Balancing Buyer and Supplier Responsibilities

Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0

*By the Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains, ABA Business Law Section**

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Introduction

This project was born of challenge, frustration, and hope. There is little doubt that workers in international supply chains are being abused, in the most

* This report is the product of the Working Group and reflects its rough (and sometimes hotly debated) consensus. While produced under the auspices of the Uniform Commercial Code Committee of the American Bar Association Business Law Section, the report has not been approved or endorsed by the Committee, the Section, or the Association. Accordingly, the report should not be construed to be the action of either the American Bar Association or the Business Law Section. Nothing contained herein, including the clauses to be considered for adoption, is intended, nor should it be considered, as the rendering of legal advice for specific cases or particular situations, and readers are responsible for obtaining such advice from their own legal counsel. This report and the clauses and other materials herein are intended for educational and informational purposes only. The lawyer who advises on the use of these clauses must take responsibility for the legal advice offered.

** David Snyder as chair and Susan Maslow as vice chair served as principal drafters of this report, particularly the introductory text and Version 1.0 of the MCCs, which served as the groundwork for this Version 2.0. Much of the drafting of the new contract clauses in Version 2.0 was undertaken *pro bono publico* by a team at Linklaters LLP, although the ultimate drafting was done (and ultimate drafting decisions made) by Snyder and Maslow with the support or at least acquiescence of the Working Group. David Snyder is Professor of Law and Director of the Business Law Program at American University, Washington College of Law, in Washington, D.C., and would like to acknowledge grant funding from the law school as well as travel funding from the American Bar Association. During the final stages of this project he served as a Fernand Braudel Senior Fellow at the European University Institute (Florence), whose grant support is gratefully acknowledged. He would also like to thank Katherine Borchert, Philip Killeen, Sophie Lin, and Alexandra Finocchio for excellent research assistance. Susan Maslow is a semi-retired partner at Antheil Maslow & MacMinn, LLP, in Bucks County, Pennsylvania. She is also chair of the Corporate Social Responsibility Subcommittee to Implement the ABA Model Principles on Labor Trafficking and Child Labor. Special thanks are due to Aditi Bagchi, Omri Ben-Shahar, Robert Hillman, Jonathan Lipson, Trang Nguyen, Kish Parella, and Salli Swartz.

† Sarah Dadush, Professor of Law at Rutgers Law School, led the Principled Purchasing Project to move the MCCs toward a more balanced allocation of responsibility for the human rights performance of supply contracts between buyers and suppliers. Specifically, the Project team produced MCCs that articulate the buyer's obligations to behave responsibly in relation to its supplier in order to better protect workers' human rights; the Project team also produced the Responsible Purchasing Code of Conduct, referred to as Schedule Q throughout the MCCs. The team is made up of Olivia Windham-Stewart, John F. Sherman III, and a team of lawyers acting *pro bono publico* from Linklaters LLP, and the Project benefited from a generous grant by the Laudes Foundation.

horrifying ways, even as they work to produce the staples of our everyday lives and indeed support much of our economy. Young children and enslaved people pick and process cocoa and coffee beans; they pick and process cotton; they sew clothes, weld steel, and assemble sporting goods; they mine rare minerals and extract valuable sources of energy. Many workers find themselves in injurious and even deadly working conditions, with people hurt and killed by the hundreds.[1] Supply chains can be riddled with modern forms of slavery, particularly debt-bonded labor.[2] Much has been invested in ameliorating these conditions but not enough. They continue,[3] and they are now sharpened and heightened by the enveloping crisis of the COVID-19 pandemic.

One of the crucial tools for addressing these problems is the contractual governance of supply chains. The Model Contract Clauses (MCCs) offered here seek to help companies implement healthy corporate policies in their supply chains in a way that is both legally effective and operationally likely. In general, the MCCs do not state the human rights performance standards themselves. The MCCs do not state what the working conditions must be like, how many fire exits are necessary, or what measures must safeguard against conflict minerals. The MCCs are designed for use across sectors, so the substantive standards will vary (clothing brands need no standards on conflict minerals, and electronics makers are not concerned with cotton sourcing). The human rights standards that the supplier must follow are assumed to be stated in what is here called Schedule P (P for Policy), and the standards that the buyer must follow are assumed to be stated

1. *See, e.g.*, Steve Henn, *Factory Audits and Safety Don't Always Go Hand in Hand*, NPR (May 1, 2013), http://www.npr.org/2013/05/01/180103898/foreignfactory-audits-profitable-but-flawed-business; Matt Stiles, *Documents: Wal-Mart Auditors Inspect Bangladesh Factory, Find Safety Flaws*, NPR (Apr. 30, 2013), http://www.npr.org/2013/04/30/180123158/documents-wal-mart-auditors-inspectbangladeshi-factory-find-safety-flaws.

2. The International Labour Organisation estimates that around 50 percent of victims of forced labor in the private economy are affected by debt bondage—around eight million people worldwide. *See Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, ILO (2017), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf; https://antislavery.org/slavery-today/bonded-labour.

3. *See, e.g.*, Annie Kelly, *Nestlé Admits Slavery in Thailand While Fighting Child Labour Lawsuit in Ivory Coast*, Guardian (Feb. 1, 2016), https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast (presenting Nestlé's instances of forced labor within its supply chains); Daniela Penha, *Slave Labor Found at Starbucks-Certified Brazil Coffee Plantation*, Mongabay (Sept. 18, 2018), https://news.mongabay.com/2018/09/slave-labor-found-at-starbucks-certified-brazil-coffee-plantation/ (finding slave labor in a Starbucks coffee bean supplier); Michael Sainato, *Accidents at Amazon: Workers Left to Suffer After Warehouse Injuries*, Guardian (July 18, 2018), https://www.theguardian.com/technology/2018/jul/30/accidents-at-amazon-workers-left-to-suffer-after-warehouse-injuries (revealing numerous instances of workplace injuries in Amazon's factories); Martje Theuws & Pauline Overeem, *Flawed Fabrics: The Abuse of Girls and Women Workers in the South Indian Textile Industry*, SOMO Ctr. Res. Multinational Corps. 17–30 (2014), http://www.indianet.nl/pdf/FlawedFabrics.pdf (reporting on women's labor conditions in five spinning mills: Best Cotton Mills, Jeyavishnu Spintex, Premier Mills, Sulochana Cotton Spinning Mills, and Super Spinning Mills); Pauline Overeem & Martje Theuws, *Case Closed, Problems Persist: Grievance Mechanisms of ETI and SAI Fail to Benefit Young Women and Girls in the South Indian Textile Industry,* SOMO Ctr Res. Multinational Corps. 21–23 (2018), http://www.indianet.nl/pdf/CaseClosedProblemsPersist.pdf (finding the grievance mechanisms for spinning mills did not provide remedy to affected workers and did not meet the requirements of the United Nations Guiding Principles).

in Schedule Q. Both Schedules P and Q are likely to take the form of codes of conduct, one for the supplier and one for the buyer. They are outside the scope of the MCCs themselves. This practice is typical. A purchase agreement consists largely, if not entirely, of legal obligations; the specifications for the goods themselves are often contained in separate schedules or in other documents. Although the Working Group cannot offer a model Schedule P because of the wide variation across industries, we do provide the building blocks for Schedule P for buyers that are starting to consider or are revising their expectations of their contracting partners. Because it is less industry-specific, a standard Schedule Q is offered, enumerating and explaining the responsible purchasing practices that buyers may be expected to follow.

The Model Contract Clauses offered below (MCCs 2.0) are designed as an improvement on and an alternative to those published three years ago (MCCs 1.0).[4] MCCs 1.0 were intended to harness supply contracts as one critical tool—among many—to put human rights policies into operation while managing company risk. Although many corporations have admirable human rights policies, mere policies can languish if they are not integrated into the operational and legal life of the company and particularly into the company's supply chains. MCCs 1.0 were drafted to give counsel a model to follow in operationalizing their companies' human rights policies, easing the task for overburdened corporate counsel, and giving the benefit of extensive research conducted by the Working Group.

MCCs 1.0 met with considerable interest and enthusiasm, and the Working Group received extensive feedback that was often supportive, sometimes critical, and sometimes both. The great interest in the project also led to the informal augmentation of the Working Group with many voices from outside the Business Law Section, which is the official location of the Working Group (under the auspices of the Uniform Commercial Code [U.C.C.] Committee). With that feedback, the Working Group embarked on a new version of the MCCs. Version 1.0 envisioned a business model where buyers were confronted with troublesome suppliers who would violate the human rights of workers; the buyers would need to manage this problem through contractual control of their suppliers, and the MCCs could help them do so. Additional research reveals, however, that human rights violations at the supplier level are often rooted in the buyers' own purchasing practices, particularly by timing demands, pricing pressures, and last-minute order modifications, as well as a lack of due diligence—turning a blind eye—to human rights issues. MCCs 2.0 accordingly assign contractual responsibility for human rights in the supply chain to the buyers as well as the suppliers. In these revised clauses, buyers commit to responsible purchasing practices while suppliers commit to responsible and ethical management of their

4. David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts*, 73 BUS. LAW. 1093 (2018) [hereinafter MCCs 1.0].

workforce and their subsuppliers. Crucially, both buyers and suppliers are required to engage in "human rights due diligence." These responsibilities are enforceable, although the legal remedies are not facile. MCCs 2.0 now include extensive provisions on human rights remediation as well as more standard contract remedies.

To many lawyers, the addition of buyer responsibilities is the most significant change from MCCs 1.0, but the shift from a regime of representations and warranties in MCCs 1.0 to a regime of human rights due diligence in MCCs 2.0 is at least as important. Several strong forces motivated this move. In any case, large multinational enterprises (MNEs) will likely find themselves subject to mandatory human rights due diligence. Human rights due diligence is already mandatory for companies meeting certain criteria under French law,[5] and regulatory efforts in a similar direction are well underway in European Union law.[6] Small and medium enterprises (SMEs) will benefit from a more realistic regime of due diligence rather than the strict liability of representations and warranties that, as a practical matter, will often be untrue and therefore routinely breached. In other words, MCCs 2.0 move from a demand that the supplier make a number of representations and warranties that both parties will perhaps know to be false, or doubtful, to a contractual expectation that all parties in the supply chain, from the buyer itself to its top-tier suppliers to the lowest level subcontractors, will all be duly diligent about human rights impacts. In some ways, due diligence is familiar as it is a constant in corporate practice. Still, many lawyers will find it new in two ways. Obviously, it is a move away from more

5. French Corporate Duty of Vigilance Law, Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 relating to the duty of care of parent companies and sponsoring undertakings], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 28, 2017, https://www.legifrance.gouv.fr/eli/jo/2017/3/28; *see also* Wet zorgplicht kinderarbeid [Dutch Child Labor Due Diligence Act], Wet van 24 oktober 2019, Stb., 2019, https://zoek.officielebekendmakingen.nl/stb-2019-401.html. While this piece was being prepared for the press, two new relevant acts were passed, one in Germany and another in Norway: Act on Corporate Due Diligence in Supply Chains, Federal Ministry of Labour and Social Affairs (Aug. 18, 2021), https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=A74A78EA8F08BAFCFE51BB8CDB1741AD.delivery1-replication?__blob=publicationFile&v=3 (providing an English translation of the German Act); Norwegian Transparency Act of 2021, https://stortinget.no/globalassets/pdf/lovvedtak/2020-2021/vedtak-202021-176.pdf (last accessed Nov. 20, 2021).

