Shedding light on ethics:

A review of an EU ban on forced labour products from the solar industry's perspective

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List of abbreviations

AB	Assessment Body
BIS	Bureau of Industry and Security
CAP	Corrective Action Plan
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBSA	Canadian Border Services Agency
CCP	Chinese Communist Party
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	United Nations Committee on the Elimination of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSDD Proposal	European Commission Proposal for a Due Diligence Directive
CSR	Corporate social responsibility
EPRS	European Parliamentary Research Service
ESDC	Canadian Labour Program of Employment and Social Development
ESG	Environmental, Social and Governance
EU	European Union
GATT	General Agreement on Tariffs and Trade
GW	Gigawatts
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICSMS	Information & Communication System Module
ILO	International Labor Organization
IMCO	European Parliament Committee on Internal Market and Consumer Protection
ISO	International Organization for Standardization

KYC checks	Know Your Counterparty evaluations
MEPs	Members of the European Parliament
MFN	Principle of most-favourable nation treatment
MSA	Australian Modern Slavery Act of 2018
NAFTA	North America Free Trade Act
NGO	Non-government / civil society organisation
NT	National treatment concept
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PRC	People's Republic of China
PV	Photovoltaic
R&D	Research & Development
SMEs	Small and medium-sized enterprises
SPE	SolarPower Europe
SSI	Solar Stewardship Initiative
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
The Council	Council of Ministers
TW	Terawatts
UFLPA	Uyghur Forced Labour Prevention Act
UN	United Nations
USMCA	Canada-United States-Mexico Agreement Implementation Act
VETC facilities	Vocational Education and Training Centres
WRO	Withhold Release Order
WTO	World Trade Organization
XIM	Xinjiang Implementing Measures for the PRC Counter-Terrorism Law
XRD	Xinjiang Uyghur Autonomous Region Regulation on De-extremification
XUAR	Xinjiang Uyghur Autonomous Region, China

Executive summary
In an era defined by rising geopolitical tensions and heightened awareness of human rights issues, international trade dynamics, particularly those involving the People's Republic of China ('PRC'), have come under intense scrutiny. This thesis embarks on an exploration of the complex interplay of trade relations between the European Union ('EU') and the PRC in connection to human rights violations in the Xinjiang Uyghur Autonomous Region in China ('XUAR'). In doing so, a particular focus is set on the solar photovoltaic ('PV') energy industry.
Reports emerged in late 2017 of human rights abuses targeting predominantly Muslim ethnic minority communities, particularly the Uyghurs, in the XUAR. These reports, coupled with evidence of forced labour programmes orchestrated by the Chinese Communist Party ('CCP'), underscore the urgent need to address systemic abuses within global supply chains.
In order to help European enterprises to handle the risk of forced labour in their business conduct and supply networks, the European Commission published a "Proposal for a Regulation on prohibiting products made with forced labour on the Union market" (COM(2022) 453 final) on 14 September 2022, commonly referred to as the marketing ban of products made with forced labour.
However, this approach is inherently at odds with the EU's objective of climate neutrality by 2050. The European Union aims to deploy 320 gigawatts ('GW') of solar PV capacity by 2025 and targeting almost 600 GW by 2030. The dominance of the PRC in the global solar value chain poses challenges, particularly regarding the prevalence of forced labour in the mining of raw materials and their processing to polysilicon. The projected development of the PV market in Europe puts the solar industry at the forefront where the proposed Regulation must effectively prevent the marketing of products made with forced labour in Europe. Consequently, this master's thesis investigates: *To what extent is the European Commission's proposed marketing ban suitable to prevent the utilisation of forced labour in the solar PV value chain?*
To assess the suitability of the EU Commission's proposed marketing ban, this thesis adopts a multifaceted approach. It conducts three case studies examining similar legislative measures in Canada, USA and Australia, reviews relevant literature on trade restrictions and evaluates the legal text of the Commission Proposal for a marketing ban of products made with forced labour. Additionally, the thesis incorporates insights from the European solar industry by analysing the Solar Stewardship Initiative's ESG Standard to understand its implications for solar industry's business practices.
By synthesising findings from these analyses, this master's thesis provides comprehensive insights into the effectiveness and viability of the proposed marketing ban. Ultimately, it seeks to inform legal scholars, industry stakeholders, and advocates concerned with human rights and sustainability,

offering valuable contributions to ongoing dialogues surrounding international trade and human rights protection.

The thesis concludes with 17 reflections on which it forms the basis for addressing the initial research question. The comprehensive analysis has shown that the European Commission's proposed marketing ban represents a significant advancement in combatting forced labour within the solar value chain. Firstly, its integration into a broader legal framework, alongside the Commission Proposal for a Corporate Sustainability Due Diligence Directive and the Corporate Sustainability Reporting Directive, reflects the EU's commitment to addressing modern slavery comprehensively. Moreover, the Proposal balances regulatory measures with market forces, allowing economic entities flexibility while incentivising ethical business conduct, as exemplified by the Solar Stewardship Initiative.

However, challenges persist in implementing robust traceability systems, particularly in high-risk regions such as the XUAR. Varying enforcement capacities and political will among the EU Member States' competent authorities put the strict and homogeneous enforcement of the marketing ban at risk. Furthermore, the economic operators' limited due diligence capacities and supply network complexities pose significant obstacles in guaranteeing the safety of the whole solar value chain. In addition, the EU's approach to combatting forced labour lacks clear mechanisms for remediating individuals who have experienced adverse human rights impacts. Both the proposed marketing ban and the industry response have been somewhat vague in this regard, highlighting a need for improvement.

Addressing these challenges will require collaboration among stakeholders, ongoing monitoring, and proactive measures. Through effective collaboration and continuous adaptation, meaningful progress can be made in promoting ethical business practices and safeguarding human rights globally. By leveraging the momentum generated by the proposed marketing ban and fostering a culture of accountability, the EU has the ability to play a pivotal role in driving positive change within the solar industry and beyond.

Expressions of acknowledgement

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1. Introduction

In an era marked by rising geopolitical tensions worldwide, discussions surrounding international trade have taken centre stage in the political realm, particularly concerning the People's Republic of China ('PRC'). These dialogues revolve primarily around strategic dependencies and the European Union's goal to promote and protect human rights worldwide. The resilience of international supply chains is the dominant concern in recent media debates, heightened by supply shocks during the COVID-19 pandemic and the ongoing Russia-Ukraine conflict. However, there is also a growing recognition of the significance of safeguarding human rights in trade relations. Nowhere is this more evident than in the context of modern slavery, where recent reports and allegations have underscored the urgency of addressing systemic abuses and exploitation within global supply chains. This thesis embarks on an exploration of these pressing issues, delving into the complexities of international trade dynamics and the intersecting realms of geopolitics, economic interests, and human rights violations.

The 2022 Global Estimates of Modern Slavery, a collaboratively developed report by the International Labor Organization ('ILO'), Walk Free Foundation, and International Organization for Migration, provides alarming statistics, estimating that 27.6 million individuals around the world were subjected to forced labour in 2021. This form of exploitation affects 86 percent of the victims through the private economy, while state-imposed policies impact 14 percent of the total. The report also highlights a concerning increase of 2.7 million individuals in forced labour between 2016 and 2021, translating to a rise in prevalence from 3.4 to 3.5 per thousand people globally. The increase was driven entirely by forced labour in the private economy[1].

Meanwhile, in late 2017, reports began to surface from various civil society groups, alleging the disappearance of members of predominantly Muslim ethnic minority communities, particularly the Uyghurs, in China's Xinjiang Uyghur Autonomous Region ('XUAR'). By 2018, the United Nations ('UN') Working Group on Enforced or Involuntary Disappearances observed a sharp rise in cases from XUAR, coinciding with the establishment of 're-education' camps by the Chinese government[2].

Furthermore, evidence emerged in the spring of 2018 suggesting that the Chinese Communist Party ('CCP') runs its network of detention centres and internment camps in XUAR as part of a broader strategy to transform the region into an obedient and profitable economic hub. While individuals from indigenous communities remained detained without trial, regional and local authorities shifted focus towards establishing a vast forced labour system,

[1] Commission Staff Working Document, 16 December 2022, SWD(2022) 439 final, *Prohibiting products made with forced labour on the Union market*, p. 6.

[2] Communication of the Office of the United Nations High Commissioner for Human Rights, 31 August 2022, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 1.

purportedly aimed at employing vast amounts of the adult ethnic Muslim population to enhance economic productivity and regional 'stability'[3].

After a thorough investigation including on-site visits, the Office of the United Nations High Commissioner for Human Rights ('OHCHR') under Michelle Bachelet published a report on its assessment of human rights concerns in XUAR in August 2022. It further underscored concerns regarding human rights violations in XUAR. The report highlights indications of discriminatory labour and employment practices, including those linked to the Vocational Education and Training Center ('VETC') system, which appear to be coercive and calls for transparent clarification by the Chinese government[4]. Moreover, the OHCHR report emphasises severe and unjust human rights restrictions resulting from the Chinese government's counter-terrorism and counter-extremism strategies in XUAR, disproportionately impacting Uyghur and other predominantly Muslim communities[5].

The ILO Forced Labour Convention of 1930 (No. 29) defines forced or compulsory labour as: "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily"[6].

Given the CCP's substantial investment in forced labour programmes and their clear violation of international labour rights conventions, it becomes crucial to examine the specific industry sectors affected by such practices. This thesis delves into one such industry - solar photovoltaic ('PV') energy - to illustrate how forced labour in XUAR intrudes supply chains of products that are imported into Western markets.

A report, published by the Helena Kennedy Centre for International Justice at Sheffield Hallam University, provides compelling evidence that victims of the CCP's forced labour regime are directly employed in the mining and processing of raw materials that are used in the PV industry. The direct sale of polysilicon that is tainted with forced labour to the top four PV module manufacturers in the world has substantial impacts on the whole supply network of the industry. Due to the extensive implementation of government-backed compulsory labour programmes, it is almost impossible to obtain raw materials that are free from forced labour if they are sourced in XUAR under the current regime[7].

At the same time, the European Union ('EU') seeks to deploy over 320 gigawatts ('GW') of solar PV capacity by 2025, more than doubling the 2020 output, and targeting almost 600 GW by 2030[8].

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[3] MURPHY & ELIMÄ (2021:9).

[4] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 128.

[5] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para.143.

[6] Treaty of the International Labor Organization, 28 June 1930, No. 29, C*onvention Concerning Forced or Compulsory Labour,* Art. 2.

[7] MURPHY & ELIMÄ (2021:27).

[8] Strategy paper of the European Commission, 18 May 2022, COM(2022) 221 final, *EU Solar Energy Strategy*, p. 1.

The PRC stands as a dominant force driving the global rise of solar power. Leveraging aggressive government support and *rough-and-tumble entrepreneurialism*, China has harnessed its formidable manufacturing supply chain and financial institutions to seize upon the solar opportunity. Consequently, the PRC has cultivated sophisticated solar enterprises operating across various segments of the solar value chain[9].

In order to help European enterprises to handle the risk of forced labour in their activities and supply networks, the European Commission together with the European External Action Service published a non-binding Guidance on Due Diligence in July 2021[10]. Because voluntary methods were proven to be insufficient, Commission President von der Leyen announced in her speech at the 2021 State of the Union that the Commission is working on a ban on products on the European market that are produced using forced labour[11]. Later on, a Resolution on "a new trade instrument to ban products made by forced labour" was passed by the European Parliament in response to this pursuit[12]. A "Proposal for a Regulation on prohibiting products made with forced labour on the Union market" (COM(2022) 453 final) was finally released by the European Commission on 14 September 2022[13]. The Commission's Working Staff Document states that the proposed Regulation aims to "effectively prohibit placement and making available of products made with forced labour, including child labour, in the EU market"[14]. Both domestically manufactured goods and imports would be subject to this ban. It incorporates worldwide standards in addition to existing EU initiatives on corporate sustainability due diligence and reporting obligations[15].

For prohibiting the marketing of products made with forced labour, the European Union uses its power as China's most important trade partner to enforce its political interests. However, this approach is inherently at odds with the goal of climate neutrality in the EU by 2050. The projected development of the PV market in Europe puts the solar industry at the forefront where the marketing ban must effectively prevent the marketing of products made with forced labour in their value chain in Europe. Consequently, this master's thesis will investigate: *To what extent is the European Commission's proposed marketing ban suitable to prevent the utilisation of forced labour in the solar PV value chain?*

To answer this research question, the thesis will follow a holistic approach by conducting three case studies, a thorough literature review, a law review of the

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[9] BALL ET AL. (2017:29).

[10] MONARD ET AL. (2022a).

[11] State of the Union address by the European Commission, VON DER LEYEN, 15 September 2021, *State of the Union 2021*.

[12] Resolution of the European Parliament, 09 June 2022, 2022/2611 (RSP), *Texts adopted: A new trade instrument to ban products made with forced labour.*

[13] Press release of the European Commission, 14 September 2022, IP/22/5415, *Commission moves to ban products made with forced labour on the EU market*.

[14] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 34.

[15] MONARD ET AL. (2022b).

Commission's Proposal for a marketing ban of products made with forced labour and an analysis of the response to the forced labour issue by the European solar industry. In the first part, three case studies will be conducted that cover legislative measures of other western countries, namely the USA, Canada and Australia, to prevent the utilisation of forced labour practices by importing products in their respective territories. Learnings will be drawn from these case studies that show potential positive and negative characteristics of the laws in the respective countries.

In a next step, the latest literature on legislative measures to address forced labour is researched, highlighting key learnings that should be considered when evaluating the effectiveness of trade restrictions. By drawing upon academic, legal, and industry sources, this chapter offers a comprehensive examination of the criteria needed to evaluate the European Commission's Proposal for a marketing ban on forced labour products, aiming to determine the law's effectiveness and robustness. In a third step, the legal text of the Commission Proposal for a marketing ban on forced labour products will be reviewed and assessed to what extent the findings of the case studies and literature research have been taken into account.

To make a well-founded argument about the suitability of the ban for the European solar industry, the industry perspective is incorporated by analysing the Solar Stewardship Initiative's ESG Standard. The initiative works with manufacturers, developers, installers, and purchasers across the global solar value chain to collaboratively foster responsible production, sourcing, and stewardship of materials. Their industry standard covers requirements to address environmental, social and governance sustainability for production sites engaged in manufacturing of polysilicon, ingots, wafers, cells and modules, and other component manufacturing[16].

This master's thesis provides a comprehensive analysis of the suitability of the proposed marketing ban to prevent the utilisation of forced labour within the solar value chain. By synthesising insights gathered from both the legal review and the examination of the industry response, the thesis seeks to form holistic arguments that illustrate the effectiveness and viability of the proposed legal measure to prevent the marketing of solar products made with forced labour in the European Union. In doing so, the thesis aims to provide valuable insights to legal scholars, industry stakeholders, and advocates concerned with human rights and sustainability.

[16] Standard of the Solar Stewardship Initiative, 20 October 2023, v. 1.0, *The Solar Stewardship Initiative ESG Standard*, p. 1.

2. Surveying the landscape: Human rights violations in Xinjiang, China

Demographically, the Xinjiang Uyghur Autonomous Region ('XUAR') has experienced significant growth and demographic change in its ethnic composition since 1949. The first census in 1953 showed that over 75 percent of the region's population consisted of Uyghurs, predominantly Sunni Muslims, while ethnic Han Chinese made up seven percent. Other predominantly Muslim ethnic groups, including Hui, Kazakh, Kyrgyz, Mongol, and Tajik people, also resided in the region. According to an Analysis carried out by the United Service Institution of India based on the Chinese census, the ethnic composition has shifted over time, with the Uyghur population now constituting approximately 45 percent of the region's total, and Han Chinese accounting for about 42 percent[17].

Historically, the XUAR has been one of the poorest regions in the People's Republic of China ('PRC'), which prompted central authorities to initiate extensive development and poverty alleviation efforts over the past decades. State media reports indicate that between 2014 and 2018, 2.3 million people in XUAR emerged from poverty, with 1.9 million belonging to the southern Xinjiang region, which has the highest population of diverse ethnic groups[18].

In July 2009, riots erupted in the region's capital Urumqi, leading the Office of the United Nations High Commissioner for Human Rights ('OHCHR') to call for an investigation into the causes of the violence[19]. The Chinese Communist Party ('CCP') attributed the unrest to 'separatist, terrorist, and extremist forces' and reported thousands of terrorist attacks in Xinjiang from 1990 to the end of 2016. These attacks purportedly resulted in the deaths of numerous innocent people and hundreds of police officers, causing extensive damage to property. Simultaneously, violent incidents occurred in different Chinese cities outside the XUAR, characterised by the CCP as terrorist acts[20].

Official statements from the CCP emphasised that "Xinjiang-related issues are in essence about countering violent terrorism and separatism"[21]. In its March 2019 white paper "The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang", the Chinese government asserted that it addresses these issues "in accordance with law"[22]. According to the CCP, China's legal framework is described as an "anti-terrorism law system" which

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[17] MADHUKAR & SWAYAMSIDDHA (2022:5).

[18] News article by Xinhua, 11 October 2019, *Xinjiang makes headway in poverty alleviation*.

[19] Press release of the Office of the United Nations High Commissioner for Human Rights, 7 July 2009, 2009/10, *UN human rights chief alarmed by high loss of life in China's Xinjiang region*.

[20] White paper of the State Council Information Office of the People's Republic of China, March 2019, *The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang*.

[21] Speech at the High-level Segment of the 46th Session of the United Nations Human Rights Council, WANG, 22 February 2021, *A people-centered Approach for Global Human Rights Progress*.

[22] White paper, *The Fight Against Terrorism and Extremism and Human Rights Protection in Xinjiang*.

comprises specific national security and counter-terrorism legislation, general criminal law and criminal procedural law, as well as regulations related to religion and 'de-extremification'. Most of these laws and regulations, both at the national and regional levels, were adopted or revised between 2014 and 2018 within the context of the CCP's Strike Hard campaign[23].

The CCP closely links its poverty alleviation schemes with the prevention and countering of religious 'extremism'. The aforementioned white paper suggests a perceived connection between religious extremism and poverty in the XUAR. In identified areas of extreme poverty in southern Xinjiang, the paper states that 'terrorists, separatists, and extremists' incite resistance to learning the standard Chinese language, rejecting modern science, and refusing to enhance vocational skills and economic conditions. Consequently, individuals in these areas are said to fall into long-term poverty[24].

Official data on the number of individuals undergoing re-education as part of CCP's of the Strike Hard campaign has not been released by the CCP. In 2018, the United Nations Committee on the Elimination of Racial Discrimination ('CERD') highlighted the absence of official statistics and called on the PRC to provide data for the past five years, acknowledging estimates ranging from tens of thousands to over a million individuals detained[25].

The CCP's poverty alleviation programmes, including those in Xinjiang, heavily involve employment schemes. According to the CCP's September 2020 white paper on "Employment and Labour Rights in Xinjiang", the total employment in Xinjiang increased from 11.35 million to 13.3 million between 2014 and 2019, a rise of 17.2 percent. The average annual increase in urban employment exceeded 471,000 people, with 148,000 in southern Xinjiang, constituting 31.4 percent. The average annual relocation of 'surplus rural labour' surpassed 2.76 million people, of whom over 60 percent, nearly 1.68 million, were in southern Xinjiang. These initiatives primarily focused on southern Xinjiang, an area lagging behind in traditional development indicators[26].

A November 2020 government report documented the 'placement' of 2.6 million minoritised citizens in jobs within the Uyghur Region and across the country through state-sponsored surplus labour initiatives. The CCP reported a 46.1 percent year-on-year increase in the number of XUAR citizens 'transferred' for work, suggesting that around a fifth of the Uyghur and Kazakh

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[23] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 16.

[24] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 117.

[25] Communication of the United Nations Committee on the Elimination of Racial Discrimination, 19 September 2018, CERD/C/CHN/CO/14-17, *Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)*, paras. 40(a) & 42 (h).

[26] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para.116.

population in XUAR is engaged in labour relocation programmes between 2017 and 2018[27].

As of 2018 ever-more evidence and reports emerged that indicate forced labour practices emerged with respect to Uyghur and other predominantly Muslim minorities inside and outside XUAR. These allegations relate to two main contexts:

(1) placements in Vocational Education and Training Centres ('VETC facilities') upon 'graduation'

(2) labour placements in the XUAR and in other parts of China, known as 'surplus labour' and 'labour transfer' [28].

The CCP counts as surplus labour those Xinjiang citizens living outside internment camps who lack jobs, are only seasonally employed, work as small-scale farmers, or are retired. Government-sponsored surplus labour transfer programmes have long existed in the XUAR, but the efforts have expanded and intensified in recent years[29]. Employing government documents and state media reports, researchers have clearly identified that these so-called surplus labour and labour transfer initiatives practiced in the XUAR are in fact mechanisms of a massive programme of compulsory labour[30].

As the CCP faced growing international pressure about the detention camps, China's state broadcaster aired a 15-minute focus interview in October 2018 that featured a VETC facility in the southern Xinjiang city of Hotan. The report stated that "terrorism and extremism are the common enemy of human civilisation". In response, the report said, the local government in Xinjiang was using vocational training to solve this 'global issue'[31].

In 2019 the CCP released a white paper which stated that "education and training [in VETC facilities] is not a measure to limit or circumscribe the freedom of the person". In addition, China noted in its response to the Committee on the Elimination of Racial Discrimination ('CERD') that VETC facilities are "schools by nature"[32].

In October 2018, shortly after the CCP acknowledged the existence of VETC facilities, the Xinjiang Implementing Measures for the P.R.C. Counter-Terrorism Law ('XIM') and the XUAR Regulation on De-extremification ('XRD')

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[27] White paper of the State Council Information Office of the People's Republic of China, 17 September 2020, *Employment and Labor Rights in Xinjiang*.

[28] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 118.

[29] MURPHY & ELIMÄ (2021:10).

[30] LEHRAND & BECHRAKIS (2019:15).

[31] Focus interview by CCTV, 16 October 2018, *Build a solid foundation for source governance*.

[32] Communication of the United Nations Committee on the Elimination of Racial Discrimination, 9 October 2019, CERD/C/CHN/FCO/14-17, *Information received from China on follow-up to the concluding observations on its combined fourteenth to seventeenth periodic reports*, pp. 3-4.

were both revised to explicitly introduce provisions permitting the establishment of such centres[33].

When it comes to the nature and functional purpose of the educational programmes in VETC facilities the XIM states that their purpose is to both educate and rehabilitate people who have been influenced by 'extremism'. It therefore includes "vocational skills education and training centres and other education and transformation establishments"[34].

In order to identify people that come under scrutiny of PRC's poverty alleviation and de-extremification system, the Chinese government introduced in its revised XRD Regulation a list of 75 "primary expressions of extremification". These expressions, described as "words and actions under the influence of extremism", are meant to be prohibited. The lists encompass 'signs' and 'primary expressions' of religious extremism, including activities that fall within the exercise of fundamental freedoms and are not inherently linked with violence or potential violent action[35].

Examples of such expressions include "rejecting or refusing radio and television", being "young and middle-aged men with a big beard", "suddenly quitting drinking and smoking", and "resisting cultural and sports activities such as football and singing competitions". Additionally, various forms of conduct associated with expressing different opinions are considered signs of extremism, such as "resisting current policies and regulations", "using mobile phone text messages and social chat software for learning experiences", "reading illegal religious propaganda materials", "carrying illegal political and religious books and audio-visual products", and "using satellite receivers, the Internet, radio, and other equipment to illegally access overseas religious radio and television programmes". "Resisting government propaganda" and "refusing to watch 'normal' movies and TV networks" are also listed as indicators[36].

These indicators, aimed at identifying individuals "at risk of extremism or terrorism", appear to be based on elements that may not serve as actual indicators of engagement in violent extremist or terrorist conduct. Instead, they seem to rely on a simplistic association of these indicators with terrorism or extremism, with many being mere manifestations of personal choices in the practice of Islamic religious beliefs and legitimate expression of opinions[37].

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[33] Regulation of the Standing Committee of the 12th People's Congress for the Xinjiang Uygur Autonomous Region, 29 March 2017, *Xinjiang Uyghur Autonomous Region Regulation on De-extremification (unofficial translation)*, Art 17;
Regulation of the Standing Committee of the 13th People's Congress of the Xinjiang Uighur Autonomous Region, 10 October 2018, *Xinjiang Implementing Measures for the P.R.C. Counter-Terrorism Law (unofficial translation)*, Art. 38-39 & 44.

[34] Regulation, *Xinjiang Implementing Measures for the P.R.C. Counter-Terrorism Law (unofficial translation)*, Art. 38-39.

[35] Regulation, *Xinjiang Uyghur Autonomous Region Regulation on De-extremification (unofficial translation)*, Art 9.

[36] Translation of the University of British Columbia, BYLER, 7 June 2021, *Learning and identifying 75 religous extreme activities in parts of Xinjiang (unofficial translation)*.

[37] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para.28.

With respect to the allegations of forced labour in the XUAR that are not necessarily connected to VETC facilities, some publicly available information on surplus labour schemes suggests that various coercive methods may be used in securing 'surplus labourers'. The 13th Five-year Plan on Poverty Alleviation in the Xinjiang Uyghur Autonomous Region, adopted in May 2017, makes reference to "insufficient willingness of the poor people to gain employment making it difficult to transfer employment and increase income"[38].
A 2018 county-level government Directive further illustrated this system, where government agents or labour recruiters assigned each Uyghur or Kazakh person designated as surplus labour a point value and categorised them as controlled, general, or assured. These categories determined the distance of a person's work placement from home, with those needing control sent for 'training', and others sent to work either close to home or across the country. No one is exempt from this quantitative points system, ensuring that surplus labourers undergo training and employment[39].

> "All surplus labour force in the jurisdiction shall be managed by a quantitative points system, so as to ensure that all the surplus labourers in the jurisdiction who should be trained are trained, and all who should be employed are employed. […] If, during organization, publicity campaigns, and mobilization efforts of all villages and townships, there are people who are discovered to be able to participate in training but are unwilling to participate in training, or who are able to go elsewhere for employment but are not active in seeking employment, or have outdated concepts or stubborn thinking, the corresponding points should be deducted"[40].

Interviews with a government cadre and a former detainees shed light on the coercion employed in this system. People with family members in internment camps were coerced into working in factories, with promises that their labour would improve their detained family members' scores and expedite their release. These practices underscore the entwined nature of the poverty alleviation, de-extremification, and labour transfer systems, where personal choices and familial connections influence individuals' participation in state-sponsored labour programmes[41].
In the aforementioned local government Labour Transfer Directive, labour agencies are instructed to:

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[38] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para.122.
[39] MURPHY & ELIMÄ (2021:10).
[40] Implementing plan of the Qapqal County Human Resources and Social Security Board, 22 March 2018, *for serving the transfer and employment work for the urban and rural surplus labour force in Qapqal County (unofficial translation)*.
[41] MURPHY & ELIMÄ (2021:11).

> "have organizational discipline in place and implement militarised management to make people with employment difficulties get rid of selfish distractions, to change their long-cultivated lazy, idle, slow, and inconstant behaviors of personal freedom, to abide by corporate rules and regulations and work discipline, and to devote themselves fully to daily production. The government should use iron discipline to ensure that worker cooperation results in a 1+1>2 result"[42].

As part of the surveillance practices supporting the anti-terrorism logic underpinning the labour transfer system, Han 'relatives' were assigned to visit and even live in Uyghur homes. Their role was to educate individuals on appropriate behaviour and carefully monitor them for signs of deviation from party ideology. These 'relatives' were required to report anyone resisting poverty alleviation programmes like labour transfers. Such practices, combined with the logic of anti-terrorism, restricted minoritised citizens' legitimate opportunities for choice when participating in state-sponsored labour transfer programmes[43].

A report published by the China Institute of Wealth and Economics suggests that the labour transfer regime serves not only to reduce Uyghur population density in Xinjiang but also as a method to influence, integrate, and assimilate Uyghur minorities. This indicates that poverty alleviation may not be the sole or primary motivating factor behind the programme[44].

The CCP's August 2019 white paper on "Vocational Education and Training in Xinjiang" explains that the system seeks to balance harsh punishment for serious acts with compassion, leniency, education, and rehabilitation for minor cases. Criminal courts handle serious acts, while an administrative track deals with more 'minor' cases through VETC facilities. The distinction between 'serious' and 'minor' acts of terrorism or extremism remains unclear, as the same types of conduct are often included under both legal categories. Moreover, under the law, each intervening authority at every stage of the process, whether in the criminal or administrative track, can determine that 'education' is warranted. This can result in the transfer of an individual to a VETC facility, making it an available consequence for any act construed as terrorism or extremism, regardless of criminal prosecution[45]. Reporters have identified at least 135 camps co-located with or in proximity to factories[46].

Individuals sent to VETC facilities described being taken there by public security officials, often after being held at a police station. Detained people between 2017 and 2019 reported later to OHCHR that they had to go to a VETC

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[42] Implementing plan, *for serving the transfer and employment work for the urban and rural surplus labour force in Qapqal County (unofficial translation)*.

[43] MURPHY & ELIMÄ (2021:12).

[44] Report of the China Institute of Wealth and Economics, 23 December 2019, 1009, *Report on poverty alleviation work for Xinjiang Hotan Region Uyghur labour force transfer and employment*.

[45] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 29.

[46] News article by BuzzFeed, KILLING & RAJAGOPALAN, 28 December 2020, *China's Camps Have Forced Labor And Growing US Market*.

facility without an alternative option and lacked the ability to challenge the referral process. None had access to a lawyer before or during their time in the facility. Long interrogations often preceded their placement. Once in the VETC facilities, detainees observed significant security presence, armed guards, and police uniforms. The detainment varied from two to 18 months, with no information provided about the duration. Half of the interviewees by the OHCHR had limited contact with family under surveillance, while the other half had no communication. Government-promoted videos propagated a positive image of these camps, but those interviewed by OHCHR stated they were told to be positive during visits, suggesting coerced narratives. The OHCHR's "Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China", published in August 2022, therefore states that the CCP's claim of attendees' freedom to join or quit programmes contradicted consistent accounts revealing a lack of free consent. This makes placements in VETC facilities a form of involuntary deprivation of liberty[47]

Compensation varied among factories, with some detainees reporting receiving no payment, while others earned several hundred dollars a month – barely exceeding the minimum wage in the poor regions of the XUAR. In one county, an insider estimated that over 10,000 detainees, constituting ten to 20 percent of the internment population, were working in factories, earning as little as a tenth of their previous income. A former Xinjiang TV reporter, now in exile, disclosed that during his month-long detention, young detainees were taken to work in carpentry and a cement factory without any compensation[48].

Those purportedly 'released' or 'graduated' from the internment camps often face mandatory employment in factories near their former places of internment[49]. Shohrat Zakir, Chairman of the Xinjiang Uyghur Autonomous Region, announced in October 2018 that detainees completing their internment terms would be "seamlessly integrated into jobs with settled enterprises". To this end, he stated: "We will try to achieve a seamless connection between school teaching and social employment, so that after finishing their courses, the trainees will be able to find jobs and earn a well-off life"[50].

The above mentioned OHCHR report from August 2022 challenges the Chinese government's assertions that labour practices in the region are voluntary. While the CCP claims that such employment is based on voluntary labour contracts and in accordance with the law, the OHCHR expresses doubts. It raised particular concern about the close association between the labour schemes and the counter-extremism framework, including the Vocational Education and Training Center system. The OHCHR concludes that the VETC

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[47] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, paras. 41–44.

[48] News article by Associated Press, KANG ET AL., 19 December 2018, *US sportswear traced to factory in China's internment camps*.

[49] News article by The New York Times, BUCKLEY & RAMZY, 16 December 2018, *China's Detention Camps for Muslims Turn to Forced Labor*.

[50] News article, *US sportswear traced to factory in China's internment camps*.

system constitutes a widespread arbitrary deprivation of liberty through involuntary placements and compulsory training. Individuals within the system live under a constant threat of penalties, exemplified by detainees reporting that working within VETC facilities is mandatory as part of the 'graduation process', leaving them with no option to refuse due to fear of prolonged detention[51].

The accounts provided by former detainees shed light on widespread mistreatment within VETC facilities, raising grave concerns about human rights violations. Two-thirds of the interviewed individuals by the OHCHR reported experiencing treatment amounting to torture and other forms of ill-treatment, occurring during interrogations or as punishment. Such mistreatment included beatings with batons, interrogation with waterboarding, prolonged solitary confinement, and enforced immobility. Many detainees were held in police stations prior to VETC placement, where similar abuses occurred. Additionally, detainees described being shackled, enduring constant hunger resulting in significant weight loss, and suffering sleep deprivation due to constant surveillance. They were forced to learn political teachings and sing patriotic songs daily. Medical interventions, including injections and pills, were administered without informed consent, causing a form of lethargy. Some detainees reported instances of sexual violence, including rape, often perpetrated by guards in separate rooms. These conditions led to persistent health issues and psychological trauma among detainees, resulting in long-term consequences. According to the OHCHR, these accounts reveal blatant violations of human rights standards, including the prohibition of torture and cruel, inhuman, or degrading treatment[52].

