent those products from being produced with forced labour so the problem itself will not go away.”¹²⁵ Sure, this is technically correct; the EU implementing an import ban will not magically stop forced labor abuse from occurring. This overly simplified point misses the bigger picture, however, as the point of an import ban is to cut human rights abusers off from one the largest markets in the world, and as was seen in the Top Glove case, companies can take the threat of this seriously enough to change their practices on the ground.

Dombrovskis also warned that such a measure “could be challenged . . . as it risks being perceived as discriminatory,” and that “[i]f a ban has to be pursued, it should be a ban of all goods produced with forced labour, no matter where the forced labour took place.”¹²⁶ As was covered in section II.B, however, the US import ban has yet to be challenged under WTO rules, and those rules in of themselves are obsolete. The EU should not continue to hamstring its efforts to guide global human rights policies by playing by rules other major players refuse to respect. As for the latter quote, it is always nice when the detractor makes your point for you. It is strange to posit that a ban should not be put in place because it needs to be applied everywhere, even inside the EU. The EU’s human rights mandate requires this anyway, and it is unclear what point Dombrovskis is attempting to make here.

Finally, “[r]ather than import bans, Brussels is drawing up sweeping ‘due diligence’ legislation that will force companies to take action against potential abuses of human rights in their supply chains.”¹²⁷ A due diligence package is, of course, a key aspect of a larger regulatory regime of this kind. There are, however, several problems with a due diligence alone approach.

¹²⁵ Khan, *supra* note 14.

¹²⁶ *Id.*

¹²⁷ *Id.*

For one, “shoehorn[ing] . . . a forced labor ban into a looser package on due diligence rules for companies . . . would put the onus more on business and national corporate regulators,” while simultaneously lessening the roles for “enforcers at the Commission and EU customs.”¹²⁸ This will lead to the uneven enforcement issue discussed previously and risk products produced with forced labor entering into circulation in various Member States. It also limits the ability of “the EU customs authorities act[ing] fast and stop[ping] the importation of these produces, as well as ensur[ing] that workers are remediated quickly.”¹²⁹ Burying an import ban in a due diligence package would be “a weak move which would slow down—and likely water down—both laws, and do nothing to help people living with the horror of modern slavery.”¹³⁰ Further, regarding the issue of conflict minerals, the fact that the EU had to shift from a voluntary due diligence structure to a mandatory compliance program that prevented imports of conflict metals supports implementing these measures now to prevent ongoing human rights abuses should the EU wait, try a due diligence only approach, and then have to make the shift later. In sum, the question should not be whether the EU implements an import ban, it should be how.

An entire additional paper could cover ways to make the US import ban model more efficient.¹³¹ As such, this paper will address the issues flagged by the EU in their proposal for an EU import ban akin to the US. EU policymakers flagged three issues present in the US model: (1) concerns that enforcement of the US Tariff Act is simply an extension of other foreign policy objectives, (2) lacks transparency and accountability, and (3) needs a requirement to remediate harm.¹³² To being, these are all valid critiques of the US system, but they are by no means

¹²⁸ Aarup, *supra* note 114.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See, e.g., Brewer, *supra* note 7 at 93 (arguing for a threat of an adverse inference that supports a finding of forced labor should a company fail to adopt a supply chain accountability program).

¹³² VANPEPERSTRAETE, *supra* note 10, at 4-5.

insurmountable obstacles preventing the EU from implementing an import ban. Concerning the first point, and to a certain extent the second, establishing a clear set of criteria and making enforcement mandatory in specified cases would help to prevent claims that the ban is being used for improper aims. As long as the requirements and process are well documented and established, the first two issues should be addressed. It is understandable that the US system raises concerns over being improperly used for ulterior foreign policy motives—44 of the 68 WROs issued in the last 32 years have been against Chinese goods—it is difficult to say that it being abused for those purposes.¹³³ China has been one of the worst human rights abusers in the world along with being one of the largest exporting nations. While this is a concern, it is unclear whether the EU should truly be concerned with repeating this behavior in their own ban. Further, this behavior is not inherent to the policy option, perhaps just American administration of it. Greater disclosure of process, however, would probably be key to address the first two noted concerns. Finally, the concern about remediation can be addressed through exacting financial penalties against the abusers to fund remedial projects or requirements for lifting a WRO can be put in place to ensure that the situation on the ground improves. It should be noted as well that, as Top Glove shows, companies may voluntarily address these concerns based on either public relations ground or to guarantee future access to American and European markets.¹³⁴ Furthermore, some companies may take preemptive steps to avoid future regulatory and reputational harms.¹³⁵ This is by no means an exhaustive discussion of places for improvements or what those improvements could be, but even by briefly addressing some of the raised concerns, it becomes clear that there is plenty of space for experimentation and creative problem

¹³³ CASEY, *supra* note 73, at 2.

¹³⁴ VANPEPERSTRAETE, *supra* note 10, at 5.

¹³⁵ See Sarfaty, *supra* note 24, at 439 (noting that Intel preemptively cut out conflict minerals from their supply chain instead of risking penalties under the Dodd-Frank Act).

solving to make import bans more equitable and efficient. Maintaining flexibility will be key, as it will allow for new developments in an ever-changing global economy. An import ban would be invaluable in a larger regulatory regime combating forced labor.

V. Conclusion

Forced labor is pervasive throughout the global economy. Goods tainted by exploitation pass through customs unimpeded every day. As long as forced labor remains profitable, economic actors will continue the cycle of exploitation. From both theoretical and practical standpoints, import bans appear to be effective policy tools for combating forced labor abroad. They craft the correct incentives for businesses and cut off key market access to goods produced through human rights abuse. By adopting a forced labor import ban, the EU would take a momentous step towards curbing the practice. It is a necessary policy choice to harmonize trade regulations with the US, honor the EU's stated commitments towards advancing human rights, and create a coherent trade policy for global corporations to follow.

There is more to the story of the Congo after Leopold transferred ownership to the Belgian government. While global outrage and knowledge persisted while Leopold was still in charge, it quickly dissipated at the hand-off. There were no actions taken to address the underlying issues that plagued the region under Leopold and the system of forced labor he oversaw.¹³⁶ Even the champion of the movement, Edmund Morel, “considered the Belgian takeover of the Congo only ‘a partial victory’” because “he knew that the system Leopold had set up would not be quickly dismantled; it was too profitable.”¹³⁷ Knowledge of the atrocities that were committed and the forced labor exploitation that fueled the rubber and ivory trade was not enough to fix the situation on the ground. Removing one bad actor only for more to take his

¹³⁶ HOCHSCHILD, *supra* note 1, at 272.

¹³⁷ *Id.* at 271.

place was not enough. What was needed was real action threatening the profits of human rights abusers and protecting survivors of abuse and exploitation. Sir Arthur Conan Doyle, a late but influential participant in the Congo movement, sums it up best when describing the new Belgian Congo, “So long as in any report of Congo reforms, such a sentence occurs as ‘Adult natives will be compelled to work,’ there can be no true reform whatever.”¹³⁸ As long as tainted goods continue to accrue profits for those who violate basic human rights, there can be no true reform whatever.

¹³⁸ *Id.* at 271-72.