6. The announcement was made in April 2020 by EU Commissioner for Justice Didier Reynders that the European Commission will introduce legislation on mandatory human rights due diligence as part of the European Green Deal and the COVID-19 recovery package. *See generally* Eur. Parl. Comm. on Legal Affairs, *Draft Report with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability* (2020/2129(INL)) (Sept. 11, 2020); Eur. Parl. Subcomm. on Human Rights, *Briefings on Human Rights Due Diligence Legislation—Options for the EU* (PE 603.495) (June 2020). For an update on EU developments, see Jonathan Drimmer et al., *Pre-Draft of the EU Mandatory Corporate Due Diligence and Corporate Accountability Initiative: 10 Questions Businesses Need to Know*, Paul Hastings (Oct. 5, 2020), https://www.paulhastings.com/publications-items/details/?id=da731c70-2334-6428-811c-ff00004cbded. On March 10, 2021, the EU Parliament adopted the Draft Directive on Corporate Due Diligence and Corporate Accountability [hereinafter Draft Directive]. The Draft Directive was previously expected to be finalized and to come into force in 2021 but has encountered several legislative delays. If finalized, all Member States will have twenty-four months to adopt laws, regulations, and administrative provisions necessary to comply with the directive.

traditional contract drafting that centers on standard "reps and warranties." More fundamentally, human rights due diligence is not simply about assessment of corporate risk and assuring legal compliance but instead requires a consideration of stakeholders' (including workers') interests that are not identical to those of the contracting parties.

More broadly, MCCs 2.0 seek to align much more closely with the 2011 UN Guiding Principles on Business and Human Rights (UNGPs)[7] and with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises as well as the OECD Due Diligence Guidance for Responsible Business Conduct.[8] The UNGPs and OECD Guidelines and Guidance have enjoyed wide uptake by many businesses already, and the ABA itself has officially endorsed the UNGPs, as have numerous other bar organizations.[9] Aside from human rights due diligence, the UNGPs and the Guidelines drove several significant changes in MCCs 2.0. Human rights remediation is generally prioritized over typical contract remedies (like money damages), and issues like pricing, changes of circumstances (such as COVID-19), timing, and modifications are addressed expressly. In addition, the Working Group discovered that while many companies already have committed to respect human rights in their corporate codes of conduct, many are looking for help in doing so in their supply chains. Accordingly, we are offering guidance with respect to what buyers may require of their suppliers in the form of "Building Blocks for Schedule P" as well as guidance in the form of a Schedule Q that states the buyer's responsibilities. Schedule Q fills a gap in the supply chain governance arena because most codes of conduct apply to suppliers, not buyers. As there are few, if any, examples of buyer codes, Schedule Q is specific and detailed.

Some of these changes are path-breaking but necessary. As detailed below, the legislative move to mandatory human rights due diligence has already started. France led the way, with other countries considering similar legislation, and the European Union has announced that it will be moving in this direction. Large MNEs may already be subject to such rules because of their business in France or the Netherlands, and others may soon find themselves in a like

7. *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, annex, U.N. Doc. A/HRC/RES/17/31 (Mar. 21, 2011) (accessible at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [hereinafter UNGPs].

8. *See* OECD Guidelines for Multinational Enterprises (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf; OECD Due Diligence Guidance for Responsible Business Conduct (2018), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

9. The ABA House of Delegates endorsed the UNGPs in 2011 and has since been followed by the International Bar Association, the Law Society for England and Wales, the Japan Federation of Bar Associations, and the European Bars Federation [Fédération des Barreaux d'Europe (FBE)]. For a concise history of the background, content, and uptake of the UNGPs, see John F. Sherman III, *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights*, *in* Corporate Social Responsibility—Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century ch. 20, § 20.04 (Rae Lindsay and Roger Martella eds., 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561206.

position. That said, many companies find themselves very differently situated, and this project has always been intended for a broad range of companies, including SMEs. Further, different companies are in different places with respect to the commitments they want to make and the responsibilities they can undertake. For these reasons, the MCCs 2.0 *retain a fully modular approach so that companies can choose the commitments that best reflect their positions, their goals, and their sector of activity*. This is not a certification document; it is not a prix fixe menu. Companies are fully free to order their contractual provisions à la carte, choosing the clauses and the commitments that are right for them.

Version 1.0, the Chief Issues Addressed, and the Resolutions Retained in Version 2.0

This project was originally conceived as an effort in legal problem-solving, careful drafting, and research in order to move corporate commitments from mere policy statements to the legal and operational side of companies. It was instigated by a previous ABA project: after much effort and negotiation, the ABA adopted model principles against labor trafficking and child labor.[10] The Business Law Section had achieved some success in convincing companies to adopt these principles, but there was considerable concern that they were ineffective as mere policy statements. The Working Group was formed to operationalize them, in corporate parlance. The Working Group saw its mission as making corporate human rights policies legally effective and operationally likely. These twin goals remain our mantra.

The main challenge at the initial stage of the work was to solve the mismatch between commercial law rules and human rights law and standards. The problem is that goods made in unacceptable conditions might fully conform to product specifications. As we said then, "The background law does not deal easily with the problem of soccer balls that are perfectly stitched but that were sewn by child slaves."[11] The problem manifests itself primarily with respect to conformity and remedies, and MCCs 1.0 took on the task of resolving those issues. The first version of the MCCs was geared to solve a commercial law problem and to assure that the clauses would be likely to work with typical purchasing documents. They were designed as a helpful resource for companies' counsel.

10. There are both ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor (ABA Model Principles) and ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor (Model Policies). The ABA Model Principles are the high-level articulation of the detailed material in the Model Policies. The ABA Model Principles also form Part II of the Model Policies. Only the ABA Model Principles were adopted by the ABA House of Delegates, so only the ABA Model Principles represent the official position of the American Bar Association. For a detailed discussion, see E. Christopher Johnson Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 Bus. Law. 1083 (2015). For more information on the Model Principles Task Force, see ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor, http://www.americanbar.org/groups/business_law/initiatives_awards/child_labor.html (last accessed Nov. 20, 2021).

11. MCCs 1.0, *supra* note 4, at 1095. *See generally* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 Harv. L. Rev. 526 (2004).

The chief issues were making supplier obligations flow through the entire supply chain; allowing for traditional contract remedies along with human rights remediation even if suppliers' defaults did not lead to defective goods (e.g., perfect shirts that were made in extremely dangerous conditions); conceiving of mitigation as something other than resale at market prices (because the goods may be "perfect" but nevertheless tainted by their reprehensible provenance); allowing a full range of remedies in a less-than-promising international transaction; and structuring the relationship through the use of disclaimers to limit the liability of buyers. MCCs 1.0 offered solutions to these issues, and for the most part they remain in MCCs 2.0, although no solution is ideal. They were (and are) as follows.

- All responsibilities flow through the entire supply chain under broad definitions of subcontractors, employees, and representatives, and duties are imposed on all of them. See MCCs 2.0 ¶ 1.2.
- In MCCs 1.0, goods are nonconforming and the buyer has a right of rejection and cancellation or avoidance if the supplier has violated Schedule P. See MCCs 1.0 ¶ 2. This right remains in MCCs 2.0 unless the buyer failed to engage in responsible purchasing practices. See MCCs 2.0 ¶ 3. If the buyer did contribute to the problem, the situation is more complex. See MCCs 2.0 ¶¶ 2.3(e), 6.2(f), 6.5(b).
- Mitigation is reconceived (as is "acceptance" under U.C.C. § 2-606) in recognition of the possibility that reselling tainted goods might actually increase damages (e.g., through reputational harm and other consequential damage). Alternative mitigation could include donating the tainted goods to charity, for instance, unless other action is required by law, as when the U.S. trafficking statutes are implicated. See MCCs 2.0 ¶ 6.4.
- Remedies are still specified in detail, taking into account the particular problems of tainted but otherwise conforming goods, reputational harm, informational issues, and so on. See MCCs 2.0 ¶ 6. Nevertheless, MCCs 2.0 make clear that neither party should profit from breaches of ethical practice. See MCCs 2.0 ¶ 6.3(a). Further, remedies in MCCs 2.0 must be understood in conjunction with the commitment to human rights remediation of the problem (see ¶ 2) rather than termination of the relationship. This shift is discussed further below.
- Although some who have worked on the project have pushed hard to remove them, the disclaimers have been retained in modified form. Compare MCCs 1.0 ¶ 5.7, with MCCs 2.0 ¶ 7.

The treatment of disclaimers deserves further consideration. The problem is that a variety of legal doctrines may perversely discourage buyers from taking affirmative steps to identify and address human rights abuses in their supply chains. Typically, buyers have no enforceable duties to workers who are legally

separated from the buyers, and in most international supply chains, the workers are legally remote from the ultimate buyers (although buyers are prohibited under U.S. law from importing goods made with forced labor). If the buyer takes affirmative steps, however, it may become liable to workers for failing to use reasonable care in an undertaking that it willingly undertook. Further, some types of control by buyers over suppliers may sacrifice the suppliers' independent contractor status, which can be so important in shielding buyers from liability.[12] For these reasons, the disclaimers in MCCs 1.0 sought to maintain the legal independence of the suppliers, even though the buyer was imposing duties on its suppliers to keep the supply chain clean. For example, while a buyer might monitor its suppliers, MCCs 1.0 provide that the buyer assumes no *duty* to do so.[13]

Some buyers, of course, may have noncontractual legal duties to monitor, to disclose information, and so on; for instance, buyers who are federal contractors and therefore bound by the Federal Acquisition Regulation must "monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities."[14] And all buyers may have a duty to disclose the discovery of forced labor in their supply chains under some circumstances.[15] Further, buyers who commit to abide by the UNGPs or other norms may be under their own corporate duty to do just that, which will involve considerable involvement in keeping their supply chains clean.[16] Such buyers will monitor their suppliers on an ongoing basis to determine whether they are in compliance with Schedule P, and they must map their supply chains to determine whether their products are produced with human rights abuse at more remote links in the chain, below those suppliers with whom they have a direct contractual relationship. Such monitoring and mapping are fundamental to human rights due diligence under the UNGPs. None of this, however, means that contractual disclaimers are inappropriate. That buyers may have a regulatory or statutory duty, enforceable by the government, or their own corporate commitments to the UNGPs or other norms, does not mean that buyers will also want to incur

12. Consider the case law reviewed in Ramona Lampley, *Mitigating Risk, Eradicating Slavery*, 68 Am. U. L. Rev. 1707 (2019); David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 Am. U. L. Rev. 1869, 1902–03 (2019). Note the "trenchant observation of Judge Johnston that current tort doctrine encourages Western buyers to divorce themselves from the supply chain as much as possible and to 'ignore[] workplace safety' as a means to 'escape liability.'" Rahaman v. J.C. Penney Corp., No. N15C-07-174 MMJ, 2016 WL 2616375, at *9 n.68 (Del. Super. Ct. May 4, 2016). The complaint was originally filed in the United States District Court for the District of Columbia, naming Bangladesh as a defendant (No. 15-CV-00619-KBJ (D.D.C. filed Apr. 23, 2015)).

13. MCCs 1.0, *supra* note 4, ¶ 5.7.a.

14. FAR, 48 C.F.R. §§ 52.222-56, 22.1703(c)(1)(ii)(A) (2021).

15. *See, e.g.*, 18 U.S.C. § 541 (2018); 19 C.F.R. § 12.42(b) (2021). Foreign laws may also impose similar legal duties on U.S. companies doing business in or with their countries. *See supra* note 5.

16. *See generally* John Gerard Ruggie & John F. Sherman III, *Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice,* 6 J. Int'l Dispute Settlement 455 (2015), https://scholar.harvard.edu/files/john-ruggie/files/adding_human_rights_punch_to_the_new_lex_mercatoria.pdf.

parallel contractual (or tort) liability, enforceable by their contracting counterparties or other private plaintiffs, except as stated explicitly in the contract.