These instances of mistreatment point to a breach of the fundamental obligation to give humane and dignified treatment to detained individuals, as well as the absolute prohibition of torture and other forms of cruel, inhumane, or degrading treatment or punishment[53]. Moreover, the cumulative conditions and practices prevalent in VETC facilities represent violations of the basic standards for the humane treatment of detainees, as outlined by the OHCHR. Such circumstances, particularly when experienced over prolonged periods or recurring instances, can lead to severe physical and psychological distress, potentially meeting the threshold for torture or other forms of cruel, inhumane, or degrading treatment or punishment[54].

China is subject to a comprehensive international legal framework that encompasses various human rights treaties, conventions, and customary international law norms. These legal instruments establish obligations for China to

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[51] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 121.

[52] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, paras. 70–74.

[53] Treaty of the United Nations General Assembly, 16 December 1966, U.N.T.S. 999, *International Covenant on Civil and Political Rights*, Art. 7 & Art. 10.

[54] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 75.

uphold and protect fundamental human rights and adhere to international labour standards. Firstly, the PRC is a State Party to several key human rights treaties, in particular the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), the Convention on the Rights of the Child ('CRC'), the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the Convention on the Rights of Persons with Disabilities ('CRPD')[55].

When it comes to the International Covenant on Civil and Political Rights ('ICCPR'), it is worth noting that China has signed but not yet ratified it. However, it remains bound by customary international law norms derived from this Covenant, such as the right to life, freedom of expression, freedom of religion, and the right to a fair trial. These norms are considered binding on all states, regardless of their treaty ratification status, and constitute fundamental principles of international law[56].

China is also bound by human rights norms accepted as constituting customary international law, notably with respect to the right to life, the prohibition of discrimination based on race, religion or sex, and the right to freedom of religion. Moreover, some human rights norms are also considered to constitute *jus cogens* of international law. These norms are accepted and recognised by the international community of states as a whole from which no derogation is permitted under any circumstances. They include the prohibitions of arbitrary deprivation of life, torture, slavery, arbitrary detention, racial discrimination, and the commission of international crimes, such as crimes against humanity. As such, China is obliged to comply with these norms and ensure that its domestic laws and practices are consistent with them[57].

China's labour relocation programmes primarily aim at rural labourers, intending to transition them from agricultural to industrial workers. These initiatives typically target poorer regions, often labelled as 'underdeveloped' and susceptible to 'religious extremism', particularly in southern and western Xinjiang[58]. While these programmes might be aimed at poverty alleviation, the absence of voluntariness raises concerns of potential discrimination based on religious and ethnic backgrounds and therefore inter alia a breach of customary international law.

Additionally, China is subject to international labour standards established by the International Labor Organization ('ILO'). These standards include conventions and recommendations related to forced labour, child labour, discrimination in employment and occupation, and freedom of association and

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[55] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 6.

[56] Treaty, *International Covenant on Civil and Political Rights.*

[57] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 6.

[58] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 123.

collective bargaining. China has ratified several ILO conventions, including the Discrimination (Employment and Occupation) Convention of 1958 (No. 111), and the Employment Policy Convention of 1964 (No. 122), among others. These conventions set out principles and rights at work that China is obligated to respect and implement within its territory, including the equality of opportunity and treatment without discrimination based on race and religion as well as the free choice of employment. On 20 April 2022, the National People's Congress of China approved ratification of the Forced Labour Convention of 1930 (No. 29) and the Abolition of Forced Labour Convention of 1957 (No. 105). The CCP has undertaken a number of important labour law reforms, which should strengthen safeguards against forced labour[59].

The Chinese labour transfer programmes violate citizens' fundamental right to freely choose their employment, as enshrined in Article 23 of the Universal Declaration of Human Rights[60]. Additionally, the "Protocol to Prevent, Suppress and Punish Trafficking of Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" explicitly prohibits coercion, abduction, fraud, or any other form of exploitation for labour purposes[61].

The evidence indicates that the Chinese labour transfer programme in the XUAR serves multiple purposes, including punishing individuals with dissenting ideological views, fostering economic development through compulsory labour, and exerting control over marginalised communities based on racial and religious grounds. Despite the CCP's assertion that these initiatives aim to alleviate poverty, the looming threat of internment camps effectively eliminates any possibility for Uyghur or other minority citizens to decline participation without facing repercussions. This violates the principles outlined in the ILO Forced Labour Convention of 1930 (No. 29), including the abolition of slavery[62].

As a final observation, China's 'anti-terrorism law system' operates on vague and expansive principles, granting significant discretion to various officials for interpretation and implementation. The methods employed to identify and assess problematic behaviour lack empirical evidence linking them to terrorism or violent extremism, and the legal consequences are unpredictable and inadequately regulated. This framework presents grave concerns regarding compliance with international human rights law, as it is susceptible to arbitrary and discriminatory application, unjustifiably restricts fundamental rights, and risks arbitrary detention without adequate safeguards. Moreover, the system's association of 'extremism' with certain religious and cultural practices poses

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[59] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para.115.

[60] Treaty of the United Nations General Assembly, 10 December 1948, *Universal Declaration of Human Rights*, Art. 23.

[61] Protocol of the United Nations General Assembly, 15 November 2000, U.N.T.S. 2237, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,* Art. 3.

[62] Treaty, C*onvention Concerning Forced or Compulsory Labour,* Art. 2.

a significant risk of unnecessary, disproportionate, and discriminatory targeting of ethnic and religious communities[63].
In addition, the OHCHR's findings reveal a lack of free and informed consent among individuals placed in VETC facilities, rendering their detention effectively involuntary. Their indefinite confinement, subject to undefined criteria evaluated by authorities, constitutes a clear deprivation of liberty. Such practices violate the principles of international human rights law, particularly the prohibition of arbitrary detention as established in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Detention becomes arbitrary when used to suppress legitimate exercise of human rights, including freedom of expression, religion, and cultural identity[64].

2.1. Forced labour implications of the solar photovoltaic market

Given the Chinese government's substantial investment in forced labour programmes and their clear violation of international labour rights conventions, it becomes crucial to examine the specific industry sectors affected by such practices. This thesis delves into one such industry – solar photovoltaic ('PV') energy – to illuminate how forced labour in the XUAR intrudes supply chains and enters global markets. In order to understand the severeness of the issue for the industry, special emphasis is given to the current global market dynamics for suppliers and importers of PV products and their projected growth over the next years.
Solar power has been emerging as the leading power generation source globally over the last few years. From the more than 300 gigawatts ('GW') of new renewable power generating capacity added, solar PV claimed a share of 56 percent, grid-connecting 167.8 GW in 2021. The role of solar in the global energy transition is getting more and more prominent, considering that solar alone installed more capacity than all other renewable technologies combined[65]. The remarkable success of solar energy can be attributed to its significant cost reduction over the past decade. While the cost of solar has been lower than fossil fuel generation and nuclear for several years, it even managed to be lower than wind in many regions around the world in 2021. The spread with conventional generation technologies is widening, considering that the cost of gas and nuclear went up[66].
However, over the past two years, there have been substantial disruptions in international supply networks, resulting in notable price surges (see Figure 1). The long-term consequences of the COVID-19 pandemic and the last lockdown in Shanghai in 2022 have resulted in rising shipping expenses, while the conflict in Ukraine has triggered global inflationary pressure. Within the solar industry, the cost of polysilicon has been steadily increasing over the past two

[63] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 35.
[64] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, para. 44.
[65] SolarPower Europe (2022a:7).
[66] SolarPower Europe (2022a:9).

years. It reached its highest point at approximately 38 USD/kg in December 2022, compared to slightly below 10 USD/kg in early 2021. Additionally, prices of other products in the value chain also experienced significant increases[67].

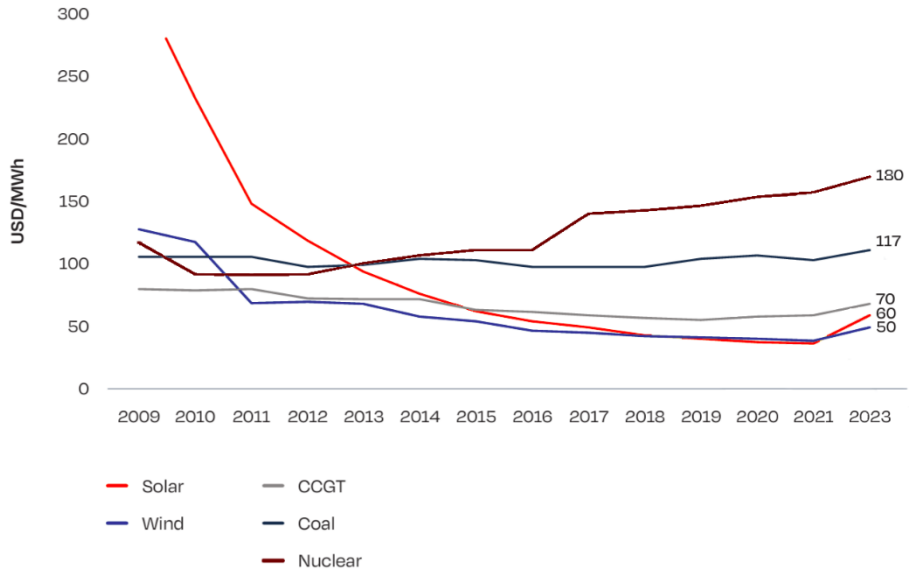

Figure 1: Compared cost of electricity generation 2009-2023[68]

Recent geopolitical developments and armed conflicts caused a sharp increase of the all-time high energy prices observed in 2021 in the European Union ('EU') and many other regions of the world. Wholesale gas prices in Europe were five times higher in the first quarter of 2022 than a year earlier and in August. These price fluctuations have severe implications for manufacturing costs, particularly in energy-intensive industries such as solar. The price of commodities has also been increasing[69].

Amidst these challenges, the solar industry has witnessed substantial growth due to low-cost manufacturing abroad, predominantly in the PRC. The global cumulative PV installed capacity starting from its 855.2 GW level in 2021 had passed the one-terawatt ('TW') threshold (1 046.6 GW) by the end of 2022. More than half of this capacity is based in Asia (57 percent in 2022) with China being the global leader in total solar installation capacity, 21.5 percent in Europe, 11.9 percent in North America and 9.5 percent elsewhere in the world. Thus, 191.5 GW was added between 2021 and 2022 a 35.5 percent year-on-year increase (from 141.2 GW in 2021). Asia installed 58.5 percent of the additional global solar photovoltaic capacity, Europe 19.7 percent, and

[67] SOLARPOWER EUROPE (2023a:11).
[68] SOLARPOWER EUROPE (2023a:11).
[69] Communication of the European Commission, 15 November 2022, COM(2022) 643 final, *Report on progress on competitiveness of clean energy technologies*, pp. 3-4.

North America 10.1 percent. The world's other regions added 11.8 percent of the capacity[70].

Anticipating further growth, the solar industry is expected to significantly increase annual production to meet global emission reduction targets. The annual production of solar PV cells and modules is in the range of 200 to 230 GW. The next TW milestone, one terawatt of annual production capacity, is expected to be reached within the next five to seven years and reach even two TW by the beginning of 2030. This five- to ten-fold increase will have severe consequences for the PV industry and further research and development ('R&D') efforts are necessary to facilitate this growth[71].

When it comes to the European Union, the year 2022 witnessed the introduction of the REPowerEU plan, a pivotal component of the EU's response to the ongoing energy crisis. This plan serves as a roadmap to swiftly reduce the EU's reliance on foreign energy imports through strategies focused on energy savings, diversification of energy imports, and accelerating Europe's clean energy transition[72].

Achieving the objectives outlined in the REPowerEU plan necessitates an additional cumulative investment of EUR 210 billion by 2027, supplementing the funds already allocated to achieve climate neutrality by 2050[73]. This financial commitment will facilitate the extensive expansion and hastened implementation of clean energy technologies, including solar photovoltaic, wind, heat pumps, energy-saving technologies, biomethane, and renewable hydrogen[74].

The REPowerEU plan, reaffirmed the EU's dedication to realising the long-term goals of the European Green Deal, striving for climate neutrality by 2050, and fully enacting the Fit for 55 package, unveiled in July 2021. Fulfilling the ambitions of the European Green Deal entails the development, execution, and expansion of innovative energy efficiency and renewable energy solutions[75].The plan aims to significantly enhance renewable energy adoption in various sectors, including power generation, industry, buildings, and transportation[76]. This not only accelerates EU energy independence and advances the green transition but also contributes to long-term reductions in electricity prices and fossil fuel imports. Strategies will encompass bolstering renewable energy infrastructure alongside implementing energy-saving and efficiency measures[77].

Furthermore, the EU Green Deal Industrial Plan includes revisions to EU subsidy regulations, particularly aimed at supporting critical clean technologies such as solar. Leveraging existing funds, such as EU recovery funds, and

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[70] EurObserv'ER (2023:2).
[71] Chatzipanagi et al. (2022:5).
[72] Communication, *Report on progress on competitiveness of clean energy technologies*, p. 1.
[73] Strategy paper of the European Commission, 18 May 2022, COM(2022) 230 final, *REPowerEU Plan*, p. 12.
[74] Strategy paper, *REPowerEU Plan*, pp. 6-8.
[75] Communication, *Report on progress on competitiveness of clean energy technologies*, p. 1.
[76] Strategy paper, *REPowerEU Plan*, p. 6.
[77] Communication, *Report on progress on competitiveness of clean energy technologies*, p. 5).

creating markets for sustainable solar products are pivotal components of this strategy. The European Commission advocates for the competitive edge of European-manufactured goods and explores innovative financing mechanisms, like EU-wide tenders for solar manufacturing, to ensure investment stability[78].

When it comes to concrete renewable energy targets of the EU energy mix, they have consistently been surpassed in recent years. The revised Renewable Energy Directive (EU) 2023/2413 states the latest binding renewable energy target for the EU, elevating it for 2030 to a minimum of 42.5 percent, with aspirations to reach 45 percent[79]. This Directive, integrated into all EU countries by November 2023, aims to nearly double the existing share of renewable energy in the EU.

As part of the REPowerEU plan, the EU Solar Energy Strategy seeks to deploy over 320 GW of solar PV capacity by 2025, more than doubling the 2020 output, and targeting almost 600 GW by 2030[80]. The EU solar energy strategy addresses the main bottlenecks and barriers to investment with a view to accelerating deployment, ensuring security of supply and maximising the socio-economic benefits of PV energy throughout the value chain. One part of the EU Solar Energy Strategy is the European Solar PV Industry Alliance. It aims at scaling up manufacturing technologies of innovative solar photovoltaic products and components[81].

Solar photovoltaic utilise semiconductors to convert light into electricity through the photoelectric effect. The primary technologies for photovoltaic cells and modules include crystalline silicon (mono and poly), which constitute over 90 percent of the market. These technologies involve assembling mono- or multi-crystalline silicon wafers into standard solar modules, typically comprising 60 or 72 pieces[82].

The remaining market segment encompasses thin-film technologies which make up less than five percent of the global PV market. Photovoltaic systems can be ground-mounted, building-mounted, or building-integrated, and their electricity handling methods vary, including grid-connected, stand-alone, or grid-connected with battery backup setups. Key components of photovoltaic systems include modules, tracking systems, balance of system components, and inverters[83].

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[78] News article by Innovation News Network, ACKE, 3 April 2023, *The changing face of Europe's solar energy sector*.

[79] Directive of the European Parliament & Council of Ministers, 18 October 2023, 2023/2413, *amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652*, para. 5.

[80] Strategy paper of the European Commission, 18 May 2022, COM(2022) 221 final, *EU Solar Energy Strategy*, p. 1.

[81] Communication, *Report on progress on competitiveness of clean energy technologies*, pp. 21–22.

[82] BERNREUTER (2020).

[83] CHATZIPANAGI ET AL. (2022:5).

The solar PV market is categorised into rooftop and ground-mounted segments, with the former spanning residential, commercial, and industrial applications, while the latter predominantly covers large-scale utility installations. These segments vary within the European PV market across countries, influenced by factors such as support schemes, overall market context, and investment profitability in large-scale PV solar plants[84].

Manufacturing polysilicon solar modules, the prevailing technology in the global solar market, involves several major steps, with China holding a dominant market share along these steps (see Figure 2). The primary raw material used to produce PV cells is quartz, which is found in the vast deserts of the XUAR. Industry estimates indicate that Xinjiang holds ten percent of the PRC's reserves of vein quartz which is used in the manufacture of metallurgical-grade silicon[85]. The value chain for solar PV products is in its simplified form structured as follows:

1. Quartz is mined and then processed into metallurgical-grade silicon[86].
2. Metallurgical-grade silicon is processed into polysilicon.
3. The polysilicon is cast into cylindrical ingots.
4. Ingots are sliced into thin, square-shaped pieces called wafers.
5. The wafers are processed by applying various chemical coatings to create photovoltaic items known as solar cells.
6. The solar cells are packaged into rectangular shaped, glass-covered assemblies called solar modules or solar panels. Within a module, the solar cells are positioned between two outer layers – solar glass on the front side and either glass or a backsheet on the rear side.
7. Upon installation, numerous modules are interconnected using wire to create a solar array[87].

Regarding the interconnectedness of the solar value chain, many major solar module producers, especially in the PRC, are vertically integrated from ingot to module production. Alternatively, some companies may engage in collaborative efforts, where one company sells polysilicon to a wafer manufacturer, who then supplies the wafers to the first company's module manufacturing subsidiary[88].

[84] SolarPower Europe (2017:19).
[85] Ball et al. (2017:109-110).
[86] Murphy & Elimä (2021:20).
[87] Ball et al. (2017:109-110).
[88] Murphy & Elimä (2021:37).

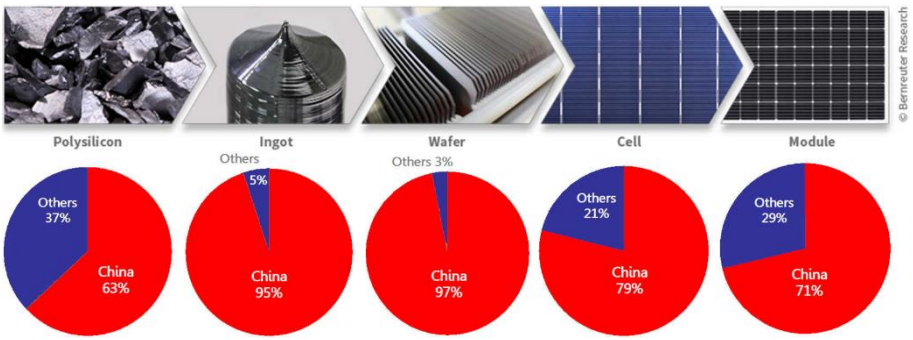

Figure 2: China's global market share in the solar value chain in 2019[89]

The PRC stands as a dominant force driving the global rise of solar power. Leveraging aggressive government support and *rough-and tumble entrepreneurialism*, China has harnessed its formidable manufacturing supply chain and financial institutions to seize upon the solar opportunity. Over the past decade, China has not only been dominating solar module production but has also emerged as a leader in developing some of the world's largest solar projects and advancing solar R&D. Consequently, the PRC has cultivated sophisticated solar enterprises operating across almost all segments of the solar value chain[90].

The geostrategic significance of solar power is perhaps most evident in the trade disputes between the United States and China concerning Chinese-made solar products. Starting in 2011, these disputes arose as major China-based solar firms began flooding Western markets with solar modules at exceptionally low prices, leading to accusations of predatory pricing and unfair government subsidies. Subsequently, the United States and later the European Union imposed tariffs on Chinese-made solar products, alleging China of unfair trade practices[91].

Meanwhile, other major industrial nations, including the United States, India, Europe, and Japan, are striving to reduce dependency on China in the midst of rising geopolitical tensions. Solar power is increasingly recognised as pivotal in this endeavour, with China maintaining its status as the world's primary photovoltaic powerhouse. Recent data from the Chinese Ministry of Industry and Information Technology underscores China's dominance. In 2022, national production of polysilicon, silicon wafers, cells and modules reached 827,000 tons, 357 GW, 318 GW and 288.7 GW respectively and for 2023, the photovoltaic industry's total output value was estimated to exceed EUR 183.5 billion.

China's influence extends beyond production and exports to installed capacity, with the country finishing transitioning from traditional incentive schemes to auctions and non-subsidized systems. Despite fluctuations in demand, China

[89] BERNREUTER (2020).
[90] BALL ET AL. (2017:29).
[91] BALL ET AL. (2017:38).

has consistently demonstrated robust growth in solar installations, setting records year after year[92].
Moreover, despite price increases starting in 2021, solar imports to the European Union have surged to meet growing demand, resulting in an increase in the EU's trade deficit with the PRC for solar PV products. Between 2019 and 2021, the European Union experienced an increase of its trade deficit with China for solar PV products from EUR 6.1 billion to EUR 9.2 billion[93]. During that period, extra-EU trade shows a comparatively stable export activity (see Figure 3). While the trade balance varies among EU Member States, there is a notable dependency on China for critical materials within the PV value chain among all countries. Luxembourg has the most favourable relative trade balance value (-0.02). It is one of just two EU Member States that had a modest enhancement in their trading position compared to the 2016-2018 timeframe, during which it had a relative trade balance of -0.06. Croatia is another country that has made progress in its trade balance, although it remains negative from -0.14 between 2016 and 2018 to -0,08 between 2019 and 2021. Germany remains unchanged during the two periods by remaining at -0,11, setting it apart from all other EU countries. Portugal saw a favourable trade balance of 0.46 from 2016 to 2018, but from 2019 to 2021, its imports surpassed its exports, leading to a negative trade balance of -0.28. Cyprus experienced the most significant trade transformation, with a shift from -0.05 during the 2016-2018 timeframe to -0.99 during the 2019-2021 timeframe[94].

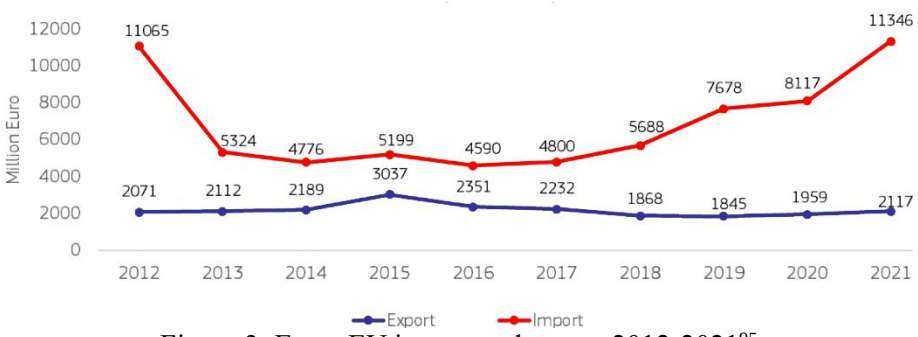

Figure 3: Extra-EU import and export 2012-2021[95]

This dependency underscores the need for the EU to diversify its supply sources and mitigate supply risks associated with critical materials used in solar technology. A comprehensive review on critical materials within the PV value chain underscores the EU's significant dependency on the PRC as a leading producer critical raw minerals. Resources with high supply risks for the EU include silicon metal (used in solar PV), indium, gallium, germanium, and borates. The processed materials carry a medium supply risk, with the

[92] EurObserv'ER (2023:12).
[93] Communication, *Report on progress on competitiveness of clean energy technologies*, p. 7.
[94] Chatzipanagi et al. (2022:59).
[95] Chatzipanagi et al. (2022:60).

components segment facing the highest risk, as the EU imports over 90 percent of its main solar module components, notably wafers and solar cells (see Figure 2). Other primary raw materials, such as boron, molybdenum, phosphorus, tin, and zinc, are also potentially critical import goods. Projections for 2050 suggest varying consumption patterns among materials, with germanium, tellurium, indium, selenium, and silicon (which is used in solar products) facing potentially high supply pressure. However, while primary raw materials pose high supply risks, the EU's importation of final products, rather than raw materials, mitigates some of the supply effects on raw materials[96].

In just fifteen years, the PRC has risen to dominance in the global solar energy supply chain. By 2020, China alone produced nearly 75 percent of the world's polysilicon, with four major producers in Xinjiang accounting for around 45 percent of the global supply. This rapid growth saw significant acceleration in the last five years, with the top six polysilicon producers reaching a production capacity of 470,000 tons in 2020, nearly matching the total global capacity just five years prior. The expansion of China's polysilicon industry gained momentum after 2013 when the PRC imposed duties on U.S. imports, prompting domestic producers to ramp up production to meet the domestic demand. The Xinjiang Party Committee and the CCP further promoted industrial expansion in the region, particularly in silicon and polysilicon production, as part of the Made in China 2025 strategy[97].

The CCP supported these efforts through subsidies and employment-focused initiatives, leading to significant growth in the non-ferrous metals industry, including polysilicon, which accounted for over five percent of Xinjiang's industrial output by 2020. Capitalising on cheap energy prices, China's polysilicon manufacturers rapidly expanded, leveraging energy costs unavailable to international competitors. They were building production facilities in proximity to coal plants or even vertically integrating them into their business operations and solidifying their positions as industry leaders by the end of 2020[98].

The PRC's strong dominance in polysilicon production is expected to be expanded even further. In early 2021, plans were announced to add an additional 80,000 tons of polysilicon manufacturing capacity, all of which is being constructed in China. This expansion is on top of the existing capacity of approximately 650,000 tons in 2020, with an additional 118,000 tons production capacity already under construction. Despite this, the EU maintains a significant presence in the production equipment segment (50 percent) and inverter manufacturing (15 percent) within the PV value chain[99].

In a bid to foster industrial growth in Xinjiang, prefectural governments have offered substantial financial and tax benefits to corporations relocating or establishing facilities there. With incentives dating back to 2010, exemptions were made to companies in 'difficult regions' from corporate income tax for up to five years. Additional incentives were provided by local prefectures,

[96] CHATZIPANAGI ET AL. (2022:62–63).
[97] MURPHY & ELIMÄ (2021:15).
[98] MURPHY & ELIMÄ (2021:16).
[99] Communication, *Report on progress on competitiveness of clean energy technologies*, p. 22.

such as tax exemptions for companies meeting export sales criteria. The forced labour practices mentioned before were closely associated with the expansion of the PV industry in the XUAR and the corresponding incentive schemes. In 2015, the CCP implemented a programme that provided incentives to towns, villages, and other grassroots organisations, as well as public employment service agencies, labour dispatch agencies, labour brokers, and other entities and individuals who successfully facilitated the organised transfer and employment of 'surplus rural labour' to new and growing enterprises[100].

Starting in 2016, when the camp system started to develop, companies that hired the surplus labour to work in their facilities were given substantial benefits. These benefits included subsidies for constructing new factories, transportation of the products to the coast, training for the new workers (including Chinese language training), transportation for the new workers, and payment of salaries. Companies were instructed and supported to recruit these surplus labourers and to serve as mediators of ethnic cohesion. In doing so, the companies were actively supporting the Chinese government to achieve its goal of attaining an average annual transfer of 2.2 million rural surplus labourers for employment between 2016 and 2020[101].

These programmes, including incentives for employing surplus labour transfers, were eagerly adopted by numerous raw material and polysilicon manufacturers in the XUAR. The local authorities in Xinjiang implemented a range of corporate incentives with the explicit aim of attracting polysilicon and other labour-intensive industries to relocate to the region. Additionally, the CCP instructed corporations to view the *absorption* of 'excess labour' as a social obligation. The corporate subsidies and other incentives are alleged to be utilised to this day to support the execution of the Chinese government's extensive labour transfer agenda. Although companies may not experience a noticeable and directly traceable reduction in their production expenses by utilising forced labour, the comprehensive set of subsidies associated with operating in the Uyghur Region does indeed result in a substantial financial advantage[102].

When looking deeper into the solar value chain for traces of forced labour practice, most evidence can be found at the initial stages, especially at mining and processing raw materials. As explained above, to create polysilicon, quartz is mined and then processed metallurgical-grade silicon. The last ten years has seen the rapid expansion of the metallurgical-grade silicon manufacturing sector in XUAR[103].

A report, published by the Helena Kennedy Centre for International Justice at Sheffield Hallam University, provides compelling evidence that victims of the CCP's forced labour regime are directly employed in the manufacturing of silicon. These individuals are responsible for operating the melting furnaces and inspecting the final products. Furthermore, it is likely that the market leading companies source their quartz from companies that are likely involved in

[100] MURPHY & ELIMÄ (2021:17).
[101] MURPHY & ELIMÄ (2021:17).
[102] MURPHY & ELIMÄ (2021:18).
[103] MURPHY & ELIMÄ (2021:20).

labour transfers and potentially hiring detainees from VETC facilities. The direct sale of metallurgical-grade silicon by the market leaders to the top four PV module manufacturers in the world has substantial impacts on the whole supply network of the industry. Due to the extensive implementation of government-backed labour programmes, it is almost impossible to obtain raw materials that are free from forced labour if they are sourced from Xinjiang under the current regime. Regardless of the source of the raw materials, there is an additional risk of forced labour in the subsequent stage of production in the solar module supply chain, specifically in the manufacturing of polysilicon[104].
Mono-grade or multi-grade polysilicon is a major export good of the XUAR. By 2020, four out of the six polysilicon producers with the greatest production capacity were corporations that had substantial manufacturing facilities in the region. All four of them employ government-backed labour transfers and produce goods that are sold in the global solar module market. As polysilicon can be blended and ingots can be manufactured from various sources, enterprises downstream from these major polysilicon producers face a substantial risk of their supply chains being contaminated by forced labour from Xinjiang[105].
Most of the polysilicon tainted by forced labour is sold to other Chinese firms. Subsequently, they process it into ingots, wafers, and cells, and use it domestically or export it to international markets, including Europe. The supply chain mapping of the report mentioned above estimates that the use of the tainted polysilicon is expected to be widespread in the solar PV sector. Almost all Chinese solar panel companies are connected to the market leaders in the Chinese polysilicon production that utilise forced labour[106].
The report of the Sheffield Hallam University's Helena Kennedy Centre for International Justice also highlights that Chinese companies that do not have a polysilicon facility in the Uyghur Region, nevertheless appear to be transporting raw materials out of the XUAR to other locations in China. This bears the potential that even the polysilicon produced outside of the XUAR might be tainted by forced labour. Thus, the reach of forced-labour-tainted metallurgical-grade silicon is much wider than a portrait of the XUAR-based companies alone can reveal[107].
Given the concerning findings regarding the widespread use of forced labour in the Xinjiang Uyghur Autonomous Region and its relation to the solar PV industry, it is imperative for the European Union to take decisive action to prohibit products tainted by such practices. While efforts to monitor and sanction Xinjiang-based companies are crucial, it is equally vital to recognise the potential for forced-labour-tainted products to enter the solar supply chain through indirect routes. Therefore, this paper argues the EU should implement a robust set of legal measures that require thorough due diligence throughout the entire solar value chain, including stringent monitoring of raw material transportation and processing facilities across countries and regions.

[104] MURPHY & ELIMÄ (2021:27).
[105] MURPHY & ELIMÄ (2021:28).
[106] MURPHY & ELIMÄ (2021:29).
[107] MURPHY & ELIMÄ (2021:35).

3. Case Study: Import bans of products made with forced labour

As awareness grows about the prevalence of forced labour in various industries, governments worldwide are implementing legal measures to prevent the importation of products made with forced labour into their territories. This chapter undertakes a comprehensive analysis of the legal measures enacted by three prominent jurisdictions – Canada, the United States, and Australia – to address this pressing issue.

Each case study provides an in-depth examination of the legal frameworks, enforcement mechanisms, and challenges faced by the observed countries in addressing forced labour in the supply chains of their markets. Drawing on primary sources such as legislation, regulations, and judicial decisions, as well as secondary sources including academic literature, government reports and industry publications, this paper offers a comprehensive overview of the legal landscape governing forced labour import restrictions in Canada, the USA and Australia.

The analysis delves into the strengths and weaknesses of the legal measures implemented by the observed countries, highlighting key differences and commonalities among them. By examining the evolution of these legal frameworks over time and assessing their effectiveness in practice, the chapter aims to provide valuable insights into the complexities of combatting forced labour in supply chains at the national level.

Furthermore, this chapter serves as a critical component of the paper's legal review of the European Commission Proposal for a marketing ban on forced labour products. By analysing the experiences of Canada, the United States, and Australia, the chapter seeks to identify lessons learned and best practices for the development and implementation of effective legal measures within the European Union ('EU').

3.1. Canada

Since July 2020, Canadian law foresees the ban of all imports produced with forced labour via Memorandum D9-1-6. The Memorandum came into effect after the ratification of the Canada-United States-Mexico Agreement Implementation Act ('USMCA'), which replaced the North America Free Trade Act ('NAFTA'). It amended the Canadian Customs Tariff Act to comply with provisions USMCA that foresee bans forced-labour imports[108].

The agency in charge of upholding this prohibition is the Canadian Border Services Agency ('CBSA'). The Memorandum reclassifies designated forbidden goods under tariff provision number 9897.00.00 as: "Goods manufactured or produced wholly or in part by prison labour; Goods mined, manufactured or produced wholly or in part by forced labor"[109]. However, enforcing the Memorandum appears challenging for the CBSA seeing as only a handful of shipments have been detained ever since its enactment.

