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BRIEFING PAPER

State imposed forced labour (SIFL): what companies need to know

Overview

The risk of forced labour and trafficking in supply chains is rising up the agenda of major companies.

To date, attention has mainly focused on forced labour in the private economy, and the need to weed out unscrupulous recruiters and suppliers.

But what happens when the forced labour is imposed by the State itself, perhaps as a systematic practice of punishing political dissidents or religious minorities? Evidence is emerging that such abuses are widespread in certain countries that supply goods to major international brands. Apart from the human rights violations being committed, production based on this type of forced labour poses significant legal and reputational risks to business. And while companies may find that cheap labour based on coercion is profitable in the short term, it is not sustainable in the long term.

There are different types of State responsibility for cases of forced labour. At one end of the spectrum, forced labour can be imposed directly and deliberately by the State. At the other, the State can fail to prevent forced labour perpetrated by others. Between the two, there are situations in which the State knowingly creates the conditions for actors, including State industries, to exact forced labour. But there may also be situations, such as the use of unpaid or low-paid labour from prisoners in private prisons. This has created some confusion and debate (for example between ILO supervisory bodies and Member States)

regarding the State's responsibility for committing offences or perpetuating conditions of forced labour, as to how forced labour is defined.

This paper raises the question of the extent to which companies can avoid becoming involved in SIFL and remediation should be the responsibility of individual companies, rather than the State and public authorities, and asks what companies can do to remediate these types of forced labour situations, either alone or in partnership with others.

Concepts and terminology

What is forced labour?

Forced labour exists when people either enter work or service with no freedom of choice, and/or cannot leave work or service without punishment or threat of punishment. Essentially, it is coercive employment.

The ILO has adopted two Conventions (legal instruments) on the subject, in 1930 and 1957 respectively. The first instrument was adopted primarily to combat forced or compulsory labour imposed by States in colonial territories, and the Convention set- out progressive action to eradicate the practices. It also clarified that the exaction of forced labour is a criminal offence, to be dealt with through strict and adequate penalties. The second Convention was adopted at the height of the Cold War, not long after the atrocities of the Second World War, and focused more directly on SIFL. It called for the immediate abolition of forced labour that was being imposed by the State for a range of purposes, including: as a means of political coercion or education; as a method of mobilising and using labour for purposes of economic development; and as a means of racial, social, national or religious discrimination.

Types of SIFL

There are two broad categories:

Compulsory labour by citizens - These are cases where national or local authorities require work from otherwise free citizens, perhaps for a short period of time. An example is compulsory cotton-picking during harvest season in certain Central Asia republics, where there has been extensive use of both adult and child labour. Other cases involve the use of citizens in compulsory civil service, which States use as a method of mobilizing labour for the purposes of economic development. Some countries, such as the Democratic Peoples' Republic of Korea, pursue a deliberate policy of exporting their labour under conditions that constitute forced labour (ETI has provided a Briefing Note about this.) [we should hyperlink to this].

Prisoners and detainees These are cases where prisoners or persons in administrative detention are required to work, in breach of international human rights instruments

including the ILO Forced Labour Conventions. Examples of alleged flagrant abuse have been recently highlighted in the media and draw attention to the practice in some countries of holding members of ethnic or religious minorities, or political dissidents, without trial, in detention or “re-education” camps. They are often compelled to perform forced labour over long periods of time. The exploitation of prison labour in some industrialized countries also constitutes forced labour, as prisoners in private prisons are expected work for wages way below legal minimum wage rates.

Why should this matter to companies?

Loss of reputation and the risk of litigation

The exaction of any forced labour is a criminal offence; and a company tainted with this practice anywhere in its business activities and extended supply chain can be subject to litigation as well as severe reputational risk. In the past, there have been a number of court cases against major companies alleged to have been complicit in human rights violations including forced labour in countries with repressive regimes¹.

The risk is arguably greatest in the case of SIFL, particularly when widespread forced labour has been exacted by the State as part of campaigns against religious and ethnic minorities or other politically persecuted groups. Many companies may not be aware of the use of SIFL in their supply chains, because of limited visibility and transparency, but it is important that they are alert to this risk. They may find themselves compelled by their own government to cease trading in goods produced overseas under forced labour conditions. Under US law, for example, it is illegal to import goods into the US that are made wholly or in part by forced labour. Customs authorities may detain goods believed to have been produced with forced labour: in September 2019 US customs issued orders covering a range of goods in diverse countries of Africa, Asia and Latin America. With an increased spotlight on trade and tariff barriers, advocacy groups are increasing public pressure on companies found to be benefiting from forced labour because of a lack of thorough due diligence. There is also a growing demand for government laws and policy measures to be strengthened regarding corporate due diligence and transparency.

Companies should be very careful about any involvement with prison labour, particularly in private prisons, ensuring that their company practice does not breach international standards. Concerns and publicity may well grow sharply in the light of current trends in correctional policy. The US has drawn the most attention on this issue, where advocacy groups have published the names of major companies using prison labour products and services. Some reports have equated working conditions and very low wages with “slavery”.

¹ In 1996, for example, a group of Myanmar residents filed a lawsuit against Unocal in a U.S. Federal court. The plaintiffs alleged that they had suffered human rights abuses including forced labour at the hands of the Myanmar military during the construction of a gas pipeline, and that Unocal was complicit in this. The parties reached an out-of-court settlement in which Unocal agreed to compensate the plaintiffs and also provide funds for development programmes in Myanmar.

How can companies best control the risks?