Buyer reluctance to take on additional liability to private plaintiffs should come as no surprise; millions of dollars are spent in litigation over implied private rights of action. The disclaimers simply say that the buyer takes on no contractual duties beyond those explicitly stated; the buyer may or may not owe duties for some other reason, but the disclaimer expressly rejects private contractual enforcement of such duties. The disclaimers thus do important work in protecting buyers who choose to become more involved in managing their supply chains rather than burying their heads in the sand. In short, they help companies manage their risk while they comply with their duties, being clear that some companies may wish to limit who can sue under the contract for alleged breaches of those duties. And to be clear, as just noted, the buyer in MCCs 2.0 does take on some explicitly stated contractual duties, as discussed in the next section. The disclaimers as drafted in MCCs 1.0 are flat, but in Version 2.0 the disclaimers are necessarily qualified: it would not be true to say that the buyer is taking on no obligation to monitor its supply chain, for instance. The buyer is taking on that and other responsibilities as part of its human rights due diligence in Article 1. Thus, the disclaimers remain in MCCs 2.0, but with exceptions for the obligations that the buyer takes on elsewhere in the agreement.[17]

The Move to Buyers Sharing Responsibility with Suppliers

A number of reasons have motivated the addition of buyer responsibilities, but two are compelling: protection for workers cannot happen successfully without buyer responsibility, and many buyers are now or will soon be legally required to take on this responsibility. These twin reasons are all the stronger because they are intertwined.

Buyers' purchasing practices can play a key role both in protecting and in harming workers. Version 1.0 of the MCCs was conceived on the notion that problems in the supply chain are caused by irresponsible suppliers, not by the ultimate buyer. This is in tension with the UNGPs, the research that supports them, and more recent research in conjunction with the drafting of MCCs 2.0.[18] In short, if the MCCs are to be successful, buyers need to follow responsible purchasing practices.

17. MCCs 2.0 ¶ 7.1(a)–(b) ("Buyer does not assume a duty under this Agreement . . . except as stated in Article 1 and 2".).

18. Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 Am. U. L. Rev. 1519, 1537–40 (2019) (citing Vijay Padmanabhan et al., The Hidden Price of Low Cost: Subcontracting in Bangladesh's Garment Industry (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659202); John F. Sherman III, *The Contractual Balance Between 'Can I?' and 'Should I?' Mapping the ABA's Model Supply Chain Contract Clauses to the UN Guiding Principles on Business and Human Rights*, Harv. Kennedy Sch. Working Paper No. 73 (Apr. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574811.

Extensive research has shed light on the realities of international supply chain contracting and the role of buyers' purchasing practices. The leaders of the Principled Purchasing Project, which is part of the Working Group, put together an extraordinary set of consultations during the summer of 2020. It is not necessarily the kind of rigorous empirical research from which findings may be generalized, but we did hear from many people in many sectors. Consultations were held with representatives of large Western buyers (including three companies that are certainly household names), with a third party that is often involved in remediation, with nongovernmental organizations and others from civil society, with investors committed to ESG values,[19] with representatives of multilateral international organizations, with standard setters and auditors, with union and labor advocates, with industry associations, and with suppliers from several countries in East and South Asia.[20] After these consultations and other research, the Working Group has no doubt that buyer demands, typically related to production times, price requirements, or change orders, can often cause or contribute to human rights violations. It has become clear that improving buyers' purchasing practices is central to protecting workers from human rights abuses. To be effective, the MCCs must provide mechanisms for buyers to share responsibility with suppliers.

To the business-minded lawyer, effectiveness must always be the ultimate goal, but any lawyer's mind is trained to home in on legal risks; developing legal requirements on human rights due diligence and increased legal enforcement of existing regulations heighten the need for buyers to focus on their responsibility. It is still true that policing supply chains carries risks,[21] and candid lawyers must acknowledge as much to their clients.[22] But the countervailing risks have been heavy for some time, and they are becoming even weightier now. When MCCs 1.0 were published, companies were already concerned with a variety of compliance obligations, particularly around federal trafficking, forced labor, and child labor statutes, as well as disclosure obligations under some state and foreign laws.[23] Many of these may have seemed like paper obligations, and companies seldom if ever felt the brunt of any enforcement. That

19. That is, environmental, social, and governance values.

20. The consultations were held under Chatham House rules, so identifying information cannot be disclosed here. In all, over fifty people were consulted, representing roughly forty to fifty organizations.

21. *See supra* note 12 and accompanying text.

22. *See* Model Rules Prof'l Conduct 2.1 (2021) (duty to provide candid advice to clients).

23. MCCs 1.0, *supra* note 4, at 1095 (citing Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7114 (2018); 18 U.S.C. §§ 1589–1592 (2018) (criminal sanctions for forced labor, trafficking, and peonage); Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA) (Title XII of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-04, 127 Stat. 54); Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Pub. L. No. 114-125, 130 Stat. 122 (2016); Cal. Civ. Code Ann. § 1714.43 (2021); Federal Acquisition Regulation, 48 C.F.R. §§ 52.222–50 to 52.223-7 (2021); UK Modern Slavery Act 2015, c. 30; French Corporate Duty of Vigilance Law, *supra* note 5; Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1); *see also* Australian Modern Slavery Act 2018 (Cth) No. 153 part 2; Dutch Child Labor Due Diligence Act, *supra* note 5.

has changed, and U.S. Customs and Border Protection has now seized numerous cargoes under withhold release orders issued pursuant to antitrafficking laws.[24] Corporate boards and officers can no longer afford attractive but ineffective corporate policies. Few current risk assessments will be able to justify turning a blind eye to the problems.

And if U.S. Customs enforcement were not enough to spur action, new legislation has also begun to require companies to be responsible for their supply chains, and not just concerning child labor, forced labor, and conflict minerals, but also with respect to working conditions and workers' health and safety. For many years, admittedly, companies had few seriously enforced legal incentives to clean their supply chains. That landscape changed when France passed its duty of vigilance law in 2017 and the Netherlands passed a similar Child Labor Diligence Act in 2019.[25] The EU is now showing every sign of following suit.[26] These changes are discussed in the next section, but the point for now is that both operational effectiveness and legal obligation, in practice and on paper, require buyers to take responsibility for their supply chains. MCCs 2.0 help them to do that.

The Move from Representations and Warranties to Human Rights Due Diligence

The same two reasons—operational effectiveness and enforced legal requirements—that compel the addition of buyer responsibilities within MCCs 2.0 also require the move from representations and warranties to human rights due diligence. For many MNEs there is not much of a risk calculus on this score; simply put, human rights due diligence is currently required by French law and Dutch law and will likely be required very soon by EU law.[27] Even for MNEs that are not subject to French and Dutch law and that will not be subject to EU law, and for SMEs in similar circumstances, the move still makes sense. The regime of representations and warranties, with their accompanying strict liability—if they are not true, there is breach—is unrealistic and ineffective, and often so much so as to be downright fictitious. Frequently, this regime is thought to lead to what is called a "tickbox" or "checkbox" approach to supply chain management in which buyers require a laundry list of representations of compliance from their suppliers. Suppliers mechanistically provide them by checking the boxes, and everyone

24. *See, e.g.*, Press Release, U.S. Customs & Border Protection, CBP Issues Detention Order on Palm Oil Produced with Forced Labor in Malaysia (Sept. 30, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-palm-oil-produced-forced-labor-malaysia. After a long period when enforcement was rare, U.S. CBP has issued roughly eighteen "withhold release orders" (WROs) in the last twelve months (as of Oct. 11, 2020). Some link this surge in enforcement to multimillion dollar settlements by buyers. *See* Andy Hall, *Statement on Top Glove's Estimated US$40m Reimbursement of Migrant Worker Recruitment Related Fees and Costs*, Facebook (Oct. 5, 2020), https://m.facebook.com/story.php?story_fbid=10157620591885677&id=675065676.

25. *See supra* note 5.

26. *See supra* note 6.

27. *See supra* notes 5–6 and accompanying text. Although it is narrower because it is limited to child labor, the Dutch statute of 2019 similarly imposes a due diligence regime. *See supra* note 5.

goes home happy (although they may be more than a little resentful of time wasted filling forms). Little is achieved.[28]

The move from representation-and-warranty to due diligence is eminently practical, then, and should be reassuring to the parties. The participants in the supply chain are no longer being asked, unrealistically and fictitiously, to literally guarantee perfect compliance with the human rights and safety standards in Schedule P and the principled purchasing practices in Schedule Q. Instead, they are being required to be duly diligent, on an ongoing basis, about achieving those goals. This is not mere aspiration; the parties are contractually obligated to use reasonable means to achieve the goal. But there is no longer strict liability for failure of perfect compliance. And there is no longer the knowledge, certain to both parties, that the human rights obligations of the contract are breached the moment it is signed.

Although warranty rather than due diligence is the usual style of contract drafting in common law countries, diligence obligations are no stranger to the common law. Notions of good faith efforts or best efforts are standard in many contracts for sales of goods,[29] and due diligence accords well with the *obligation de moyens*, which is sometimes even called an *obligation de diligence*, in the civil law.[30] To some, the switch may seem surprising; after all, if human rights are so crucial, should the parties not be expected to be strictly liable rather than merely to use appropriate efforts? Yet, given the size and complexity of many supply chains, the varying capabilities of different companies, from the largest MNEs to the most modest SMEs, due diligence is the better regime. These inescapable facts are recognized in the UNGPs. Under Guiding Principle 24, businesses are entitled to prioritize and focus their attention on the most severe human rights harms or on harms that would become irremediable in the event of a delayed response. Not everything can be made perfect, ever, much less all at once. Perfection is not and cannot be the standard. Priorities are necessary, as is reflected in MCCs 2.0, particularly sections 2.3(c) and 2.5.

Human rights due diligence is a prospective, retrospective, and ongoing risk management process that enables businesses to respect human rights by identifying, preventing, mitigating, and accounting for how they address the impacts of their activities on human rights.[31] To be effective, it requires understanding

28. D. A. Baden et al., *The Effect of Buyer Pressure on Suppliers in SMEs to Demonstrate CSR Practices: An Added Incentive or Counter Productive?*, 27 Eur. Mgmt. J. 429, 435 (2009); *see also* James Harrison, *Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment*, 2 Impact Assessment & Project Appraisal 107, 111, 115 (2013), https://www.tandfonline.com/doi/full/10.1080/146155 (explaining that due diligence "could degenerate into a 'tick-box' exercise designed for public relations purposes rather than a serious integral part of corporate decision-making"); *see also* Ruggie & Sherman, *supra* note 16, at 460.

29. *See, e.g.*, U.C.C. § 2-306 (2011).

30. For basic explanations of the *obligation de moyens* or *de diligence* and its relation to other kinds of obligations with stricter liability, such as the *obligation de résultat* or the *obligation déterminée*, see Martin Davies & David V. Snyder, International Transactions in Goods: Global Sales in Comparative Context 437–41 (2014).