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[108] SANTOS ET AL. (2023).

[109] Memorandum of Canada Border Services Agency, 28 May 2021, D9-1-6, *on Goods Manufactured or Produced by Prison or Forced Labour.*

The CBSA collaborates with the Labour Program of Employment and Social Development ('ESDC') to uphold the prohibition on forced labour. Specifically, the ESDC researches supply chains and prepares assessments that highlight occurrences of goods likely extracted, executed, or produced through forced labour. These evaluations are then shared with the CBSA which uses the information to identify and detain forced labour products[110].

In case CBSA agent comes to the conclusion that certain commodities were manufactured with forced labour according to Section 59 para. 1 of the Customs Act, their tariff classification is reclassified as prohibited goods under tariff item 9897.00.00. According to Section 101 and Section 102, the goods may then be detained and subsequently disposed, removed, or exported[111].

The Canadian government has adopted a regional approach when dealing with entities connected to the Xinjiang Uyghur Autonomous Region ('XUAR') in China. The XUAR has been recognised as a region of special concern, and the Canadian government published additional due diligence best practices. The statements of the Canadian governing bodies indicate that companies in Xinjiang are considered specifically likely to apply forced labour[112].

In response to reported human rights violations in Xinjiang, the Canadian government has implemented restrictive measures against four officials and one enterprise. These bans prohibit Canadians from conducting business with said entities. Compared to other countries, such as the USA, the scope of these sanctioned entities is very limited[113].

Canadian importers who conduct business with entities operating in the XUAR, are mandated to sign an Integrity Declaration. Signing this document confirms that these companies are aware of the laws outlined by Canada which forbid forced labour. Furthermore, they pledge not to procure products directly or indirectly from Chinese entities linked to forced labour and guarantee a review of their supply chains with regard to any potential ties to forced labour operations[114].

The Canadian approach of engaging in business with Xinjiang affiliates has been widely discussed. The signature of an Integrity Declaration and the auditing of Canadian supply chains differs significantly from the U.S. model, which places burden of proof on Chinese shippers to demonstrate that their goods are not produced under unlawful conditions. This means each shipment must be evaluated on a case-by-case basis by CBSA officials. However, the Canadian international trade lawyer Cyndee Todgham Cherniak remarked that there is not a significant group within the CBSA committed specifically towards determining companies involved in forced labour practices. Thus, the CBSA lacks the resources to fully enforce Canada's approach[115].

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[110] PELLERIN & FARELL (2021).
[111] PELLERIN & FARELL (2021).
[112] PELLERIN & FARELL (2021).
[113] PELLERIN & FARELL (2021).
[114] PELLERIN & FARELL (2021).
[115] News article of The Globe and Mail, CHASE, 2 May 2022, *Canada lags U.S. in intercepting imports made with forced labour*.

Moreover, a recent case, Kilgour v. Canada (2022) determined the manner in which Canada implements its import ban law. Representatives of the non-governmental organisation ('NGO') Canadians in Support of Refugees in Dire Need argued that goods from the XUAR based solely on forced labour grounds should be deemed as presumptively banned by the CBSA if no contradictory evidence is found to support their compliance with set laws and regulations for importation purposes. However, this request was denied by the CBSA who said it lacks the necessary legal authority to do so and rather examines the unique circumstances surrounding each individual case before making any prohibitive decisions against the imports' legality or illegality within Canadian borders. The Federal Court upheld the CBSA's approach under the current law[116].

In reality, however, practical enforcement of the case-by-case approach is scarcely observed. From June 2020 to April 2022, Canada's border control authorities have confiscated just one shipment of forced labour product containing clothes originating from the People's Republic of China ('PRC'). For comparison, the USA have detained over 1,400 shipments during the same time. Consequently, various trade experts and legal scholars are criticising the efficiency of Canada's actions against forced labour imports coming from the XUAR. Their point being that if there is any interest in enhancing their standing on this front then Canadian authorities must concentrate more resources towards gathering intelligence and investing more resources into investigation procedures whilst also taking firm action when required[117].

As pointed out by Michael Nesbitt, a distinguished law professor at the University of Calgary, unless there is an rise in Canada's proactive approach towards issues such as enforcement and restriction compliance, its current lacking action will likely continue. Moreover, Nesbitt observes that Canadian authorities have been opting on warning importers about potential risks when dealing with Xinjiang-related entities[118].

Specialists in the field of trade also note that Canada and United States' contrasting statistics on seizures cannot be solely attributed to the extent of their respective commercial activity. Their statement implies that Canadian authorities, despite policy promises aimed at dealing with this issue appropriately, exhibit insufficiencies concerning implementation measures as well a failure to conduct extensive intelligence-gathering screenings[119].

Canada is now in need to adopt a more assertive strategy towards identifying and intercepting imports of forced labour products for it to be efficient. The Canadian Government has indeed decided on an alternative course, namely supply chain due diligence reporting requirements. Four reform proposals to ensure a ban of imports of goods produced with forced labour are currently undergoing parliamentary readings. Their likelihood of adoption varies, however.

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[116] O'HARA ET AL. (2022).
[117] News article, *Canada lags U.S. in intercepting imports made with forced labour*.
[118] News article, *Canada lags U.S. in intercepting imports made with forced labour*.
[119] O'HARA ET AL. (2022).

One such proposal, Bill C-243, foresees an "Act respecting the elimination of the use of forced labour and child labour in supply chains". It mandates public and private entities to publish reports detailing their prevention measures against forced labour or child exploitation outside Canada. This law also encompasses goods imported into Canada. Notably absent from its scope are state-run institutions. In an effort towards monitoring compliance with this legislation, rigorous inspections will be carried out. Responsible for the enforcement would be the Minister of Public Safety and Emergency Preparedness who wields considerable power over mandating information disclosure as needed[120].

Bill C-262 foresees an "Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad". It employs a comprehensive strategy to tackle instances of human rights violations, including forced labour. The proposed legislation would entail more extensive obligations on different entities like preventing the occurrence of adverse effects with regards to human rights violations caused by business operations and partnerships outside Canada. Furthermore, these bodies must establish robust due diligence protocols that facilitate the identification of actual or possible negative impacts towards humans' fundamental freedoms stemming from their dealings with suppliers or contractors. Additionally, Bill C-262 establishes a private right for action for those who experience loss or damage due to an entity's failure to comply with its obligations to prevent adverse impacts on human rights[121].

The "Xinjiang Manufactured Goods Importation Prohibition Act", also referred to as Bill S-204, is aimed at tackling the alleged practice of forced labour in cotton production within China's XUAR region. Unlike its American counterpart, this bill takes a more stringent approach by completely prohibiting the importation of goods created either wholly or partially within Xinjiang regardless whether they were produced with forced labour or not. These reform proposals indicate that Canada is attempting to take a more proactive approach to cracking down on forced labour imports, but they are still undergoing parliamentary readings and may require additional resources and enforcement measures to be effective[122].

The proposed Canadian legislation Bill S-211, titled an "Act to enact fighting against forced labour and child labour in supply chains act and to amend the customs tariff", aims to achieve a higher degree of transparency within supply chains. It mandates certain entities to report measures taken towards reducing forced or child labour in their supply chains. It is the reform bill most likely to be adopted and will be enforced on global producers, manufacturers, distributors as well government institutions alike. Under the Act's scope of entities fall all businesses listed on the Canadian stock exchanges along with those

[120] BOSCARIOL ET AL. (2022).
[121] BOSCARIOL ET AL. (2022).
[122] BOSCARIOL ET AL. (2022).

connected to Canada that meet certain financial thresholds for at least one of its two most recent financial years[123].
In compliance with the regulations outlined in Bill S-211, entities obliged to report must provide a detailed listing of their undertaken measures and procedures applied to prevent the utilisation of forced labour or child labour during production or importation into Canada. This report is mandated by law for public access and must be available on the entity's website.[124]
In the event that an entity does not adhere to its reporting duties under Bill S-211, it may be subjected to monetary fines with a maximum value of USD 250,000. The Bill also amends the Customs Tariff to prohibit the importation of goods into Canada that are wholly or in part produced by child labour, in addition to the existing prohibition on goods produced wholly or in part by forced labour. The Bill's proposed provisions shows stark similarities with the European Commission's Proposal for a Due Diligence Directive COM(2022) 71 final ('CSDD Proposal'), which also imposes due diligence obligations on public and private entities[125].

3.2. United States of America

U.S. President Biden formally signed the Uyghur Forced Labour Prevention Act ('UFLPA') on 23 December 2021. By focusing on imports of items originating from or produced in China's XUAR, this law seeks to address accusations of forced labour. Due to the import restriction on goods made using forced labour, businesses must now adhere to stricter scrutiny and transparency standards for supply chains located in the PRC and may anticipate prolonged shipment delays to the US[126].
The UFLPA is a component of a larger government effort to address alleged abuses of forced labour in Xinjiang. The U.S. Customs and Border Patrol ('CBP') had been using a sector-specific strategy before to its implementation in June 2022, issuing Withhold Release Orders ('WROs') for cotton, tomatoes, clothing, hair products, silica-based items (i.e. solar products), and computer parts from Xinjiang since 2016. The Bureau of Industry and Security ('BIS') of the Department of Commerce put over 50 Chinese firms on an entity list in 2020 and 2021, prohibiting the import of their goods into the U.S. market. The CBP also issued a number of additional WROs during those years[127].
The UFLPA demands an import ban on:

> "[…] all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of China,

[123] PELLERIN & FARELL (2021).
[124] PELLERIN & FARELL (2021).
[125] PELLERIN & FARELL (2021).
[126] News article by Global Trade, EIDELMAN, 5 February 2022, *Xinjiang US Import Sanctions Looming Over Global Supply Chains.*
[127] News article, *Xinjiang US Import Sanctions Looming Over Global Supply Chains.*

> or by persons working with the Xinjiang Uyghur Autonomous Region government for purposes of the 'poverty alleviation' program or the 'pairing-assistance' program"[128].

The USA has changed from its prior sectoral approach to a rebuttable presumption with the passage of the Uyghur Forced Labour Prevention Act ('UFLPA'), which implies that imports from the XUAR are prohibited without any de minimis criteria[129]. The Act requires the Commissioner of the CBP to apply a presumption that all commodities coming entirely or partially from the XUAR or from entities on the UFLPA Entity List are created with forced labour and therefore illegal to be imported into the territory of the United States of America. This presumption is applicable to products made or transported by the PRC and other nations that use Xinjiang-sourced inputs[130].
This result has led to a de facto ban on all cells and modules using polysilicon from the XUAR, says Christian Roselund, a Senior Policy Analyst for supply chain traceability at Clean Energy Associates[131].
Additionally, importers must comply with the UFLPA's requirements for due diligence, effective supply chain tracing, and supply chain management to ensure that they are not bringing in products made entirely or partially using forced labour, particularly those from the XUAR. This rule is applicable to every step of the supply chain, including products that may be transported from other regions of the PRC or to foreign nations for additional processing[132].
Despite the Act's heavy emphasis on the Uyghur population in the XUAR, it is critical to understand that the law ultimately targets forced labour incidents from all Chinese religious and ethnic minorities. In general, the labour of all those who contributed to produce the items is more significant than its physical location, its facilities, and the numerous supply chains it is connected to[133].
Each shipment is thoroughly examined by the CBP to see if it is subject to the UFLPA regulations, and any appropriate action is then taken individually for each shipment. The UFLPA Entity List, which is required by Section

[128] Bill by the Congress of the United States of America, 22 December 2022, H.R. 1155, *An Act ensuring that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes*, Art. 3.
[129] PELLERIN & FARELL (2021)
[130] Guideline by U.S. Customs and Border Protection, 13 June 2022, 1793-0522, *Uyghur Forced Labor Prevention Act - U.S. Customs and Border Protection Operational Guidance for Importers*, p. 4.
[131] News article by PV Tech, RAI-ROCHE, 21 June 2022, *Uyghur Forced Labor Prevention Act comes into force in the US.*
[132] Guideline, *Uyghur Forced Labor Prevention Act - U.S. Customs and Border Protection Operational Guidance for Importers*, p. 4.
[133] MIRZA (2023).

2(d)(2)(B) of the UFLPA and is published in the Federal Register, is one of many resources the CBP uses to identify shipments[134].
Because of this, the Department of Homeland Security has published a list of companies whose goods cannot enter the U.S. territory. Currently, the list is concentrated on four priority industries: clothing, cotton and cotton-based products, silica-based products (i.e. solar products), tomatoes, and tomato-related products. As of August 2022, there were 31 items total on the list, which were split among four categories:

(1) Entities in Xinjiang that mine, produce or manufacture wholly or in party any goods with forced labour.
(2) Entities working with the government of Xinjiang to organise forced labour traffic of persecuted groups out of Xinjiang.
(3) Entities that exported products from China into the United States.
(4) Entities that source material from Xinjiang or from the government of Xinjiang for any scheme that uses forced labour[135].

Numerous businesses on the list are charged with engaging in forced labour or supporting the relocation of individuals to alleged labour camps in the PRC. The businesses include Daqo, East Hope, and GCL, producers of polysilicon, as well as Hoshine Silicon and their Xinjiang affiliates. Because the CBP can seize shipments coming from factories with numerous supply chains, the bans are extensive. Since it is challenging to confirm whether the sources of polysilicon, a raw material for solar products, are free of forced labour, this is particularly troubling for the solar industry[136].
Unless the Commissioner of the CBP grants an exemption, the UFLPA presumption is applies to all shipments. In order to get an exemption from the import ban, some criteria must be satisfied:

> (1) "The importer has:
> (a) fully complied with the guidance described in section 2(d)(6) of the UFLPA (UFLPA Strategy) and any regulations issued to implement that guidance; and
> (b) completely and substantively responded to all inquiries for information submitted by the Commissioner to ascertain whether the goods were mined, produced, or manufactured wholly or in part by forced labour; and
> (2) by clear and convincing evidence, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labour"[137].

[134] Guideline, *Uyghur Forced Labor Prevention Act - U.S. Customs and Border Protection Operational Guidance for Importers*, p. 7.
[135] VUKSIC (2022).
[136] News article, *Uyghur Forced Labor Prevention Act comes into force in the US.*
[137] Guideline, *Uyghur Forced Labor Prevention Act - U.S. Customs and Border Protection Operational Guidance for Importers*, p. 9.

To show full compliance with the requests of the CBP, the importer can bring forward various documents, so-called *Review Submissions*:

- Due Diligence System Information
- Supply Chain Tracing Information
- Information on Supply Chain Management Measures
- Evidence that goods were not produced in the XUAR.
- Evidence that goods from China are not produced with forced labour[138]

3.2.1. Critics

The statute was put into action in June 2022. Within half a year, U.S. Customs and Border Protection agents seized imports worth USD 806 million. Although the import ban is effective in keeping products made with forced labour out of the U.S. market, it has some disadvantages. The law is supposed to hold the Chinese Government accountable for how it treats Uyghurs and other minorities in Xinjiang. The U.S. solar market, however, has been negatively impacted by the crackdown, and its supply chain has been interrupted. The majority of the 1,592 goods that the U.S. arrested were solar panels, an essential share of the American solar infrastructure that is mostly produced in the XUAR and other parts of China. Large-scale projects have been halted as a result of the law, which has practically stopped the flow of solar imports into the US[139].

Since then, business associations and civil society organisations have grown more vocal in their criticism of the CBP for failing to disclose more information regarding import detentions and other specifics of the CBP procedure. Disclosing more information would make it possible for parties with interests in high-risk industries to more successfully coordinate their efforts to prevent forced labour along the whole value chain of a product[140].

The U.S. Solar Market Insight, which was released in March 2023 by the U.S. Solar Industries Association and Wood Mackenzie, showed that the U.S. solar sector added 20.2 gigawatts ('GW') of capacity in 2022, a 16 percent reduction from 2021. Commercial, community, and utility-scale solar all had year-over-year declines compared to 2021. The utility-scale segment installed 4.3 GW in Q4, its highest quarter of 2022, but this was still the segment's weakest fourth quarter since 2018. Utility-scale volumes decreased 31 percent for the year; the last time this happened in the utility solar sector was in 2017, just before the Investment Tax Credit ran out[141].

However, according to the U.S. Solar Industries Association, growth has picked up significantly in 2023. Although there is still some ambiguity

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[138] Guideline, *Uyghur Forced Labor Prevention Act - U.S. Customs and Border Protection Operational Guidance for Importers*, pp. 13-15.
[139] MIRZA (2023).
[140] NEUHAUSER (2023).
[141] DAVIES ET AL. (2023:5).

regarding the UFLPA's requirements for the CBP's release of detained goods, some manufacturers have recently managed to obtain limited releases[142].
Additionally, prices in the equipment and soft cost categories rose in the U.S. solar market. Higher capital expenses for solar in 2022 were caused by a combination of factors including increased demand, supply shortages, rising inflation, and unfavourable policy conditions. The UFLPA had an impact on the growth even if it was not the only factor in it. In comparison to Q4 2021, system pricing for the residential segment increased by seven percent, while it increased by two percent for the commercial segment. The introduction of large-format modules in 2022 largely offset increases in capital expenditures for the utility sector. In comparison to last year, system pricing for utility-scale fixed-tilt systems increased by five percent, and for tracker systems, it increased by three percent[143].
Of course, the responses of the Chinese solar sectors to the implemented import ban are what have caused the developments in the U.S. solar market. The Chinese government has acknowledged that local solar panel and solar cell producers were stockpiling their goods. Chinese industry officials put pressure on importers to urge the CBP to lessen its enforcement of the import ban, thereby damaging the U.S. solar business. This resulted in supply chain bottlenecks, which raised solar prices and raised worries within the White House that the nation's ambitions for renewable energy would not be met[144].
In addition, Chinese companies has been constructing factories in Southeast Asia to get around the U.S.'s increasing customs fees. This action runs the risk of circumventing the restrictions imposed on their Chinese production facilities. Furthermore, concerns arose by several U.S. importers about certain Southeast Asian businesses owned by Chinese holdings that refuse to ship their goods to the U.S. in retaliation for the Xinjiang prohibitions[145].

3.3. Commonwealth of Australia

With the passing of the Modern Slavery Act 2018 ('MSA') on 1 January 2019, Australia was one of the first nations to enact legislation to combat modern-day slavery. According to the law, businesses with operations in Australia and minimum annual consolidated sales of AD 100 million are required to submit yearly reports on their efforts to combat modern slavery in their domestic, international, and supply chains[146]. However, the Act did not initially cover the seizure of imported goods if it was believed that forced labour was used in their production process[147].
Section 16 of the Act requires that reporting entities:

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[142] DAVIES ET AL. (2023:6).
[143] DAVIES ET AL. (2023:16).
[144] News article by Forbes, RAPOZA, 24 August 2022, *China Admits Companies Hoard Solar. They Got Biden To Remove Tariffs Because Of It*.
[145] News article, *China Admits Companies Hoard Solar. They Got Biden To Remove Tariffs Because Of It*.
[146] KWAN ET AL. (2022).
[147] GIOVANELLI (2023).

(1) "describe the risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; and
(2) describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; and
(3) describe how the reporting entity assesses the effectiveness of such actions"[148].

According to the Australian federal government, effective procedures for identifying and eradicating modern slavery may be devised and put into place by compelling big corporations to submit annual audits of their efforts to do so[149].

In the first year following the MSA's implementation, more than 2,500 Modern Slavery Statements were posted on the Modern Slavery Statements Register[150]. By the mid-2022, there were 6,841 entities from 43 nations and jurisdictions submitting 4,535 mandatory disclosures and 621 voluntary statements to the register[151].

Even if there are many pronouncements, there is great variety in the methods used by organisations to evaluate the success of their interventions. Although the conceptual literature on organisational effectiveness lacks resolution and the Australian government does not provide specific formal guidance, the Act expressly calls for effectiveness[152].

Effectiveness was not highlighted by 15 percent of the reporting institutions, whereas 27 percent did so in the MSS's overall language and 58 percent did so in a distinct sub-section. The need to submit a descriptive report on how they successfully manage modern slavery in their operations and supply chains was not met by 15 percent of the reporting entities because they failed to discuss efficacy in their MSS. This goes against the criterion to some extent[153].

There are several reasons why the Modern Slavery Act of Australia is not being followed. First, companies are having trouble understanding how they should handle the issue of modern slavery in accordance with the MSA. The rules and best practises required to create a uniform reporting standard are unclear and lacking in understanding. Additionally, it appears that businesses are not motivated to make significant progress towards compliance[154].

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[148] Legislative Act by The Parliament of the Commonwealth of Australia, 10 December 2018, 153/ 2018, *An Act to require some entities to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes*, Section 16.
[149] CHRIST & BURRITT (2023:2).
[150] JOHNSON ET AL. (2022).
[151] KWAN ET AL. (2022).
[152] CHRIST & BURRITT (2023:14).
[153] CHRIST & BURRITT (2023:8).
[154] Press release of Business News Australia, DEDOVIC, 10 December 2021*, Report: One in five Australian businesses still not prioritising modern slavery obligations*.

The University of New South Wales published a paper that highlighted the inadequate reaction businesses have had to these difficulties. The "Paper Promises" paper examined the MSA's initial effectiveness while concentrating on four major risk areas: clothing from China, rubber gloves from Malaysia, seafood from Thailand, and fresh Australian vegetables. The report's findings were alarming, with the typical organisation under consideration receiving a average score 37 percent. The report found in further detail that:

- 77 percent of the companies examined failed to report under each of the required reporting criteria.
- 52 percent of businesses failed to recognise modern slavery dangers in their supplier chains or operations.
- The potential of Uyghur forced labour in supply chains was not mentioned by 75 percent of apparel companies buying materials from the PRC.
- 52 percent of healthcare organisations that purchased PPE gloves from Malaysia did not recognise that this industry is at a high risk to be tainted modern slavery.
- 52 percent of food firms who purchase Australian horticulture products did not recognise this as a field with a high risk of modern slavery.
- 40 percent of seafood suppliers from Thailand did not recognise this industry as having a significant risk of modern slavery.
- 78 percent of businesses were unable to articulate how the COVID-19 outbreak changed their risk profile on modern slavery[155].

Following the first round of reporting under the MSA, it became clearer to organisations how they should approach reporting and what the reporting requirements are. The Australian Border Force provided guidance on how far entities should go when identifying risks in their value chains, and what constitutes the supply chain under the MSA, as this term is not defined in the legislation. However, the summary report on the first reporting cycle showed that only 25 percent of the surveyed companies disclosed the countries of their suppliers, and most did not identify suppliers beyond tier one of their supply chain[156].

This lack of seriousness in due diligence reporting could have significant consequences later on. The Australian government is currently reviewing the MSA and has indicated a commitment to take a firmer stance on combatting modern slavery. The law requires a review every three years, and the Australian government initiated a public consultation round in 2022[157].

Some reform measures were already the subject of extensive discussion during the public consultation of the Modern Slavery Bill. However, the MSA in its current form takes a narrower approach, with the intention that there may be a gradual enhancement of the MSA at a later stage. One potential reform

[155] SINCLAIR &, DINSHAW (2022:4-7).
[156] SINCLAIR &, DINSHAW (2022:25).
[157] SINCLAIR &, DINSHAW (2022:14).

measure being considered is the ban on the import of products made wholly or in part with forced labour, which could cause problems in supply chains of Australian businesses. Organisations that have not assessed their supply chain will be harder hit, and their business operations are at risk of coming to a halt[158].

The Issues Paper drafted for the public consultation questions whether amendments should be made to the MSA that would require businesses to identify the due diligence efforts they have taken to identify and address their modern slavery risks more seriously. One area for improvement is that the MSA does not define the term or scope of the due diligence that entities are required to report on. Another reform issue is to lower the threshold for reporting. Currently, the MSA requires businesses to report if they have a global consolidated revenue of at least AD 100 million in their last financial year. This was intended to ensure that the scheme "focuses on entities that have the capacity to meaningfully comply and the market influence to clean up global supply chains" [159]. Furthermore, the MSA does not impose penalties on reporting entities that fail to submit a statement or submit a statement that does not comply with the mandatory reporting criteria. Instead, the ministry administering the MSA can issue requests for explanation or remedial action to non-compliant reporting entities, and *name and shame* entities that do not comply with these requests[160]. While the Issues Paper is confined to the review of the MSA, it refers to importing bans "on goods sourced from regions or industries that are declared to carry a modern slavery risk as 'a prominent example'" to complement the MSA[161].

3.3.1. Import ban to complement the MSA

In 2020, the Senate Standing Committee on Foreign Affairs, Defence, and Trade Legislation published recommendations regarding the Customs Amendment (Banning Goods Produced by Uyghur Forced Labour – Bill 2020). These are currently taken into consideration by the Australian government. It recommended a more comprehensive re-evaluation of the government's strategy for preventing forced labour in supply chains[162].

Andrew Hudson, Partner in the Customs and Trade practice of Rigby Cooke Lawyers, has previously discussed a bill introduced in the previous Federal Parliament aimed at banning goods that are produced, either wholly or partly, through forced labour. The Customs Amendment (Banning Goods Produced by Forced Labour – Bill 2021), the final draft of this legislation, has been submitted to the Senate that held office until mid-2022[163]. If approved, it would have added a new section to the Customs Act called Section 50A that reads as follows:

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[158] KWAN ET AL. (2022).
[159] KWAN ET AL. (2022).
[160] KWAN ET AL. (2022).
[161] KWAN ET AL. (2022).
[162] BRIDGES (2021).
[163] HUDSON (2023).

> "The importation into Australia of goods produced or manufactured, in whole or in part, through the use of forced labour (within the meaning of the Criminal Code) is prohibited absolutely"[164].

The language of the law closely mimics that of the U.S., which begs the question of whether the U.S. is setting an example for its allies to follow in drafting import bans on products made with forced labour.

The Senate Standing Committee on Foreign Affairs, Defence, and Trade Legislation proposed a three-step procedure for applying the import ban:

(1) First, the Australian government would establish and maintain a list of products or companies considered to be at high risk of being associated with forced labour.

(2) Secondly, Australian Border Force would be empowered to issue warnings by applying a *rebuttable presumption* with respect to specific goods, companies or regions with a particularly high risk of being associated with forced labour.

(3) Thirdly, prospective importers would have the right to provide evidence to show that their products were manufactured in a legitimate manner, thereby overcoming the rebuttable presumption[165].

That legislation does not provide details on the process, including whether the Australian Border Force would be given powers like those held by the U.S. CBP to seize items believed to be in breach of the provision. Although working groups have been strongly advocating for its inclusion, the 2021 draft of the law did not set out whether a *community protection question* would be added to a full import declaration stating which goods were (or were not) the product of forced labour, in part or in whole[166].

Despite the 2021 Bill's stated goal of addressing modern slavery, it lacks crucial legal information, such as an explanation of the circumstances under which products may be deemed to have been made with forced labour. Additionally, there are no express rights of appeal for those who suffered, and the Proposal ignores other distinct forms of modern slavery like servitude, debt bondage, and slavery. The 2021 Bill is therefore unreliable and uncertain, and it might be too limited to fully address the numerous variations of modern slavery[167].

The Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2021 was approved by the Senate in August 2021 despite its drawbacks. It finally failed because the House of Representatives did not give it enough government support. It was doubtful that the Australian government would

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[164] Bill by The Parliament of the Commonwealth of Australia, 22 November 2022, *Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2022*, Schedule 1.
[165] BRIDGES (2021).
[166] BRIDGES (2021).
[167] HUDSON (2023).

begin implementing a federal human rights regime so near to the conclusion of its tenure because of the federal elections in 2022[168].
The proposed import ban would have a big impact on Australia's renewables industry, which is among the global leaders in attempts to rapidly expand capacities and has installed five times as much variable renewable energy per person as the EU. This is especially important given the significant risk of modern slavery practices in the manufacturing of solar panels in the XUAR in China. Large orders of solar panels would not be allowed into Australia and would be blocked at the border, according to Senator Rex Patrick, the Bill's sponsor[169].
After the election, the legislation has been introduced into the Senate again as the Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2022, into the Senate. The legislation replicates the clauses of the earlier Forced Labour Bill 2021 and includes a similar rationale in the associated explanatory memorandum. The larger issue of the regulatory structure needed to support the imposition of the new requirement is not addressed, as it was before, though. The bill is currently undergoing parliamentary hearings and it remains to be seen which amendments can be passed and whether it will be adopted this time[170].

3.4. Derived learnings

In order to quickly identify contagion routes and vulnerable areas, authorities need have access to information as well as the intelligence and common sense to analyse it intelligently and rationally. Massive data gathering is not a magic bullet, and depending on data that is too granular, too ill-defined, and reported too late would not support the ongoing monitoring of the development of systemic risks. Therefore, reporting criteria should be created with a realistic understanding of what is feasible. To better comprehend and manage systemic risk, authorities' skills to work with massive datasets and uphold an effective framework for supply chain monitoring need both be improved simultaneously[171].
However, it can be time- and resource-intensive to evaluate the basis for a ban, watch over its implementation once it is in place, and enforce any violations, as demonstrated. As can be observed in the example of Canada, even while a legislation is in effect, the government does not necessarily provide the necessary funds for effective enforcement[172].
By allowing any stakeholder to submit claims of goods tainted by forced labour and therefore distributing the task of monitoring possible threats, the U.S. approach somewhat lessens this difficulty. However, in order to decide whether the evidentiary level has been satisfied, a designated authority would still need to evaluate reports. This can call for a significant amount of

[168] COVINGTON (2022).
[169] JOHNSON ET AL. (2022).
[170] HUDSON (2023).
[171] GAI ET AL. (2019:38-39).
[172] FANOU (2023:4).

intelligence capabilities. Depending on the ban's reach – whether it applies to all products from a certain area or only those produced or imported by a single company – the practical difficulty of assessing whether to seize a particular shipment of goods would change[173].

Similar circumstances must be taken into account for the EU, where the ability and political will of individual member states to execute any planned import limits would likely differ greatly. The assessment on the enforcement of Australia's Modern Slavery Law found that there is a significant danger that not all national authorities have enough capability to ensure that only compliant items are placed on the market[174]. By examining the case of Australia, the thesis notes that special emphasis should be taken to define the term or scope of the due diligence that entities are required to report on. Furthermore, the imposition of penalties on reporting entities that fail to submit due diligence reports or submit a statement that does not comply with the mandatory reporting criteria must be high and fast enough, to incentivise legal compliance.

In addition, the regulation must make sure that the authorities do not build hurdles to prevent valid cases on the use of forced labour from being taken forward as seen in the Canadian case, where almost no seizures have been taken place. The available enforcement capacities and political willingness to implement the ban must therefore be taken into account. Regardless of whether the European Union or one of its Member States is the appropriate body for detecting and seizing items made with forced labour, this must be assured. The authorities should also make sure that fraud in the identification and seizure procedures does not obstruct the administration of justice. The competent authorities must be free from any economic or political pressure from other State agents or corporate actors in order to achieve this[175]. This can be seen in the USA case where foreign and domestic business representatives questioned the viability of the UFLPA's rebuttable presumption. This led subsequently to a loosening of the enforcement authority's strict application of the law to allow imports again.

[173] PIETROPAOLI, ET AL. (2021:4).

[174] Communication of the European Commission, 20 May 2021, COM(2021) 249 final, *Report on the application of Directive 2014/40/EU concerning the manufacture, presentation and sale of tobacco and related products,* Ch. 2.2.

[175] Publication by the United Nations Human Rights Council, 16 June 2011, HR/PUB/11/04, *kangBusiness and Human Rights*, pp. 28-29.

4. Literature-based analysis of trade restriction design: Identifying key elements and lessons learned

This chapter carries out an extensive research in the latest literature on legislative measures to address forced labour, highlighting key learnings that should be considered when evaluating the effectiveness of trade restrictions. By drawing on a range of academic, industry and legal sources, this chapter lays out a framework to evaluate the European Commission's Proposal on a marketing ban on forced labour products on whether it is both robust and effective. In doing so, the outlined learnings are divided among eleven sections:

(1) Legal framework
(2) Due diligence
(3) Value chain vs. supply chain
(4) Circumvention methods
(5) Cooperation mechanisms
(6) Monitoring procedures
(7) Provision of guiding material
(8) Procedural obligations
(9) Consequences & remedies
(10) Market implications
(11) Derived learnings

The examined literature does not only address import or marketing bans on forced labour products, but considers a broader spectrum of political issues, sectors and addressees. As an example, Gai et al. address in their 2019 paper on "Regulatory complexity and the quest for robust legislation" the finance sector, but its learnings can also be applied in the context for this paper. The same goes with the United Nation's 2011 publication on "Guiding Principles on Business and Human Rights". It mainly addresses domestic economic operators in its principles, but they can also be transposed and applied for international organisations such as the European Union ('EU').

