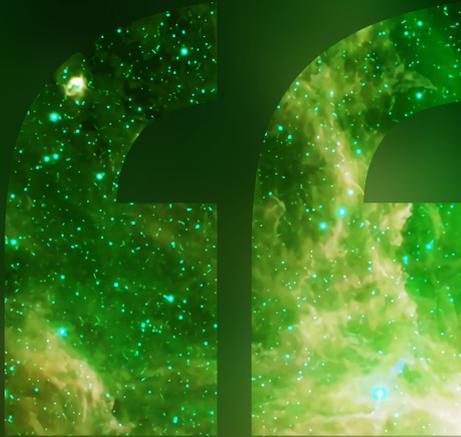


**C L I F F O R D**

**C H A N C E**



**FORCED LABOUR:  
NEW REGULATIONS ARE  
CHANGING CONTRACTUAL  
OBLIGATIONS ACROSS  
THE WORLD**



**— THOUGHT LEADERSHIP**

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## FORCED LABOUR: NEW REGULATIONS ARE CHANGING CONTRACTUAL OBLIGATIONS ACROSS THE WORLD

An international framework aimed at the eradication of forced labour across the world has long been in place, set out in ILO Conventions and embraced within UN Sustainable Development Goal 8.7. New efforts in States and regions have been mounted in recent years, throwing a spotlight on the role of business in achieving these aims. These include requirements to conduct supply chain due diligence and to report on forced labour risks and how these are addressed. In this briefing, we survey some of the recent developments and focus on the way in which development finance institutions have been playing a role. All of these developments are accompanied by the use of contractual mechanisms in support of addressing forced labour and related risks. Companies, investors and financial institutions across the world need to think about how these developments affect their operations and value chains.

### AN OVERVIEW OF INTERNATIONAL LAW AND STANDARDS

A majority of the world's States have expressly agreed to abolish forced labour and take steps to suppress its use through the International Labour Organization (ILO) Forced Labour Convention, 1930 (No.29) (the 1930 Convention) and the ILO Abolition of Forced Labour Convention, 1957 (No. 105) (the 1957 Convention) which are binding on those member States which have ratified them, who must implement national laws to comply with the conventions. Most recently, China ratified both conventions on 12 August 2022 and Japan ratified the 1957 Convention on 19 July 2022.<sup>1</sup>

The 1930 Convention defines *forced 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" and requires ratifying States to suppress all forms of forced labour. This definition is used not only in regulatory frameworks across the world (having direct impact on corporate governance) but also in development finance institutions' standards on forced labour (impacting both contractual relationships as well as corporate governance).

The 1957 Convention supplements the 1930 Convention by focusing on five issues that had emerged following the

Second World War – forced labour (i) as punishment for the expression of political views, (ii) used for the purposes of economic development, (iii) used for participation in strikes, (iv) used as a means of racial or other discrimination, and (v) used as labour discipline.

The 1930 and 1957 Conventions were supplemented further in 2014 by the Forced Labour Protocol, ratified by 59 States, imposing obligations to prevent, protect and remedy in relation to forced or compulsory labour and bringing trafficking for the purposes of forced or compulsory labour into scope.

The Forced Labour (Supplementary Measures) Recommendation, 2014 (No.203) (11 June 2014) provide non-binding practical guidance to member States in meeting their obligations.

States have also agreed to prohibit and eliminate the worst forms of child labour as a matter of urgency. The Worst Forms of Child Labour Convention (No. 182) **reached universal ratification in August 2020.**

The Sustainable Development Goals, adopted by UN member States in 2015, set a specific target in relation to forced labour and other forms of modern slavery, calling for global action to "[take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the

worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms." (SDG 8.7)

These laws and standards have paved the way for States to implement relevant laws and regulations aiming to eradicate forced labour.

## THE EU EXAMPLE

Developments in the EU are indicative of the recent increased focus on measures which require businesses to have better oversight of the risks of forced labour in their supply chains.

Article 5(2) of the Charter of Fundamental Rights of the European Union and Article 4 of the European Convention on Human Rights explicitly prohibit forced and compulsory labour.

Two directives<sup>1</sup>, which were to be transposed by EU member countries by 20 July 2011 and 6 April 2013 respectively, provide specific EU legislation on forced labour related issues. They establish the principle of liability of *legal persons* for using forced labour, accompanied by administrative and criminal sanctions and prohibitions on the employment of non-EU nationals who do not have permission to stay by EU *employers*. These sanctions are administered by member States.