31. See the UNGPs, *supra* note 7, especially Principles 11, 17–22, 29, and 31.

the perspective of potentially affected individuals or "stakeholders," and engagement with stakeholders pervades each stage of the process. It is understood within the context of the UNGPs and the subsequent OECD Guidelines and Guidance.[32] The OECD Due Diligence Guidance provides enterprises with the flexibility to adapt due diligence to their circumstances, recognizing that the nature and extent of diligence will be affected by the size of the enterprise, the context of its operations, and other factors. Specific guidance for SMEs seeking to implement effective human rights due diligence processes can also be found in the Guidance.[33] In addition, the OECD has produced sector-specific due diligence guidance for the minerals, extractives, agriculture, garment and footwear, and financial sectors, as well as guidance that applies across sectors. Like the Guiding Principles, a key aspect of the OECD Due Diligence Guidance is to carry out and improve the diligence process on an ongoing basis. Although the language is not well suited for contract clauses, the following list provides a good, though not exhaustive, understanding of the concept. Human rights due diligence includes:

(i) embedding responsible business conduct into the culture of the company through leadership, incentives, policies, and management systems;

(ii) identifying and assessing actual and potential adverse human rights impacts, throughout the supply chain, that the contract-related activities may cause or contribute to, or that may be directly linked to the operations, products, or services contemplated by the contract;

(iii) ceasing, preventing, and mitigating such adverse impacts;

(iv) tracking and monitoring, in consultation and collaboration with internal and external stakeholders, the success of mitigation or prevention;

(v) communicating how adverse impacts are addressed, mitigated, or avoided; and

(vi) providing for or cooperating in remediation where appropriate.[34]

As can be appreciated from this list, while due diligence is familiar to corporations and their counsel, human rights due diligence is not coterminous with the kind of due diligence undertaken for a merger or a public offering. Human rights due diligence goes beyond technical legal compliance and includes the need to look at risks through the perspective of the stakeholder, as learned through engagement with the stakeholder; the prioritization of responsive action by severity of impact on the stakeholder; the need to search on an ongoing basis for human rights risks throughout the entire supply chain, and not just the first few tiers; the

32. OECD Due Diligence Guidance, *supra* note 8.
33. *See* OECD Due Diligence Guidance, *supra* note 8, at 9, 18, Annex Questions 6, 7, and Table 4.
34. See the introduction to Section II of the OECD Due Diligence Guidance, *supra* note 8.

development of leverage to influence contractual parties to refrain from, mitigate, or remediate harm to human rights; and the need to go beyond the limits of local law. In other words, human rights due diligence is a necessary part of ongoing supply chain management; it is proactive, forward and backward looking, responsive to actual or potential impacts, and requires meaningful and regular engagement with stakeholders. Under the present law, to some degree, and under the law as it is developing, those impacts are part of the inescapable responsibility of the contracting parties, and that is why they are the focus of the first obligation stated in MCCs 2.0.

Express Treatment of Human Rights Remediation

Human rights remediation receives extensive treatment in MCCs 2.0. In contrast, MCCs 1.0 provide for termination on breach but assume the parties would not actually move to termination except in the rarest and most egregious circumstances. Instead, the parties would work to remediate the problem by taking measures to stop and correct the harm and to address any grievances. Termination, generally speaking, is in no one's interest. The buyer does not want to suffer the disruption and incur the delay or switching costs to transfer its business to new suppliers. The supplier certainly does not want to lose business. And except in the most extreme circumstances, the workers do not want to lose their jobs and their livelihood, such as it is. MCCs 1.0 give the buyer a termination right, which would increase the buyer's leverage, as contemplated by the UNGPs and OECD Guidelines,[35] in order to require human rights remediation by the supplier. In this way MCCs 1.0 are similar to many loan documents that allow a lender to call a loan upon default, accelerating all amounts due and requiring immediate payment, even though in most circumstances everyone expects the loan to be sent to "workouts" where efforts can be made to salvage the loan. Of course, not all loan documentation works this way, and similarly, MCCs 1.0 provide an alternative for notice and cure if the parties want to provide contractually for human rights remediation.[36]

Because everyone should contemplate remediation in almost all circumstances, MCCs 2.0 flip the position of MCCs 1.0 and provide for remediation expressly and extensively.[37] In addition, remediation is not solely the responsibility of

35. *See* UNGPs, *supra* note 7, Commentary to Principle 19; OECD Guidelines, *supra* note 8, § II, art. 3.2.

36. *See* MCCs 1.0, *supra* note 4, ¶¶ 2.3 (cancellation and avoidance), 2.5 (no right to cure), at 1099–1100 & n.30 (suggesting in a footnote an alternative clause for notice and cure to allow remediation).

37. MCCs 2.0 ¶ 2 (remediation); *see also id.* ¶ 2.4 (right to cure). It is an interesting question of contract design to decide whether a contractual termination right, like that in ¶ 2.3 of MCCs 1.0, *supra* note 4, should be included in transactions that do not contemplate its use but instead contemplate remediation (or in commercial practice, a workout). A termination right that will seldom be used might be conceived as a supracompensatory remedy that in a competitive market will be undesirable. *See generally* Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 Yale L.J. 369 (1990). For that reason, the switch to the scheme in MCCs 2.0 is perhaps desirable. The relevant market may not be competitive, however, and for that

the supplier; the buyer must participate if it has caused or contributed to the problem.[38] These provisions are not only in keeping with the shared responsibility of buyers and suppliers but also seem especially appropriate in cases where the buyer has caused or contributed to the harm. On the other hand, and perhaps just as obviously, cases may arise where the conduct is so egregious that immediate termination is required, with no opportunity for remediation, and MCCs 2.0 provide expressly for this as well.[39] These cases involve what are often called zero-tolerance activities.

Force Majeure, Responsible Exit, COVID-19, and Other Disruptions

The radical disruptions of COVID have caused new problems in supply chains and exacerbated old ones. MCCs 2.0 address these problems with two innovative provisions.[40] MCCs 2.0 acknowledge that the intervention of an event like COVID, or a particularly vicious monsoon, or political unrest, or countless other events, could upset the supply chain in a way that the goods could only be produced in violation of the commitments in Schedule P. Often these violations occur because of unauthorized subcontracting. In the case of COVID, lack of personal protective equipment could make production unsafe. These events may or may not constitute a force majeure, and the outcomes of judicial decisions on this issue are notoriously unpredictable under the U.C.C. and international sales law.[41] Judicial resolution of disputes in international supply chains is often impractical anyway. For these reasons, the clauses themselves provide guidance.

Notably, they apply to any "reasonably unforeseeable, industry-wide or geographically specific, material change" regardless of whether the change constitutes a force majeure. A supplier may exit the relationship without default if staying in the relationship would force it to breach Schedule P. When it comes to buyers wanting to exit the relationship, for whatever reason, including a force majeure event or something similar, the clauses impose on the buyer a duty to "consider the potential adverse human rights impacts and employ commercially reasonable efforts to avoid or mitigate them," regardless of the reason for exit. In light of claims that many buyers abandoned their suppliers when the COVID-19 lockdowns set in without compensating them—even for completely manufactured goods, and, in some cases, even for goods that had already been

reason a buyer with bargaining power may prefer the termination right. The greater buyer leverage might arguably increase the chance of forcing remediation as well, but this will depend on the particular facts of the market and the parties' place in it, and even if so, overweening buyer power to terminate may undermine valuable cooperation and be counterproductive for that reason. These issues arise from holdup problems in supply chain contracting generally, and the Working Group fully admits that it has not solved those problems (and further believes that whoever does solve those problems will probably get a Nobel Prize in economics to show for it).

38. MCCs 2.0 ¶ 2.3(e).

39. *Id.* ¶ 2.4.

40. MCCs 2.0 ¶¶ 1.3(e)–1.3(f).

41. *See* U.C.C. §§ 2-613, 2-615 (2011); CISG art. 79. *See generally* Davies & Snyder, *supra* note 30, at 326–27.

shipped[42]—MCCs 2.0 add that "[t]ermination of this Agreement shall be without prejudice to any rights or obligations accrued prior to the date of termination, including, without limitation, payment that is due for goods."

These clauses hardly solve all the problems of force majeure, COVID, and similar events. Nothing can. But they bring human rights into the equation and may help the parties reach resolutions that take into account a broad view of the interests involved.

The Addition of Dispute Resolution in MCCs 2.0

Because the MCCs are drafted as an addition to a primary sales agreement, Version 1.0 contains no provision for dispute resolution. Presumably choice of law, choice of forum, arbitration, or the like would be treated in the main agreement. After publication of MCCs 1.0, the Working Group learned more about the special context of dispute resolution that involves human rights, and for that reason MCCs 2.0 add two relevant provisions.

Most prominently, clauses on nonjudicial dispute resolution have been added. For companies that prefer to litigate rather than arbitrate, litigation remains an option. (Alternative drafting is offered in MCCs 2.0 ¶ 8.6, so companies can choose arbitration or litigation.) Still, even companies that want judicial resolution of ultimate disputes may benefit from pre-litigation efforts at amicable resolution, and these mechanisms are set up in this new version. This kind of collaborative resolution is consonant with the more cooperative approach now taken in much cutting-edge supply chain management. Many companies will find the "up the line" scheme to be consistent with their management practices in many other business contexts.[43]

In addition, as MCCs 2.0 align more closely with the UNGPs, an "operational level grievance mechanism" is set up to address problems as they arise.[44] This mechanism is informal, but it is nevertheless required, and it must be fully functional. Again, its purpose—to be "legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue with affected stakeholders, including workers"—will

42. *See* Jeffrey Vogt et al., Farce Majeure: How Global Apparel Brands Are Using the COVID-19 Pandemic to Stiff Suppliers and Abandon Workers, https://www.ecchr.eu/en/publication/die-ausrede-der-hoeheren-gewalt (last accessed Nov. 20, 2021).

43. *See* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 Colum. L. Rev. 1377, 1404 (2010); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 Colum. L. Rev. 431, 442 (2009); Susan Helper, John Paul MacDuffie, & Charles F. Sabel, *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism* 9 Indus. & Corp. Change 443, 449 (2000). In addition, governments adhering to the OECD Guidelines set up a National Contact Point (NCP) to further the effectiveness of the OECD Guidelines by, among other activities, helping to resolve disputes. The NCP in the United States provides a nonjudicial grievance mechanism with a mediation and conciliation platform.

44. MCCs 2.0 ¶ 1.4.

align with many companies' efforts toward collaborative supply chain management. Further, it is required for consistency with the UNGPs.[45]

Conclusion: Companies Can Choose the Commitments that Suit Their Needs and Goals

A modular approach is the central drafting strategy of the MCCs in both versions. The Working Group fully recognizes that not all companies are in the same place. Not only do they possess differing capabilities and face varying contexts, they are simply in different positions in their approach to human rights. Some companies—often those that have been involved in the worst problems—have advanced far in taking responsibility for the effects of their business on human rights. Other companies have taken only a few steps, and many have not yet started on the path. The MCCs are drafted for all of these companies and are designed so that counsel, with a minimum of effort, can adapt them to the particular circumstances of each company.