In general, due diligence is considered part of non-financial reporting, regardless of whether it is applied by corporations or (international) authorities. Corporations usually categorise it under the framework of corporate social responsibility ('CSR'), while authors suggest it be included in sustainability reporting. As this subject garners more attention from political decision makers, there are numerous domestic reporting guidelines, principles, regulations, and standards, as well as international initiatives[176]. The European Parliament regards due diligence as a preventive measure whereby companies take appropriate actions to prevent adverse impacts arising from their business activities[177]. This often involves a more comprehensive and proactive approach, as companies are legally obligated to demonstrate that they have taken steps to eliminate wrongful conduct, such as human rights violations[178].

[176] VILLIERS (2022:555).
[177] Press release of the European Parliament, YAKIMOVA, 10 March 2021, 20210304IPR99216, *MEPs: Companies must no longer cause harm to people and planet with impunity*.
[178] VILLIERS (2022:565).

When it comes to forced labour products, the European Commission's Proposal on Corporate Sustainability Due Diligence Directive COM(2022) 71 final ('CSDD Proposal') published on 23 February 2022 is the most prominent example that mandates companies within the Union to carry out due diligence. However, this paper argues that also the Commission's "Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market" (COM(2022) 453 final) follows in that definition as it mandates domestic importers and foreign exporters to disclose information to certify their business conduct does not harm people.
When designing a regulation that obliges companies to comply with sustainability requirements, Gai et al. highlight the necessity of a symmetric approach:

> "Regulation should be complex (state-contingent, risk-sensitive, case-dependent) enough to appropriately capture the heterogeneity of institutions, risks and circumstances, but not so convoluted and onerous to comply with and enforce that it results in unnecessary cost burdens, discourages competition and innovation, leaves room for regulatory arbitrage or induces hard-to-anticipate behaviours that can increase systemic risk"[179].

When considering ways to address forced labour products, there are two main options to consider: an import ban or a marketing ban. To provide clarity on these concepts, brief explanations of each approach are provided below:

- Import ban: This type of restriction prohibits the import of goods (or services) from certain origins into the Union market or requires certification that the producer has not engaged in forced labour.
- Marketing ban: This type of restriction prohibits the promotion, buying, and selling (including advertising) of specific products (or services) that have been identified within the Union market, irrespective whether they are produced domestically or imported[180].

This paper argues that there is no evidence of forced labour in the European solar manufacturing industry, while the Chinese competitors, which have an overwhelming global market share, are accused of using forced labour. Consequently, the ban would primarily affect imports. Therefore, learnings that are suitable for import restriction may also be suitable for a marketing ban on forced labour products in the solar sector.
Although a marketing or import ban instrument follows an internal market logic and is therefore not a trade instrument as such, it can nevertheless lead to a quantitative restriction sanctioned under the rules of the World Trade Organization ('WTO'). In the following research, findings for import bans are therefore also appropriate to be considered for evaluation a marketing ban on forced labour products.

[179] GAI ET AL. (2019:7-8).
[180] JACOB ET AL. (2022:10-11)

Marketing and import restrictions mostly apply to commodities, whereas due diligence requirements on businesses tend to be the preferred strategy for addressing traded services connected to forced labour (such as in prostitution, mining, construction, etc.). The CSDD Proposal attempts to address forced labour's usage in global value chains, including in the manufacture of goods and the delivery of services by businesses[181].

4.1. Legal framework

Article 169 of the Treaty on the Functioning of the European Union ('TFEU') establishes the legal basis for the European Union to implement trade restrictions, such as marketing bans, on products made with forced labour. The Article states that the European Union can adopt appropriate measures to ensure the fulfilment of its objectives, particularly when it comes to protecting human rights, promoting social progress, and combatting unfair trade practices[182]. This article serves as a crucial mandate for the EU, empowering it to take necessary measures. Forced labour represents a severe violation of fundamental human rights, and by imposing trade restrictions on products associated with such practices, the EU fulfils its responsibility to address this pressing issue and uphold its commitment to ethical and responsible trade.

When assessing the legality of trade restrictions under international law, we must take into account both international trade law and international human rights law. International human rights law usually does not empower states to control the extraterritorial operations of companies that are located in their territory or under their authority. Furthermore, as long as a legitimate jurisdictional foundation can be shown, they are not normally forbidden from doing so. Within these constraints, certain human rights treaty authorities advise states to take action to stop mistreatment overseas by commercial businesses under their authority[183]. The Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development ('OECD'), which require parent companies to report on the global operations of the entire enterprise, are one example. Another is performance standards demanded by organisations that support foreign investments. Other strategies equate to extraterritorial law and enforcement directly. This includes criminal laws that permit charges based on the nationality of the offender regardless of the location of the offence. The perceived and actual rationality of State Acts may depend on a number of variables, such as whether they are supported by international agreements[184].

The choice of the measure's scope has a significant bearing on whether a trade restriction is legitimate under international trade law. The above discussed Australian private senator's Bill that suggested prohibiting the import of items made using Uyghur forced labour in the People's Republic of China ('PRC')

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[181] JACOB ET AL. (2022:11).

[182] Treaty of the Council of the European Union, 26 October 2012, C326/47, *Consolidated version of the Treaty on the Functioning of the European Union*, Art. 169.

[183] Publication, *Guiding Principles on Business and Human Rights*, p. 3.

[184] Publication, *Guiding Principles on Business and Human Rights*, p. 4.

is one example of legislation imposing an import restriction that might directly address particular concerns about forced labour. Alternately, an import ban law may limit the import of any products made anywhere, in whole or in part, with forced labour[185].

Despite this, it is widely agreed that any import restriction on goods made using forced labour in the EU must be in line with WTO regulations. The General Agreement on Tariffs and Trade ('GATT'), which was created by the WTO, established non-discrimination as its guiding principle. The principle of *most-favourable nation* ('MFN') treatment, which is Article 1 of the GATT, states that WTO member countries cannot typically discriminate against their trading partners. It states that any treatment and conditions that are more favourable than those given to any third party would be equally extended to any other party to the Agreement[186]. Second, the GATT's Article 3 on goods stipulates the *national treatment* ('NT') concept, which indicates that domestically and imported goods should be handled equally. Discriminatory non-tariff barriers, or any other type of policy instrument that has the potential to affect trade flows, such as quotas, import licencing schemes, sanitary laws, restrictions, etc., are prohibited under Article 3 para. 4. Simply said, it forbids discrimination between imported items and domestic ones with the same product properties[187]. Additionally, the GATT's Article 9 calls for the universal abolition of quantitative trade barriers like import bans[188].

The NT obligation outlined in Article 3 para. 4 GATT would be complied with if there was a complete marketing and import ban on goods made or transported using forced labour. This would guarantee that domestic and imported goods are subject to the same rules and that they are not treated less favourably than domestic goods[189]. It is important to note, however, that there are justifications for such a prohibition, even if the establishment of an import ban was not followed by an export ban and could thus disadvantage third party WTO member countries. WTO member countries may be free from the equal treatment obligation under the ten General Exceptions to the MFN treatment set down in Article 20 of the GATT. WTO member countries may implement measures required "to protect public morals" (Article 20(a)), "to protect human, animal, or plant life or health" (Article 20(b)) or linked to "products of prison labour" (Article 20(e)). As a result, applying Article 20 of the GATT could justify treating domestic goods and imports differently[190].

If a trade restriction treats domestic and foreign trade partners differently, the EU would need to establish a link to one of these exceptions. However, in the WTO agreements or related case law, formal connections between trade and human rights, such as labour and social standards, have not yet been made.

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185 PIETROPAOLI, ET AL. (2021:3).

186 Treaty by World Trade Organization (WTO), 15 April 1994, U.N.T.S. 1867, *The General Agreement on Tariffs and Trade (GATT)*, Art. 1.

187 Treaty, *The General Agreement on Tariffs and Trade (GATT)*, Art. 3.

188 Treaty, *The General Agreement on Tariffs and Trade (GATT)*, Art. 11.

189 JACOB ET AL. (2022:21).

190 Treaty, *The General Agreement on Tariffs and Trade (GATT)*, Art. 20.

When looking into other international agreements, there is evidence of a link to measures required to protect public morals, even though its interpretation is still evolving. This claim is further supported by China's ratification in August 2022 of two ILO Conventions, namely the Forced Labour Convention and the Abolition of Forced Labour Convention[191].

When applying these exceptions, it is important to consider that Article 20 of the GATT has two significant restrictions: Such measures cannot discriminate amongst WTO member countries if the same condition for the exception also exists in the domestic country or the exception is arbitrarily used to disguise a restriction on international trade. Furthermore, to prevent arbitrary or discriminatory use of such an import limitation, it would be essential to refrain from focusing on any specific geographic region or economic player. Consequently, a trade limitation cannot favour certain items over others based on their place of origin. This restriction would thus need to be evidence-based and follow consultation with the affected parties[192].

To better understand WTO compatibility, it is worth taking a quick look into the case of the EC Seal Products (Canada vs. European Communities 2014 & Norway vs. European Communities 2014). The Regulation of the European Community No. 1007/2009 forbade the importing and sale of seal products. An exception applied to goods obtained from hunts carried out by Inuit or indigenous populations or hunts performed for the management of marine resources. While the WTO Appellate Body determined that the measures were necessary to protect public morals in accordance with Article 20(a) GATT, the EU's attempt to invoke this exception was unsuccessful because it violated the spirit of Article 20 by treating seals goods from commercial hunting differently from those taken by indigenous populations. According to Norway and Canada, the exclusions breached the non-discrimination requirements of GATT Articles 1 para. 1 and Article 3 para. 4. The EU subsequently lowered the Inuit exemption in Regulation (EU) 2015/1775 to conform with WTO regulations and deleted the exception for regular control measures for sustainable management needs[193].

4.2. Due diligence

State authorities and authorities of international organisations ('competent authorities') must conduct human rights due diligence to avoid, mitigate, and account for adverse effects on human rights. Such procedures should include assessing the actual and potential effects on human rights, acting in response to the information, monitoring the results, and explaining how the effects are being addressed. Due diligence on human rights should address any negative effects on human rights that a business may cause via its own operations or

[191] JACOB ET AL. (2022:35).
[192] JACOB ET AL. (2022:35).
[193] Verdict by World Trade Organisation (WTO), 18 June 2014, DS400, *Canada vs. European Communities*.

that may be directly related to the domestic importer's operations, goods, or services by its business relationships[194].
In this process, the human rights context is evaluated, persons who could be impacted are identified, relevant human rights standards and concerns are compiled, and the potential effects of the planned activity and related commercial ties are projected. Consideration should also be given to the varying risks of specific human rights consequences on people from groups or communities that may be more vulnerable or marginalised[195].
Regulatory and supervisory authorities should also be able to respond to new developments by activating or deactivating existing tools (such as investigations and restrictions), recalibrating elements of regulation, or making other adaptations thanks to timely access to pertinent information and its efficient processing. Strong legislation on trade restrictions should make it easier for regulatory and supervisory bodies to address vulnerabilities and potential contagion routes once they have been identified. This may entail building contingency plans to separate essential institutional functions and placing restrictions on individual organisations or activities[196].
Additionally, rather than replacing legislation, market forces, corporate governance, and management ethics should work in tandem with it. Market discipline on matters of human rights can boost consumer demand for products made ethically. However, if the goals of regulated firms and society vary, then depending excessively on market discipline or self-regulation is hazardous. Therefore, non-regulatory discipline should be seen as an addition to regulation rather than a replacement. However, strong regulation should give plenty of opportunity for non-regulatory discipline to operate rather than trying to regulate every facet of corporate activity in great detail[197].

4.3. Value chain vs. supply chain

In his book monography called "The Challenge of Sustainability", John Zinkin finds complexity to be:

> "[…] when the whole is made up of interrelated parts so that simple 'cause and effect' chains are replaced by complicated, rapidly changing, interdependent forces and events"[198].

Managing interconnected supply chains in a globalised environment may make large organisations into complicated entities. The distinctions between corporate groupings, huge firms, and supply chains are sometimes muddled since these supply networks span several nations, cultures, and legal

[194] Publication, *Guiding Principles on Business and Human Rights*, p. 17.
[195] Publication, *Guiding Principles on Business and Human Right, pp. 19-20*.
[196] GAI ET AL. (2019:39).
[197] GAI ET AL. (2019:39).
[198] ZINKIN (2020:197).

frameworks[199]. Fragmented manufacturing is a part of these multi-layered, multi-dimensional supply chains, which are arranged in fluid, dynamic ways. It is crucial to take these considerations into account when putting into effect a trade restriction on goods produced using forced labour[200].

The effect that trade restrictions can have on their targets is one of the difficulties presented by interconnected supply networks. For instance, if an import ban is imposed, a company may lose a sizeable portion of its market share. The report, published by the Helena Kennedy Centre for International Justice at Sheffield Hallam University, demonstrates how intertwined such indirect supply chain connections may be[201]. Therefore, geographically constrained import bans must be complemented with tracking measures in order to be successful[202].

Implementing these systems, nevertheless, poses a traceability problem. Even businesses may only be able to name their top-tier suppliers, with lower-tier suppliers often being difficult to identify[203]. Regulating bodies find it challenging to handle dangers related to modern slavery, which calls for limits on both finished products and intermediate commodities. Thus, in order to combat modern slavery as effectively as possible, one must interact with the entire value chain, also known as the chain of custody, and develop more nuanced investigative skills[204].

Villiers (2022) has in his paper "New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability" disregarded the notion of simplifying globalised, linked supply networks as a solution to this complexity. The European Union acknowledges that complexity and variety within corporate structures may be required to shield them against disruptive challenges. Instead, the EU chooses to maintain the resilience of supply networks for European corporations. Trade relationships may become stronger and more resilient to supply shocks by including redundancy. Complex supplier networks therefore provide challenges for due diligence but also aid to maintain ongoing corporate operations[205].

The paper argues that a sophisticated approach to trade restrictions is necessary to distinguish between businesses that actively commit or contribute to breaches of human rights and those that are only involved in such violations as a result of commercial interactions[206].

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[199] BLUMBERG (2001:298).
[200] SERDARASAN (2013:533).
[201] MURPHY & ELIMÄ (2021).
[202] PIETROPAOLI, ET AL. (2021:9).
[203] CLARKE & BOERSMA (2017:111).
[204] SCHWARZ ET AL. (2022:87).
[205] VILLIERS (2022:551-553).
[206] Publication, *Guiding Principles on Business and Human Rights*, p. 21.

4.4. Circumvention methods

One possible downside of having to comply with regulations enforcing a ban on items made using forced labour is that it would ultimately tempt businesses operating under unlawful conditions to expand their clientele into non-EU countries. These nations would thereby be able to resell these tainted products to the Union market. Companies that violate human rights utilise this in order to circumvent existing commercial ties and operate beyond the bounds of regulations[207].

The intentional complexity of supply chains built to take advantage of regulatory loopholes, dodge obligations, or conceal issues are other strategies for circumvention. Multinational corporations may have their headquarters in one country, but they may conduct their economic operations elsewhere, outside the purview of the laws of that country. Another favoured approach is to operate in low-income nations that lack the infrastructure or resources necessary for effective regulation, enabling them to operate without interference[208].

One prominent example in which circumvention methods are applied is the case of garments from North Korea. According to numerous reports, these clothing items circumvent U.S. and EU import restrictions on North Korean textiles by going through the PRC and ending up on the global market. There are also worries that importers would source from Vietnamese suppliers that stealthily source from Xinjiang-based companies because of the U.S. Uyghur Forced Labor Prevention Act (UFLPA). Additionally, importers whose goods are stopped at the border by U.S. and Canadian restrictions are permitted to re-export the product to a location without such import restrictions. The effectiveness of import restrictions may be increased by international cooperation, but given the absence of market dynamics, state-sponsored forced labour may be less responsive[209].

A trade restriction can specify a range of commodities, from the more precise to the more general to address all intermediate products in a value chain, from the raw material to the finished product. A very specific import restriction could only apply to imports related to one person or one business. A more broad-based ban can apply to all items from a certain location or a certain range of products. The enforcing authority may decide to implement both particular and general import restrictions using flexible import ban instruments like the UFLPA[210].

A trade limitation should also be flexible enough to change along with the industry's business practises and avoid impeding innovation. As corporate, legal, and technology situations change, regulations that were reasonable when they were first introduced may no longer be relevant. Regulations cause institutions and people to alter their behaviour, and as a result, their responses evolve through time and interact nonlinearly with the regulatory environment. Therefore, it is challenging to predict in advance what the best regulatory

[207] VILLIERS (2022:565).
[208] VILLIERS (2022:551).
[209] FANOU (2023:3).
[210] PIETROPAOLI, ET AL. (2021:3).

measures to lower systemic risk will be. Although they are difficult to foresee with much precision, systemic risks should be taken into consideration when formulating the legislation[211].
Trade rules have historically placed a substantial emphasis on addressing risks that are quantifiable and doing so in proportion to their defined relevance, which is dependent n existing historical information. This is similar to the majority of widely used risk management strategies. However, such a strategy might not be enough to handle new types of risk, structural change, and events that are difficult to predict or quantify beforehand (*unknown unknowns*)[212].
The authorities' limited ability to handle every potential manifestation or cause of systemic risk must be acknowledged in order to create comprehensive rules. A regulatory framework that recognises its limitations in not being able to address every vulnerability but is adaptable and comprehensive enough to be effective when dealing with a variety of them and to adapt to the changing environment by perhaps recalibrating a few fundamental tools, should be able to produce a better overall result[213].
To this end, consistent review of the human rights situation on the ground is necessary in order to successfully capture the dynamics at play when rectifying adverse human rights impacts through corporate activities (see chapter 4.6)[214].

4.5. Cooperation mechanisms

Increased international information sharing is a successful method to improve the investigation capabilities and application of import restrictions. To do this, political allies may exchange intelligence on potential threats of modern slavery, map their supply chains, and find related goods and businesses. By putting in place the required infrastructure, the EU may be able to significantly contribute to global efforts combat modern slavery[215].
This 'honest cooperation' would entail economic actors sharing gathered data with relevant EU authorities and local stakeholders. One way could be developing an indicative, verifiable, and often updated public database on hazards associated with forced labour in certain geographic regions or with respect to specific goods. With the use of this database, statistics on forced labour could be produced, geographic locations could be mapped and certain entities could be better monitored[216].
By cooperating with other compatible nations in enforcing import restrictions on forced labour, the EU might go one step further, maximising the potential effects and minimising the chance of trade divergence to other markets. In

[211] GAI ET AL. (2019:3-7).
[212] GAI ET AL. (2019:20).
[213] GAI ET AL. (2019:34).
[214] Publication, *Guiding Principles on Business and Human Rights*, p. 20.
[215] SCHWARZ ET AL. (2022:87).
[216] JACOB ET AL. (2022:16).

some circumstances, the market power concentration may even stop the need for limits to be triggered[217].

Working with non-state actors like civil society organisations ('NGOs') is another strategy. Public authorities should directly interact with those who could be impacted by human rights issues, taking into consideration communication and other hurdles that can make this difficult. Authorities should also examine alternative approaches, such as consulting with reliable, independent expert resources, in cases when direct contact to impacted people is not practicable[218].

Although these non-state actors lack judicial authority, they can nonetheless employ human rights-compliant culturally relevant methods such as adjudicative or dialogue-based mechanisms. These procedures may offer special benefits including quick access and correction, cheaper prices, and global reach.

Another relevant target group for cooperation are regional and international human rights organisations. These NGOs have vast expertise in dealing with cases of states that do not or insufficiently uphold human rights, especially when caused by corporate misconduct[219].

Working with both national and international NGOs can help to enhance the data produced by governmental and multilateral entities by offering crucial insights into local trends and threats. Supporting foreign organisations financially in their effort should therefore also be considered by authorities to ensure a more efficient investigative environment[220].

In order to obtain information on human rights violations directly from victims, so-called non-judicial grievance mechanisms should be established by corporations, NGOs as well as by government bodies. Such mechanisms provide affected people with channels to raise concerns. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly. To this end, the United Nation's "Guiding Principles on Business and Human Rights" lay out eight criteria to ensure the mechanisms' effectiveness:

> (1) "Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
> (2) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
> (3) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
> (4) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

[217] SCHWARZ ET AL. (2022:212).
[218] Publication, *Guiding Principles on Business and Human Right*, p. 20.
[219] Publication, *Guiding Principles on Business and Human Right*, p. 31.
[220] SCHWARZ ET AL. (2022:87).

(5) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
(6) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights;
(7) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(8) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances"[221].

4.6. Monitoring procedures

Due diligence requires a holistic and active approach for corporations as they must show that they have acted to eradicate or mitigate any risks to stakeholders identified in their internal examination processes. In doing so, the monitoring of the effects and outcomes of economic operators' efforts in identifying and eradicating forced labour among the value chain of its products is crucial for the successful application of a marketing ban[222]. Additionally, it is important to monitor the goods entering the EU to identify those which are made using forced labour. This mission necessitates thorough inspections of imports into the EU of commodities from high-risk regions, oversight of public procurement, and observation of actions throughout the global value chain in the private sector. A uniform EU list would therefore make it easier to impose import restrictions on forced labour and would encourage awareness and ethical business practises in both the public and commercial sectors. The USA sets with its "List of Goods Produced by Child Labor or Forced Labor" a good reference model in that regard[223].

The effectiveness of responses of marginalised or disadvantaged groups must as well be monitored by authorities. Relevant corporate reporting procedures should be a part of these surveillance methods. Authorities should therefore include reporting requirements for enterprises in its communication items, such as recommendations and guidelines, to enhance compliance (see chapter 4.7). Businesses that are affected by a trade restriction can utilise the same methods they use for other concerns, such as performance contracts and evaluations, surveys, and audits, utilising gender-disaggregated data where appropriate. Compliance with marketing or import restrictions can also be ensured by providing feedback on how well the corporate human rights due diligence mechanisms are working[224].

Authorities must make sure that the regulatory burden is commensurate with the market flaw at risk when requiring disclosure of compliance data on

[221] Publication, *Guiding Principles on Business and Human Rights*, pp. 33-34.
[222] VILLIERS (2022:565).
[223] JACOB ET AL. (2022:39).
[224] Publication, *Guiding Principles on Business and Human Rights*, p. 39.

human rights treatment from economic operators. It must be specified what kind and amount of proof is necessary to support an import restriction as well as who may provide proof and ask for a ban[225].
For smaller or less sophisticated regulated businesses, regulations can be burdensome, leading to high compliance and enforcement costs as well as more general costs like distorted competitiveness and innovation and activity shifts to less regulated sectors. Larger players are both a bigger source of misconduct than smaller ones and are better suited to handle complex and nuanced laws. Smaller players might benefit from exemptions or streamlined approaches to particular regulations by implementing the proportionality principle in the creation of regulatory frameworks[226].
The EU must establish a high threshold or imposing import restrictions while giving constructive engagement priority when it is practicable. This is necessary to guarantee meaningful and serious engagement towards remedying recognised violations and to maintain the EU's commitment to eradicate modern slavery[227]. However, European companies have expressed reservations as to whether a ban comparable to that under current U.S. law, the UFLPA, is viable. When whole value chains are not completely identifiable, it can be challenging to confirm or refute claims of forced labour, especially in the case of the Xinjiang Uyghur Autonomous Region ('XUAR') where independent auditor access is restricted[228].
Evaluation of the effectiveness of the implemented trade restriction is also crucial, in addition to keeping an eye on the impacted economic operators' compliance efforts. A regulatory component's effectiveness and justification in terms of benefits outweighing costs are determined via evaluations. Evaluations conducted after a law goes into effect help to spot unexpected repercussions and potential regulatory mistakes, which helps to produce a deeper quantification of the advantages and disadvantages associated with its use. These assessments, which can include a wide range of policies to evaluate their interconnections and potential contributions to systemic risks, can be carried out by independent entities to prevent conflicts of interest[229].

4.7. Provision of guiding material

It should be underlined that imposing trade restrictions alone will not solve the problem of companies' obliviousness of forced labour incidents in their supplier chains. Jacob et al. wrote in their 2022 paper on "Trade-related policy options of a ban on forced labour products" that efficient execution of import bans necessitates a lot of information, including knowledge about the impacted product, its origin, and the use of forced labour in its manufacturing. Therefore, efficient traceability systems are essential to ensure the efficacy of

[225] PIETROPAOLI, ET AL. (2021:3).
[226] GAI ET AL. (2019:37).
[227] SCHWARZ ET AL. (2022:212).
[228] PIETROPAOLI, ET AL. (2021:3).
[229] GAI ET AL. (2019:33).

import prohibitions[230]. Governments that impose such limitations must help businesses do adequate due diligence on their supply chains[231].
Authorities must carefully consider evidence and possible repercussions before adopting trade restrictions in order to reduce the likelihood of adverse effects on vulnerable communities[232]. An indicative list and instructions on how to determine whether a good is going to be banned would make it simpler to identify them, helping to contextualise a trade restriction on products made using forced labour. Such a list might make it clear which goods to look at and what factors to consider before choosing whether to prohibit them[233].
Furthermore, publishing detailed policy guidelines are crucial to help corporations to uphold human rights. Those documents should outline desired results and best practises, offer guidance on suitable procedures that apply human rights due diligence, and take into account issues of gender, vulnerability, and marginalisation. The communication material should also consider the unique difficulties faced by indigenous peoples, women, ethnic minorities, religious minorities, children, people with disabilities, and migrant workers and their families[234].
Businesses and governments alike must comprehend the reasons behind limitations as well as the steps necessary to get them lifted in order for them to be successful. For actors not already subject to limits, clear rules for decision-making can operate as a signal. This contextualisation offers a behavioural framework that might help avoid imposing import restrictions in the first place and help manage business relationships in when they are not directly involved[235].
The EU should also provide economic actors with capacity-building opportunities. It may give businesses more clout by taking a proactive role in preventing or reducing negative effects on human rights[236]. However, corporate self-regulation is still necessary for forced labour import restrictions, even with more instructions. It is done on-site by the exporter, even though local importers may request it. To guarantee complete compliance, there must be real consequences for non-compliance, consistent standards applied across businesses, and unambiguous government control[237].

4.8. Procedural obligations

After economic operators have been identified whose operations or business relationships pose risks of human rights violations, the regulation on trade restriction should require them to report formally on how they address these violations. This can be done by the economic operators by disclosing

[230] JACOB ET AL. (2022:17).
[231] FANOU (2023:4).
[232] SCHWARZ ET AL. (2022:16).
[233] JACOB ET AL. (2022:14).
[234] Publication, *Guiding Principles on Business and Human Rights*, pp. 5-6.
[235] SCHWARZ ET AL. (2022:86).
[236] Publication, *Guiding Principles on Business and Human Rights*, p. 22.
[237] LAFIANZA (2022:7).

information on measures to comply with human rights obligation and product information.
The economic operator may be required to report on its duty of due diligence when disclosing information on compliance with human rights requirements. Importers and distributors would need to disclose on their supply chain due diligence procedures as broadly as feasible. The report could be made available online to the general audience. The reported information could include the following details:

- Risks identified in the supply chain
- Records of meetings held with stakeholders
- Information on the company's board members, management, and employees
- Connections to public administrators (government's interest in the company)
- Findings of third-party audits[238]

It is crucial for self-reporting to provide information like the supply chain locations where parts were processed in order to guarantee that questioned economic operators offer reliable information about their goods. Even with these safeguards in place, however, it is only possible to effectively check for forced labour if the origins of a product can be identified at an early stage (value chain monitoring). This is due to the possibility that forced labour may possibly impact some items inadvertently, making data collecting even more difficult and raising the question of whether marginally altered final products should also be outlawed[239].
The business self-disclosure framework system would rely on data from third countries as well as a distributor and importer economic operators' due diligence processes. By identifying sectors of their businesses where risks connected to forced labour may develop, economic operators can establish appropriate information channels with governmental authorities and civil society.[240]
To establish a more comprehensive set of rules, it is crucial to integrate this disclosure framework with already-existing frameworks like the human rights due diligence standards of the OECD and the United Nations ('UN')[241].
It is crucial for the quality and authenticity of human rights reports and product information to be independently verified by outside parties. This may be done by impartial third-party audits, which would examine the procedures, systems, and practises utilised to carry out supply chain due diligence[242]. Another less resource-extensive but also less rigid form of verification could be a voluntary questionnaire to be sent out and filled out by employees of the economic operator, respecting privacy and data protection rules. However, issues might

[238] JACOB ET AL. (2022:17).
[239] JACOB ET AL. (2022:16-17).
[240] JACOB ET AL. (2022:16-17).
[241] VILLIERS (2022:565).
[242] Publication, *Guiding Principles on Business and Human Rights*, p. 24.

develop because business owners are unwilling to share information or because foreign governments step in to not allow independent audits[243].
In order to promote respect for human rights, states should encourage or impose requirements on businesses to communicate how they handle their impacts on human rights. Provisions to provide weight to such self-reporting in the case of any court or administrative procedure might be included in incentives to communicate appropriate information. What and how firms should communicate can be helpfully clarified by policies or legislation in this area, ensuring both accessibility and accuracy of communications[244].
In all instances, communications should:

(1) Take into account the nature and extent of the company's human rights impacts and be accessible to the intended recipients, both in form and frequency.
(2) Include enough information to assess the effectiveness of the company's measures in addressing the relevant human rights impact.
(3) Not put stakeholders, personnel, or legitimate commercial confidentiality requirements at risk[245].

The ability or willingness of the local importer or foreign exporter to minimise or mitigate adverse effects on human rights may not always be there. In these situations, the relevant authorities must determine if the partnership can be ended. Before making such a decision, authorities should take into account reliable assessments of a potential worsening of adverse human rights impacts.

4.9. Consequences and remedies

It should be highlighted that applying trade restrictions broadly may be viewed as a relatively blunt approach to dealing with problems like the import of goods made using forced labour. All exporting companies are impacted when an import embargo covers a whole area or industry, whether or not those companies use forced labour practises. This strategy could result in reduced export revenues and, consequently, lower pay. Therefore, there is a chance that import restrictions might have the opposite effect of what was intended, such as increasing the possibility of forced labour because of lower pay[246].
These so-called 'unintended' or 'undesirable' consequences can very strongly depend on each trade restriction. For instance, businesses may decide to fully leave the afflicted nation or region in response to such limitations. Workers in areas tormented by forced labour may also leave such sectors and enter riskier ones like construction[247].
It Is crucial to recognise that there Is little evidence on the possible wider effects and geopolitical tensions brought on by import restrictions[248]. There are

[243] JACOB ET AL. (2022:18-19).
[244] Publication, *Guiding Principles on Business and Human Rights*, p. 6.
[245] Publication, *Guiding Principles on Business and Human Rights*, p. 23.
[246] PIETROPAOLI, ET AL. (2021:8).
[247] FANOU (2023:3-4).
[248] PIETROPAOLI, ET AL. (2021:8).

stories, nevertheless, that emphasise the unexpected consequences in a few specific circumstances. Esquel, a Hong Kong-based clothing manufacturer, is one such case that is referenced in the literature. Esquel apparently experienced revenue losses as a result of limitations on its exports relating to the XUAR, which resulted in the closure of two plants in Mauritius and the loss of 7,000 jobs[249]. Another instance highlights the detrimental effects of the U.S. Dodd-Frank Act, which essentially outlawed importing from the Democratic Republic of the Congo (DRC), creating difficulties for disadvantaged communities that depend on mining for their living in the areas of finance, health, and education.[250]

Import restrictions should be carefully planned, and before they are put into effect, governments should perform impact-based analyses, including dialogues with the affected stakeholders. Furthermore, initiatives to encourage businesses to adopt improvements that benefit employees should go hand in hand with trade restrictions[251]. The need that impacted enterprises take specific corrective activities to mitigate any harm caused by forced labour is an example of a regulation that benefits employees[252].

Import restrictions that include remediation processes can work for both, companies importing products from relevant nations and third-country entities selling to the Union market. Collaboration with private sector players in the target nation who collaborate with foreign economic actors to enhance their business practises might also be a part of such initiatives[253].

However, it is crucial to keep in mind that even when remediation is implemented, local suppliers frequently shoulder the financial burden rather than international importers. This is demonstrated by the Malaysian glove manufacturer's case, known as the Top Glove Case, in which overseas importers of the firm's goods did not pay to the reimbursements given to migrant workers[254]. According to some academics, in order to guarantee that abuses of forced labour are corrected, enforcement authorities should levy financial penalties on importers. The money from these fines would then be used to support corrective initiatives targeted at helping impacted employees[255].

4.10. Market implications

The consideration of the unexpected effects of extensive trade restrictions highlights the need of taking into account potential market distortions brought on by such policies. The notion of market distortion becomes an important market consequence to be considered while developing trade-restricting legislation. Redundancies, or the capacity to have alternative suppliers in case one is unable to provide, are essential since, as was already said, the intricate

[249] FANOU (2023:4).
[250] SCHWARZ ET AL. (2022:87-88).
[251] NISSEN (2022:378).
[252] PIETROPAOLI, ET AL. (2021:3).
[253] SCHWARZ ET AL. (2022:87).
[254] FANOU (2023:3).
[255] LAFIANZA (2022:20).

architecture of interconnected supply chains not only contributes to regulatory complexity but also needs them[256]. Ensuring functional redundancy improves the market's resilience in the Union. Regulations frequently serve to restrict or direct the actions of the companies they govern, thereby favouring some business models while discouraging others. As a result, it is critical to prevent overly homogenising regulated firms and activities since doing so risks undermining market diversity[257].