Recommendations

On SIFL, as with other dimensions of forced labour, there are some things that individual companies can do alone, some that are best achieved in partnership with other companies and industrial groups, and some that need to be tackled via combined action, with partners including governments, international organizations, trade unions, NGOs and civil society.

Action by individual companies

Companies should take similar measures to those addressing any form of forced labour in their supply chains, but with specific attention to specific risk of SIFL. They need to map high risk areas and operations, carefully vet and train suppliers, strengthen employment and purchasing contracts in high risk areas, and report on both problems identified and any action taken to remediate them.

But the nature of SIFL, particularly when governments are compelling minorities or dissidents to work in detention camps or factories, requires additional due diligence measures. Governments may go to considerable lengths to conceal forced labour, and may seek reprisals against auditors or advocacy groups which seek to document them.

Companies need to:

- Establish clear policies and processes to take preventive as well as corrective action on forced labour
- When considering new or reviewing existing sourcing from countries and suppliers, conduct a full risk assessment of the laws, policies and practices that may permit the systematic application of SIFLⁱ
- Enhance risk assessment by engaging with local civil society organisations and where appropriate, draw on credible media sources
- Use independent and third-party investigation and auditing, where circumstances permit
- Take a transparent and partnership approach with suppliers, making clear what will not be tolerated
- Address subcontracting and outsourcing as SIFL is rarely found on the first tier of the supply chain, this will require closer scrutiny of production capacity, order volumes with other customers and effective planning
- Discuss and adopt policies against unauthorised subcontracting, inform suppliers in all tiers about such policies, and subject them to periodic review
- Where cases are suspected or found, ensure that the first priority is for the protection and welfare of the workers. Work with local civil society experts in victim

support where possible. Adopt a sensitive and careful approach to ensuring that workers are not subject to further victimisation or harsh treatment, and that their income is protected whilst investigations are conducted and alternative arrangements can be found.

- Where identified alert other companies to the risk either directly or through credible intermediaries like the ETI

Joint action by companies, industrial groups and other stakeholders

On a sensitive issue like SIFL, there is a particular need for companies to act together, given its systematic nature. Human rights abuse is pre-competitive and should be treated as such. Companies that are affected by adverse publicity when SIFL is exposed by media reporting should develop a common response. In the cases of Central Asian cotton, Thai shrimp and others, broad partnerships and task forces have worked with governments to achieve improved monitoring together with policy reforms. This can be a model for addressing SIFL, whether a thematic concern such as prison labour and private companies, or a politically motivated SIFL concern in a particular region.

Case studies

Building a national consensus in Myanmar

Progress cannot be expected overnight. It can take years of negotiation, backed by advocacy campaigns and perhaps an international Commission of Inquiry, to achieve the law, policy and implementation structures needed to eradicate the abuses. An example is Myanmar where, 20 years ago, an ILO Commission of Inquiry and a broad-based human rights campaigns against the then military government led a number of US and European apparel companies to cease all imports from the country. Subsequently, after a civilian government took office, there was cooperation between governments, employers' and workers' organisations, including a National Tripartite Dialogue Forum in early 2017, to address different forms of forced labour. The Myanmar experience shows how complaints and other mechanisms, originally designed to address SIFL, can create a national consensus for also addressing other forms of forced labour.

The Uzbekistan Cotton Pledge

In Uzbekistan, combined action by major importers has played a major role in persuading the government to commit itself to reforming the State system of forced labour in cotton production. Over 300 leading brands signed the Uzbekistan Cotton Pledge, committing them to not knowingly sourcing cotton from the country until the government stopped using forced labour in the cotton sector. Progress has been monitored through a Third Party Monitoring (TPM) mechanism led by the ILO. According to the latest TPM report, most forced labour has now been eliminated from Uzbekistan's cotton fields (though international NGOs have pointed to ongoing structural problems in Central Asian Republics including Turkmenistan and Uzbekistan).

Sharing experiences and learning lessons

It is important to document these experiences so that lessons can be shared. Companies could be encouraged to share their experiences in addressing SIFL concerns and cases of litigation they may have faced. This can help ensure that international institutions take more effective action. The ETI and initiatives such as the ILO Global Business Network on Forced Labour are useful vehicles for sharing lessons and experiences.

Exit strategies and protecting workers

In 2019, a US clothing company ceased all sourcing and production from a region of a country following widespread negative publicity about SIFL. Such pressure on companies is likely to grow, particularly in regions where SIFL has been widely documented. But it is important that companies pay careful attention to the impact of these actions on workers and should do everything they can to ensure that workers are not further punished, nor their safety jeopardised.

Combined action, preparing the ground for the policy and practical measures required to eradicate SIFL, will work effectively when the government of a country is willing to acknowledge the problems and cooperate with multi-stakeholder initiatives to address them. But if there is convincing evidence that the SIFL abuses are widespread and the government fails to take responsibility for perpetrating forced labour offences, companies are advised to cease their sourcing and business activities in an affected region of the country.

This can be a hard choice, particularly when the country in question is a major trading partner. Companies are advised to act together, and in cooperation with other informed experts, in weighing the evidence and determining the appropriate response. Transparency is essential as company actions and business practices will be open to scrutiny by independent observers. A basic principle is that companies can be held liable for perpetrating forced labour by benefiting from it, and have a duty to protect and respect workers' fundamental human rights. More national laws are in place or under consideration that will require mandatory reporting on Human Rights abuses.

ⁱ <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>
<https://www.ilo.org/global/topics/forced-labour/statistics/lang--en/index.htm>