The Working Group has faced calls to require buyers to agree to all of the clauses, to prohibit "cherry-picking," and to mandate a particular allocation of responsibility. And the Working Group has faced criticism for failing to do so, or for rejecting goals that can only be aspirational. These calls and criticisms misconceive the place of the Working Group. We cannot impose duties or mandate compliance. Nor have we chosen an aspirational mission. We are a creature of the Uniform Commercial Code Committee of the ABA Business Law Section, and we see ourselves as practical lawyers. The original and ongoing goal to draft clauses that are "legally effective and operationally likely" can only be achieved if companies adopt the clauses. Otherwise the MCCs will be relegated to even greater irrelevance than the corporate policies that languish, unused, in the minute books of board meetings. Accordingly, the MCCs are drafted so that companies can eliminate clauses that do not fit their goals; they can use MCCs

45. UNGP 29, *supra* note 7. MCCs 2.0 have been very much influenced by the groundbreaking work in the Hague Rules on Business and Human Rights Arbitration (2019). At the same time, it should be noted that many are skeptical of arbitration in the context of human rights, particularly because of experiences in investment arbitration. Arbitration can be seen as favoring corporate interests over human rights, with biased arbitrators and confidentiality provisions that protect wrongdoers and hamstring balanced advocacy. For some of the leading discussion, see generally Kyle D. Dickson-Smith & Bryan Mercurio, *Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples?*, 40 Sydney L. Rev. 213, 219–20 (2018); Duy Vu, *Reasons Not to Exit? A Survey of the Effectiveness and Spillover Effects of International Investment Arbitration*, 47 Eur. J. L. & Econ. 291, 307 (2019); Alessandra Arcuri & Francesco Montanaro, *Justice for All? Protecting the Public Interest in Investment Treaties*, 59 B.C. L. Rev. 2791, 2792 (2018); Luke E. Peterson & Kevin R. Gray, International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration 12–13, 27 (2003). Much of the criticism, however, is based on investor-state dispute resolution, and there are significant distinctions between investor-state disputes and supply chain disputes. The former generally involve states and investors; the latter are generally disputes between two sets of businesses. The numerous international arbitrations between business entities should speak favorably about the positive aspects of arbitration. Article 8 of MCCs 2.0 gives parties both arbitration and litigation options, and the annotations provide further discussion of the issues involved.

1.0 if MCCs 2.0 are too much; they can adapt everything[46] to meet their needs. For many companies, the most critical step is the first one—to start taking measures to improve their contracts. If the Working Group can make it easier to take that first step, we will have accomplished one of our most important objectives. That is not our only objective, however. We hope to provide guidance for companies that would like to move into a leadership position. We have tried to achieve balance while understanding that different companies walk on different tightropes in different tents.

We began with the confession that challenge, frustration, and hope were the catalysts for this project, and their powerful combustion continues to move the project forward. After publication of MCCs 1.0, it became clear that an ambitious effort toward revision would be needed to meet the goals of the project, which at its center is focused on improving the human rights of workers and other stakeholders, practically and immediately, through contracts—one of the most potent tools available. At the same time, we know that more needs to be learned, that new methods of supply chain management are coming into use, that new laws are in the offing, and that more work will need to be done. For now, we believe MCCs 2.0 offer a practical tool for companies that want to commit to protecting workers and other stakeholders in their international supply chains. It is not an easy task. The problem is spread across the world and results from countless factors, including basic economic realities. It will not be fixed soon, and it will not be fixed by supply chain reform alone or by contract clauses standing by themselves. This is the challenge. And it is sometimes frustrating that the problem can seem intractable, particularly since so many people, with different missions, different incentives, and different perspectives, contend for so many different solutions. Still, we believe that every effort can help and that practical solutions offered for even the most complex problems can result in real improvements in the lives of real people. That is our ultimate objective.

Contents

46. In this introduction, we have not tried to catalog all of the changes, or even all of the significant changes, from MCCs 1.0 to 2.0, but we are confident that counsel will readily identify problematic clauses in any case.

CLAUSES TO BE INSERTED INTO SUPPLY CONTRACTS, PURCHASE ORDERS, OR SIMILAR DOCUMENTS FOR THE SALE OF GOODS

The text proposed assumes that buyers are located in the United States and that the applicable law is either (a) U.S. state law that implements the Uniform Commercial Code without material nonuniform amendment or (b) the United Nations Convention on Contracts for the International Sale of Goods (the CISG, a treaty to which the United States is a party and which applies to many international sales of goods under CISG article 1(1)(a)).

For the most part, substantive human rights standards and ethical purchasing practices are not contained in these clauses and are instead assumed to be specified in Schedule P and Schedule Q, respectively. For companies that do not already have substantive human rights requirements for their suppliers, "Building Blocks for Schedule P" is included separately to provide guidance. A pro forma Schedule Q is also provided separately. In the clauses below, please refer to the footnotes for explanations of risks, statutory and case law, and human rights guidance from the UN Guiding Principles on Business and Human Rights (the Guiding Principles or UNGPs) and the 2011 OECD Guidelines for Multinational Enterprises (the OECD Guidelines) as well as the 2018 OECD Due Diligence Guidance for Responsible Business Conduct (the OECD Due Diligence Guidance).

1 ***Mutual Obligations with Respect to Combatting Abusive Practices in Supply Chains***. As of the Effective Date[47] of this Agreement, Buyer and Supplier each agree:

1.1 *Human Rights Due Diligence.*[48]

(a) Buyer and Supplier each covenants to establish and maintain a human rights due diligence process appropriate to its size and circumstances to identify, prevent, mitigate, and account for how each of Buyer and Supplier addresses the impacts of its activities on the human rights of individuals directly or indirectly affected by their supply chains, consistent with the 2011 United Nations Guiding Principles on Business and Human Rights.[49] Such human rights due diligence shall be consistent with guidance from the Organisation for Economic Co-operation and Development for the applicable party's sector (or, if no such sector-specific guidance exists, shall be consistent with the 2018 OECD Due Diligence Guidance for Responsible Business Conduct (the OECD Due Diligence Guidance)).[50]

(b) [Buyer and Supplier each] [Supplier] shall and shall cause each of its [shareholders/partners, officers, directors, employees,] agents and all subcontractors, consultants and any other person providing staffing for Goods[51] or services required by this Agreement (collectively, such party's "Representatives") to disclose information on all matters

47. An effective date may not be necessary, but the parties may prefer an "Effective Date" to be either the date of this Agreement or the date when all conditions precedent are satisfied. Alternatively, parties may want to set a period during which certain, but not all, obligations under this Agreement are effective. Presumably a certain level of human rights due diligence [hereinafter HRDD] will have been done by Buyer before engaging in extensive negotiations with prospective suppliers. Note that the HRDD contemplated in the following clauses goes beyond the customary know-your-customer, anti-money laundering, and other due diligences that companies may otherwise employ, as explained more fully in the introduction. *See supra* notes 27–34 and accompanying text. Note further that the Effective Date is referenced in Section 1.1(d) to include pre-signing remediation plans.

48. *See supra* notes 27–34 and accompanying text (on HRDD under the UNGPs and OECD).

49. *See* UNGPs 15–19, *supra* note 7.

50. *See supra* note 8.

51. "Goods" is assumed to be defined earlier in the Agreement (and not defined in Schedule P). *See also infra* Section 3.2 (on the definition of "Nonconforming Goods").

relevant to the human rights due diligence process in a timely and accurate fashion to [the other party] [Buyer].

(c) For the avoidance of doubt, each party is independently responsible for upholding its obligations under this Section 1.1, and a breach by one party of its obligations under this Section 1.1 shall not relieve the other party of its obligations under this Agreement.

(d) Human rights due diligence hereunder may include implementation and monitoring of a remediation plan to address issues identified by due diligence that was conducted before the Effective Date.

1.2 *Schedule P Compliance Throughout the Supply Chain.*[52] Supplier shall ensure that each of its Representatives acting in connection with this Agreement shall engage with Supplier and any other Representative in due diligence in accordance with Section 1.1 to ensure compliance with Schedule P. Such relationships shall be formalized in written contracts that secure from the parties terms [in compliance with] [equivalent to those imposed by] [at least as protective as those imposed by] Schedule P.[53] Supplier shall keep records of such written contracts to demonstrate compliance with its obligations under this Agreement and shall deliver such records to Buyer as reasonably requested.[54]

1.3 *Buyer's Commitment to Support Supplier Compliance with Schedule P.*[55]

(a) *Commitment to Responsible Purchasing Practices*. Buyer commits to support Supplier's compliance with Schedule P by engaging in responsible purchasing practices [in accordance with Schedule Q].

(b) *Reasonable Assistance*. If Buyer's due diligence determines Supplier requires assistance to comply with Schedule P, Buyer, if it elects not to terminate this Agreement under Section 2.5, shall employ

52. Guiding Principle 13 requires that businesses avoid causing or contributing to human rights harms through their own activities, address such impacts where they occur, and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships. Accordingly, this clause seeks to embed obligations to comply with human rights through the entire supply chain. In keeping with the modular approach of these clauses, businesses may want to circumscribe their responsibility in line with the degree to which they are connected to the activities of the business.

53. The content of Schedule P is beyond the scope of this document. Note, however, that some suggest the best practice is to avoid reference to specific laws in favor of a general reference because legislative initiatives are broader in some countries than in others. In the event that the drafter nevertheless wishes to require that Supplier specifically represent compliance with antitrafficking and similar legislation, consider avoiding the term *applicable*, which will limit required adherence by companies that do not meet the size or revenue requirements of certain legislation. This might present a problem where the law applies to Buyer, because of its size, but not Supplier, because of its (relatively small) size.

54. UNGP 21, *supra* note 7, requires businesses to communicate externally, particularly where concerns are raised by affected stakeholders, and sets out standards for the form, frequency, adequacy, and confidentiality of such human rights reporting. *See also* UK Modern Slavery Act, *supra* note 23, § 54.

55. See *supra* note 49 on UNGPs 15–19.

commercially reasonable efforts to provide such assistance],[56] which may include Supplier training, upgrading facilities, and strengthening management systems.[57]] Buyer's assistance shall not be deemed a waiver by Buyer of any of its rights, claims or defenses under this Agreement or under applicable law.

(c) [*Pricing*. Buyer shall collaborate with Supplier to agree on a contract price that accommodates costs associated with upholding responsible business conduct, [including, for the avoidance of doubt, minimum wage and health and safety costs, at a standard at least as high as required by applicable law [and International Labour Organisation norms]].[58]]

(d) *Modifications*. For any material modification (including, but not limited to, change orders, quantity increases or decreases, or changes to design specifications) requested by Buyer or Supplier, Buyer and Supplier shall consider the potential human rights impacts of such modification and take action to avoid or mitigate any adverse impacts, including by amending the modification [consistent with Schedule Q]. If Buyer and Supplier fail to agree upon modifications and/or amendments that would avoid a Schedule P breach, then either party may initiate dispute resolution in accordance with Article 8.

(e) *Excused Non-Performance*. If (i) Supplier provides notice and reasonably satisfactory evidence to Buyer that a Schedule P breach is reasonably likely to occur because of a requested modification or because of a

56. As market standards are unlikely to provide adequate measures for what constitutes "reasonable assistance," Buyer's obligations are articulated in Schedule Q.

57. Parties may consider deeming the cost of reasonable assistance to be a setup or mobilization expense associated with Supplier's preparing to provide goods to Buyer. For example, if Schedule P obligations effectively require that Supplier make capital improvements to meet Schedule P targets that may go beyond the minimum requirements of applicable law, Supplier's costs for such compliance may qualify for reasonable assistance from Buyer. Depending on the circumstances, Buyer and Supplier may determine that such assistance should be provided as a single payment at the beginning of the term of the Agreement or the parties may decide to spread assistance over time, over units delivered, or otherwise. Where assistance is provided over time, the parties should clearly state when such assistance might be suspended or whether such assistance would be accelerated on early termination.