It Is desirable to keep the market's participants diverse, but it is unreasonable to think that they will all be able to withstand trade restrictions. Thus, it is crucial to take all necessary precautions to prevent market players from failing. Practical regulation should ensure that business entities can leave the market without creating too much havoc. A strong trade regulation must make it possible for unprofitable and ineffective companies to depart the system without jeopardising systemic stability. A change in the direction of regulatory activities may be necessary. Trade restrictions should make sure that the failure of a single organisation does not cause a substantial disruption in the supply availability for domestic importers due to monopolies[258].

With the *survival of the system* as a top priority, trade policy should work to assure the ongoing availability of essential commodities and services to society. Due to its reliance on the survival of these businesses, a regulatory system that encourages the concentration of activity in a small number of market players might become susceptible. This is especially relevant given the rising demand for solar supply in the European Union. Regulations should take into account a thorough knowledge of correlations, interconnections, and macroeconomic feedback processes (*macro-prudential*) rather than only concentrating on specific vulnerabilities. Since *micro-prudential* supervisors carry out the majority of macroprudential actions, supervisory agencies must work closely together, share information, and have a common understanding[259].

A market's ability to compete and innovate might be hampered by excessive regulatory complexity since it can make it difficult for new players to enter the market. Because new rivals must incur high compliance costs, established market leaders (*incumbents*) may discover that regulatory complexity discourages competition from entering the market. As a result, incumbents are able to charge more for their services than they would in a market with more competitors. Compared to a framework with fewer regulations, institutions operating under a complicated regulatory environment could have more market power and experience less pressure to be cost-effective[260]. A strong regulatory framework must thus regularly address market developments brought on by trade limitations in addition to keeping up with market evolution. Regulation must be a continuous process, thus requests for breaks should be ignored[261].

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[256] VILLIERS (2022:551-553).
[257] GAI ET AL. (2019:37).
[258] GAI ET AL. (2019:38).
[259] GAI ET AL. (2019:38).
[260] GAI ET AL. (2019:22).
[261] GAI ET AL. (2019:36).

European companies should evaluate alternative sourcing countries for important products that are currently under high risk of being tainted by forced labour. By diversifying its supplier markets, the EU can address the full spectrum of market variety, resolvability, systemic risks, and innovation as discussed above.
In the context of the solar sector, this must be done for the sourcing of raw materials and polysilicon in which China currently has a market share of over 60 percent[262].
By diversifying supply chains, import limitations might be implemented without running the danger of seriously disrupting the market in vital industries like renewable energy items. When implemented in tandem with allied partners and multilateral solutions, such policies have the potential to increase the influence of importers from the EU by decreasing the relative negotiating strength of dominant suppliers[263].

4.11. Derived learnings

By disclosing information, an organisation provides recipients with an opportunity to assess its processes, behaviours and performance, which is essential for increasing trust[264]. This extensive research has shown that the process of restricting goods and disclosing information is complex and there is a multitude of ways how it can be done. The practical use of this theoretical enforcement mechanism for trade restrictions for goods made with forced labour has, however, only been somewhat successful as seen in the case studies on import bans of products made with forced labour (see chapter 3).
The effectiveness of trade barriers in preventing forced labour depends on a variety of variables. These elements include the degree of collaboration among enforcement authorities, state and non-state actors, the allocation of resources for law enforcement, and the thoroughness of the due diligence carried out. Targeted import bans can be coordinated across many nations. Each of these elements, including the extensiveness (whether it is general or targeted to certain regions, sectors, businesses, or persons), can affect the effects of a trade restriction.
Based on the outlined research, this paper argues that the EU should adopt a more responsive and context-specific approach when creating trade restrictions on items made using forced labour. Such a strategy must be supported by in-depth analysis and data. It is crucial to take into account the possible negative effects of limitations on vulnerable groups in order to lessen the risk of harm to those who are most vulnerable. Therefore, it is crucial to carry out a thorough impact assessment early in the decision-making process using approaches that are supported by science[265].
Although trade limitations, such as marketing bans, are seen as viable actions to combat forced labour, they are indirect weapons that should be included in

[262] BERNREUTER (2020).
[263] SCHWARZ ET AL. (2022:212).
[264] VILLIERS (2022:554).
[265] SCHWARZ ET AL. (2022:212).

an all-encompassing plan aimed at tackling the issue's underlying causes[266]. Due to the many factors that contribute to forced labour in supply chains, it is doubtful that the issue can be exterminated effectively and sustainably by depending exclusively on regulatory initiatives. As a result, marketing restrictions should be carefully evaluated in conjunction with other regulatory and non-regulatory measures.[267]

To counter forced labour, additional legal measures should be put in place, such as obligatory human rights due diligence. With this strategy, corporations are legally required to guarantee that their activities and commercial interactions do not contribute to human rights breaches and to actively lessen any harm that may result[268]. In this sense, Amnesty International and the European Center for Constitutional and Human Rights argue in the European Commission's Call for Evidence on the proposed EU forced labour instrument that trade restrictions cannot independently address the root causes of forced labour. However, such bans are:

> "Appropriate for when 'on-the-ground' interventions as part of human rights due diligence efforts to address forced labour are not feasible, not reasonably expected to address the forced labour, or simply impossible (as, for example, in cases of state-imposed forced labour) […] or to undertake meaningful preventative and remedial actions on forced labour"[269].

[266] JACOB ET AL. (2022:19).
[267] PIETROPAOLI, ET AL. (2021:1).
[268] FANOU (2023:4).
[269] Position paper of Anti-Slavery International, 20 June 2022, F3316131, *Response to the European Commission Call for Evidence on the initiative to "effectively banning products produced, extracted or harvested with forced labour"*, p. 2.

5. Legal review of the Commission Proposal on prohibiting products made with forced labour on the Union Market

The elimination of forced labour and the adoption of global standards for ethical business behaviour are top priorities in the EU's 2020-2024 National Human Rights Action Plan[270]. In order to help European enterprises to handle the risk of forced labour in their activities and supply networks, the European Commission together with the European External Action Service published a non-binding Guidance on Due Diligence in July 2021[271]. Because voluntary methods were proven to be insufficient, Commission President von der Leyen announced in her speech at the 2021 State of the Union that the Commission is working on a ban on products on the European market that are produced using forced labour[272]. Later on, a Resolution on "a new trade instrument to ban products made by forced labour" was passed by the European Parliament in response to this pursuit[273]. A "Proposal for a Regulation on prohibiting products made with forced labour on the Union market" (COM(2022) 453 final) was finally released by the European Commission on 14 September 2022[274]. This gradual approach therefore follows the recommendation of the literature-based analysis according to which a trade restriction should be sort of the measure of last resort in incentivising economic operators to comply with human rights obligations.

Anti-Slavery International called the Commission Proposal for a marketing ban on products made with forced labour ('the Proposal') "an essential step toward building a smart mix of tools to help to eliminate forced labour across the world"[275]. The Commission's Working Staff Document states that the proposed Regulation aims to "effectively prohibit placement and making available of products made with forced labour, including child labour, in the EU market and their export from the EU"[276]. It stipulates that companies cannot export or place products created by using forced labour on the Union market. Both domestically manufactured goods and imports would be subject to this ban. It incorporates worldwide standards in addition to existing European Union ('EU') initiatives on corporate sustainability due diligence and reporting obligations[277]. This means that businesses must take precautions to guarantee

[270] Briefing of the European Parliament, ALTMAYER, February 2023, PE 739.356, *Proposal for a ban on goods made with forced labour*, p. 2.
[271] MONARD ET AL. (2022a).
[272] State of the Union address, *State of the Union 2021*.
[273] Resolution, *Texts adopted: A new trade instrument to ban products made with forced labour.*
[274] Press release, *Commission moves to ban products made with forced labour on the EU market*.
[275] Position paper of Anti-Slavery International, 11 October 2022, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, p. 1.
[276] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 34.
[277] MONARD ET AL. (2022b).

that their suppliers do not employ forced labour and that they do not utilise it at their own manufacturing facilities[278].
Article 2 of the Convention Concerning Forced or Compulsory Labour defines forced or compulsory labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"[279]. Companies would be compelled to withdraw such products from the EU market if it was discovered that they were produced under labour conditions that meet this description, which might entail destroying products currently existing in their supply chains[280].
This chapter explores and assesses the Commission's Proposal for a marketing ban on goods produced by using forced labour. The legal foundation for applying this Regulation within the EU is first explored. Then, a thorough description of how this legislation is supposed to work is given. To form a comprehensive assessment of the law, feedback from various stakeholders on the Proposal is also outlined. Finally, an overview is provided on the current status of the law within the ordinary legislative process, along with amendments from the European Parliament and the Council of Ministers ('the Council') that are possibly to be discussed in the trilogue negotiations. References to previously addressed learnings relevant literature and findings in the country-specific case studies are made throughout the text, contributing to a deeper understanding of the subject matter.

5.1. Legal foundation of the Proposal

The ILO's Convention on Forced Labour of 1930 (No. 29) and the Convention on Abolition of Forced Labour of 1957 (No. 105), along with the Protocol of 2014 to the Forced Labour Convention No. 29 and the ILO Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour (No. 203), serve as the guiding principles for the Commission's Proposal at the international level. This is consistent with the United Nations ('UN') Sustainable Development Goals' explicit targets to end forced labour by 2030 and child labour by 2025[281]. Additionally, forced labour is expressly prohibited in Article 4 of the European Convention on Human Rights[282]. The same is true of Article 5 para. 2 of the EU Charter of Fundamental Rights, which states that "no one shall be required to perform forced or compulsory labour"[283]. In addition to being addressed by international and European activities, this restriction is firmly established in both current EU law and upcoming legislative proposals.

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[278] JACOB ET AL. (2022:22).
[279] Treaty, C*onvention Concerning Forced or Compulsory Labour,* Art. 2.
[280] News article of EURACTIV, ELLENA, 12 April 2023, *Progress on forced labour products ban too slow, says leading rapporteur.*
[281] Briefing, *Proposal for a ban on goods made with forced labour*, p. 3.
[282] Treaty of the Council of Europe, 4 November 1950, ETS No. 005, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 4.
[283] Convention of the European Parliament and of the Council of the European Union and of the European Commission, 18 December 2000, C364/1, *Charter of Fundamental Rights of the European Union*, Art. 5.

When viewed through the lens of EU law, the Proposal is also consistent with the EU's commitment to upholding human rights, as stated in Article 6 of the Treaty on the European Union ('TEU'), which ties the EU's operations to the European Convention on Human Rights and its Charter of Fundamental Rights[284].

The EU has implemented a number of legal steps over the past few years to adhere to these obligations under international and treaty law. The Proposal for a Directive on Corporate Due Diligence ('CSDD Proposal'), which was published by the European Commission on 23 February 2022, is one of the most recent ones[285]. Additionally, the Corporate Sustainability Reporting Directive, which the Commission proposed in April 2021 and was adopted in December 2022, expands the categories of businesses subject to the Non-Financial Reporting Directive's duty to provide information on human rights problems. According to the Commission's proposed Corporate Sustainability Reporting Directive, the information to be provided on human rights should, if applicable, include information about forced labour in companies' value chains[286]. This does suggest that the EU is adhering to the literature's recommendation to include the trade embargo in a larger framework of legal measures to combat modern slavery and consequently forced labour.

When designing a legal measure to ban forced labour products, the Commission needed to make initial considerations under which policy fields the law must be placed to be most fruitful in its enforcement. The EU's authority over the European Single Market was therefore chosen. The EU is required to make decisions in the common commercial policy under Article 207 of the Treaty on the Functioning of the European Union ('TFEU'). In order to close any loopholes into the larger European market, it is permitted to develop a uniform policy prohibiting the free circulation of goods produced with forced labour in any given Member State[287]. Additionally, Article 114 TFEU mandates that the Council of Ministers and the European Parliament to adopt measures that align the laws, regulations, or administrative actions of Member States. These measures aim to achieve consistency with the goal of establishing and ensuring the smooth operation of the internal market[288].

According to Article 3 of the proposed Regulation, economic operators are not allowed to "place or make available on the Union market products made with

[284] Treaty of the Council of the European Union, 26 October 2012, C326/15, *Consolidated version of the Treaty on the European Union*, Art. 6.

[285] Proposal of the European Commission, 23 February 2022, COM(2022) 71 final, *for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*.

[286] MONARD ET AL. (2022a).

[287] Treaty, *Consolidated version of the Treaty on the Functioning of the European Union*, Art. 207.

[288] Treaty, *Consolidated version of the Treaty on the Functioning of the European Union*, Art. 114.

forced labour, nor shall they export such products"[289]. Consequently, the proposed regulation would directly affect trade and export policy even though it falls under the EU's internal market competence[290]. In this context, making available is broadly defined as "any supply of a product for distribution, consumption, or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge"[291]. When products are made available for sale online or through other methods of remote sales, the act of placing them on the market is considered to occur when the sales offer specifically targets users within the European Union. This implies that non-EU companies selling goods to the EU market would also fall under the jurisdiction of the Regulation[292].

Like the U.S. approach, the proposed EU instrument takes a broad approach without mentioning a precise product scope. Any product where forced labour is used at any point in its extraction, production, or supply chain is covered by the Regulation. It is still unclear, though, if consumables like fuel or energy as well as machinery used in the production of forced labour products are included. Furthermore, the prohibition does not explicitly cover services provided under forced labour conditions. Geographically speaking, the proposed Regulation covers goods that can be purchased or exported from any region, including products made within the Union. The Proposal is therefore undoubtedly regarded as a prohibition on marketing, encompassing more than just an import ban[293].

The broad application of this legislation has benefits and drawbacks. The law's consistent application to import, export, and domestic production regarding forced labour is a plus because it shows a non-discriminatory attitude towards third countries. As a result, this paper claims that it complies with Article 1 of the General Agreement on Tariffs and Trade ('GATT') and may not need to comply with the exceptions listed in Article 20, even though its conditions might be satisfied anyway (see chapter 4.1).

5.1.1. Differentiation to the Commission Proposal for a Corporate Sustainability Due Diligence Directive

When discussing the EU's strategy for handling products created with forced labour, relevant literature and business sources frequently cite the Commission's "Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937" (COM(2022) 71 final) that was published on 23 February 2022. It requires corporations that exceed certain thresholds to address the negative impacts of their business operations,

[289] Proposal of the European Commission, 14 September 2022, COM(2022) 453 final, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 3.
[290] Briefing, *Proposal for a ban on goods made with forced labour*, p. 4.
[291] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 2(d).
[292] Working Document, *Prohibiting products made with forced labour on the Union market,* p. 35.
[293] MONARD ET AL. (2022b).

subsidiaries, and value chains on the environment and human rights, both inside and beyond the EU. In addition to establishing a public enforcement framework, this Proposal strengthens civil liability and gives those who are harmed by negative effects access to remedy[294]. As a result, it is vital to highlight the parallels and distinctions with the proposed marketing ban.

It is important to clarify that the proposed marketing ban does not impose due diligence obligations on companies, nor does it extend the requirements stipulated in the CSDD Proposal to companies that are not covered by it. Thus, the proposed Regulation for a marketing ban on forced labour products does not introduce any specific requirements for economic operators to carry out due diligence on forced labour or any other human rights aspects. The economic operators are free to choose how they monitor the risk of forced labour in their supply chain[295]. This contradicts the findings in the analysed literature and industry sources. There, it was suggested that in order to ensure compliance with import and marketing restrictions, due diligence obligations should be made obligatory for all businesses.

Companies that are subject to the CSDD Proposal must manage the risks of forced labour in their supply chain in accordance with the obligations from the future due diligence legislation, which may be sufficient to assure the absence of forced labour from their supply chain. For these companies, no additional compliance costs are envisaged under the current Proposal on prohibiting products made with forced labour[296].

Large businesses operating in the EU will have a corporate due diligence obligation under the CSDD Proposal that is now under consideration. These businesses across all industries would have to identify, prevent, mitigate, bring to an end, or minimise their negative effects on human rights and the environment. EU limited the scope of economic operators that would be subject to the proposed Directive. Companies must meet specified requirements, such as having more than 500 employees and a net worldwide turnover of over EUR 150 million, are included in the proposed Directive's scope. If non-EU businesses engage in high-risk industries or have a turnover of more than EUR 150 million in the EU, they will also be included[297].

In order to remedy detect violations among their value chains, businesses must actively collaborate with their business partners. Disengagement continues to be the last option when negative effects cannot be mitigated. The prohibition of placement and making available of any product on the single market is not

[294] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 13.

[295] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 34.

[296] Press Release of the European Commission, 23 February 2022, IP/22/1145*, Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains*.

[297] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 13.

foreseen in the Directive's proposal, but it does involve fines in the event of non-compliance with the due diligence obligations[298].
The most notable difference between the two proposals is that the proposed forced labour Regulation would apply to all businesses, whereas the proposed Due Diligence Directive would only apply to those that fulfil the certain size requirements[299]. This is the main distinction between the two proposals. The CSDD Proposal encompasses both human rights and environmental issues, but the proposed Regulation on forced labour products solely addresses one aspect of human rights. The two proposals therefore have different scopes. Moreover, not all obligations for due diligence included in the Proposal for the Directive are necessary to address forced labour risks[300].
Under the two proposals, the outcomes of identifying forced labour problems vary as well. Companies are obligated to, among other things, take the necessary steps to remove any negative human rights effects (including forced labour issues) from their supply chains under the proposed Due Diligence Directive. Failure to comply with this or other obligations under the proposed Due Diligence Directive would result in penalties. Companies would also be liable for damages if they did not carry out their due diligence obligations for the prevention and mitigation of potential negative effects. Under the regulation however, forced labour issues in the supply chain of products would result in a prohibition to export, or place on the EU market, the products in question[301].
This being said, both proposals are evidently intertwined. Article 4 of the proposed regulation outlines a pre-investigation phase in which competent authorities request the following information:

> "[...] on whether the economic operators under assessment are subject to and carry out due diligence in relation to products in accordance with applicable Union legislation or Member State legislation setting out due diligence and transparency requirements with respect to forced labour"[302].

This means that even if due diligence measures would be per se voluntary under the prohibition, compliance with the Due Diligence Directive's obligations would be strongly taken into account when determining whether there is a reasonable suspicion that products are made with forced labour. Therefore, it would be even more crucial for economic operators to understand and

[298] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, p. 2.
[299] MONARD ET AL. (2022a).
[300] Briefing, *Proposal for a ban on goods made with forced labour*, 3.
[301] MONARD ET AL. (2022a).
[302] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 4.

effectively carry out their due diligence obligations in light of the proposed forced labour Regulation[303].
This study concludes that additional guidance is required regarding how these two proposals interact and where it may be necessary to draw distinctions between these rules given the interdependence of these laws. This may also apply to other secondary laws that impose obligations on economic operators for due diligence. Competent authorities who assess charges of forced labour may also consider compliance with them as well.

5.2. How the proposed marketing ban is intended to work

To put it simply, anyone who has suspicion on forced labour would be allowed to file a complaint with the relevant national authority in charge under the proposed regulation. In more detail, the proposed Regulation's Article 10 states that "any natural or legal person or any association not having legal personality" is eligible[304]. This large target audience adheres to the advice of the literature-based analysis to take into account outside information. However, the Proposal is not very clear when it comes to establishing reporting mechanisms for these audiences. The Proposal lacks details on how to build up suitable complaint mechanisms for international or national authorities, particularly when it comes to complaints made by individuals like harmed workers.
The following subchapters dive deeper into the functioning of the proposed Regulation. In doing so, this chapter outlines:

(1) Competent authorities
(2) Investigation procedures
(3) Risk-based approach
(4) Burden of proof

5.2.1. Competent authorities

The Commission's Proposal for a marketing ban on forced labour products involves a combined approach to tackle forced labour. While the Commission will provide accompanying measures for coordinated implementation, Member States will be responsible for effectively monitoring their national markets. This means that competent authorities appointed by each Member State would enforce the law[305]. The Commission Proposal for a Regulation assigns implementation and enforcement obligations to individual Member States, with the Commission playing a coordination role. The Commission's duties entail publishing guidelines and compiling a database of forced labour risk factors that is accessible to the general public. This is in contrast to the U.S. model, which is enforced by a single federal authority[306]. According to the

[303] MONARD ET AL. (2022a).
[304] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 10.
[305] Briefing, *Proposal for a ban on goods made with forced labour*, pp. 4-5.
[306] MONARD ET AL. (2022b).

Commission, this decentralised enforcement strategy should enable flexibility in identifying relevant authorities in accordance with national conditions[307].
This decentralised approach of the Proposal raises concerns in relation to the different capacities of Member States in implementing and monitoring the marketing ban. Additionally, varying political stances on labour laws in trade and with to third countries could have negative effects on enforcement. Comparatively, a centralised EU investigative body stronger likelihood of success in implementing such a mechanism. However, this possibility would be constrained by the need for political support within the EU and adequate funding[308].
According to the Proposal for a marketing ban on forced labour products, the Commission will actively monitor the Regulation's implementation in order to verify that it meets its goals and that the various national competent authorities are working together effectively[309]. However, neither a particular procedure for examining appropriateness of the national implementation nor formal validation or monitoring processes are specified in the regulatory provisions[310]. Therefore, this paper concludes that the Proposal falls short of fully addressing the previously stated suggestions on assessing the appropriateness of the measures taken by enforcement authorities to enforce the law. In addition, at the current state of affairs, there is a lack of precise guidance on which criteria Member States should adhere to when implementing their competent authorities.
The Commission Proposal further calls for the creation of a Union Network against forced labour products in order to fulfil its coordination and oversight responsibilities. Article 24 describes this network as follows:

> "The network shall serve as a platform for structured coordination and cooperation between the competent authorities of the Member States and the Commission, and to streamline the practises of enforcement of this Regulation within the Union, thereby making enforcement more effective and coherent"[311].

Representatives from the Commission, the Member States' competent authorities, and, if necessary, experts from the customs authorities will make up this network. The collaboration of the network's competent authorities should

[307] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 35.
[308] SCHWARZ ET AL. (2022:87).
[309] Proposal, fo*r a for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, p. 2.
[310] Position paper, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, p. 2.
[311] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 24.

guarantee that Member States will apply the future legislation in a consistent manner[312].

Although all products from all origins are in theory covered by the proposed Regulation, the Commission acknowledges that some products and regions should be given priority for enforcement since they pose a higher risk. [313] A database of the risk of forced labour in particular locales or in relation to particular products will therefore be created. Risks related to state-imposed forced labour will be included in the database. Products, suppliers, forced labour history, geographies, and others will all be taken into account as risk indicators. These indicators will be based on unbiased, verifiable information, including as reports from international organisations, civil society organisations, commercial organisations, and experience from implementing Union legislation[314].

The Commission will issue guidelines and work with external experts to create an indicative, non-exhaustive, regularly updated database of high-risk products in particular geographic areas or risk categories, including products of forced labour imposed by state authorities[315]. This database would follow a similar approach to the U.S., whereby it would identify under relevant guidance and a dedicated database certain sectors or industries in which the risk of forced labour is particularly high[316].

In addition, Member States will have at their disposal the Information and Communication System Module ('ICSMS'), which is to be set up as part of the Information and Communication System referred to in Article 34 of the Market Surveillance Regulation[317]. The module will contain information on a variety of decisions, such as whether or not to open an investigation at the conclusion of the preliminary phase. It will also enable information sharing and investigation collaboration among the competent authorities of the Member States. As a result, when faced with a potential case, the competent authorities will have a variety of instruments and information sources at their disposal to evaluate the risk of forced labour in a particular product[318].

In order to promote cooperation and coordination among all national competent authorities and the European Commission, this paper argues that the creation of a Union network against forced labour products is a suitable idea. However, the information on the guidelines offered by the Commission is at the current state of the legislative procedure quite rare. Only one particular

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[312] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 37.

[313] MONARD ET AL. (2022b).

[314] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 23.

[315] Working Document, Prohibiting products made with forced labour on the Union market, pp. 36-37.

[316] MONARD ET AL. (2022b).

[317] Regulation of the European Parliament and of the Council, 20 Juni 2019, (EU) 2019/1020, *on market surveillance and compliance of products*.

[318] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 37.

guideline has been released thus far. The Commission stipulated in the Proposal that no later than 18 months following the Regulation's adoption, it would provide the appropriate guidelines to help the national authorities carry out their tasks[319]. Given that the law would be applied 24 months after it entered into force, it is crucial for the Commission to offer these guidelines as soon as possible to avoid leaving the national authorities in the dark.

5.2.2. Investigation procedures

The competent EU Member State authorities would launch investigations, which would be conducted in two phases—a preliminary investigation phase and an investigation phase. The competent authorities will determine whether there is a *substantiated concern* that products were likely manufactured using forced labour during the preliminary investigation phase[320]. During this phase, the authorities of the Member States may start the procedure after obtaining pertinent information. They can order the economic operator to disclose information about the measure they took to identify, prevent, mitigate, or eliminate risk of forced labour in their operations and value chains. The operator's due diligence activities must be taken into account by the authorities (see chapter 5.1.1). It is important to note that this does not imply that the economic operator will be required to begin the due diligence procedures during this time. But even when a competent authority has verified concerns about a specific product made available by the relevant companies, the fact that corporations have conducted due diligence does not automatically prevent them from being investigated and eventually being sanctioned[321]. In their response, the economic operator must submit any current due diligence or other actions they have taken within 15 working days[322].

The economic operator will have the chance to provide additional documents and more thorough information to the competent authorities during the (final) investigation phase if the national authority determines that there is a substantiated concern of a violation of Article 3 (ban on forced labour products). Information identifying the products under investigation, their manufacturer or producer, and their product suppliers will be included in this.[323] The competent authorities may perform audits during this investigation phase, including on the grounds of the economic operators. The relevant economic operators must agree to it, and the government of the Member State or third country where

[319] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 23.
[320] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 4(5).
[321] Working Document, *Prohibiting products made with forced labour on the Union market*, pp. 35-36.
[322] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 4(4).
[323] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 5(3).

the inspections will take place must be officially notified and have no objections raised[324].
The findings of the investigation may lead to the competent authorities establishing a breach of Article 3 "on the basis of any other facts available" if it is determined that the economic operators' submissions are insufficient[325]. In that case, competent authorities may prohibit the economic operator of making these products available on the Union market and orders them to withdraw already existing products from the market and dispose them at their dispense[326]. However, if the products have already reached the consumers, this withdrawal will not apply[327]. If this is not done within the time frame established by the national authority the customs authority will need to ensure that the products are withdrawn and disposed. The relevant customs authorities shall next identify the product in question among the products declared for release for free circulation or export after receiving notification from the national competent authority that the use of forced labour for a certain product has been confirmed. The customs authorities would then prohibit the release of certain products for circulation or export[328].
Should the economic operators disagree with this decision, they may request a review procedure within five working days for perishable goods and 15 working days for other products. This request must include additional information proving that the product in question was not produced using forced labour. The decision may be challenged in court for its validity on procedural or substantive grounds by the economic operators[329].
The competent authorities request a wide range of information for doing so, including product information and results of due diligence investigations. However, particularly for Member States with limited investigation capabilities, this procedure can take much time before a formal decision to withdraw these products has been made. The products are still being offered on the internal market of the EU until that choice is made. This contrasts sharply with the U.S. model in which imports can already be seized, if there are sufficient grounds for suspicion. The EU method also differs from the U.S. method in that investigations may be conducted even after the pertinent products have been placed on the market. In the U.S., the prohibition is put into effect at its border[330].

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[324] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 5(6).
[325] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 6(2).
[326] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 6(4).
[327] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 1(2).
[328] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 15.
[329] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 8.
[330] MONARD ET AL. (2022b).

In the end, sufficient penalties for non-compliance must be in place for economic operators to comply with the final decision made by the national authorities. The Member States are required to establish the penalties for non-compliance and shall take all necessary steps to ensure that they are carried out in conformity with national law. These penalties are specified to be *effective, proportionate, and dissuasive*[331].

5.2.3. Risk-based approach

Generally speaking, the EU's proposed prohibition would apply to all economic operators, defined as "any natural or legal person or association of persons who is placing or making available products on the Union market or exporting products"[332]. Thus, regardless of their size or the volume of the product they make available or export, all businesses, including small and medium-sized enterprises ('SMEs'), would have to follow the restriction set forth in the Regulation[333]. However, SMEs often times lack the resources and knowledge necessary to put in place efficient due diligence processes that cover the whole value chain to show compliance in case of an investigation. When compared to a large corporation with more resources, withdrawing goods from the market may also place a greater burden and increase the risk of financial difficulty on SMEs[334]. This paper makes the case that because SMEs may face a greater burden, the EU may have even more leverage to order them to alter their business practises than it does with regard to major corporations. Finding efficient methods to track SME compliance with human rights obligations should therefore be in the EU's best interest.

Despite the fact that the Proposal takes into account all economic operators, it is expected that competent authorities will concentrate their enforcement efforts where they are most likely to be effective[335]. Small and medium-sized businesses would, in practice, be less likely to be the subject of enforcement action even though they would be covered by the proposed Regulation[336]. This consideration of company size might be applied on numerous procedures of the proposal:

- Design of the measure: Given that smaller businesses will likely have fewer resources for supply chain due diligence and mapping than larger ones, the competent authorities will take a company's size and capabilities into consideration when requesting information and establishing deadlines during the investigation phase.

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[331] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 30.
[332] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 2(h).
[333] MONARD ET AL. (2022b).
[334] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 37.
[335] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, p. 9.
[336] MONARD ET AL. (2022a).

- Risk-based enforcement: Under this strategy, the authorities should concentrate their enforcement efforts in areas where they are most likely to have an impact, even though no economic operator is exempt from the regulation's purview. This would probably involve focusing investigation efforts on high-risk industries and regions that the Commission communicates in its foreseen public database.
- Supportive tools: SMEs that are eager to follow this type of law by conducting pre-emptive supply chain due diligence may lack the means and knowledge to do so. To assist in keeping the cost of compliance low, it would be beneficial for companies to obtain guidelines, templates, and supporting tools[337].

The subject of risk-based enforcement is the most discussed one of these three when talking about the appropriateness of this Proposal for SMEs. This is where SMEs are most likely not to be targeted. The following factors, which are expressly stated in the Regulation, must be taken into account by competent national authorities when opening up an investigation:

- The economic operator's proximity to the point in the value chain where the risk of forced labour is most likely to occur (i.e.: the manufacturer or importer)
- The economic operator's size and financial resources
- The volume of the products in question
- The scale of the suspected forced labour[338]

The Commission argues, SMEs will be indirectly affected from due diligence observations to the extent that they are included in the supply networks of bigger corporations which monitor their whole value chains. In such circumstances, it would be in the larger company's best interest to make investments or take other steps aimed at eliminating or reducing the risk of forced labour in all areas of its supply chain. This would include the supply chain upstream and downstream from the SME, which could then be 'protected' by the actions performed by the bigger businesses without having to pay high compliance costs for their own due diligence[339].

This paper finds that the European Commission took great effort to address the previously raised concern of applicability of due diligence obligations for small economic operators. Industry sources and academic literature highlighted the difficulties certain companies might experience in monitoring their supply chains, especially with regards to raw materials and areas with concentrated market power. However, the current proposed system is not able to adequately dispel these concerns. The practically lacking application for SMEs bears the risk of a fragmentation of currently big economic operators to diminish their likelihood of being investigated. It therefore does not solve the enforcement issue for corporations but bears the risk of legislative loopholes.

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[337] Working Document, *Prohibiting products made with forced labour on the Union market*, pp. 37-38.

[338] MONARD ET AL. (2022b).

[339] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 38.

5.2.4. Burden of proof

The Commission Proposal on a marketing ban of products made with forced labour requires companies to disclose details of their value chain, upon request and to the competent authorities, when put under investigation[340]. This would apply to any economic operator who is accused of using forced labour in the production, gathering, or extraction of a product, as well as any work or processing involved in the manufacture of the product at any point in its value chain[341].

While crafting the Proposal, the Commission considered the advantages of establishing a threshold for the volume and/or value of products below which authorities would not initiate investigations. Such a de minimis provision might theoretically be used as a way to take into account the SMEs' circumstances. They might have been largely exempted by such an approach as it is likely that SMEs will make fewer quantities of their products available on the market. Setting up de minimis limits would, however, distort the internal market's playing field and introduce loopholes, according to the Commission. It would also not be a guarantee that SMEs always fall outside the scope of this proposal, since smaller economic operators could certainly make considerable volumes of products available on the market, depending on the sector[342]. Consequently, the Commission's decision follows the U.S. model, where the Uyghur Forced Labour Prevention Act also applies to all products, regardless of their type or industry[343].

Importantly, under the EU's proposed Regulation, the burden of proof for a violation of the prohibition against forced labour would always fall on the competent authority. However, it may be necessary in practice for economic operators whose products come directly or indirectly from regions classified to use forced labour to 'voluntarily' give evidence to the competent authority proving that they are not violating the Regulation[344]. Furthermore, the proposed Regulation would give competent authorities the authority to request from economic operators to provide specific information pertinent to the investigation and conduct checks and inspections under specific circumstances (see chapter 5.2.2). This suggests that the cooperation and submission of evidence by the economic operator will be crucial to the investigation's outcome[345]. Although the Proposal does not include a burden of proof for the economic operators, this paper contends that, in practice, they have to bear a burden of proof.

