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Submission to Employment and Social Development Canada on supply chain legislation and the forced labour import ban

Above Ground appreciates the opportunity to comment on legislation to eradicate forced labour from Canadian supply chains and strengthen the forced labour import prohibition, which the government pledged to develop in its [mandate letter](#) to the labour minister and in [Budget 2023](#).

Here we share our high-level concerns, observations and recommendations. Given time constraints, we are not able to provide detailed comment on all the potential measures discussed, and questions posed, at the October 13 consultation session and in ESDC's accompanying discussion paper. We nonetheless cover the points that seem to us most critical to ensure that this legislation will truly make a difference in protecting workers' rights globally.

Due diligence legislation

As a member of the Canadian Network on Corporate Accountability (CNCA), Above Ground shares the concerns and recommendations outlined in the CNCA's submission on this topic. Here we reiterate a few points that we consider especially important.

Concerns and observations

1. UN experts, over a hundred [academics](#), tens of thousands of [Canadians](#) and hundreds of [civil society groups](#) in Canada and abroad have called for Canada to adopt *mandatory* human rights due diligence legislation. Given this, the question of **how any "due diligence" requirement will be enforced** is paramount. We note with concern that the discussion paper provides no information about potential enforcement mechanisms being considered for this law.
2. The potential requirements listed in the discussion paper seem to be limited to procedural requirements. This raises concern that **"due diligence" is possibly being conceptualized as a mere process**, which would critically undermine the law in our view.

To exercise due diligence, i.e., appropriate care, a company would have to undertake all the steps discussed, but it is the *quality* of the actions it takes that determine if it has been duly diligent. For example, if a firm takes some steps to assess risks posed to rights-holders in its supply chain, but fails to consider the most severe and obvious risks, then it could meet the procedural requirement of identifying risks while falling far short of due diligence.

Truly diligent action is what must be made mandatory. This can only be accomplished by empowering the courts to scrutinize companies' efforts to prevent or remedy abuse, and rule on whether those efforts are appropriate and sufficient, considering the particular circumstances of each case.

3. The **scope of human rights risks** that would have to be addressed is not entirely clear. Although the Minister of Labour and Seniors [has spoken](#) of a law targeting only forced labour, the discussion paper does not state such a limitation in its description of possible requirements. We welcome this as a possible sign that the government has not ruled out a law requiring due diligence to protect a broad range of workers' rights, or indeed all human rights, which are interconnected and indivisible.

Recommendations

1. The law should set out an explicit obligation, enforceable through civil litigation, for companies to **prevent harm**, with effective due diligence available as a limited defence.
2. It should **mandate courts** to rule on whether a company is exercising due diligence — i.e., taking *all* measures that are *reasonable* and *appropriate* under the particular circumstances of the case — to prevent and remedy abuse.
3. The courts must be able to find companies liable and **order remedial action**, including providing remedy to victims where relevant, when companies are found to have acted without due diligence.
4. The law should **include all human rights** within the scope of due diligence requirements.

Import ban enforcement

Concerns and observations

1. The potential new measures described in the discussion paper do not seem to address what are, in our view, some of the biggest **problems with current enforcement**. Two of particular concern are:
 - a) The near-total **lack of transparency** regarding enforcement actions, with no information being routinely reported, and information disclosed on request being extremely limited.¹

¹ If the CBSA determines goods were made with forced labour, it will disclose on request the type of goods, e.g., "women's and children's clothing from China," but not the manufacturer. This puts Canada markedly out of step with other jurisdictions that have or are developing similar legal provisions. The U.S. consistently publishes this information. Mexico and the E.U. plan to routinely publish a list of prohibited goods, and it is difficult to imagine how this could be done without naming the manufacturer.

As a result, only an importer whose shipments are stopped is alerted to the fact that the CBSA has found the product in question to be made with forced labour.

- b) Rules that appear to hinder the CBSA's ability to ensure that once its investigative staff **have evidence** that a product is made with forced labour, shipments of these goods will be consistently classified as such and denied entry.²
2. The **risk-based and "import control" regime** contemplated in the discussion paper is difficult to comment on given the lack of detail. For example, with the suggestion that a presumption of goods being produced by forced labour might "be rebuttable by importers through the completion of due diligence requirements and other documentary requirements," we wonder what is meant by "completion of due diligence requirements."
3. We are encouraged to see the government is considering the possibility that enforcement actions might result in **unintended harm** to workers, and seeking solutions to mitigate against this risk.