58. In cases where the parties want to support a "living wage" under the Agreement, they are encouraged to review their costing using established methodologies, such as Fair Wear's labor-minute costing tools, and living wage estimates found at https://www.fairwear.org/programmes/lw-tools-and-benchmarks and to consult definitions such as that provided by the Global Living Wage Coalition, which defines a living wage as "[t]he remuneration received for a standard workweek by a worker in a particular place sufficient to afford a decent standard of living for the worker and her or his family. Elements of a decent standard of living include food, water, housing, education, health care, transportation, clothing, and other essential needs including provision for unexpected events," and the ACT-endorsed definition, which is, "The minimum income necessary for a worker to meet the basic needs of himself/herself and his/her family, including some discretionary income." This should be earned during legal working hour limits (i.e., without overtime). *What Is a Living Wage?*, GLOB. LIVING WAGE COAL., https://www.globallivingwage.org/about/what-is-a-living-wage/ (last visited Jan. 30, 2021); *How Does ACT Define a Living Wage?*, ACT, https://actonlivingwages.com/living-wages/ (last visited Jan. 30, 2021).

reasonably unforeseeable, industry-wide or geographically specific, material change to a condition affecting Supplier;[59] (ii) the parties cannot agree on a solution that avoids breach of Schedule P; and (iii) Supplier elects not to perform in order to avoid breaching Schedule P, then the parties hereby agree that this Agreement or a specific purchase order hereunder may be terminated in whole or in part by Supplier and that Supplier shall not be in default of its obligations under this Agreement as a result of such non-performance.[60]

(f) *Responsible Exit*. In any termination of this Agreement by Buyer, whether due to a failure by Supplier to comply with this Agreement or for any other reason (including the occurrence of a force majeure event or any other event that lies beyond the control of the parties),[61] Buyer shall (i) consider the potential adverse human rights impacts and employ commercially reasonable efforts to avoid or mitigate them; and (ii) provide reasonable notice to Supplier of its intent to terminate this Agreement. Termination of this Agreement shall be without prejudice to any rights or obligations accrued prior to the date of termination, including, without limitation, payment that is due for acceptable goods produced by Supplier pursuant to Buyer's purchase orders before termination.[62]

1.4 *Operational-Level Grievance Mechanism*.[63] During the term of this Agreement, Supplier shall maintain an adequately funded and governed nonjudicial Operational-Level Grievance Mechanism ("OLGM") in order to effectively address, prevent, and remedy any adverse human rights impacts that may occur in connection with this Agreement. Supplier shall ensure that the OLGM is legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue with affected stakeholders,

59. For example, if a supplier lacks sufficient personal protective equipment (PPE) to protect its workers in a pandemic to allow for normal operations, it should not be found in breach.

60. This provision is intended to address not only change orders but force-majeure-like events that go beyond a simple change in conditions affecting a single supplier.

61. This phrasing should be adapted to the phrasing of any force majeure clause in the main supply contract to be sure the provision can harmonize with the parties' agreed approach to and definition of a force majeure event.

62. It is not uncommon for buyers to exert their leverage—such as threats of termination—to require discounts or other benefits from suppliers. However, this type of behavior is unlikely to be upheld in courts, and this provision is meant to allow Supplier to enforce its rights despite any superior leverage that Buyer may have. Buyer is required to satisfy all obligations accrued prior to termination, including payment in full for goods produced without violation of Schedule P.

63. Guiding Principle 29 provides that all businesses must have in place an OLGM to resolve human rights disputes early and directly through engagement and dialogue with stakeholders. It is part of the businesses' ongoing HRDD responsibility. Guiding Principle 22 expects that businesses should cooperate with or participate in legitimate remedial processes when the businesses recognize that they have caused or contributed to an adverse impact. Legitimate processes can include state judicial and nonjudicial dispute resolution mechanisms, as well as nonstate nonjudicial mechanisms. Under Guiding Principle 31, all nonjudicial dispute resolution mechanisms, state and nonstate, should meet the effectiveness criteria enumerated in the text of the clause. *See* UNGPs, *supra* note 7.

including workers. Supplier shall maintain open channels of communication with those individuals or groups of stakeholders that are likely to be adversely impacted by potential or actual human rights violations so that the occurrence or likelihood of adverse impacts may be reported without fear of retaliation. Supplier shall demonstrate that the OLGM is functioning by providing [monthly] [quarterly] [semi-annual] written reports to Buyer on the OLGM's activities, describing, at a minimum, the number of grievances received and processed over the reporting period, documentary evidence of consultations with affected stakeholders, and all actions taken to address such grievances.

2 ***Remediating Adverse Human Rights Impacts Linked to Contractual Activity***.

2.1 *Notice of Potential or Actual Violations.*

(a) Within _____days of (i) Supplier having reason to believe there is any potential or actual violation of Schedule P (a "Schedule P Breach"), or (ii) Buyer's receipt of any oral or written notice of any potential or actual Schedule P Breach, Supplier shall provide to Buyer a detailed summary of (1) the factual circumstances surrounding such violation; (2) the specific provisions of Schedule P implicated; (3) the investigation and remediation that has been conducted and/or that is planned as informed by implementation of the OLGM process set forth in Section 1.4; and (4) support for Supplier's determination that the investigation and remediation has been or will be effective, adequate, and proportionate to the violation.

(b) If Supplier reasonably believes that Buyer's breach of Buyer's obligations under Section 1.3 caused or contributed to the Schedule P Breach and that remediation of the Schedule P Breach requires Buyer's participation under Section 2.3(e), Supplier shall notify Buyer and provide details supporting its claim. If Buyer rejects Supplier's allegation, Buyer shall provide Supplier with its written explanation rejecting Supplier's position. In such case, the Dispute (hereinafter defined) shall be resolved under Article 8.

(c) Supplier hereby designates (name) (title) at (email address) and Buyer designates (name) (title) at (email address) to send/receive all notices provided under this Section 2.1 [and in addition notices shall be given as specified in Section ____ for general notices under this Agreement].

2.2 *Investigation.*

(a) Upon receipt of a notice under Section 2.1, Buyer and Supplier shall fully cooperate with any investigation by the other party or their representatives. Without limitation, such cooperation shall include,

upon request of a party, working with governmental authorities to enable both Supplier and Buyer or their agents to enter the country, to be issued appropriate visas, and to investigate fully.

(b) Each party shall provide the other with a report on the results of any investigation carried out under this Section; provided that any such cooperation in the investigation does not require Buyer or Supplier to waive attorney-client privilege, nor does it limit the defenses Supplier or Buyer may raise.

2.3 *Remediation Plan*.[64]

(a) If Buyer becomes aware of a Schedule P Breach[65] that has not been effectively remediated, Buyer shall, in collaboration with Supplier's other buyers where legally appropriate,[66] require Supplier to prepare a remediation plan (a "Remediation Plan").

(b) The purpose of the Remediation Plan shall be to restore, to the extent commercially practical, the affected persons to the situation they would have been in had the adverse human rights impacts not occurred. [The Remediation Plan shall enable remediation that is proportionate to the adverse impact and may include apologies, restitution, rehabilitation, financial and non-financial compensation, as well as prevention of additional adverse impacts resulting from future Schedule P violations.][67]

(c) The Remediation Plan shall include a timeline and objective milestones for remediation, including objective standards for determining

64. Remediation is both retrospective and prospective. It is retrospective because it attempts to make people whole for the harm they have suffered. It is prospective because it seeks to prevent recurrence. In this way, remediation is embedded within HRDD. The forms of remediation in the clause are based on the commentary to UNGP 25, *supra* note 7.

65. Under UNGP 24, *supra* note 7, businesses are entitled to prioritize and focus their attention on the most severe human rights harms or harms that become irremediable if there is a delayed response. A "severe harm" is characterized by its gravity, the number of people affected, and the ability to make people whole. *See id.* UNGP 14 (defining in commentary what contributes to the severity of harm).

66. Research suggests that cooperation among buyers who all purchase from the same troubled supplier can be especially effective, but buyers should keep in mind any applicable antitrust or competition laws. Counsel should consider, for example, FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990); Letter from A. Douglas Melamed, Acting Ass't Att'y Gen., U.S. Dep't of Just., to Kenneth A. Letzler, Arnold & Porter (Oct. 31, 1996) (Business Review Letter on Apparel Industry Partnership development of standards for manufacturing under humane conditions). The context of these authorities is different, however, and buyers should consider concerted efforts with the benefit of research and advice of counsel. Note that ethical and safety concerns do not necessarily allow activities otherwise proscribed by the antitrust laws. *See* Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679 (1978) (association's refusal to bid on price due to concerns about safety was per se an unlawful boycott). In response to the COVID-19 pandemic, the Department of Justice Antitrust Division issued a number of expedited Business Review Letters to provide requested guidance on permissible cooperation among competitors. At the time of writing, it is not known whether similar Business Review Letters may be available to facilitate human rights remediation if the parties implement appropriate safeguards to mitigate the risks of anticompetitive behavior.

67. The bracketed language comes from the commentary to UNGP 25, *supra* note 7; companies committed to the UNGPs will likely want to retain the language for that reason.

when such remediation is completed and the breach cured.[68] Supplier shall demonstrate to Buyer that affected stakeholders and/or their representatives [and/or a third party acting on behalf of such stakeholders][69] have participated in the development of the Remediation Plan.[70] [The Remediation Plan may contemplate recourse to the dispute resolution mechanisms set forth in Article 8, as appropriate.]

(d) Supplier shall provide [reasonably satisfactory] evidence to Buyer of the implementation of the Remediation Plan and shall demonstrate that participating affected stakeholders and/or their representatives are being regularly consulted. Before the Remediation Plan can be deemed fully implemented, evidence shall be provided to show that affected stakeholders and/or their representatives have participated in determining that the Remediation Plan has met the standards developed under this Section.

68. "Cured" may have different meanings in other contexts. In this case, a "completed" remediation or "cured" breach may include an ongoing activity (e.g., periodic monthly reports on compliance).

69. Ideally, all adversely impacted stakeholders would be granted enforcement rights under this Agreement, but there are significant commercial and practical obstacles to granting such third-party beneficiary rights. For that reason, Section 7.2 disclaims third-party rights under the contract. If parties wish to include such rights, however, they may consider the language proposed in Corporate Accountability Lab, Towards Operationalizing Human Rights and Environmental Protection in Supply Chains: Worker-Enforceable Codes of Conduct (Feb. 2021), https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/6026fd326aa9cd4f88697a20/1613167923256/Towards+Operationalizing+Human+Rights+and+Environmental+Protection+in+Supply+Chains.pdf (last accessed Feb. 23, 2021):

> 1.1. The Parties to this [Purchase Order/Agreement] acknowledge and agree that the terms of [Schedule P/Schedule Q] are intended to benefit and protect not only the Parties but also persons directly impacted by (1) Supplier's activities performed under this [Purchase Order/Agreement] and (2) activities by subsuppliers that the Supplier contracts with to perform under this [Purchase Order/Agreement]. Such persons include but are not limited to workers, land owners, property owners, those residing, working, and/or recreating in proximity to supply chain activities who are injured or suffer damages due to breach of [Schedule P/Schedule Q], including survivors of those killed or disabled. Such persons are intended third-party beneficiaries to [Schedule P/Schedule Q].
>
> 1.2. All intended third-party beneficiaries of [Schedule P/Schedule Q] have the right to enforce [Schedule P/Schedule Q] against Parties in any court or tribunal that has jurisdiction over the [Buyer/Supplier or Purchase Order/Agreement].
>
> 1.3. Third-party beneficiaries may assign their rights to a labor union, nongovernmental organization, or other organizations providing legal assistance they select.

Parties adopting this language will need to consider its relation to other dispute resolution mechanisms and should note in particular the clause (¶ 1.2) on jurisdiction.

70. The OECD Due Diligence Guidance recommends that remediation be risk based, prioritizing the most severe risks for corrective action. OECD Due Diligence Guidance, *supra* note 8, at 34–35, Annex Questions 41–45 and 48–54. The appropriate remediation will depend on the nature and extent of the harm and the prioritization of risk. For example, many buyers choose to rate forced labor and child labor as high risk or Zero Tolerance; *see* Section 2.5. Buyer may refuse Goods originating from a factory where such Zero Tolerance breaches have taken place and may require rigorous comprehensive remediation of that factory while maintaining the contract with other factories operated by Supplier when appropriate.