In contrast to the United States, the Commission Proposal does not include a rebuttable presumption that all products from a particular region are produced

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[340] Proposal, *for a for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 5(3).

[341] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, pp. 2-3.

[342] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, p. 9.

[343] PELLERIN & FARRELL (2021).

[344] MONARD ET AL. (2022a).

[345] MONARD ET AL. (2022b).

by using forced labour. It more closely resembles the Canadian model, which requires competent authorities to decide whether a product is prohibited on a case-by-case basis and is based on the information presented. However, it is worth recalling that this system has proven to be not enforceable by the Canadian authorities and is currently undergoing reforms.
The competent authorities would have to base their assessment in all phases of the investigation on all available information that is at their disposal. This includes the following non-exhaustive list of five types of information that might be taken into consideration, according to the proposal:

- Submissions to the Commission made by natural or legal persons or any association without legal personality.
- The risk indicators and other information that would be included in future Guidelines that are issued by the Commission.
- Information of a publicly available database of forced labour risks to be set up by the Commission.
- Information and decisions stored in the Information and Communication System established in the Market Surveillance Regulation, including any past cases of compliance or non-compliance of an economic operator.
- Information requested by the competent authority from other relevant authorities on whether the economic operator conducts due diligence on forced labour to comply with EU or Member State legislation[346].

These mentioned risk indicators will be based on verifiable information from independent sources, such as reports from international organisations, particularly the International Labor Organization, civil society organisations, business organisations, and the authorities' own experience from implementing EU law with forced labour due diligence requirements[347].

5.3. Stakeholder feedback

One of the most salient criticisms of the European Commission Proposal for a Regulation banning forced labour products is that it does not put the fate of the workers who are exploited at its heart[348]. This is partially due to the fact that such a legal measure is only reactionary to an already existing issue and does little to prevent the occurrence of forced labour. What forced labour import prohibitions are intended to accomplish is also a topic of heated debate. Schwarz et al. (2022) observed that trade restrictions "provide an important moral signal that can help maintain the EU's international reputation on human rights issues"[349]. This seems to imply that even ineffective bans might nevertheless achieve other political objectives. However, even in cases when such prohibitions are effective, their main goal is to diminish the contribution

[346] MONARD ET AL. (2022a).
[347] Working Document, *Prohibiting products made with forced labour on the Union market*, p. 36.
[348] Position paper, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, p. 1.
[349] SCHWARZ ET AL. (2022:16).

of Western importers and consumers to forced labour rather than to completely eradicate it[350].

One of the greatest pledges, particularly from stakeholders in civil society, is that the Proposal should be changed to place more emphasis on making sure that workers receive remediation[351]. This entails adopting a worker- and remedy-centred strategy, with businesses remediate the harm they cause to the affected communities[352]. It is worth noting, that remediation procedures were part of the European Parliament's request for a law to prohibit forced labour products in its June 2022 Resolution[353]. Such procedures are also in line with the findings of the literature-based analysis on best practises. This paper already outlined the importance of efficient remediation processes, including assessing their effectiveness. It would guarantee the prevention of a variety of unintended consequences and increases the Union's leverage in requiring businesses to alter their business practises.

According to Anti-Slavery International, the oldest international non-governmental organisation advocating against slavery and related abuses, the pre-investigation, investigation, decision-making, lacking remediation, and enforcement processes need to be reformed. It highlights that due diligence operations should not serve as a cover in the pre-investigation phase, as the evidentiary bar might be lower at that step to meet. That stage of the procedure should solely determine if there is a substantiated concern of forced labour by looking into the product specifics. Only at the investigation stage should due diligence measures be taken into account. The group further points out that the Proposal simply demands that forced labour products be withdrawn and disposed. The competent authority of the Member State bears the burden of proof, allowing the products under investigation to stay on the market until a final decision has been made. Economic operators now have the opportunity to divert their products to other marketplaces in the meantime, thereby significantly increasing the Member State's investigative efforts. Additionally, Anti-Slavery International suggests that the Regulation should specifically state that findings of a single product's violation of Article 3 applies to all products coming from the same production facility or economic operator[354].

Investor stakeholders advocate to further expand the scope of enforcement to better include systematic state-sponsored forced labour, patterns of forced labour in businesses, and patterns of forced labour across producers,

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[350] FANOU (2023:4-5).

[351] Position paper, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, p. 1.

[352] Position paper of Investor Alliance for Human Rights, 21 March 2023, *Global Investors Welcome the EU's Proposed Forced Labor Ban While Urging Modifications to Strengthen its Effectiveness*.

[353] Resolution, *Texts adopted: A new trade instrument to ban products made with forced labour*, para. 8.

[354] Position paper, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, pp. 1-2.

manufacturers, and importers[355]. One approach, outlined by Anti-Slavery International, would be to follow the U.S. model and amend the wording of the prohibition to expressly include the option of establishing regional bans (rebuttable presumption)[356]. Consequently, this would result in a greater compliance burden with WTO law and presumably also more serious political repercussions from the impacted countries.
Representatives from civil society organisations argue that during the investigation process, competent authorities should interact with affected workers and their representatives to identify and minimise any potential unintended consequences of imposing a ban on them. This would also give workers the opportunity to use a potential ban as leverage to improve their working conditions, enable remediation, and enable access to justice[357].
When discussing unintended consequences, conducting a thorough impact assessment early in the decision-making process is important, as it was previously mentioned. This reduces the risk of harm to those who are most vulnerable by taking into account potential adverse impacts on human rights[358]. For the Proposal for a marketing ban on forced labour products, this was not done by the Commission. Instead, the Proposal for a marketing ban of forced labour products refers to the impact analysis of the proposed CSDD Directive. In its Working Staff Document, the European Commission then stood to its referral but added some details of its considerations. It noted that the marketing ban is expected to have substantial economic and social impacts. It also shows that the impacts for the economy and society are almost entirely qualitatively assessed which leaves their monetary effects entirely without evaluation[359].
Beyond the lack of remediation for affected workers, the Proposal also fails to address the root causes of forced labour. To support employees, trade unions, civic society, human rights activists, small and medium-sized businesses, and local communities – wherever forced labour occurs – a set of supporting measures would be needed[360]. This is in line with the suggestions in the examined literature, which state that the EU should actively support third parties in addition to cooperating with them.
From an industries' perspective, the European association for metals, Eurometaux, advocates for a more harmonised approach with other pieces of legislation containing due diligence requirements. These include the proposed Battery Regulation, the CSDD Proposal, the Corporate Sustainability Reporting Directive, and the Responsible Minerals Regulation. To create a strong and

[355] Position paper, *Global Investors Welcome the EU's Proposed Forced Labor Ban While Urging Modifications to Strengthen its Effectiveness*.
[356] Position paper, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, p. 3.
[357] Position paper, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, p. 2.
[358] SCHWARZ ET AL. (2022:212).
[359] Working Document, *Prohibiting products made with forced labour on the Union market*, pp. 38-39.
[360] Position paper, *Civil Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market*, p. 3.

effective regulation, the additional instrument must be harmonised with already-existing legislation that involves due-diligence obligations[361]. This notion was extended even further by the European solar industry association, SolarPower Europe, in the Commission's call for evidence. It stated that the Proposal should be, in addition to being aligned with EU secondary law, in line with and complement other international due diligence initiatives, human rights obligations, and sustainability provisions, such as the OECD's due diligence guidelines for responsible business conduct[362]. This pledge for alignment has been noted after the publishing of the Proposal by the European Parliamentary Research Service ('EPRS'). It notes that more information is required, particularly about how the proposed CSDD Directive and proposed Regulation on the marketing ban interact with each other[363]. This study supports that conclusion.

So far, solar companies have been remaining cautious of the proposed Regulation. Concerns about the scope of the law that would require targeted companies to conduct due diligence along their whole value chains were voiced by the Spanish solar manufacturer Solaria. It asserts that private corporations lack the capacity to perform such extensive surveillance. This line of argumentation mirrors the communication of solar companies in the case of the proposed CSDD Directive[364].

From a business standpoint, the lack of an impact assessment could have unintended consequences for them as well. The EU wants to promote strategic autonomy to increase the resilience in supply chains of European companies, as it was stated in the introduction of this paper. However, the proposed Regulation has the potential to act against this objective. It does not outline any significant steps that would mitigate potential market impediments. According to the findings of the literature-based research, this can lead to a number of issues, including a lack of supply chain redundancies, hampered innovation, market entry barriers for new competitors, and higher output prices. Therefore, Eurometaux advocates a different amendment than that of the civil society organisations. A reasonable amount of time should be given to the company to mitigate or remedy the human rights violation before the product is banned under violation of Article 3 (prohibition of products made using forced labour). This would prevent economic interpreters from opting for a *cutting and running scenario* for their suppliers. If companies cut business relations and filling their supply chains with new partners that are not yet surveyed by competent authorities, this could lead to the same or worse forced labour situation[365]. On the other hand, giving companies time for compliance after they

[361] Position paper of Eurometaux, *EU proposal for Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, p. 1.
[362] Position paper of SolarPower Europe, 20 June 2022, *SolarPower Europe contribution to call for evidence on foced labour ban*, p. 2.
[363] Briefing, *Proposal for a ban on goods made with forced labour*, p. 6.
[364] News article of Deutsche Welle, DIEHN, 17 September 2022, *Wie die EU Zwangsarbeit bekämpfen will*.
[365] Position paper, *EU proposal for Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, p. 2.

have been investigated would extend the import of goods made inhumanely, adding to the suffering of the workers.
The potential leverage the EU has by banning products from its single market is another issue that is raised by available literature and industry sources alike. As noted before, working together with like-minded partners would enable each to multiply the leverage it might exert through its own trade policy. To prevent human rights abuses in corporate supply chains and to stop economic operators from shifting their business operations or exports to less regulated locations, it is crucial to harmonise legislation with international partners[366]. Industry representatives therefore argue that the Proposal should more strongly take into account other model laws, such as those from Canada, USA, and Australia, without necessarily replicating them[367]. This study has demonstrated that by choosing a case-by-case strategy rather than offering a rebuttable presumption, the EU takes a significantly different approach than its allies. They have either already introduced such a logic (USA) or are currently amending their laws in that regard (Canada and Australia).
This chapter concludes that stakeholders bring up a broad spectrum of amendments. Their criticism on the Proposal range from it might be too ineffective in contributing to the global abolition of forced labour to it is too strict and bears a high risk to cause a broad variety of unintended civil and economic consequences. It is now on the EU's co-legislators to take these voices into account when formulating their positions for the trialogue negotiations.

5.4. Outlook

The proposed Regulation on a ban on forced labour products is currently being discussed by the European Parliament and the Council of Ministers. There are preliminary indicators that will be subject to negotiation, however official positions have not yet been published. For the European Parliament, the Committee on Internal Market and Consumer Protection ('IMCO') will be in charge of this matter. The Rapporteur is S&D (Portugal). The Working Party on Competitiveness and Growth has commenced work on that matter within the Council[368].
It is important to recall that the Parliament had already voiced its opinions on the subject in its June 2022 Resolution requesting that the Commission develop a "new trade instrument to ban products made by forced labour"[369]. However, not all of the suggestions made by the Parliament have been included in the Commission's proposal. For instance, the Parliament envisaged that both the Commission (particularly the Chief Trade Enforcement Officer) and national competent authorities would be mandated to launch investigations. However, the Commission's Proposal for a marketing ban of forced

[366] LAFIANZA (2022:20).
[367] Position paper, *EU proposal for Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, p. 2.
[368] Briefing, *Proposal for a ban on goods made with forced labour*, p. 6.
[369] Resolution, *Texts adopted: A new trade instrument to ban products made with forced labour*.

labour products reserves this role exclusively for the competent EU Member State authorities[370].

Some Members of the European Parliament ('MEPs') are likely to advocate for the Commission to be given a stronger enforcement role in the upcoming negotiations. Particularly, the current system raises questions about its ability to guarantee the uniform application of the Regulation across all EU Member States[371]. Maria-Manuel Leitão-Marques warned that putting all of the responsibility for implementation on national authorities could undermine the effectiveness of the law due to potential variations in enforcement across the Union. She therefore publicly urged for switching to a more Europe-centred approach. In addition, when the Proposal was announced, German MEP Bernd Lange, the head of the trade committee, expressed a similar worry. He recommended that the EU should have a bigger role in the proposed Regulation's implementation. This is consistent with EU's wider push to play a bigger role in implementing trade-related restrictions in other contexts (i.e. application of sanctions by the EU)[372]. This assessment also follows the criticism this paper has made when assessing the investigation procedure of the proposal.

Along with the aforementioned civil society organisations, some MEPs are advocating for a Regulation that takes a more victim-centred approach and includes remedial measures for employees harmed by forced labour practises. In that regard, members of the Development Committee discussed their position on the Proposal in March 2023, emphasising the necessity to centre the ban on the needs of the victims while providing remedy for the impacted workers. The rapporteur seems cautious on giving to much promise to that point but said EU lawmakers were looking at ways to introduce remediation in the proposal. In addition, a rebuttable presumption of the use of forced labour in certain regions is currently also being discussed[373].

The Council's negotiating position is less publicly known. The enforcement of the Regulation by the Member States is something that is likely to be discussed in the Council as well. This paper argues that the Council is not likely to choose a more centralised, European-level enforcement. Instead, it is worth to look into the Council's position on laws of a similar nature that take supply chain observations into account. Naturally, the already-presented CSDD Proposal would be an appropriate choice. It mandates that businesses that exceed certain criteria conduct supply chain due diligence procedures and is evidently intertwined with the examined Proposal for a marketing ban. In this case, the Council chose a more limited scope of due diligence that must be carried out for compliance. This makes enforcement for businesses more practical. In the Council's position on the proposed Due Diligence Directive, the phrase *chain of activities* has taken the place of the term value chain. As this term focuses on a company's suppliers and excludes the providers of intermediate products and raw materials, it has in this context a more constrained meaning than value

[370] MONARD ET AL. (2022a).
[371] MONARD ET AL. (2022b).
[372] News article, *Progress on forced labour products ban too slow, says leading rapporteur*.
[373] News article, *Progress on forced labour products ban too slow, says leading rapporteur*.

chain. Media outlets have harshly criticised this stance[374]. This paper makes the case that adopting this Council position to the proposed Regulation would make the marketing ban simpler to comply for economic operators under investigation. By doing so, there is a risk that the law will become weaker and less effective at prohibiting the marketing of products using forced labour on the Union market.

It is also important to note how little time the EU has to come to a compromise on the proposal. As of May 2023, the slow progress on the forced labour file in the Council of Ministers has prompted concerns. Diplomats from three EU Member States stated that the Swedish Council Presidency is deprioritising the work on the ban. The presidency's goal is to only evaluate the proposal's articles until the end of its term. If this timeline is accurate, the Spanish Presidency, which will take office in July 2023, will need to move quickly. It would need to find a timely agreement among the Member States and then ensure that the Council and the European Parliament reach a compromise on the matter before the European election in mid-2024[375].

In early reports on the proposal, it was assumed the ban been adopted by the end of 2023. The proposed marketing ban of forced labour products also calls for a 24-month transition period before the law is applied. Consequently, the EU instrument would have been in effect not before than 2026[376]. This estimate looks less and less likely, and the most recent media publications predict that a settlement will not be reached before 2024[377]. Rapporteur Leitão-Marques stated that the Parliament still hopes to finish the case by February 2024, which would require reaching a solution with the Member States by that time. To meet this tight deadline, the European Parliament might be willing to amend the Proposal only slightly, she stated[378].

The Proposal for a marketing ban on forced labour products itself foresees the option to postpone the clarification of several of issues raised in this chapter until the Regulation has been adopted. The adoption of delegated and implementing acts is contemplated for these matters. Delegated acts would supplement the legislative act, specifying the information that would be needed to be made available to customs authorities[379]. To establish uniform conditions for the regulation's implementation, implementing acts would be allowed to be created. The specific procedural guidelines and implementation details[380], as well as the specifics of the data to be included in the decisions of the competent authorities, would be specified in these acts[381].

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[374] DAVIES ET AL. (2022).
[375] News article, *Progress on forced labour products ban too slow, says leading rapporteur*.
[376] MONARD ET AL. (2022b).
[377] News article, *Wie die EU Zwangsarbeit bekämpfen will*.
[378] News article, *Progress on forced labour products ban too slow, says leading rapporteur*.
[379] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 16.
[380] Proposal, *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 22.
[381] Proposal *for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market*, Art. 7.

6. European solar industry response: Solar Stewardship Initiative

The exploration of the solar industry's response to the proposed marketing ban on forced labour products is crucial for a comprehensive understanding of the dynamics at play. This chapter delves into the perspectives and actions of key industry players, shedding light on their stance regarding the ban and its implications for the solar value chain. By exploring the industry response, this paper aims to explain how major stakeholders, specifically Europe's leading association for the European solar PV sector, SolarPower Europe ('SPE'), navigate the complex landscape of forced labour concerns. This provides insights into the practical implications of the proposed ban and its alignment with industry goals.

In response to concerns related to human rights violations in the Xinjiang region, SPE has actively been engaging on various stages of the legislative process of the proposed marketing ban. It contributed to the evidence-gathering process initiated by the European Commission and actively participated in the subsequent public consultation[382].

Outside of the legislative process, the association works continuously on evaluating and improving the Environmental, Social and Governance ('ESG') performance of its members. To this end, SolarPower Europe published its Solar Sustainability Best Practices Benchmark in 2021[383]. This report presents the results of sustainability case studies and best practices along the solar value chain, covering the industry's carbon footprint, circularity, supply chain sustainability and transparency, biodervisty, public acceptance and human rights[384].

When it comes to human rights, a 2018 study of the Business & Human Rights Resource Centre evaluated the commitments of the biggest renewable energy markets as insufficient. More particularly, it found that the commitment to consultation and engagement with affected communities is too low, the commitment to labour rights is uneven, a gap in the access to remedy for affected communities, and that supply chain monitoring did not cover human rights[385].

SPE acknowledges in its Sustainability Best Practices Benchmark paper that companies' human rights policies and practices in the renewable energy sector are not yet strong enough to ensure this transition is fast and fair. It calls on investors to step up their engagement to ensure renewable energy projects in countries with less developed frameworks for human rights protection meet international standards[386].

To address this challenge, the SPE report lays out four approaches:

(1) Develop and implement a management system to address human rights within the organisation

(2) Request ESG expert advice

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[382] Position paper, *SolarPower Europe contribution to call for evidence on foced labour ban*, p. 2.

[383] SolarPower Europe (2021:3).

[384] SolarPower Europe (2021:10).

[385] Business & Human Rights Resource Centre (2018:3).

[386] SolarPower Europe (2021:44–45).

(3) Integrate human rights considerations into supply chain contracts and management
(4) Strengthen risk assessment related to human rights through an overarching framework[387]

When it comes to the European Commission's proposed marketing ban on forced labour products, SPE welcomes and shares its goals[388]. In a press release published in November 2023, the association advocates for the recognition of multi-stakeholder initiatives as an effective way to ensure fast and accurate implementation of EU legislation on transparent supply chains. When it comes to the question of burden of proof (see chapter 5), SolarPower Europe also emphasises the need for responsible burden of proof management, highlighting the industry's challenges in supply chain transparency[389].

When it comes to the trade policies with China, which are heavily debated in the European political sphere, SolarPower Europe highlighted in its press release the impracticality of traditional trade defence measures such as import tariffs. Instead, SPE suggests that a more viable approach lies in fostering responsible business conduct and creating alternative, transparent supply chains. The adoption of a forced labour statement for SolarPower Europe and its member demonstrated the commitment of private companies to adhere to European legislation and principles, further emphasising the industry's proactive stance on addressing forced labour concerns[390].

To ensure legislative compliance with the proposed marketing ban on forced labour products and to ensure further continuous improvement of the ESG performance in the solar industry, SolarPower Europe and Solar Energy UK jointly initiated the Solar Stewardship Initiative ('SSI'). With implementing this standard, the SSI seeks to ensure the energy transition is just, inclusive and respects human rights. Further, the SSI aims to establish a mechanism to enhance the integrity of the supply chain of the industry. It emerges as a central player in fostering responsible production, sourcing, and stewardship of materials across the global solar value chain. With a mission to enhance transparency, sustainability, and ESG performance, the SSI serves as a key multi-stakeholder initiative responding to the challenges posed by forced labour in the solar sector[391].

The SSI was formally founded in October 2022, marking the foundation of a collaborative effort to enhance sustainability practices in the solar industry. The SSI's initial steps involved the launch of its Pilot Code of Conduct in May 2023, a significant milestone that saw active engagement with over 60 organisations from various corners of the solar sector. This collaborative effort received support not only from third-party sustainability experts but also garnered attention from the international finance community. As part of its

[387] SOLARPOWER EUROPE (2021:45-46).
[388] Position paper, *SolarPower Europe contribution to call for evidence on foced labour ban*, p. 1.
[389] Press release of SolarPower Europe, 27 November 2023, *SolarPower Europe Statement*.
[390] Press release, *SolarPower Europe Statement*.
[391] Standard *The Solar Stewardship Initiative ESG Standard*, p. 3.

commitment to transparency and continuous improvement, the SSI called for feedback on the development of the SSI Standard, inviting contributions from stakeholders deeply involved in the realm of ESG management. Building upon the insights gathered during this pilot phase, the SSI published the final ESG Standard in October 2023, representing Version 1 of the Standard. The SSI emphasises a commitment to ongoing refinement and enhancement, scheduling a formal review of its Standard no later than 2026, ensuring a dynamic and adaptive framework for sustainable practices within the solar industry[392].
Stephen Lezak, a fellow of RMI's Climate Intelligence Programme and a researcher at the University of Oxford Smith School on Enterprise and the Environment, emphasised in an interview with the trade media outlet Energy Monitor the transformative potential of standardising systems.

> "When labelling systems work, it is not just as a policing function, excluding certain regions from being able to participate in the market; they actually create value by certifying products in such a way that they suddenly, irrespective of their origin, have more value as a certified good in the market than a non-certified good"[393].

The SSI Principles in its ESG Standard outline the commitment expected from its member companies. These include conducting operations in compliance with applicable laws and regulations. Notably, if national law conflicts with those set out in the SSI Standard the member will seek ways to meet the higher requirement, where possible. Furthermore, SSI members commit to respecting human rights, applying the standard's requirements in operations, and encouraging adoption along the supply chain[394].
Recognition and equivalence of third-party standards also play an important role in the SSI's approach. The initiative assesses various sustainability standards implemented by its supporters for recognition and alignment with the SSI Code. According to the SSI Assurance Manual, the SSI recognises the equivalence of other sustainability systems, certifications, and externally assured management systems that match its requirements, providing a flexible framework for companies involved in multiple sustainability initiatives[395].

6.1. SSI ESG Standard

The Solar Stewardship Initiative's ESG Standard encompasses a comprehensive framework, outlining key provisions to ensure ethical and responsible practices within the solar industry. Under the banner of Business Integrity and Legal Compliance, facilities are mandated to develop systems for maintaining

[392] Press release of Solar Stewardship Initiative, 17 May 2023, *Flagship Solar Supply Chain Sustainability Initiative Launches Public Consultation*.
[393] GORDON (2023).
[394] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 5.
[395] SOLAR STEWARDSHIP INITIATIVE (2023b).

awareness and ensuring compliance with international standards and national laws related to environmental, social, and governance practices. To this end, members are required to develop integrated and/or stand-alone ESG management systems that facilitate a continuous improvement. This includes policies, procedures, defined roles and responsibilities, financial and human resources, controls, monitoring protocols, training programmes, and internal and external communication and reporting requirements. Additionally, risks of environmental, social, or human rights impacts, including those associated with supplier operations must be identified and integrated into the company's risk and impact assessment systems[396].

Stakeholders and communities play a central role in the SSI ESG Standard, with members tasked to identify and engage with groups and individuals affected by or interested in their activities. To this end, stakeholder engagement plan, scaled to the operation's risks, impacts, and development stage, is to be developed. The engagement processes should be accessible, inclusive, equitable, culturally appropriate, gender-sensitive, and rights-compatible, with efforts demonstrated to remove barriers for affected stakeholders. In addition, the clause on community development further emphasises the assessment of potential adverse impacts on local communities, necessitating the development of action plans to minimise, mitigate, or compensate for adverse social, environmental, and economic impacts. Simultaneously, opportunities and actions fostering positive impacts on local communities must be identified, and the assessment of positive socio-economic impacts ensures a comprehensive understanding of the project's community development impact[397].

The ESG standard's transparency provision mandates members to publicly report on their ESG performance at least once a year, covering all material topics in alignment with internationally recognised reporting standards[398]. This commitment enhances transparency and accountability within the solar industry. Overall, these provisions collectively create a robust and principled approach, ensuring facilities engage in ethical, sustainable practices, promote stakeholder engagement, and transparently report on their ESG performance.

The Responsible Sourcing Policy stipulated in the Solar Stewardship Initiative's ESG Standard serves as a pivotal component ensuring ethical and sustainable practices throughout the solar value chain. This policy is designed to align with the ESG requirements outlined in the Standard. By implementing such a policy, facilities commit to communicating and raising awareness of these principles among their supply chain partners. Essentially, this policy becomes a guiding framework that mandates adherence to responsible practices, reinforcing the commitment to sustainability and ethical conduct. Simultaneously, Know Your Counterparty evaluations ('KYC checks') require facilities to conduct thorough due diligence on all suppliers. This involves a comprehensive assessment of their identity, credibility, and adherence to ethical

[396] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 6.
[397] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 6.
[398] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 6.

standards. By scrutinising business practices, compliance with environmental and social standards, and governance principles, facilities ensure that their supply chain partners align with ESG commitments outlined in the Standard. KYC checks not only mitigate potential risks but also contribute to a supply chain that upholds responsible and sustainable practices[399].
The Office of the United Nations High Commissioner for Human Rights ('OHCHR') under Michelle Bachelet conducted an assessment of the human rights situation in the Xinjiang Uyghur Autonomous Region ('XUAR'). The report concluded:

> "With respect to the allegations of forced labour in the context of placements in [Vocational Education and Training Centres] VETC facilities, it should firstly be noted that the Government's White Papers and other public statements show a clear link between VETC facilities and employment schemes. […] However, the close link between the labour schemes and the counter-'extremism' framework, including the VETC system, raises concerns in terms of the extent to which such programmes can be considered fully voluntary in such contexts. As explained above, the VETC system amounts to large-scale arbitrary deprivation of liberty through involuntary placements in residential facilities and compulsory 'training'"[400].

The ESG Standard places specific emphasis on responsible sourcing from conflict-affected and high-risk areas. Facilities, sourcing from such regions, are mandated to develop and implement a Responsible Sourcing Policy consistent with the OECD Due Diligence Guidance. This ensures that sourcing practices adhere to the highest standards, preventing inadvertent support for unethical or harmful practices in conflict-affected regions[401]. Considering the UN's assessment in Xinjiang, the SSI ESG Standards' due diligence obligation in accordance with the OECD Due Diligence Guidance may be especially adequate to ensure transparency in the XUAR region, if audits would be possible.
The due diligence system ensures responsible sourcing practices. Components include the establishment of robust management systems, risk identification and assessment, strategy implementation to respond to identified risks, independent third-party audits, and annual public reporting. Collectively, these provisions are meant to contribute to a responsible, ethical, and sustainable supply chain in alignment with the principles outlined in the Solar Stewardship Initiative's ESG Standard[402].
The ESG Standard emphasises compliance with national and international human rights law, aligning with the United Nations ('UN') Guiding Principles

[399] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 7.
[400] Communication, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, paras. 120-121.
[401] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 7.
[402] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 7.

on Business and Human Rights. Specifically, the Human Rights Due Diligence Process outlined in the SSI ESG Standard is instrumental in addressing the actual and potential impacts on human rights, extending to the supply chain of the certified facility. Crucially, this involves developing a policy commitment to respect human rights, ensuring its communication to all relevant parties, including suppliers, and obtaining senior management endorsement. Regular reviews of the human rights policy underscore the ongoing commitment to upholding these principles[403].

In the context of the XUAR region, where concerns about human rights violations have been raised, this due diligence becomes especially significant. By undertaking a comprehensive process that seeks to identify, prevent, mitigate, and account for impacts on human rights, facilities within the solar industry can address challenges associated with forced labour and other human rights abuses.

Moreover, when a facility identifies that its operations have caused or contributed to adverse human rights impacts, the SSI ESG Standard mandates the provision for or cooperation in the remediation of these impacts through legitimate processes[404]. Specifically addressing indigenous peoples, the SSI ESG Standard mandates that if indigenous peoples communities or groups are known to be in the sphere of influence of a facility, the facility must commit to obtaining their consent for new projects[405].

In upholding ethical labour practices, the Solar Stewardship Initiative's ESG Standard incorporates a comprehensive set of provisions to ensure a fair and humane work environment. The standard is founded on principles that reject any form of forced labour or modern slavery, aligning facilities with international conventions such as the ILO Forced Labour Convention of 1930 (No. 29) and the ILO Abolition of Forced Labour Convention of 1957 (No. 105). The labour provisions in the SSI ESG Standard also prohibit child labour, mandate compliance with minimum age standards and require facilities to take immediate remedial action if breaches are identified. Recognising the fundamental rights of workers, the standard upholds freedom of association and collective bargaining, fostering an environment where workers can join unions without interference. Discrimination is explicitly prohibited, with systems mandated to eliminate biases based on race, religion, age, gender, and more. The standard also takes a strong stance against workplace harassment and disciplinary practices, emphasising the importance of fair and respectful treatment of workers[406].

To ensure equitable employment terms, the standard guarantees transparent communication of workers' rights, prevents unfair contractual arrangements, and allows workers the freedom to terminate employment without penalties. Ethical recruitment practices are mandated to shield workers from exploitation, prohibiting the imposition of recruitment fees and ensuring the use of

[403] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 10.
[404] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 10.
[405] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 10.
[406] Standard, *The Solar Stewardship Initiative ESG Standard*, pp. 10-11.

registered and compliant labour agencies. To this end, facilities must conduct appropriate due diligence against labour agencies providing workers to them to ensure compliance with national law, international standards, and their own codes of conduct. Further, facilities are not allowed to require from any worker any deposit or charge for specific material or equipment provided[407]. These are important provisions because China is known to use labour agencies and financial burdens to apply and conceal forced labour practices in the XUAR region[408].

Addressing working hours, the standard sets limits to promote a healthy work-life balance, stipulating a maximum of 48 hours per working week and ensuring voluntary overtime. Fair compensation is a key focus, with facilities mandated to adhere to legal minimum wages, provide premium rates for overtime, and ensure timely and fully documented payments. The standard encourages the determination and implementation of a living wage, reinforcing its commitment to workers' well-being[409].

6.2. SSI Certification Procedure

The Solar Stewardship Initiative's certification process is a rigorous and collaborative endeavour involving various roles and responsibilities to ensure the adherence of member companies to the SSI ESG Standard. Companies seeking certification embark on a procedure that encompasses self-assessment, third-party evaluation, and ongoing commitment to continual improvement.

For companies aspiring to achieve certification against the SSI Standard, the initial step involves becoming SSI Members. This entails applying for membership through the SSI Secretariat, which conducts a due diligence check. Upon successful completion, companies can formally apply for membership. After signing the SSI Principles, paying the associated fees, and completing the due diligence check, the company is confirmed as an SSI member. The continuous collaboration between the SSI Secretariat and the SSI Member involves the decision of appointing the Assessment Body ('AB') from the list of SSI-approved Abs, thereby initiating the certification process. The on-site assessment by an SSI-approved AB must then be carried out within 9-10 months after signing the SSI Principles. The certification of the members' sites should be finished within one year after the signature[410].