Enhanced mandatory standards to address certain risks identified in specific sectors are also envisaged (in particular for EU *importers* of tin, tantalum and tungsten, their ores, and gold originating from high-risk areas, who have certain specific supply chain due diligence obligations<sup>2</sup>). The EU also adopted reporting directives on non-financial information for certain EU undertakings, including information regarding social, employment and human rights issues (mainly introduced by the Non-Financial Reporting Directive (NFRD) on sustainability reporting dated 22 October 2014). The latest directive in that respect (the Corporate Sustainability Reporting Directive) was adopted on 28 November 2022 and entered into force on 5 January 2023 with the aim to broaden the scope of the EU non-financial reporting requirements already in place, including on forced labour. This includes, for example, the requirement for the company's management report to include

details concerning the company's value chain. The company will have to account for its entire value chain, even if those companies are outside the EU.

The European Commission (EC) has recently proposed complementary legislation to further the EU's commitment to eradicate forced labour: (i) a proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (the Draft Corporate Sustainability Due Diligence Directive or CSDDD) dated 23 February 2022 and (ii) a proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour in the Union market (the Draft Supply Chain Regulation) dated 14 September 2022.

## Draft Corporate Sustainability Due Diligence Directive

The EC's Draft Corporate Sustainability Directive applies to:

- EU companies which have more than 500 employees on average and a net worldwide turnover of more than EUR 150 million in the last financial year;
- EU companies which have more than 250 employees on average and a net worldwide turnover of more than EUR 40 million in the last financial year if at least 50% of it is generated in one or more listed sectors which have been identified by the European Commission as high impact for the purposes of the directive; and
- companies which are formed in accordance with the legislation of a third country and fulfil one of the following conditions: (i) generated a net turnover of more than EUR 150 million in the EU; or (ii) generated a net turnover of more than EUR 40 million in the EU, provided that at least 50% of its net worldwide turnover was generated in one or more of the high impact sectors.

The EC's proposal envisages mandatory due diligence, requiring those companies caught by the directive to identify actual and potential adverse human rights and environmental impacts arising from (i) their operations, (ii) the operations of their

**Legal persons** are defined as "any person having legal personality under the member State's national law".

**Employer** is defined as "any natural person or legal entity, including temporary work agencies for or under the direction and/or supervision of whom the employment is undertaken".

**Importers** are defined as "any natural or legal person declaring minerals or metals for release for free circulation (...) or any natural or legal person on whose behalf such declaration is made".

**Value chain** is defined as activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company (*Draft Corporate Sustainability Directive, art. 3(g)*).

**Established business relationship** is defined as a business relationship, whether direct or indirect, which is, or which is expected to be "lasting, in view of its intensity or duration" and which "does not represent a negligible or merely ancillary part of the value chain" (*Draft Corporate Sustainability Directive, art. 3(g)*).

subsidiaries and (iii) the *value chain* operations carried out by entities with whom the relevant company has an *established business relationship* (which is to be reassessed periodically). Relevant impacts are those that arise from the violation of one of the rights or prohibitions set out in a series of identified international treaties. The Draft Sustainability Due Diligence Directive cites several treaties that are relevant to forced labour, including the treaties that comprise the International Bill of Rights (containing prohibitions on slavery), the ILO's Worst Forms of Child Labour Convention and the 1930 Convention.

Once identified, actions that must be taken to prevent adverse human rights impacts and, where necessary, bring any such impacts to an end include *contractual cascading* - seeking contractual assurances from a business partner or direct partner with whom the company has a direct/established business relationship, under which the counterparty states that it will ensure compliance with the company's code of conduct and implement a prevention/corrective action plan. This includes seeking corresponding contractual assurances from its partners to the extent that their activities form part of the company's value chain. Such contractual assurances must be accompanied by appropriate measures to ensure compliance. The draft directive refers ultimately, if other options are not successful, to the company's obligation to refrain from entering into new, or extending existing, business relationships, as well as, to the extent permitted by relevant law, potential suspension and termination of relationship.

Under the proposal, it is a defence from liability if a company has sought relevant contractual assurances from a direct business partner (such as by contractual cascading backed up by verification of compliance) if in the circumstances, it was reasonable for the company to expect that the action it took would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.

Please click [here](#) for a detailed analysis of the Draft Corporate Sustainability Directive and [here](#) for our summary of the EU Council's position on the proposal CSDDD.