(e) If Buyer's breach of Section 1.3 has caused or contributed[71] to the Schedule P Breach or the resulting adverse human rights impact, Buyer shall participate in the preparation and implementation of the Remediation Plan, including by providing assistance [which may include in-kind contributions, capacity-building[72] and technical or financial assistance] that is proportionate to Buyer's contribution to the Schedule P Breach and the resulting adverse impact.

(f) A Remediation Plan under this Article 2 or under Section 1.1(d) shall be a fully binding part of this Agreement.

2.4 *Right to Cure.*[73]

(a) In the event of a breach by Supplier of its obligations under Schedule P, Buyer shall give notice under Section 2.1(a), which shall trigger a [commercially reasonable] cure period [as set forth under this Agreement] [as agreed by the mutual written agreement of the parties (each acting in good faith and in a commercially reasonable manner)].[74] Such breach shall be considered cured when Supplier has met the standards set out in Sections 1.4 and 2.3.

(b) If such breach is not cured within the period designated under Section 2.4(a), or is incapable of being cured, Buyer may [cancel]

71. The OECD Guidelines (as well as the UNGPs) concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products, or services by their business relationships. See OECD Guidelines, *supra* note 8, at 20; UNGP 13, *supra* note 7. The OECD Guidelines further provide that an enterprise "contributes to" an adverse impact or harm "if its activities, in combination with the activities of other entities cause the impact, or if the activities of the enterprise cause, facilitate or incentivise another entity to cause an adverse impact"; however, the "contribution must be substantial, meaning that it does not include minor or trivial contributions." *Id*. at Annex Question 29. Furthermore, the term "business relationship" is broad and "includes relationships with business partners," including franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants," advisers, entities in the supply chain, and "other non-State or State entities directly linked to its business operations, products or services." *Id*. at 10, 23. The OECD Guidelines further provide that where a harm is directly linked to the operations, products, or services of a business, the business must use its leverage to influence the entity causing the harm to prevent or mitigate it. *See id*. at 24. Under UNGP 22, *supra* note 7, businesses are responsible for providing remediation where they caused human rights harm directly through their own operations and where they contributed to harm caused by others. As under the OECD Guidelines, where a business is only linked to an adverse impact, it must use its leverage to influence the parties that caused or contributed to the impact to remediate. Thus, where Buyer fails to take reasonable action to address a Schedule P Breach promptly after becoming aware of it, Buyer may be deemed to have contributed to any ongoing harm.

72. The term *capacity building* is found in the OECD glossary of statistical terms as the "[m]eans by which skills, experience, technical and management capacity are developed within an organizational structure (contractors, consultants or contracting agencies)—often through the provision of technical assistance, short or long term training, and specialist inputs (e.g., computer systems). The process may involve the development of human, material and financial resources." *Glossary of Statistical Terms: Capacity Building*, OECD (Aug. 22, 2002), https://stats.oecd.org/glossary/detail.asp?id=5103.

73. A right to cure is essential to the ability of Supplier to avoid the human rights harms to workers and others that may result from the termination by Buyer of the Agreement.

74. Section 2.4 has been drafted broadly to provide Buyer and Supplier flexibility in crafting an appropriate industry-specific protocol for addressing Schedule P breaches by Supplier.

[avoid][75] this Agreement under Section 6.2(e) and, with or without such [cancellation] [avoidance], may exercise any of its remedies under Article 6 or applicable law.

2.5 *Right to Immediate Termination*. Notwithstanding any other provision of this Agreement, this Agreement may be immediately [canceled] [avoided] by Buyer under Section 6.2(e), without providing a cure period, if Supplier has engaged in a Zero Tolerance Activity. A "Zero Tolerance Activity" shall be any of the following activities if they were not disclosed promptly by Supplier to Buyer during due diligence under Section 1.1: (a) activities that would cause Buyer to be the subject of prosecution or sanction under civil or commercial laws whether national, regional or international; (b) activities that would expose Buyer to criminal liability; (c) activities prohibited by the Foreign Corrupt Practices Act of 1977 (as amended); (d) instances where it becomes apparent that Supplier cannot, in the absence of assistance from Buyer under Section 1.3(b), perform this Agreement without material or repeated violation of Schedule P; and (e) others specified in Schedule P.[76] Such termination shall be effectuated in compliance with Section 1.3(f) on responsible exit.

3 ***Rejection of Goods and [Cancellation] [Avoidance] of Agreement.***

3.1 *[Strict Compliance*. It is a material term of this Agreement that Buyer, Supplier, and Representatives shall engage in due diligence in accordance with Sections 1.1 and 1.2 so as to ensure compliance with Schedule P.]

3.2 *Rejection of Nonconforming Goods*. In the event of a Schedule P Breach by Supplier that renders the Goods Nonconforming Goods, Buyer shall have the right to reject them[77] unless Buyer's breach of its obligations under Section 1.3 [and/or Schedule Q] materially caused or contributed to the Schedule P Breach. Goods are Nonconforming

75. "Cancel" for contracts governed by the U.C.C.; "avoid" for those governed by the CISG. Both terms imply that the Agreement is being ended because of a breach. The agreement may be "terminated" even without a breach. *See* U.C.C. § 2-106(3) (2011). The drafting here follows the U.C.C. loosely in this regard but not strictly; the U.C.C. distinguishes between cancellation for breach of the agreement and termination "otherwise than for its breach." In the drafting of this Agreement, "termination" may or may not be for breach of the Agreement.

76. *See supra* note 70 (discussing risk prioritization). This clause attempts to balance the fact that certain violations of human rights are ultimately better addressed through the Remediation Plan process set forth above, as compared to other violations that cannot be tolerated even for an instant, the Zero Tolerance Activities. This is a difficult line to draw at times, and there is some divergence in practice and across legislation as to what may be tolerated and what is absolutely prohibited. Where these lines are drawn and what may or may not be permissible are issues for each Buyer and Supplier to address based on applicable laws and policies. Note also the Supplier's right to immediate termination without default under *supra* Section 1.3(e).

77. See U.C.C. §§ 2-601, 2-602 (2011).

Goods if the Buyer cannot resell them in the ordinary course of business or if the goods cannot pass without objection in trade or if the Goods are associated with a Zero Tolerance Activity.[78]

3.3 *[Cancellation.] [Avoidance.]* The following shall be deemed to [substantially impair the value of this Agreement to Buyer][79] [constitute a fundamental breach of the entire Agreement][80] and Buyer may [cancel] [avoid][81] this entire Agreement with immediate effect and without penalty and/or may exercise its right to indemnification and all other remedies: (a) a breach by Supplier of Schedule P that relates to a Zero Tolerance Activity, or (b) Supplier's failure to timely complete its obligations under a Remediation Plan. Buyer shall have no liability to Supplier for such [cancellation] [avoidance] but shall employ commercially reasonable efforts to comply with Section 1.3(f).

3.4 *Timely Notice.* Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ____ of this Agreement and] [Articles 38 to 40 of the CISG] [and U.C.C. §§ 2-607 and 2-608]),[82] Buyer's rejection of any Goods[83] as a result of noncompliance with Schedule P shall

78. Nonconforming Goods are presumably defined elsewhere in the Agreement, for example, with respect to conformity to product specifications. This section clarifies that goods that conform to product specifications may nevertheless be rejected in the circumstances specified in the text. The U.S. Customs and Border Protection (CBP) has the authority to detain merchandise at a port of entry if information reasonably, even if not conclusively, indicates that it is mined, manufactured, or produced, wholly or in part, by forced labor, including convict labor, forced child labor, or indentured labor under WROs issued under 19 U.S.C. § 1307 (2018). If CBP issues a WRO against a Supplier or Representative, as it has done eighteen times between September 2019 and October 2020, importers of detained shipments are provided an opportunity to export their shipments or submit proof to CBP that the merchandise was not produced by forced labor. If the goods cannot be released into U.S. markets because of a WRO or otherwise sold where and when Buyer intended, Buyer must have the right to reject the Goods as Nonconforming Goods. Similarly, if Buyer cannot sell the goods in the ordinary course of business, it should have the right to reject the Goods unless Buyer's own actions caused or contributed to the problem in a material way.

79. Because the perfect tender rule of U.C.C. § 2-601 does not apply to installment contracts, installment contracts governed by the U.C.C. should include the phrase within the first bracket.

80. The phrase within the second bracket is applicable for agreements to which the CISG applies, whether for a single delivery or an installment contract, under article 49.

81. *Cancellation* occurs when a "party puts an end to the contract for breach by the other" under U.C.C. § 2-106(4). *Avoidance* is the appropriate term under CISG article 49.

82. Articles 38–40 of the CISG require that Buyer examine the goods or cause them to be examined within as short a period as is practicable. Buyer loses the right to rely on a lack of conformity if Buyer does not give Supplier notice within a reasonable time after Buyer discovers or ought to have discovered a defect and, at the latest, within two years of the date of delivery (or other contractual period) unless Supplier knew or could not have been unaware of the defect. Because U.C.C. § 2-607(3)(a) provides a similar argument that Buyer's failure to notify Supplier of a breach within a reasonable time bars any remedy, this contractual text is included to limit disputes about what constitutes a reasonable time. If the U.C.C. is referenced in the text, the applicable state version should be cited.

83. "Nonconforming Goods" and "Inspection Period" are assumed to be defined earlier in the Agreement. Nevertheless, Nonconforming Goods are defined specifically for purposes related to human rights policies in Section 3.2.

be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.

4 [***Revocation of Acceptance.***[84]

4.1 *Notice of Buyer's Discovery.* Buyer may revoke its acceptance, in whole or in part, upon notice sent [in accordance with Section ___] of Buyer's discovery that the Goods are Nonconforming Goods unless Buyer's breach of its obligations under Section 1.3 materially caused or contributed to the Schedule P Breach. Such notice shall specify the nonconformity or nonconformities that Buyer has discovered at that point, without prejudice to Buyer's right to specify nonconformities that it discovers later.

4.2 *Same Rights and Duties as Rejection.* [Upon revocation of acceptance, Buyer shall have the same rights and duties as if it had rejected the Goods before acceptance.]

4.3 *Timeliness.* Notwithstanding any provision of this Agreement (including without limitation [the Inspection Period in Section ____ of this Agreement and] U.C.C. § 2-608), Buyer's revocation of acceptance of any Goods under this Article 4 shall be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.]

5 ***Nonvariation of Matters Related to Schedule P.***

5.1 *Course of Performance, Established Practices, and Customs.* Course of performance and course of dealing (including, without limitation, any failure by Buyer to effectively exercise any audit rights) shall *not* be construed as a waiver and shall *not* be a factor in Buyer's right to reject Nonconforming Goods, [cancel] [avoid][85] this Agreement, or exercise any other remedy. Supplier acknowledges that with respect to the matters in Schedule P, any reliance by Supplier on course of performance, course of dealing, or similar conduct would be unreasonable. Supplier acknowledges the fundamental importance to Buyer of the matters in Schedule P and understands that no usage or practice established between the parties should be understood otherwise, and any apparent conduct or statement to the contrary should not be relied upon.[86]

84. The clauses on revocation of acceptance are designed for use in contracts governed by the U.C.C. and are drafted with U.C.C. § 2-608 in mind. They should be omitted in contracts governed by the CISG. For this reason, Article 4 is bracketed.

85. *Cancel* for agreements under the U.C.C., *avoid* for the CISG. *See supra* note 81.