SSI members, upon expressing their intent to undergo certification for their production sites, need to conduct a comprehensive self-assessment within six months of signing the SSI Principles. This entails preparing relevant documentation, training programmes, and other evidence in anticipation of the assessment. The self-assessment serves as a foundational step, setting the stage for the subsequent certification process. The members are further tasked with providing the selected SSI-approved AB and its assessors with unconstrained

[407] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 11.
[408] GRZANNA (2022).
[409] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 12.
[410] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 7.

access to relevant sites, facilities, personnel, documentation, and any other information requested for a thorough evaluation[411].
The SSI-approved AB and its assessors play a pivotal role in the certification process. Acting independently, they conduct assessments against the SSI ESG Standard, meticulously verifying the information presented in the self-assessment. Notably, any critical breach uncovered during the assessment triggers an immediate report to both the member and the SSI Secretariat, the administrative body of that supports the certification process. The AB's responsibilities extend to offering insights and recommendations to the SSI Secretariat regarding certification decisions. In instances where assessment objectives prove unattainable, the AB reports the reasons to the member under assessment and the SSI Secretariat. Subsequent to the assessment, the AB compiles a comprehensive assessment report, following an agreed-upon format, which are shared with both the member and the SSI Secretariat. The AB continues to monitor the member's progress on Corrective Action Plans ('CAPs') post-assessment, ensuring a commitment to ongoing improvement[412].
In the pursuit of SSI Standard Certification, all sites and associated activities directly linked to the procurement of raw materials and the manufacturing process of polysilicon, ingots, wafers, cells, modules, and other solar components must be included in the scope of the assessment. Notably, when specific activities are outsourced or subcontracted, the SSI-approved AB must assess the associated risks and determine whether an on-site visit is necessary as part of the evaluation process[413]. To become a certified member, SSI Standard Certification must be achieved for at least two of the company's sites within one year of joining the SSI[414].
Auditors engaged in the evaluation of sites adhere to the principles outlined in "Guidelines for auditing management systems" (ISO 19011:2018) of the International Organization for Standardization ('ISO'). This involves a thorough assessment of the company's management system, considering the quality and quantity of available evidence, and evaluating the significance of the findings[415].
Crucially, Lead Assessors and Assessors involved in the certification process must maintain independence and remain free of conflicts of interest concerning the member under evaluation. Recognising the potential categories of conflict of interest as self-interest, self-review, advocacy, familiarity, and intimidation, the auditors must ensure the highest level of objectivity. Technical experts and interpreters/translators engaged in the process must also be independent from the member. The AB must provide the SSI Secretariat and the member with the names and, upon request, background information of each member of the assessment team. This provision allows the member company sufficient time to object to the appointment of any specific assessor,

[411] Standard of the Solar Stewardship Initiative, October 2023, v. 1.0, *Assurance Manual*, p. 5.
[412] Standard, *Assurance Manual*, p. 6.
[413] Standard, *Assurance Manual*, p. 7.
[414] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 3.
[415] Standard, *Assurance Manual*, p. 12.

interpreter/translator, or technical expert, ensuring a fair and impartial evaluation process[416]. Importantly, the AB refrains from advising the member on how to adapt its systems in areas where deficiencies are identified, maintaining objectivity[417].

To incorporate stakeholder perspectives, a list of affected stakeholders is compiled at least four weeks before the assessment, in consultation with the member. The AB establishes a mechanism for stakeholder comments to be submitted during the assessment and the validity of a certificate, outlining how these comments will be considered. Stakeholders may provide input in writing or be identified for interviews, with confirmed interview dates[418].

Before the Assessment Body starts its work, an assessment plan is drafted and shared with the member at least two weeks before the start of the assessment. The plan must include:

- Assessment objectives
- Dates, places, and times of the onsite visit
- Meetings to be held with site management
- Number and types of worker interviews to be held
- Dates, places and times of interviews with external stakeholders (if applicable)
- Time for document review
- Dates and time for opening and closing meetings[419]

The assessment primarily inter alia onsite activities, emphasising transparency and direct observation. The opening meeting outlines the audit activities, while the closing meeting presents the assessment conclusions. Management interviews, both senior and middle management, provide insights into the operational framework. A comprehensive site tour is conducted to observe physical conditions and practices across all areas of the site. Confidential worker interviews, conducted individually and in groups, form a crucial component of the assessment. The selection of workers for interviews ensures representation across shift patterns, worker types, and gender. Worker interviews cover both direct employees and contracted workers. To maintain confidentiality and impartiality, the site's management must not be present at the worker interviews, and any findings are discussed with management in a general manner. The document review ensures the availability and adequacy of key documents, such as policies, procedures, guidelines, employment contracts and handbooks, tailored to the size of the site. Records reviewed may include timecards, payrolls, wage slips, personnel records, job descriptions, environmental disclosures, and waste records. A risk-based assessment approach is used for sample selection and should include document reviews, interviews, and the site tour in order to cross-check information and evidence received[420].

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[416] Standard, *Assurance Manual*, p. 11.
[417] Standard, *Assurance Manual*, pp. 8-9.
[418] Standard, *Assurance Manual*, p. 10.
[419] Standard, *Assurance Manual*, p. 11.
[420] Standard, *Assurance Manual*, p. 12.

This rationale mirrors the risk-based approach of the Commission's proposal for a marketing ban on forced labour products. The multifaceted approach of the assessment methods aims to cross-check information collected during various stages of the evaluation process, fostering a comprehensive and reliable certification procedure.
The standard protocol involves a comprehensive site tour, where assessors observe physical conditions and practices across all areas of the site. This includes walking through the entire site, conducting interviews, and taking photographs if agreed upon in advance[421].
However, the reality in Xinjiang is complicated by the denial of forced labour allegations by the Chinese government, making independent audits impossible. The XUAR region has faced allegations of forced labour, particularly in the production of polysilicon, a critical component in solar cells. The US Government has listed polysilicon from China as a material believed to be produced by child or forced labour[422].
Some NGOs criticise of the SSI, arguing that if audits cannot be conducted in Xinjiang, the entire initiative is rendered useless. SolarPower Europe counters this perspective by emphasising the importance of striving for long-term change through robust market access standards that uphold European values. The association acknowledges the geopolitical complexities and limitations imposed by the lack of access to Xinjiang and points out that those sites who will not be able to provide access will not be able to obtain an SSI certification[423].
The assessment process concludes with the determination of conformance ratings based on an evidence-based approach. Upon completion of the assessment, the assessment team compiles a list of non-conformances while also recognising positive practices and conformances during the closing meeting[424]. Conformance ratings are categorised as follows:
Major Non-Conformance:

- Reflects a systemic failure or complete absence of required controls by the site
- Indicates a total failure to implement the specified requirement
- Represents a breach of law
- Encompasses a group of related, repetitive, or persistent minor non-conformances, signalling inadequate implementation

Minor Non-Conformance:

- Represents an isolated lapse in performance or control
- Implies a breach with low risk to workers or those on the site
- Pertains to a policy issue where there is no evidence of a material breach

Not Applicable:

[421] Standard, *Assurance Manual*, p. 13.
[422] GORDON (2023).
[423] Press release, *SolarPower Europe Statement*.
[424] Standard, *Assurance Manual*, p. 12.

- Denotes a requirement that cannot be implemented by a site due to the nature of its operations

Conformance:

- Indicates that systems, policies, procedures, and processes perform in a manner aligned with the intent of the SSI Standard[425]

All identified non-conformances necessitate the site's preparation and implementation of appropriate CAPs. However, it is crucial to note that the AB and its Assessors refrain from assisting in the development of a site's CAPs. Their role is to evaluate the CAPs to determine whether they are likely to effectively address the identified non-conformances, ensuring the site's commitment to rectifying any shortcomings in alignment with the SSI Standard.[426]

After the completion of the assessment, the Summary Report, Checklist, and AB recommendation are submitted for review by the SSI Secretariat. The SSI Secretariat then decides on certification based on the following criteria:

(1) All major non-conformances have been addressed/closed or downgraded to minor nonconformances.

(2) No more than 10 minor non-conformances have been raised which have adequate CAPs in place[427].

Conformance Ratings	**Corrective Action Plan**	**Timeline**	**Outcome & Score**
Major non-conformance	Root cause Analysis and Corrective Actions to be developed by the Member and sent to the AB.	Corrective Action plan received, reviewed, and approved by the AB. A follow-up onsite assessment (or remote depending on the nature of the non-conformance) will usually be required to verify implementation and effectiveness of the Corrective Actions.	No certification until major non-conformances closed or downgraded to minor non-conformance.
Minor conformance	Corrective Actions to be developed by the Member and sent to the AB.	Corrective Action plan received by the AB. Review and effectiveness of Corrective Actions evaluated at subsequent Assessment.	Between 6-10 minor non-conformances = Certification (Certified Bronze.) 5 minors or less = Certification (Certified Silver.)
Conformance	None	None	No minor non- conformances = Certification (Certified Gold.)

Table 1: SSI Conformance Ratings[428]

[425] Standard, *Assurance Manual*, p. 13.
[426] Standard, *Assurance Manual*, p. 14.
[427] Standard, *Assurance Manual*, p. 14.
[428] Standard, *Assurance Manual*, p. 15.

Once the SSI Secretariat issues a certificate to the site with an assigned grade (Gold, Silver, Bronze), the site's status is changed to a Certified Site on the SSI website. A public summary report is prepared by the SSI based on basic information about the certified site/member. This report, containing a summary description of the site and the outcome of the assessment, including the grade, is published on the SSI website. Positive and conforming aspects are also highlighted in the summary report[429].
To continuously monitor and improve the conditions on the certified sites, a surveillance interval of maximum three years is established. The SSI Secretariat notifies certified members at least three months before an assessment is due, facilitating arrangements for scheduling re-verification and re-certification assessments[430]. The surveillance frequency is determined based on the outcome of the initial assessment and the assigned grade.

Grade	**Year 1**	**Year 2**	**Year 3**
Gold	No assessment	No assessment	Re-certification – same as initial assessment.
Silver	Surveillance assessment focused on implementation of corrective actions. No grade change.	(Optional) Surveillance assessment focused on corrective actions and sample of Standard requirements. Grade may be changed.	Re-certification – same as initial assessment.
Bronze	Surveillance assessment focused on implementation of corrective actions. No grade change.	(Optional) Surveillance assessment focused on corrective actions and sample of Standard requirements. Grade may be changed.	Re-certification – same as initial assessment.

Table 2: SSI Assessment Intervals[431]

In case any changes occur to the certified site's business, the company is obliged to inform the SSI Secretariat. These changes can be:

- Organisational restructuring
- Divestments, acquisitors, or changes to the equity shares of the business
- Changes to the site's activities, products, and processes
- Changes to the locations and distribution of the site's facilities
- External influences such as changes in the statutory environment, regulations and/or other stakeholder expectations and commitments that affect the site[432]

[429] Standard, *Assurance Manual*, p. 15.
[430] Standard, *Assurance Manual*, p. 15.
[431] Standard, *Assurance Manual*, p. 16.
[432] Standard, *Assurance Manual*, p. 16-17.

It is also possible that the certification or the ongoing process is suspended or withdrawn. Any attempt to prevent the course of the assessment through fraud, coercion, deception, or interference will be considered a critical breach. After a report is filed to the SSI Secretariat, the assessment suspended, and an investigation is pended[433].
In addition, a site's certification will be suspended if:

- There is inadequate progress towards closing identified non-conformances within the deadlines specified.
- The member does not agree to a surveillance assessment or does not provide requested information to allow verification.
- The suspension period will usually be for a maximum period of six months during which the member cannot promote nor claim to be certified. The SSI Secretariat may publicise the suspension to interested parties[434].

A site's certification will be withdrawn if:

- It is concluded through an investigation that an SSI certified Member has breached the SSI Principles.
- Further to a suspension period no progress has been made to address a specific issue[435].

6.3. Grievance Mechanism

The implementation of a robust Grievance Mechanism is a pivotal component within the SSI, as outlined in the finalised version of the ESG Standard and the SSI Complaints & Appeals Document. The SSI ESG Standard empowers any stakeholder to file a formal complaint against an SSI Member or an individual associated with the Member, suspected of breaching the SSI Principles. This establishes a mechanism for addressing concerns related to forced labour and ethical breaches within supply chains[436]. In addition the SSI ESG Standard obliges its member companies to develop their own respective grievance mechanisms for workers and consumers. These individualised mechanisms enable stakeholders to voice concerns and provide evidence regarding issues such as forced labour conditions in a company's supply chain[437]. By comparing the SSI Complaints & Appeals Mechanism with the member companies' grievance mechanisms, it is clear that the former has a narrower scope by focusing on issues like audit fraud while the latter specifically addresses the stakeholders' right to effective remedy in accordance with the UN Guiding Principles on Business and Human Rights.
The SSI ESG Standard mandates that certified facilities establish an effective grievance mechanism, in alignment with the UN Guiding Principles on Business and Human Rights. This requirement emphasises the commitment to

[433] Standard, *Assurance Manual*, p. 13.
[434] Standard, *Assurance Manual*, p. 17.
[435] Standard, *Assurance Manual*, p. 17.
[436] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 5.
[437] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 7.

respecting the rights of adversely affected stakeholders by providing access to a remedy[438].

The SSI Assurance Manual defines the Grievance Mechanism for the SSI itself. The SSI Complaints & Appeals Mechanism processes concerns from various entities, including SSI Members, SSI Assessors, stakeholders, and the public. It aims to align with the UN Guiding Principles on Business and Human Rights for the effectiveness of non-judicial grievance mechanisms[439].

The SSI Complaints & Appeals Mechanism caters to expressions of dissatisfaction across different categories:

- SSI Secretariat and Governance: Concerns about the implementation of SSI policies, procedures, and operating processes, as well as decisions related to assessments or membership.
- Member of the SSI: Dissatisfaction against a company not conforming to SSI Principles or the SSI Standard.
- Certified Member Site of the SSI: Dissatisfaction against a certified site not conforming to the SSI Standard.
- Approved SSI Assessment Body or Assessor: Dissatisfaction against an approved Assessment Body or any Assessor associated with it[440].

Once a complaint or appeal is accepted, the SSI seeks to investigate it in a fair, balanced, and impartial manner, resolving it efficiently and effectively. Attempts will be made to resolve grievance via direct dialogue. If direct dialogue cannot not resolve the issue, the SSI will appoint an independent, external person to review the complaint/appeal. If the Complaint relates to a member of the SSI Secretariat, an externally appointed, impartial agent will always be appointed[441].

Complaints should follow an escalation process, starting at the lowest level and progressing as needed. This involves raising the complaint directly with the concerned party first and providing an opportunity for response or rectification. This Complaints & Appeals aims to ensure transparency, accountability, and a fair resolution process within the SSI framework[442]. It ensures a transparent and impartial resolution process for grievances. Notably, any complaint based on hearsay is not accepted outright. In such cases, the SSI requests additional information from the complainant to assess the validity of the complaint. However, the Complaints & Appeals Mechanism does mention the importance of whistleblowers and provides specific access for them[443].

In case direct dialogue was insufficient to resolve the grievance, the appointed external investigator engages with all parties involved, objectively analysing and assessing the complaint or appeal using all relevant information. The investigator then drafts a report, including a summary of the nature of the

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[438] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 7.
[439] Standard, *Assurance Manual*, p. 17.
[440] Standard of the Solar Stewardship Initiative, November 2023, v. 1.0, *Complaints & Appeals*, p. 4.
[441] Standard, *Complaints & Appeals*, p. 5.
[442] Standard, *Complaints & Appeals*, p. 4.
[443] Standard, *Complaints & Appeals*, p. 4.

complaint or appeal, an analysis of the main arguments from each party, and a proposed determination of its validity. The draft report is circulated to all parties for comments and identification of any errors. Throughout the appeals process, any membership, approval, or certification decision remains valid unless the appeal concludes otherwise. A Complaint/Appeal Panel reviews the draft report, deciding whether to accept the investigator's determination and any proposed improvement or Corrective Action Plan. The investigator oversees the implementation of any improvement or CAPs, reporting back to the Complaint/Appeal Panel on agreed milestones and completion of actions[444].
Confidentiality is a crucial aspect of the process. Complainants can raise concerns to the SSI without disclosing their identity, ensuring anonymity if desired. If a complaint is raised confidentially, the SSI makes every effort to protect the identity of the complainant. However, if an investigation is to proceed, the individual raising the complaint must agree to disclosure their identity under the SSI Complaints & Appeals Mechanism. The SSI emphasises cost minimisation for all parties involved in the Complaints & Appeals Process. In cases where a formal investigation is initiated, parties need to agree on cost-sharing. The SSI may waive costs for complaints from individual whistleblowers unless the complaint is found to be disingenuous. This approach ensures a fair and accessible mechanism for addressing grievances within the SSI framework in line with the UN Guiding Principles on Business and Human Rights[445].

6.4. Limitations and areas for improvement

Although the Solar Stewardship Initiative constitutes a well-thought approach on how to facilitate the termination of forced labour practices in the solar sector, it is not free from limitations. There are numerous areas for improvement to ensure that forced labour practices are terminated. One such limitation is the industry's position to reject extending their due diligence to the whole value chain of their products but concentrating the due diligence efforts to the suppliers of the members.
However, the in the SSI ESG Standard defined Responsible Sourcing Policy obliges SSI-certified members to conduct KYC checks to all their suppliers[446].
According to SolarPower Europe, the co-founder of the initiative, the current system set up in the SSI ESG Standard can only certify a link of certain production sites in the solar supply chain. This leaves room for improvement. To this is end, the SSI ESG standard will be complemented by a Supply Chain Traceability Standard in late 2024 which aims to ensure that intermediate products and raw materials are traced throughout the solar value chain. After the additional standard is published, the SSI aims to exactly certify how each link in the solar supply chain is connected, creating a so-called chain of

[444] Standard, *Complaints & Appeals*, p. 5.
[445] Standard, *Complaints & Appeals*, p. 6.
[446] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 7.

custody[447]. This marks an essential component to close any potential traceability gaps, but the concrete design of this standard is yet to be evaluated.
In the SSI's Pilot Code of conduct, it was foreseen that members develop and adopt a binding, time-bound and measurable plan with suppliers or other business partners to credibly obtain and verify information on origin. If after implementing the plan, the origin would have still been unknown or declared as coming from a high-risk area, the member would have had to assess whether independent access to worksite and workers to collect information and carry out work-place assessments is feasible. If not feasible, direct suppliers should have considered to source materials from commodity traders outside of the high-risk area. Further, entities would have to address the risk of forced labour in their operations and supply chains by following inter alia international guidelines including the Guidance on Due Diligence for EU Businesses. To this end, remediation and disengagement would have had to follow[448]. However, these obligations were adjusted in the final draft of the SSI ESG Standard and replaced by the Responsible Sourcing Policy, using KYC checks.
One other area of improvement is that although the scope of the SSI Standard Certification must include all sites and associated activities to become a certified member, SSI Standard Certification must be achieved for only two sites within one year. The fact that only two sites are necessary to call the whole member company certified is arbitrary and might mislead customers. The SSI ESG Standard states that continuous effort must be made to expand the coverage of sites.[449] However, this is fairly vague as there are no concrete targets companies must obtain in expanding their certification efforts.
The SSI ESG Standard obliges its members to

> "conduct its operations in compliance with all applicable laws and regulations. If national law conflicts with those set out in the SSI Standard, the Member will seek ways to meet the higher requirement, where possible"[450].

The standard does not make clear who determines that a national requirement is higher and who monitors its fulfilment (the SSI Member, the SSI Secretariat or the Assessment Bodies). This paper suggests clarifying this ambiguity in a revised version of the SSI ESG Standard at a later stage.
When a facility identifies that its operations have caused or contributed to adverse human rights impacts, the SSI ESG Standard mandates the provision for or cooperation in the remediation of these impacts through 'legitimate processes'[451]. The member's obligation to remedy adverse human rights impacts

[447] Press release of SolarPower Europe, 20 October 2023, *Solar Stewardship Initiative publishes first solar supply chain ESG Standard*.
[448] Standard of the Solar Stewardship Initiative, October 2022, *Code of Conduct*, pp. 14-15.
[449] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 5.
[450] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 5.
[451] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 10.

aligns with global efforts to address such issues responsibly. The provision therefore accounts for the in the literature review highlighted call for remediation procedures for negatively affected people. However, it is not further described how this procedure needs to look like or what is meant by legitimate processes. Overall, this is the only provision where a remediation system for affected individuals is even mentioned. In its current form it is too vague and does not live up to the outlined recommendations of the UN Guiding Principles on Business and Human Rights. It remains to be seen in future best practices how these remediation processes are applied.

The SSI ESG Standard requires members to conduct 'appropriate due diligence' against labour agencies from which they acquire workers[452]. However, it is not further defined how this due diligence should look like. Further, the SSI ESG Standard obliges its members to determine the living wage in their countries of operation[453]. However, it only asks to implement a payment plan for this wage level 'where possible' without explaining the criteria under which the possibility is determined, nor whether the ABs or the company itself determines the possibility of payment. This opens room for argumentation why loans need to be dumped despite obtaining the certification, i.e. cost pressure through competition.

After reviewing relevant communication materials of the Solar Stewardship Initiative, this paper argues that the initiative strongly focuses on close collaboration with its members to apply the standard. Part of this process is the continuous sharing of documents, announcement of audit dates and collective selection of the AB. However, this collaborative certification process bears the risk of concealing misconducts and interferences. As an example, sharing the assessment plan and dates with the member beforehand gives the company the possibility to (temporarily) disguise SSI violations for the purpose of the assessment.

It should be noted that the sharing of audit dates is a common business practice that can also be found in other certification schemes. This stems from the impracticability and inefficiency to conduct unannounced audits at production sites. For example, the ISO 19011:2018 "Guidelines for auditing management systems", which the SSI ESG Standard follows, recommends that the audit team leader should ensure that contact is made with the auditee to make arrangements for the audit including the schedule[454]. It further states to plan the visit by ensuring permission and access to the audit location and that the audited personnel of the site are being informed. This, however, does not mean that unscheduled audits are not possible at all, as the ISO Standard indicates that the visited personnel shall not be informed if the audit is unscheduled/ad-hoc[455].

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[452] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 11.
[453] Standard, *The Solar Stewardship Initiative ESG Standard*, p. 12.
[454] Standard of the International Organization for Standardization, July 2018, ISO19011:2018, *Guidelines for auditing management systems*, p. 18.
[455] Standard, *Guidelines for auditing management systems*, pp. 41-42.

Under the light of cooperation, the member has also the right to object the appointment of certain assessors as part of the Assessment Body[456]. However, the SSI Assurance Manual does not explain on which grounds a member can object the appointment of an assessor.
To obtain the SSI certification, the number of minor non-conformances is quantified and a threshold of maximum ten incidents is set[457]. In the SSI's Pilot Code of Conduct, a progressive rating system was planned to award the most suitable production sites. This progressive approach would have meant that sites are required to demonstrate continuous improvement by achieving a higher rating for all requirements between the verification cycles (one to three years) to maintain the SSI claim and by meeting recommended corrective actions[458]. This progressive rating system was planned to be released in Q3 2023 but was ultimately dropped in favour of the current static, quantified model, categorising members on a bronze, silver and gold levels.

[456] Standard, *Assurance Manual*, p. 11.
[457] Standard, *Assurance Manual*, p. 14.
[458] SOLAR STEWARDSHIP INITIATIVE (2023a).

7. Concluding reflections: Addressing forced labour in the solar industry

In this final chapter, a critical examination is undertaken with regards to the findings derived from the literature review, case studies, legal review of the Commission Proposal for a marketing ban on forced labour products and the response of the European solar industry. By synthesising these diverse strands of research, this thesis aims to draw conclusive insights into the effectiveness, feasibility, and potential implications of the proposed ban within the intricate landscape of the solar value chain. In doing so, the chapter outlines 17 formal requirements for a prohibition of products made with forced labour based on the findings of the case studies of Canada, the USA and Australia and the literature research. These Requirements are subsequently answered by the real-world observations of the law review of the Commission Proposal for a marketing ban on products made with forced labour and the European solar industry's response in the form of the Solar Stewardship Initiative ('SSI').Through this comparative analysis, the paper sheds light on the alignment between theoretical constructs and real-world political and industry practices, thereby offering valuable perspectives on the holistic implications of regulatory interventions aimed at combatting forced labour in global supply networks.

(1) Trade restriction, when crafted to effectively combat modern slavery abroad, must be integrated into a broader legal framework.
In line with this principle, the European Union ('EU') has embarked on a multifaceted approach, encompassing not only the proposed marketing ban for products made with forced labour but also the formulation of a Proposal for a Corporate Sustainability Due Diligence Directive ('CSDD Proposal') and Corporate Sustainability Reporting Directive. This comprehensive strategy signifies the EU's commitment to aligning the trade sanction within a larger framework of legal measures aimed at combatting modern slavery and, by extension, forced labour.

(2) Due diligence procedures should comprehensively address the human rights issues, identify affected individuals and vulnerable groups, and assess potential risks.
Not the proposed marketing ban, but the CSDD Proposal recognises risk management as vital obligation for economic operators to ensure that their supply chains are not tainted by forced labour. The Proposal states that the economic operators are free to choose how they monitor the risk of forced labour in their supply chain, which contradicts the findings in the analysed literature and industry sources. There, it was suggested that in order to ensure compliance with import and marketing restrictions, due diligence obligations should be made obligatory for all businesses.
Remarkably, the Solar Stewardship Initiative addresses these requirements by explicitly mandating the identification of affected groups within its binding provisions of the SSI ESG Standard.

Additionally, the SSI places a special emphasis on risk management for compliant companies, compelling them to incorporate assessments of their exposure to forced labour risks. This approach underscores a proactive stance towards safeguarding human rights within the solar industry.

(3) Market forces and corporate governance can complement legislation and the trade restriction should leave room for economic operators to act accordingly,

The proposed marketing ban demonstrates a cautious balance in this regard, leaving sufficient manoeuvrability for industry stakeholders. Notably, the solar industry has taken proactive steps by actively engaging in the establishment of due diligence mechanisms with the aim of offering dedicated Xinjiang-free products to Western markets.

(4) Import restrictions must be supplemented by robust tracking measures and traceability systems to ensure effective enforcement.

The traceability of products remains a significant challenge, both for legislators and industry representatives. Currently, the burden of proof regarding products tainted by forced labour rests with competent authorities, necessitating EU Member States to possess the capabilities to trace products at risk of being manufactured using forced labour. The effectiveness of these tracing efforts will be crucial to avoid the enforcement shortcomings witnessed in the Canada case study. On the industry side, concrete traceability requirements have yet to be published. While the SSI plans to publish a traceability standard in 2024, establishing functional mechanisms, particularly for raw materials that possess a high risk of forced labour, this step appears to be a formidable challenge for the industry.

(5) Challenges posed by the complexity of supply chains, such as identifying lower-tier suppliers and forced labour in intermediate products and raw materials, must be specifically addressed.

Recognising these challenges, the solar photovoltaic (‘PV’) industry advocates for a responsible approach to burden-of-proof management, acknowledging the inherent limitations in obtaining complete information about upstream suppliers. However, the SSI aims to address this issue by providing adequate traceability for raw materials and intermediate products, thereby mitigating the industry’s exposure to forced labour. Moreover, the Commission Proposal for a marketing ban on forced labour products mandates due diligence only for companies’ supply chains, rather than the entire value chain of the product it manufactures. Consequently, the tracing of the whole value chain of a company’s product, as recommended in the literature, appears impractical, underscoring

the nuanced complexities inherent in addressing forced labour within supply chains.

(6) Exports of products in third countries to circumvent trade restrictions must be addressed. International supply chains must be mapped to identify third countries that reexport forced labour products in the Union market.

The Commission Proposal for a marketing ban on forced labour products takes decisive steps in this direction by preventing the re-exportation of products to third countries once a violation has been determined. Similarly, imports from third countries previously importing goods from identified high-risk regions are subject to the ban, thus closing loopholes for circumvention. However, while national authorities possess the investigative capacity to monitor supply chains, the Proposal lacks precautionary measures for companies redirecting exports to third countries with lax regulations. It is also worth pointing out that, the proposed Information and Communication System Module ('ICSMS') is to be used to enhance information sharing and investigation collaboration among competent authorities of the EU Member States, offering a potential solution to trace products effectively.

(7) Strategic alliances with Western countries such as Canada, the USA, and Australia should be formed to harmonise due diligence efforts and minimise trade divergence.

The Commission Proposal for a marketing ban on forced labour products puts a great emphasis on cooperating among EU Member States with the European Commission taking a coordinating role in that regard. However, when it comes to cooperation with other Western nations such as the USA, the EU opts for a different approach. While the USA implemented a rebuttable presumption that all products coming from Xinjiang Uyghur Autonomous Region ('XUAR') are tainted by forced labour, the burden of proof in Europe lies with the competent authorities. This makes international cooperation challenging. Evidence from Western allies may still be shared and used, but it needs to be verified.

(8) Import restrictions must lay out clear and uniform due diligence reporting requirements for enterprises concerning human rights. Furthermore, the proportionality in regulatory frameworks for smaller businesses must be upheld.

Concerning these requirement, the aforementioned legal toolset of the EU comes into play. Although the Commission Proposal for a marketing ban on forced labour products does not entail obligations for economic operators to conduct due diligence, the CSDD Proposal does exactly that. Companies facing an investigation under the marketing ban would benefit greatly from adhering to this Directive. It considers the proportionality principle by limiting the scope of application to big enterprises that meet certain thresholds

and enterprises operating in high-risk regions. Furthermore, the marketing ban considers proportionality as well. Competent authorities in the EU Member States are mandated to apply a risk-based approach when determining which companies are to be investigated.

(9) The reporting criteria must be realistically attainable, feasible and verifiable, i.e. thorough inspections of imports from high-risk regions.

To determine the compliance with the proposed marketing ban, the competent authority can request information from other relevant authorities on whether the economic operator conducts due diligence to comply with legislation. This information must be based on verifiable information from independent sources. This paper makes the case that the EU follows the stated advice of the literature-based analysis by including outside information for its investigations. However, despite mentioning the verifiability of the information, the Proposal for a marketing ban on forced labour products offers no more information regarding a verification procedure or other steps to guarantee the accuracy of the information received. It is also important to note that the Proposal does not explicitly mention submissions from third country governments. As it was previously indicated, this information would be particularly import when dealing with forced labour that is imposed by the state.

When it comes to inspections in high-risk regions, the geopolitical reality makes on-site visits in XUAR factually impossible. This is why the SSI will not certify companies operating in this region. Until a change in business conduct occurs, this paper argues that such companies are likely to be non-compliant with the ban.

(10) The competent authorities must provide active assistance in supply chain due diligence for businesses. Detailed policy guidelines should be drafted, outlining desired results and best practices. The companies subject to the law must be empowered to actively build up capacities to show compliance with the Regulation.

Due to the early nature of the ban, as it is not even applied yet, guiding material is mostly lacking. SolarPower Europe, one of the founding associations of the SSI, engages actively with its members to build up capacities in supply chain due diligence. This proactive approach will help but collaboration with authorities will still be vital in navigating evolving regulatory landscapes and mitigating supply disruptions.

(11) Authorities must be provided with enforcement guidelines, extensive resources, and investigative competencies. Authorities must be capable of evaluating reports as well as to identify and seize products.

The decentralised approach of the Commission Proposal on the marketing ban raises concerns about the different enforcement capacities of EU Member States when it comes to its rigorous implementation and the monitoring of identified cases. Countries that provide inadequate funding to their competent authorities due to budgetary constraints might cause that the ban cannot be enforced in a cohesively rigid manner across the whole EU market. This thesis makes the case that a centralised EU investigative body would have a stronger likelihood of success in implementing such a mechanism. However, this possibility would be constrained by the need for political support within the EU and adequate funding. The Commission's strategy remains to be in sharp contrast to the results of the findings of the case study of Canada, where lacking enforcement capacities led to a factual non-application of the import prohibition on forced labour products. Therefore, it is argued that the proposed marketing ban, even though it would be the Commission's obligation to coordinate an EU-wide enforcement, has the potential to create loopholes in the EU's single market.

(12) Economic operators should report on how they address human rights violations. The self-reporting should include information on due diligence and supply chain procedures. Information should be independently verified by third-party audits.

This dynamic of self-reporting and third-party verification is seen in the way the SSI is conducting its ESG Standard verification. Companies seeking SSI certification embark on a procedure that encompasses self-assessment, third-party evaluation, and ongoing commitment to continual improvement. This entails preparing relevant documentation, training programmes, and other evidence in anticipation of the assessment. The self-assessment serves as a foundational step, setting the stage for the subsequent certification process. The members are further tasked with providing the selected SSI-approved Assessment Body unconstrained access to relevant sites, facilities, personnel, documentation, and any other information requested for a thorough evaluation.

(13) Unintended consequences of trade restrictions must be carefully taken into account. Impact-based analyses and discussions with affected stakeholders should be the cornerstone when drafting the law and determining cases of application.

For the Proposal for a marketing ban on forced labour products, an adequate impact assessment was not done by the European Commission. Instead, the Proposal refers to the impact analysis of the CSDD Proposal. It also shows that the impacts on the economy and society are almost entirely qualitatively assessed which leaves their monetary effects without evaluation. The law's broad application to all industry sectors and regions across the globe

raises the risk of unintended consequences, especially for industry sectors that largely rely on forced labour in their value chain, as is the case for the solar PV industry. This paper makes the case that the legislation falls short of appropriately addressing the requirement in that regard.

(14) If adverse human rights impacts are determined, remediation processes must be foreseen in import restrictions. Furthermore, competent authorities should closely collaborate with identified stakeholders during the investigation process.

The Commission Proposal for a marketing ban on forced labour products lacks specificity regarding requirements for compensating workers affected by adverse human rights impacts. Furthermore, the Commission Proposal merely mentions that worker information may be used in investigations. It makes also no mention of how workers' complaints can be filed. Conversely, the Solar Stewardship Initiative addresses these concerns by mandating its members to establish accessible grievance mechanisms for affected stakeholders. The member companies play a central role in identifying affected communities, setting up remediation plans and mitigating their adverse impacts through Corrective Action Plans. While the SSI aligns more closely with literature recommendations, its current provision on remediation within the ESG Standard lack specificity, also falling short of fully implementing the literature's recommendations.