## Draft Supply Chain Regulation

The Draft Supply Chain Regulation aims to prohibit the placement and availability on the EU market of domestically produced and imported products made with forced labour. The intention is to prevent economic operators placing or making available such products in the EU market itself, or internationally via exports. Each member State's competent authority would be in charge of assessing whether economic operators have violated this obligation using a risk-based approach. This would include taking into account actions taken by the operator to identify, prevent, mitigate or bring to an end, risks of forced labour in their operations and value chains, including in line with internationally recognised due diligence guidelines issued by the UN, the OECD or the ILO.

Enforcement and penalties would be member State-specific, although the regulation providing numerous guidelines would be of direct application in each

### High impact sectors listed in the draft Corporate Sustainability Due Diligence Directive

- (i) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear;
- (ii) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages;
- (iii) the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, non-metallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).

member State. The Draft Supply Chain Regulation, if adopted, would significantly increase the regulatory oversight of the EU over instances of forced labour as it would not only apply to persons having legal personality under a member States' national law but also to any person if it wishes to place or make available a product on the EU market or outside of the EU via exports. The Draft Supply Chain Regulation deploys the definition of 'forced labour' used in the 1930 Convention and broadly defines "product made with forced labour" as "a product for which forced labour has been used in whole or in part at *any stage* of its extraction, harvest, production or manufacture, including working or processing related to a product at *any stage of its supply chain*".<sup>vi</sup>

Such broad scope marks the growing trend of far-reaching forced labour regulation worldwide.

## SELECTED COUNTRY EXAMPLES

France's Vigilance Law of 2017<sup>vii</sup> is a pioneering example of placing wide-ranging due diligence requirements on companies with respect to human rights, including labour/worker issues, and environmental impacts in their business and through their supply chains.

For an overview of the French Vigilance Law, please refer to our earlier briefing available [here](#). In essence, this law compels large French businesses to assess and prevent environmental and human rights risks resulting from their own activities alongside the activities of the companies they control and the subcontractors or suppliers with whom they have an "established business relationship", in each case, wherever these activities take place, i.e., in France or elsewhere. It will be interesting to see the evolution of the Vigilance Law in France following the transposition of the Corporate Sustainability Directive.

The German Supply Chain Act which entered into force this year also requires certain companies to carry out due diligence on a range of human rights and environmental impacts, including forced and child labour.

The United States has numerous regulations which focus on forced labor (including the Tariff Act of 1930, Pub. L.

No. 71-361 (June 17, 1930), as amended by the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125 (Feb. 24, 2016), the Trafficking Victims Protection Reauthorization Act of 2017, Pub. L. No. 115-427 (Jan. 9, 2019), and the White House **National Action Plan to Combat Human Trafficking** (Dec. 2021)), but has most recently enacted the Uyghur Forced Labor Prevention Act (Public Law No. 117-78) (UFLPA) on December 23, 2021, which went into effect on June 21, 2022. The UFLPA creates a rebuttable presumption that goods mined, produced, or manufactured wholly or in part in Xinjiang, China, or by an entity on the UFLPA Entity List are prohibited from U.S. importation under 19 U.S.C. § 1307.

The Norwegian Transparency Act came into force in July 2022 and imposes due diligence requirements to map and assess actual and potential negative consequences for basic human rights and decent working conditions. These pieces of legislation build on legislation already in place in a number of countries requiring reporting on 'modern slavery' in California, the UK and Australia. Please see [here](#) an overview of legislation worldwide relating to human rights reporting and due diligence.

## DFI STANDARDS AND CONTRACTUAL ARRANGEMENTS

### Development Finance Institutions Standards

Development finance institutions (DFIs) have long played an important role in developing and implementing environmental and social standards to projects they finance.

### IFC

Since the late 1990s the International Finance Corporation (IFC) has formally imposed its environmental and social standards in all aspects of the projects that go through its initial credit review process, following the creation and regular review of its performance standards. **IFC Performance Standards** remain the reference point in the development finance market in terms of environmental and social standards.

Performance Standard no. 2 focuses on labour and working conditions. One of its

objectives is to avoid the use of forced labour. This performance standard applies to workers directly engaged by IFC's clients but also to workers engaged through third parties to perform work related to core business processes of the project for a substantial duration as well as workers engaged by the client's primary suppliers, with different requirements for each category of workers. The implementation of this performance standard is fully integrated into the due diligence process that IFC encourages its clients to undertake and to the environmental and social action plan put in place for their projects.