Recommendations

1. The government should **disclose more details** about the reforms it is considering and continue public engagement on this topic.
2. The enforcement strategy should be based on **clear distinctions** between different classes of goods: the many that are at significant risk of being produced by forced labour; those that are at *such high risk* of being produced by forced labour that, absent evidence to the contrary, it should be presumed; and those coming from a specific production site or producer known to be employing forced labour. It should also take into account the different dynamics of commercially-driven forced labour and state-imposed forced labour systems that affect entire industries and regions.
3. For goods that are **more likely than not produced by forced labour**, the presumption should be rebuttable only with clear, compelling evidence that forced labour is not used in their production. An importer should not be able to have them released simply by submitting

² Determining that a particular constellation of abusive practices amounts to forced labour requires specialized knowledge and training. However, the CBSA's [description of its enforcement process](#) seems to suggest that the responsibility to make this judgement is falling not on its investigative staff, but rather on each border services officer who happens to be stationed at the border where and when each shipment of products made with forced labour arrives: "Shipments containing goods suspected of being produced by forced labour will be detained at the border for inspection by a border services officer. If in the judgement of the officer the goods were produced by forced labour, the officer will apply the tariff classification under chapter 9897 and prohibit the goods from entering Canada."

documentation of efforts it has made to verify working conditions.

4. The government should carefully examine **current laws and regulations and assess ways they may impede effective enforcement** of the ban, and table amendments as needed.
5. In particular, the government should pursue **amendments to allow civil society actors** (e.g., academics, workers' associations, or non-profit organizations) to request advance classification of goods prior to their importation and re-determination following their importation.³
6. Working within the current legal framework, **the CBSA should adopt** the following practices:
 - Periodic **public reporting** (e.g., quarterly) of statistics such as the number of manufacturers under investigation, investigations completed, shipments detained, etc.
 - For each enforcement action (i.e., classification of goods as products of forced labour), publishing on its website the type of goods and, with support from the public safety minister, the **name of the manufacturer**.⁴
 - When CBSA investigative staff find that a product or category of goods is more likely than not⁵ made with forced labour, **issuing non-binding directions** to all front-line border services officers providing them with this information and guidance on how it could be used to assess goods.⁶
 - Publicly **posting these directions** online.
7. We support the idea of **requiring importers to list the manufacturer(s)** of goods in customs

³ In the case of advance classification, this would require changes only to the *Tariff Classification Advance Rulings Regulations*, and not the *Customs Act*, according to legal analysis commissioned by Above Ground.

⁴ The president of the CBSA has stated that it is legally prohibited from naming the manufacturer. However, there's a public interest exception to the broad rule against disclosing customs information that may apply in this case. According to legal analysis we obtained: "The Minister of Public Safety may provide access to customs information to any person if, in the Minister's opinion, the public interest in providing the information clearly outweighs any invasion of privacy, or any material financial loss or prejudice to the competitive position of the person to whom the information relates... The public interest in disclosure must clearly outweigh countervailing privacy and economic interests. That said, there is a serious case to be made that the public interest in combating the use of forced labour, including through greater transparency..., is significantly greater than the privacy or economic interests of manufacturers of goods." We believe the minister can very reasonably take this position here.

⁵ This would be an acceptable evidentiary standard on which officers could classify goods, according to the legal analysis mentioned above. Quoting from it: "The relevant standard would be proof on a balance of probabilities — i.e., that evidence shows that it is more likely than not that the good is the product of forced labour." This fact should be mentioned in the CBSA's notices to officers.

⁶ The CBSA would be acting entirely within its authority in using such a protocol, according to the same analysis.

documents, and of making this information public. Listing of the manufacturer's own direct suppliers of materials used in the products may also be warranted.

8. To **minimize the risk of harm** to workers due to enforcement action (i.e., a manufacturer losing business in Canada may respond with production cuts and lay-offs), the government should consider, among other possible measures:
 - Creating a civil society **advisory body** to ensure ongoing dialogue between the government, labour rights experts, and representatives of workers in high-risk industries on the enforcement of the import prohibition.
 - With input from this body, developing guidelines for the CBSA on **investigational priorities**. (For example, it might be an option to prioritize for investigation, when other factors are equal, manufacturers that are less likely to be put in a position of having to dramatically cut production due to loss of customers in Canada.)
 - **Communicating to the manufacturers** of prohibited goods precisely how their recruitment or employment practices would need to change to resolve concerns of forced labour. This might facilitate quick resolution and lifting of a prohibition before it results in costs for the producer that may trigger lay-offs.
 - Putting money from any penalties issued against importers into **a fund that would provide remedy** to workers laid off as a result of their employer losing business due to an import ban.

Above Ground works to ensure that companies based in Canada or supported by the Canadian state respect human rights and the environment worldwide. It is a project of MakeWay, a national charity that builds partnerships and solutions to help nature and communities thrive together.