(15) Financial penalties on importers that directly or indirectly support forced labour schemes should be high and imposed swiftly to ensure compliance with the marketing ban. The political and economic impartiality of the competent authorities must be upheld at every stage of the process.

The EU Member States are required to establish the penalties for non-compliance and shall take all necessary steps to ensure that they are carried out in conformity with national law. This paper contends that the penalty clause is a bit ambiguous. It provides the EU Member States with a level playing field for establishing these fines, even though it specifies the criteria for the penalties. This could undermine the ban in favour of a Member State's motivations to secure its political and economic interests. EU Member States that heavily rely on foreign imports of solar PV products for their energy transition might have a motive to enforce the ban less strictly or impose only light financial penalties. In the event that the national penalties are too light, and the ban's effectiveness is compromised, proposed marketing ban does not provide for any control authority or complaint procedure in that regard.

(16) Trade restriction must preserve the availability of essential commodities and services (increased engagement with domestic/alternative markets).

As seen in the USA case study, the rigid enforcement of an import restriction can have severe implications for the supply and demand situation of the solar industry. In the end, the enforcement lies with the Member States' interest to uphold the ban which bears a great motive of lacking enforcement in the event of supply shocks.

(17) Bans of products that are proven to be tainted by forced labour should follow a multi-step procedure involving high-risk product lists, warnings, and evidence provision for importers.

The outlined multi-step procedure described in the Commission Proposal for a marketing ban on forced labour products closely adheres to those recommendations. Economic operators have numerous chances to demonstrate compliance. The competent authorities request a wide range of information, including product information and results of due diligence investigations. However, particularly for EU Member States with limited investigation capabilities, this procedure can take much time before a formal decision to withdraw a product in question has been made. Until a decision has been made, the product remains being offered on the Union market.

These 17 conclusive reflections build the framework to answer the question asked at the beginning of this thesis: *To what extent is the European Commission's proposed marketing ban suitable to prevent the utilisation of forced labour in the solar PV value chain?*

Based on the comprehensive analysis conducted in this study, it is evident that the European Commission's proposed marketing ban represents a significant step towards preventing the utilisation of forced labour in the solar value chain. Firstly, the integration of the trade restriction within a broader legal framework, encompassing the Commission Proposal for a Corporate Sustainability Due Diligence Directive and the Corporate Sustainability Reporting Directive, underscores the EU's commitment to combatting modern slavery effectively. By aligning the marketing ban with these broader measures, the EU enhances its capacity to address forced labour comprehensively. Furthermore, the Proposal strikes a careful balance between regulatory measures and market forces, allowing economic entities to act flexibly by incentivising ethical business conduct through added value propositions as seen in the example of the Solar Stewardship Initiative.

However, challenges remain in implementing effective traceability systems, especially for high-risk regions such as the XUAR. This concerns the competent authorities in the EU Member States with varying enforcement capacities and political will as well as economic operators with limited due diligence capacities and varying complexities in their supply networks. Another substantial weakness of the EU's approach to combat forced labour is the remediation of people who experienced adverse human rights impacts. The proposed marketing ban as well as the industry side have been fairly vague in that regard and leave much room for improvement.

Collaboration among stakeholders, ongoing monitoring and adjustment, and proactive measures to address these challenges will be crucial. If this is executed successfully, meaningful progress can be achieved in promoting ethical business practices and in safeguarding human rights all around the world.

7.1. A look ahead: Towards sustainable solutions in solar supply chains

The issue of forced labour in Xinjiang has raised significant concerns globally, particularly in relation to its impact on various industries, including the solar energy sector. One of the main challenges posed by forced labour in the XUAR is its prevalence in the production of metallurgical-grade silicon and polysilicon, essential materials for manufacturing solar panels. Given the extent of the region's dominance in the polysilicon market, manufacturers face the daunting task of ensuring that their supply chains are free from forced labour at every stage, including the sourcing of raw quartz materials and the production of polysilicon.

Companies must demand assurances that the polysilicon they use is not sourced from entities engaged in forced labour transfers in Xinjiang. However, this requirement significantly limits their options, leaving only a few Chinese alternatives that are not proven to be tainted by forced labour practices[459].

In response to concerns about dependency on imports of critical raw materials, such as those used in the production of clean energy technologies like solar panels, the EU has taken steps to address supply risks that are likely to also affect the supply of polysilicon in the future. The EU's action plan, published in 2020, outlines various strategies to diversify sourcing outside the EU, foster the circular economy, and leverage domestic potential. These actions aim to enhance the EU's competitiveness in terms of costs, technology sovereignty, and resilience, while supporting the transition to a green and digital economy[460].

Furthermore, the EU's commitment to reducing dependency on imports of critical raw materials aligns with its broader objectives of promoting sustainability and mitigating risks associated with global supply chains. The Commission's communication on "The global approach to research and innovation" emphasises the importance of international cooperation in addressing challenges related to renewable energy technologies, including access to raw materials and innovation. Similarly, the communication on "EU external energy engagement in a changing world" underscores the need for cooperation and partnerships to support the green transition, particularly in areas such as renewable energy and low-carbon hydrogen[461].

While the XUAR dominates the market for metallurgical-grade silicon and polysilicon, alternative sources do exist. Approximately 35 percent of solar-grade polysilicon comes from regions outside Xinjiang, and 20 percent is

[459] MURPHY & ELIMÄ (2021:8).
[460] Communication, *Report on progress on competitiveness of clean energy technologies*, p. 7.
[461] Communication, *Report on progress on competitiveness of clean energy technologies*, p. 16.

sourced from outside China altogether. European and American manufacturers contribute approximately 15 percent of global polysilicon production[462]. This offers additional options for solar module manufacturers seeking alternatives to Xinjiang-made materials and follows the 2020 published action plan mentioned above.

The EU is exploring opportunities to reduce dependency on imports by not only utilising existing domestic resources but massively expanding its mining capacities. While there is theoretical potential to cover a significant portion of Europe's raw material needs through domestic extraction, challenges such as permitting procedures, environmental concerns, and a lack of refining capacity and skilled labour hinder progress in this area. Initiatives like the Battery Regulation ((EU) 2023/1542) aims to overcome these obstacles and promote sustainable mining and recycling practices within the EU, supporting the region's transition to a circular economy[463].

The latest renewable energy targets set by the European Union emphasise the need for a significant increase in annual solar PV installations by 2030, aiming to achieve an annual market volume of over 100 gigawatts ('GW')[464]. However, achieving this goal requires careful consideration of material efficiency and risk mitigation, particularly regarding forced labour, to prevent disruptions in the international value chain. The COVID-19 pandemic highlighted vulnerabilities in global supply chains, underscoring the importance of diversification and resilience.

To meet the growing demand for solar energy in Europe, the EU must revitalise its own production capabilities beyond polysilicon sourcing, capable to supply between a quarter and a third of the annual European demand. While certain components such as polysilicon manufacturing, backsheets, contact materials, inverters, and balance of system components are already produced within the EU, there is a need to monitor and address gaps in capacities for wafers, cells, and solar glass production[465].

Recent developments in the EU's manufacturing sector signal a shift towards increased production capacities in solar PV. ENEL's TANGO project, for example, will increase its production capacity of heterojunction modules to three GW until 2024. Meyer Burger's expansion plans are expected to significantly boost manufacturing capacity to 1.4 GW of heterojunction cells and one GW of heterojunction modules, contributing to the EU's efforts to strengthen its domestic solar industry[466].

However, reducing dependency on Chinese suppliers and mitigating risks associated with forced labour may lead to higher costs for solar products. Energy costs in regions outside China, such as Korea, the United States, and the

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[462] MURPHY & ELIMÄ (2021:45–47).

[463] Communication, *Report on progress on competitiveness of clean energy technologies,* p. 6.

[464] Directive, *amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652*, para. 5.

[465] CHATZIPANAGI ET AL. (2022:5).

[466] CHATZIPANAGI ET AL. (2022:57).

European Union, are typically much higher. Chinese companies' biggest competitive advantage is cheap energy prices by building production facilities in close proximity to coal plants and sometimes even vertically integrating them into their business model. To address this challenge, policymakers may consider subsidising domestic energy costs for green energy production, investing in polysilicon and wafer production facilities outside of China, and accepting higher prices for renewable energy solutions[467].

Furthermore, exploring alternatives to polysilicon-based modules, such as thin-film technology, could offer a viable solution. U.S.-based First Solar utilises thin-film technology and is not exposed to forced labour. Although thin-film PV products currently represent only around five percent of the global PV market, diversifying the supply chain away from polysilicon could drive innovation and foster the development of more efficient processes[468].

Amidst the promising advancements observed in the European solar value chain, which aim to bolster sustainable growth and resilience against supply shocks, a critical problem persists. While the European Union's efforts may indeed succeed in curbing the utilisation of forced labour within its own solar market, the human rights violations might remain deeply entrenched beyond Europe's borders. This enduring challenge underscores the complex and interconnected nature of global supply chains, where the exploitation of labour continues to pose a significant ethical and humanitarian concern. Despite the EU's proactive measures, such as the proposed marketing ban on forced labour products, the political motives fuelling forced labour remain prevalent in Xinjiang.

The history of China's entry into the solar industry sheds light on the complex dynamics at play. Initially, Chinese companies operated primarily as manufacturers of solar modules, exporting them to European countries that were experiencing a rise in demand due to government incentives. However, the global financial crisis prompted a reduction in solar incentives in Europe, threatening China's solar manufacturing industry with running in overcapacity. In response, the Chinese government implemented policies to stimulate domestic demand for solar energy, including feed-in tariffs and renewable portfolio standards[469].

Today, China stands as the dominant force in the solar industry, leading both in manufacturing and installations. In total installations, China has installed 400 GW of solar PV capacity, accounting for 34 percent of the world's total capacity in 2022. With around 95 GW of solar PV capacity installed in 2022 alone, China accounts for 40 percent of the annual global market share and continues to expand its leadership[470].

Despite efforts by the European Union to eliminate forced labour from its solar supply chain, China's strong domestic demand for solar PV products suggests that the problem may persist even if Western markets cease sourcing tainted

[467] Murphy & Elimä (2021:47).
[468] Murphy & Elimä (2021:47).
[469] Ball et al. (2017:147-148).
[470] SolarPower Europe (2023a:19-23).

products. While there is hope that trade restrictions may incentivise changes in business conduct abroad, there remains a risk that forced labour-tainted products could be redirected to the domestic market while certified 'clean' products are supplied to Western markets. Therefore, the future development of the human rights situation in the XUAR might remain uncertain following the implementation of the ban on forced labour products.

The thesis, therefore, closes with a call to action, emphasising the critical importance to continuously monitor the humanitarian situation in China. It underscores the necessity of engaging with stakeholders at all levels, from grassroots organisations to international bodies, to address human rights violations effectively. Moreover, this thesis advocates for the commitment of the Union to enact legislative reforms to bolster its capacity in safeguarding human rights worldwide. By remaining committed to these principles and actively pursuing tangible objectives, we can work towards a more just and equitable global society.

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Supplementary abstract: A review of an EU ban on forced labour products from the solar industry's perspective

Amidst rising geopolitical tensions and heightened attention to human rights issues, international trade dynamics, particularly those involving the People's Republic of China ('PRC'), have come under intense scrutiny. Reports emerging from various civil society groups since late 2017 have alleged the disappearance of members of predominantly Muslim ethnic minority communities, notably the Uyghurs, within China's Xinjiang Uyghur Autonomous Region ('XUAR'). By 2018, the United Nations ('UN') Working Group on Enforced or Involuntary Disappearances noted a sharp increase in cases from XUAR, coinciding with the establishment of 're-education' camps by the Chinese government. Moreover, evidence surfaced in the spring of 2018 indicating that the Chinese Communist Party ('CCP') runs a network of detention centres and internment camps in the XUAR as part of a broader strategy to transform the region into an obedient and economically lucrative hub. While individuals from indigenous communities remained detained without trial, regional and local authorities shifted their focus towards establishing an extensive forced labour system, purportedly aimed at utilising the adult ethnic Muslim population to bolster economic productivity and regional 'stability'.

Given the significant investment by the CCP in forced labour programmes and their evident breach of international labour rights conventions, it is imperative to analyse the specific industry sectors affected by these practices. This thesis focuses on one such industry – solar photovoltaic ('PV') energy – to illustrate how forced labour in the XUAR infiltrates supply chains of products imported into Western markets. Journalists and academic researchers have provided compelling evidence that victims of the CCP's forced labour regime are directly engaged in the mining and processing of raw materials used in the PV industry. The direct sale of polysilicon tainted with forced labour to the top four PV module manufacturers globally has significant repercussions for the entire supply network of the industry. Given the widespread implementation of government-backed compulsory labour programmes, obtaining raw materials free from forced labour if sourced in XUAR under the current regime is almost impossible.

The PRC remains a dominant force driving the global expansion of solar power. Leveraging substantial government support, China has capitalised on its formidable solar manufacturing supply chain and financial institutions to utilise the solar opportunity. Consequently, the PRC hosts sophisticated solar enterprises operating across various segments of the solar value chain.

In an effort to assist European enterprises in managing the risk of forced labour in their business operations and supply chains, the European Commission introduced a "Proposal for a Regulation on prohibiting products made with forced labour on the Union market" (COM(2022) 453 final) on 14 September 2022, commonly known as the marketing ban of forced labour products. However, this approach fundamentally conflicts with the EU's objective of achieving climate neutrality by 2050. The European Union aims to deploy 320 gigawatts ('GW') of solar PV capacity by 2025 and targets 600 GW by 2030.

The projected development of the PV market in Europe puts the solar industry at the forefront where the proposed Regulation must effectively prevent the marketing of products made with forced labour in Europe. Consequently, this master's thesis investigates: *To what extent is the European Commission's proposed marketing ban suitable to prevent the utilisation of forced labour in the solar PV value chain?*

To assess the suitability of the EU Commission's proposed marketing ban, this thesis adopts a multifaceted approach. It conducts three case studies examining similar legislative measures in Canada, the USA, and Australia, reviews relevant literature on trade restrictions, and evaluates the legal text of the Commission Proposal for a marketing ban of products made with forced labour. Additionally, the thesis incorporates insights from the European solar industry by analysing the Solar Stewardship Initiative's ('SSI') ESG Standard to understand its implications for the solar industry's business practices.

By synthesising findings from these analyses, this master's thesis offers comprehensive insights into the effectiveness and feasibility of the proposed marketing ban. Ultimately, it aims to inform legal scholars, industry stakeholders, and advocates concerned with human rights and sustainability, providing valuable contributions to ongoing dialogues surrounding international trade and human rights protection.

Case Study: Import bans of products made with forced labour

As global awareness increases regarding the prevalence of forced labour across various industries, governments worldwide are implementing legal measures to prevent the importation of tainted products into their territories. This chapter conducts a comprehensive analysis of the legal measures enacted by three prominent jurisdictions – Canada, the United States, and Australia – aimed at addressing this pressing issue. This paper provides a comprehensive overview of the legal landscape governing import restrictions related to forced labour products in Canada, the USA, and Australia.

To effectively identify routes of contagion and vulnerable areas, authorities are required to have access to information, as well as the intelligence and analytical skills to interpret it sensibly and logically. While massive data gathering is valuable, relying on excessively granular, poorly defined, or delayed data may hinder the ongoing monitoring of systemic risks. Therefore, establishing realistic reporting criteria is essential. Enhanced authorities' proficiency in handling extensive datasets and maintaining an effective framework for supply chain monitoring is imperative for better understanding and managing systemic risks.

Nevertheless, evaluating the basis for a ban, overseeing its implementation, and enforcing any violations can be time- and resource-intensive, as demonstrated in Canada's example where adequate funding for effective enforcement is not always provided despite legislation being in effect.

The U.S. approach somewhat mitigates this challenge by allowing any stakeholder to report goods tainted by forced labour, thus distributing the task of

monitoring potential threats. However, a designated authority still needs to assess reports to determine if the evidentiary threshold is met, requiring significant intelligence capabilities. Depending on the ban's scope, such as whether it applies to all products from a certain area or only those produced or imported by a specific company, the practical difficulty of assessing whether to seize particular shipments of goods would vary.
Similar considerations apply to the EU, where individual ability and political will of individual Member States to enforce import restriction may differ significantly. The examination of Australia's Modern Slavery Act of 2018 highlights the risk that not all national authorities possess adequate capabilities to ensure only compliant items enter the national market. By examining the case of Australia, the thesis notes that special emphasis should be taken to define the term or scope of the due diligence that entities are required to report on. Furthermore, the imposition of penalties on reporting entities that fail to submit due diligence reports or submit a statement that does not comply with the mandatory reporting criteria must be sufficiently high and swift enough, to incentivise legal compliance.
Regulations must also ensure that authorities do not create obstacles preventing valid cases of forced labour from being pursued, as observed in the Canadian case where only few seizures have occurred. Enforcement capacities and political willingness to implement the ban must be taken into account. Regardless of whether it is the European Union or one of its Member States responsible for detecting and seizing items made with forced labour, this must be ensured. Authorities should also be guarded against fraud in identification and seizure procedures hindering the administration of justice. Ensuring competent authorities are free from economic or political pressure from other state agents or corporate actors is essential, as seen in the USA case where concerns from domestic and foreign business representatives led to a relaxation of enforcement, allowing imports to resume.

Literature-based analysis of trade restriction design: Identifying key elements and lessons

This chapter undertakes thorough research into the latest literature on legislative measures addressing forced labour, emphasising key insights essential for evaluating the efficacy of trade restrictions.
When contemplating strategies to address forced labour products, two primary options are evident: an import ban or a marketing ban. To provide clarity on these concepts, brief descriptions of each approach are provided:

- Import ban: This form of restriction prohibits the importation of goods (or services) from specific origins into the Union market or necessitates certification ensuring producers have not engaged in forced labour.
- Marketing ban: This form of restriction prohibits the promotion, purchase, and sale (including advertising) of specific products (or services) identified within the Union market, regardless of whether they are domestically produced or imported.

This paper argues that there is no evidence of forced labour in the European solar manufacturing industry, while the Chinese competitors, which have an overwhelming global market share, are accused of using forced labour. Consequently, the ban would primarily affect imports. Therefore, this paper considers learnings that are suitable for import restriction also as suitable for a marketing ban on forced labour products in the solar sector.

Key insights derived from the research reveal that organisational transparency fosters trust by allowing recipients to evaluate processes, behaviours, and performance. However, the practical application of theoretical enforcement mechanisms for trade restrictions on goods made with forced labour has yielded only partial success, as seen in the case studies on import restriction in Canda, the USA and Australia.

The effectiveness of trade barriers in combatting forced labour hinges on numerous factors, including the degree of collaboration among enforcement authorities and other state as well as non-state actors, resource allocation for law enforcement, and the thoroughness of due diligence. Targeted import bans can be coordinated across multiple nations, and the scope (general or specific to certain regions, sectors, businesses, or individuals) can significantly influence the impact of a trade restriction.

Building on the outlined research, this paper advocates for a responsive and context-specific approach of the EU in designing the marketing ban of products made by using forced labour. To mitigate risks associated with forced labour effectively, such a strategy must be flanked by comprehensive investigations and high-quality data, considering potential adverse human rights impacts on vulnerable groups. Hence, conducting thorough impact assessments early in the decision-making process using scientifically supported approaches is crucial.

While trade restrictions like marketing bans are viewed as viable measures to combat forced labour, they should be part of a comprehensive strategy addressing underlying causes. Due to the multifaceted nature of forced labour in supply chains, relying solely on regulatory initiatives may not effectively and sustainably eradicate the issue. Thus, a marketing ban should be carefully evaluated alongside other regulatory and non-regulatory measures.

To curb forced labour practices, additional legal measures such as mandatory human rights due diligence requirements are necessary. Under this approach, corporations are obligated to ensure their activities and business relationships do not contribute to human rights violations and to actively mitigate any resulting harm.

Legal review of the Commission Proposal on prohibiting products made with forced labour on the Union Market

This chapter explores and assesses the Commission's Proposal for a marketing ban on goods produced by using forced labour. In order to help European enterprises to handle the risk of forced labour in their business conduct and supply networks, the European Commission published a "Proposal for a Regulation on prohibiting products made with forced labour on the Union market"

(COM(2022) 453 final) on 14 September 2022. The Commission's Working Staff Document states that the proposed Regulation aims to "effectively prohibit placement and making available of products made with forced labour, including child labour, in the EU market and their export from the EU". Both domestically manufactured goods and imports would be subject to this ban. It incorporates global standards in addition to existing European Union ('EU') initiatives on corporate sustainability due diligence and reporting obligations. This means that businesses must take precautions to guarantee that their suppliers do not employ forced labour and that they do not utilise forced labour at their own manufacturing facilities.

The Commission Proposal for a marketing ban on forced labour products adopts a decentralised approach, delegating implementation and enforcement responsibilities to individual EU Member States while the European Commission takes on a coordinating role. This approach differs from the centralised enforcement model observed in the USA. The Commission highlights the flexibility provided by decentralised enforcement, allowing for adaptation to national contexts.

However, concerns arise regarding the varying capacities of EU Member States to effectively implement and monitor the marketing ban. Differing political attitudes toward labour laws and trade relations with third countries could further complicate enforcement efforts. While a centralised EU investigative body might offer a more effective alternative, its success would also depend on political support and adequate funding.

While the Proposal recognises the importance of prioritising high-risk products and regions for enforcement, it lacks specific procedures for assessing national implementation and monitoring processes. The absence of formal validation or monitoring mechanisms raises concerns about the adequacy of enforcement measures taken by competent authorities. To address these challenges, the Commission proposed the establishment of a database of forced labour risk factors, integrating information from various sources such as international organisations and civil society stakeholders.

The enforcement procedure outlined by the Commission Proposal for a marketing ban on forced labour products involves a two-phase investigation. In the preliminary investigation phase, authorities determine whether there is a 'substantiated concern' regarding the use of forced labour in the production of certain products. Economic operators may be required to disclose information about their due diligence measures during this phase, though they are not obligated to conduct due diligence procedures at this time. If a substantiated concern is identified, the investigation proceeds to a final phase where economic operators have the opportunity to provide additional documents and information to the competent authorities. Audits may also be conducted during this phase.

Based on the investigation findings, competent authorities may determine a breach of the marketing ban. In such cases, economic operators may be prohibited from making the products available on the Union market and are

required to withdraw existing products. Failure to comply may prompt customs authorities to intervene to ensure the products' withdrawal. Competent authorities of the EU Member States are also responsible for establishing penalties that are effective, proportionate, and deterrent to ensure compliance with the marketing ban.

The enforcement procedure entails the collection of extensive information, including product details and due diligence reports. However, the process may be time-consuming, especially for Member States with limited investigation capabilities, during which products remain available on the EU market. This differs from the U.S. approach, where imports can be seized based on suspicion. The EU method also differs from the U.S. method in that investigations may be conducted even after the pertinent products have been placed on the market. In the U.S., the prohibition is put into effect at its border.

Broadly speaking, the EU's proposed prohibition would encompass all economic operators, defined as "any natural or legal person or association of persons who is placing or making available products on the Union market or exporting products". Thus, irrespective of their size or the volume of products they make available or export, all businesses, including small and medium-sized enterprises ('SMEs'), would be obliged to adhere to the Regulation's restrictions.

While the Proposal considers all economic operators, it is anticipated that competent authorities will prioritise enforcement efforts where they are most likely to be impactful. SMEs, while covered by the proposed Regulation, are expected to face less scrutiny in practice due to the risk-based enforcement approach. Under this strategy, competent authorities are to concentrate their enforcement efforts where they are most likely to have significant effects, likely focusing investigations on high-risk industries and regions identified in the Commission's anticipated public database.

In doing so, competent national authorities must consider specific factors explicitly stated in the Regulation when initiating an investigation:

- The economic operator's position in the value chain where forced labour risk is most probable (i.e.: manufacturer or importer)
- The economic operator's size and financial capabilities
- The quantity of the products in question
- The scope of suspected forced labour

This paper notes the European Commission took great effort to address concerns regarding the applicability of due diligence obligations for SMEs. Industry sources and academic literature highlighted the difficulties certain companies might experience in monitoring their supply chains, especially with regards to raw materials and areas with concentrated market power. However, the current proposed system is not able to adequately dispel these concerns. The practically lacking application for SMEs bears the risk of a fragmentation of currently big economic operators to diminish their likelihood of being investigated. It therefore does not solve the enforcement issue for corporations but bears the risk of legislative loopholes.

Under the EU's proposed Regulation, the burden of proof for a violation of the prohibition against forced labour would always rest on the competent authority. However, in practice, economic operators whose products originate directly or indirectly from regions classified to use forced labour may need to 'voluntarily' provide evidence to the competent authority proving compliance. Furthermore, the proposed Regulation would empower competent authorities to request specific information from economic operators pertinent to investigations and conduct checks and inspections under specific circumstances. This suggests that the cooperation and submission of evidence by the economic operator will be crucial to the investigation's outcome.
In contrast to the USA, the Commission Proposal does not incorporate a rebuttable presumption that all products from a particular region are produced using forced labour. Instead, it resembles the Canadian model, where competent authorities determine whether a product is prohibited on a case-by-case basis based on presented information. However, it is noteworthy that this system has proven challenging to enforce for Canadian authorities and is currently undergoing reforms.

European solar industry response: Solar Stewardship Initiative

Examining the solar industry's response to the proposed marketing ban on forced labour products is essential for comprehensively understanding the prevailing dynamics. This chapter delves into the perspectives and actions of key industry stakeholders, shedding light on their stance regarding the ban and its implications for the solar value chain. By analysing the industry response, this chapter aims to explain how major stakeholders, particularly SolarPower Europe ('SPE'), the leading association for the European solar PV sector, navigate the intricate landscape of forced labour concerns. This provides insights into the practical ramifications of the proposed ban and its alignment with the industry's objectives.
To ensure compliance with the proposed marketing ban on forced labour products and foster continual improvement of Environmental, Social, and Governance ('ESG') performance in the solar industry, SolarPower Europe and Solar Energy UK jointly initiated the Solar Stewardship Initiative. By implementing an ESG industry standard, the SSI seeks to ensure that the energy transition is just, inclusive and respects human rights. Moreover, the initiative seeks to establish a mechanism to enhance the integrity of the industry's supply chain, emerging as a pivotal player in promoting responsible production, sourcing, and stewardship of materials across the global solar value chain. With a mission to enhance transparency, sustainability, and ESG performance, the SSI serves as a vital multi-stakeholder initiative addressing the challenges posed by forced labour in the solar sector.
The Solar Stewardship Initiative's ESG Standard encompasses a comprehensive framework, outlining key provisions to guarantee ethical and responsible practices within the solar industry. Under the banner of business integrity and legal compliance, SSI-compliant production facilities are mandated to develop systems to uphold awareness and compliance with international standards and

national laws related to ESG practices. To this end, members must establish integrated and/or standalone ESG management systems that facilitate continuous improvement. This includes policies, procedures, defined roles and responsibilities, financial and human resources, controls, monitoring protocols, training programmes, and internal and external communication and reporting requirements. Additionally, risks of environmental, social, or human rights impacts, including those associated with supplier operations, must be identified and integrated into the company's risk and impact assessment systems.

Stakeholders and affected communities hold a pivotal position in the SSI ESG Standard, with members mandated to identify and engage with groups and individuals affected by or interested in their business activities. Accordingly, a stakeholder engagement plan, tailored to the operation's risks, impacts, and company size, is to be developed. The engagement processes should be accessible, inclusive, equitable, culturally appropriate, gender-sensitive, and rights-compatible, with efforts demonstrated to eliminate barriers for affected stakeholders.

The ESG standard's transparency provision requires members to publicly report on their ESG performance at least annually, covering all material topics in alignment with internationally recognised reporting standards. This commitment enhances transparency and accountability within the solar industry. Collectively, these provisions establish a robust approach, ensuring that facilities engage in ethical and sustainable practices, promote stakeholder engagement, and transparently report on their ESG performance.

The Responsible Sourcing Policy, as outlined in the Solar Stewardship Initiative's ESG Standard, plays a crucial role in ensuring ethical and sustainable practices across the solar value chain. This policy, designed to align with the ESG requirements set forth in the Standard, requires facilities to communicate and promote these principles among their supply chain partners. Essentially, it serves as a guiding framework mandating adherence to responsible practices, thereby reinforcing the commitment to sustainability and ethical business conduct. Concurrently, Know Your Counterparty evaluations ('KYC checks') necessitate facilities to conduct thorough due diligence on all suppliers, involving a comprehensive assessment of their identity, credibility, and adherence to ethical standards. By scrutinising business practices, environmental and social compliance, and governance principles, facilities ensure that their supply chain partners align with the ESG commitments outlined in the Standard. KYC checks not only mitigate potential risks but also contribute to a supply chain that upholds responsible and sustainable practices.

The ESG Standard places particular emphasis on responsible sourcing from conflict-affected and high-risk areas. Facilities sourcing from such regions must develop and implement a Responsible Sourcing Policy consistent with the OECD Due Diligence Guidance. This ensures sourcing practices adhere to the highest standards, preventing inadvertent support for unethical or harmful practices in conflict-affected regions.

The due diligence system set out by the Solar Stewardship Initiatives builds the cornerstone of its responsible sourcing practices. It incorporates robust

management systems, risk identification and assessment, strategy implementation to address identified risks, independent third-party audits, and annual public reporting. Together, these provisions contribute to a responsible, ethical, and sustainable supply chain in alignment with the principles outlined in the Solar Stewardship Initiative's ESG Standard. The human rights due diligence process outlined in the SSI ESG Standard is instrumental in addressing actual and potential impacts on human rights, extending to the facility's supply chain. This involves developing a policy commitment to respect human rights, ensuring its communication to all relevant business partners, and obtaining senior management endorsement. Regular reviews of the human rights policy underscore the ongoing commitment to upholding these principles.

Additionally, when a facility identifies that its operations have caused or contributed to adverse human rights impacts, the SSI ESG Standard mandates the provision for or cooperation in the remediation of these impacts through 'legitimate processes'. However, the current provision on remediation is vaguely defined and does not fully align with the recommendations of the literature research.

In promoting ethical labour practices, the Solar Stewardship Initiative's ESG Standard incorporates a comprehensive set of provisions to ensure a fair and humane work environment. Founded on principles rejecting forced labour or modern slavery, the standard also prohibits child labour and mandates immediate remedial action if breaches are identified. Discrimination is explicitly prohibited, with members being obliged to apply systems to eliminate biases based on race, religion, age, gender, and more. The standard also opposes workplace harassment and disciplinary practices, emphasising fair and respectful treatment of workers.

To ensure equitable employment terms, the SSI ESG Standard mandates transparent communication of workers' rights, prevents unfair contractual arrangements, and allows workers freedom to terminate employment without penalties. Ethical recruitment practices are mandated to prevent worker exploitation, including the prohibitions of recruitment fees and requirements for registered and compliant labour agencies. Further, facilities are prohibited from charging any worker deposits or fees for specific materials or equipment used at work.

Fair compensation is a key focus, with members being required to adhere to legal minimum wages, provide premium rates for overtime, and ensure timely and fully documented payments. Moreover, the standard encourages member companies to determine a living wage. However, the SSI ESG Standard does not strictly demand the implementation of this wage level from their members but only 'if possible'. This might leave room for the justification of loan dumping.

Concluding reflections: Addressing forced labour in the solar industry

In this final chapter, a examination is conducted concerning the findings derived from the literature review, case studies, legal analysis of the Commission Proposal for a marketing ban on forced labour products, and the response of

the European solar industry. By synthesising these diverse research strands, this thesis aims to draw conclusive insights into the effectiveness, feasibility, and potential implications of the proposed ban within the intricate landscape of the solar value chain. In doing so, this chapter answers the initially stated research question: *To what extent is the European Commission's proposed marketing ban suitable to prevent the utilisation of forced labour in the solar PV value chain?*

Based on the comprehensive analysis undertaken in this study, it is apparent that the European Commission's proposed marketing ban represents a significant step towards terminating the utilisation of forced labour in the solar value chain. Firstly, the integration of the marketing ban within a broader legal framework, encompassing the Commission Proposal for a Corporate Sustainability Due Diligence Directive and the Corporate Sustainability Reporting Directive, underscores the EU's commitment to effectively combat modern slavery. By aligning the proposed Regulation with these measures, the EU enhances its ability to comprehensively address forced labour. Furthermore, the Proposal strikes a delicate balance between regulatory measures and market forces, enabling economic operators to act flexibly by incentivising ethical business conduct through added value propositions, as exemplified by the Solar Stewardship Initiative.

Nevertheless, challenges persist in implementing effective traceability systems, particularly for high-risk regions such as the XUAR. This concerns the competent authorities with varying enforcement capacities and political will, as well as economic operators with limited due diligence capacities and varying supply chain complexities. Another significant weakness of the EU's approach to combatting forced labour is the remediation of individuals who have experienced adverse human rights impacts. The proposed marketing ban, as well as the industry's response, have been somewhat vague in this regard and leave much room for improvement.

Collaboration among stakeholders, continuous monitoring and adjustment, and proactive measures to address these challenges will be pivotal. If this strategy is executed successfully, meaningful progress can be achieved in promoting ethical business practices and safeguarding human rights all around the world.