### **ADB**

For its part, the Asian Development Bank (ADB) has published extensive guidance for its internal operations, with its latest **core labour standards handbook** having been published in 2006. ADB implements a country strategy and program which provides the overall strategic framework to guide ADB's operations in a country over a 5-year period. Each country strategy and program includes a labour market and standards assessment. This analysis provides ADB with an early framework of what issues need to be specifically explored further at the project level. ADB's core labour standards are designed to ensure that any prohibited labour related issue is analysed at every step of project implementation: from the country strategy and program mentioned above to the project implementation with specific reports to be provided at every stage.

### **EBRD**

The European Bank for Reconstruction and Development (EBRD) also adopted ten performance requirements in its Environmental and Social Policy, which is regularly updated, the latest update having been made in 2019. This includes a performance requirement on labour and working conditions which provide similar safeguards to those of IFC, but reflect the specific characteristics of the countries in which EBRD operates.

IFC, CDC Group Plc and EBRD, published a common practice note for their clients<sup>26</sup> in an effort to provide additional guidance to increase the private sector's ability to identify and

assess modern slavery risks and to implement appropriate controls and solutions. The joint effort to publish a common practice note, without setting new standards, shows the willingness of these institutions to facilitate harmonisation through standardised requirements, although each institution will have its own specific policies that their clients need to comply with.

A number of other development finance institutions have also included their own set of requirements regarding labour and working conditions and in particular standards on forced labour.

Although these performance requirements have historically been largely applied in the development finance and project finance worlds, a number of commercial financial institutions are now also applying them more generally through, in particular, the **Equator Principles**. These are applied extensively across project-finance related activities in an effort to address the ever-growing environmental and social governance concerns across sectors and jurisdictions.

While the DFIs have been focused on forced labour and had contractual protections in place for a long time, their emphasis in the last couple of years has been on supply chains, the interlinkages between climate change measures and human rights and what can be achieved contractually. We also note the emergence of more stringent contractual requirements in certain sectors (for example solar but also wind), where DFIs have identified enhanced risks.

## **Contractual Provisions and Cascading**

Large international businesses are required to comply, through international standards, regional and national laws and regulations, performance standards from development finance institutions, and their own internal policies, with various levels of requirements to address any forced labour issues in their activities.

When implementing projects, key stakeholders are asked to undertake effective due diligence of their supply chains, to ensure effective monitoring on an ongoing basis and to obtain direct contractual undertakings from their

contractors and subcontractors to comply with various standards.

In the project finance context, both project and finance documents now tend to have elaborate provisions on these matters. The cascading of definitions and obligations across documents is carefully assessed. The precise scope of such contractual undertakings is project specific but it typically includes specific representations, covenants, termination/suspension rights and events of default related to these issues. As a result, we are seeing lender groups, developers and suppliers spending a considerable time and effort navigating through various requirements and policies and agreeing the appropriate supply chain provisions package for the particular project.

International soft law and standards articulating expectations for business in respecting rights (including in relation to forced labour) (for example, the **United Nations Guiding Principles on Business and Human Rights** and the **OECD Guidelines for Multinational Enterprises**) are influencing contractual practice, as well as supply chain contracting models (for example, the **ABA draft model clauses on labour issues and supply chains**).

In that context, it is also interesting to note that the EC anticipates providing certain model contractual clauses for use

in business relationships to support companies in the implementation of the Draft Corporate Sustainability Directive objectives, which will provide further certainty to the various stakeholders.

- i. As at December 2022, 180 countries have ratified the Forced Labour Convention, 1930 (No.29) and 178 countries have ratified the Abolition of Forced Labour Convention, 1957 (No.105), with two countries Malaysia and Singapore, having renounced the convention since.
- ii. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 *on preventing and combating trafficking in human beings and protecting its victims*, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p.1, and Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 *providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, OJ L 168, 30.6.2009, p. 24.
- iii. Regulation (EU) 2017/821 of the European Parliament and of the Council of 1 May 2017, OJ L 130, 19.5.2017, p. 1.
- iv. Draft Corporate Sustainability Directive, art. 7(2)(b), 7(4), 8(3)(c) and 8(5).
- v. Draft Corporate Sustainability Directive, art. 7(2)(b)
- vi. Draft Supply Chain Regulation, art. 2(g).
- vii. Law n°2017-399 of 27 March 2017 relating to the *devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.
- viii. "Managing Risks Associated with Modern Slavery – A Good Practice Note for the Private Sector"



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