86. The first phrase uses the terminology of U.C.C. section 1-303, and the second phrase uses the terminology of CISG article 9(1).

5.2 *No Waiver of Remedy*. Buyer's acceptance of any Goods in whole or in part will not be deemed a waiver of any right or remedy[87] nor will it otherwise limit Supplier's obligations, including, without limitation, those obligations with respect to indemnification.

6 ***Buyer Remedies.***

6.1 *Breach and Notice of Breach*. Upon breach by Supplier, Buyer may exercise remedies to the extent provided in this Article 6. Prior to the exercise of any remedies pursuant to Section 6.2, Buyer shall notify Supplier in accordance with Section 2.1. Such notice, if with respect to an actual violation, constitutes notice of default under this Agreement.[88]

6.2 *Exercise of Remedies*. Remedies shall be cumulative. Remedies shall not be exclusive of, and shall be without prejudice to, any other remedies provided hereunder or at law or in equity. Buyer's exercise of remedies and the timing thereof shall not be construed in any circumstance as constituting a waiver of its rights under this Agreement. Buyer's remedies include, without limitation[89]:

(a) Demanding adequate assurances from Supplier of due performance in conformity with Schedule P [after Buyer makes similar assurances to Supplier of its due performance under Section 1.3 [and/or Schedule Q]].

(b) Obtaining an injunction with respect to Supplier's noncompliance with Schedule P (in which case, the parties represent to each other and agree that noncompliance with Schedule P causes Buyer great and irreparable harm for which Buyer has no adequate remedy at law and that the public interest would be served by injunctive and other equitable relief).

87. U.C.C. § 2-601 (2011).

88. U.C.C. § 2-607(3)(a) requires notice of a breach within a reasonable time after constructive discovery of the breach. A buyer who fails to give such notice will find its claims barred, with many courts holding that pre-suit notice is required.

89. This section reflects the remedies provided in the FAR, 48 C.F.R. § 52.222-50, relative to combating trafficking in persons. Additionally, the clause adds an insecurity provision under U.C.C. § 2-609. The clause also clarifies that injunctive relief may be necessary. In addition, while Buyer may want to work with a Supplier toward full compliance, Buyer should be prepared to face waiver arguments. The timing of the exercise of remedies is sensitive, and the exercise of remedies and any requests for damages may themselves have adverse impacts on human rights. This provision expressly recognizes that such careful consideration of the exercise of remedies by Buyer does not constitute a waiver. Note also that the remedies provisions here do not mention setoff. *See* 11 U.S.C. §§ 506(a)(1), 553 (2018) (setoff is a secured claim in bankruptcy). If setoff, recoupment, claw back, or similar remedies are not already provided elsewhere in the Agreement, counsel may wish to consider making such rights explicit in this clause.

(c) Requiring Supplier to terminate an agreement or affiliation with a specific factory, terminate a subcontract or remove an employee or employees and/or other Representatives.[90]

(d) Suspending payments, whether under this Agreement or other agreements, until Buyer determines, in Buyer's reasonable discretion, that Supplier has taken appropriate remedial action following the expiration of the cure period indicated in Section 2.4(a).[91]

(e) [Avoiding] [Canceling] this Agreement if permitted by Sections 2.4(b), 2.5, or 3.3.

(f) Obtaining damages, including all direct and consequential damages caused by the breach; *provided, however*, that damages shall be reduced proportionately to the degree that Buyer's breach of Section 1.3 [and/or Schedule Q] caused or contributed to Supplier's breach of Schedule P.

6.3 *Damages*. Buyer and Supplier acknowledge:

(a) Neither Buyer nor Supplier should benefit from a Schedule P violation or any human rights violation occurring in relation to this Agreement.

90. Buyer's ability to direct its supplier's operations or require the removal of an employee or employees can give rise to claims of undertaking liability or liability under the peculiar risk doctrine. *See* Rahaman v. J.C. Penney Corp., No. N15C-07-174MMJ, 2016 WL 2616375, at *9 (Del. Super. Ct. May 4, 2016). There is also concern about becoming a joint employer and thereby opening exposure or liability. Counsel should consider very carefully whether it is better to have the power to make such demands (e.g., require that Supplier fire employees or other Representatives, or terminate or suspend a relationship with a particular factory) or whether it is more important to forego this power in an effort to maintain independent status and concomitant lower risk of liability.

91. Some supply contracts will call for payment by letter of credit, which will complicate the right to suspend payment. When a documentary credit is involved, the supply contract and letter of credit should require presentation of a certificate of compliance with Schedule P. Under U.S. law, a false beneficiary's certificate could allow an injunction against payment on grounds of "material fraud by the beneficiary on the issuer or applicant." *See* U.C.C. § 5-109(b) (2011). Purposeful falsity of the certificate might perhaps be helpful even if suit must be in London or in a jurisdiction following English law, which requires fraud on the documents. The leading case from the House of Lords is United City Merchs. (Invs.) Ltd. v. Royal Bank of Can., [1983] AC 168, 183 (HL) (referring to "documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue"); *see also* Inflatable Toy Co. Pty. Ltd. v. State Bank of NSW Ltd., [1994] 34 NSWLR 243 (Austl.) (applying Australian law). If the violation of Schedule P constitutes an illegal act, the illegality theory may also be useful in a suit governed by English law. In any case, the certificate should be required to be dated within a reasonably short time of the draw. Many banks probably will not object to the requirement of an additional certificate as certificates (e.g., by SGS) are commonplace in such transactions, and environmental certificates are similar to (and in some cases may be the same as) a certificate of compliance with Schedule P. While some banks may resist the requirement of such a certificate because of fear of injunction actions and the concomitant extension of the credit risk if the injunction is ultimately denied, most banks seem unlikely to be concerned by the requirement of one more certificate, and any additional credit risk from an injunction may be mitigated by a bond or other credit support as contemplated by U.C.C. § 5-109(b)(2) and comment 7, or by the civil procedure laws or rules of certain jurisdictions requiring posting of a bond, or by collateralization or bonding provisions in the reimbursement agreement itself. Still, despite all of these efforts, suspension of payment may be impossible in cross-border documentary credit transactions because frequently a foreign bank will have honored before the injunction can issue. Once one bank honors in good faith, the commitments along the chain become firm and cannot be enjoined. *See* U.C.C. § 5-109 (2011).

If damages are owed that would result in a benefit to Buyer or Supplier, such amounts should go toward supporting the remediation processes set out in Section 1.4 and Article 2. A "benefit" is here understood to mean being put in a better position than if this Agreement had been performed without a Schedule P Breach. Nothing herein limits the right of a party to be put in the position it would have been in had this Agreement been performed without a Schedule P Breach.

(b) [If there are insufficient funds to pay damages and complete the remediation processes set out in Section 1.4 and Article 2, remediation shall take priority.]

(c) [It may be difficult for the parties to fix damages for injury to business, prospects, and reputation with respect to Nonconforming Goods produced in violation of Schedule P, and in such case, liquidated damages must be paid by Supplier to Buyer as follows: [insert amount or formula for calculation.]][92]

6.4 *Return, Destruction or Donation*[93] *of Goods; Nonacceptance of Goods.*

(a) Buyer may, in its sole discretion, store the rejected Nonconforming Goods for Supplier's account, ship them back to Supplier or export them or, if permitted under applicable law, destroy or donate the Nonconforming Goods, all at Supplier's sole cost, expense, and risk, except to the extent that Buyer has caused or contributed to the nonconformity by breach of Section 1.3 [and/or Schedule Q].

(b) Buyer is under no duty to resell any Nonconforming Goods produced by or associated with Supplier or its Representative who Buyer has reasonable grounds to believe has not complied with Schedule P, whether or not such noncompliance was involved in the production of the specific Nonconforming Goods. Buyer is entitled to discard, destroy, export or donate any such Nonconforming Goods. Notwithstanding anything contained herein to the contrary or instructions otherwise provided by

92. U.C.C. § 2-718(1) on liquidated damages prohibits penalties, providing that "unreasonably large liquidated damages [are] void as a penalty." The ultimate enforceability of these provisions will turn on whether the exercise of the remedy in the contractual clause was reasonable. Particular care should be exercised if Buyer demands liquidated damages in addition to other damages. These provisions are bracketed so that counsel can consider the most appropriate damages provisions in the relationship.

93. Donation of goods manufactured or otherwise delivered with the use of forced labor may not be permitted by the U.S. Customs and Border Protection, Cargo Security, Carriers and Restricted Merchandise Branch, Office of Trade. Buyer's only option as an importer may be to return or export the goods. Other countries may have similar restrictions on the possession and ownership of merchandise mined, produced, or manufactured in any part with the use of a prohibited class of labor, and such laws, restricting taking title to, or possession of, tainted goods, are beyond the scope of this document. These restrictions must be examined before donations are made.

Supplier, destruction or donation of Nonconforming Goods rejected [or as to which acceptance was revoked],[94] and any conduct by Buyer required by law that would otherwise constitute acceptance, shall not be deemed acceptance and will not trigger a duty to pay for such Nonconforming Goods.[95] Buyer and Supplier represent and agree that this Section and any related Sections are an effort to mitigate damages, as selling, profiting from, and being associated with tainted goods or Nonconforming Goods is likely to be damaging to Buyer, including to Buyer's reputation.

6.5 *Indemnification; Comparative Fault Calculation*.

(a) Supplier shall indemnify, defend and hold harmless Buyer and its officers, directors, employees, agents, affiliates, successors and assigns (collectively, "Indemnified Party") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, penalties, fines, costs or expenses of whatever kind, including, without limitation, the cost of storage, return, export or destruction of Goods, the difference in cost between Buyer's purchase of Supplier's Goods and replacement Goods, reasonable attorneys' fees, audit fees that would not have been incurred but for Supplier's Schedule P Breach, and the costs of enforcing any right under this Agreement or applicable law, in each case, that arise out of the violation of Schedule P by Supplier or any of its Representatives. This Section shall apply, without limitation, regardless of whether claimants are contractual counterparties, investors, or any other person, entity, or governmental unit whatsoever.

(b) Notwithstanding Section 6.5(a), Supplier's obligation to indemnify Buyer shall be reduced proportionately to the degree that Buyer's breach of Section 1.3 [and/or Schedule Q] caused or contributed to Supplier's breach of Schedule P; in other words, for the avoidance of doubt, damages shall be borne by Buyer directly to the extent Buyer has materially caused or contributed to the breach of Schedule P.[96]

94. *See supra* note 84 (on revocation of acceptance).

95. This section is drafted to address concerns that might be raised with respect to the U.C.C. § 1-305 mandate to place the aggrieved party in the position of its expectation, without award of consequential or penal damages unless specifically allowed, particularly with respect to minimizing damages. *See also* U.C.C. § 2-715 (2011) (consequential damages cannot be recovered if they could have been prevented). An attempt by Buyer to avoid mitigation might be seen as a lack of good faith. Nevertheless, reselling goods that are produced in violation of a human rights policy may be understood as increasing Buyer's damages, rather than reducing them. Accordingly, Buyer should be entitled to discard, destroy, export, or donate to a charity any goods produced in violation of a human rights policy as an attempt toward mitigation, rather than against it.

96. For example, if Supplier agrees to a change order requested by Buyer and the parties should know that Supplier will be unable to perform without violating Schedule P, indemnification to Buyer must be reduced to the extent, pro rata, that Buyer caused or contributed to the harm. This clause sets up a mechanism akin to a comparative fault regime.

7 ***Disclaimers.***

7.1 *Negation of Buyer's Contractual Duties Except as Stated.* Notwithstanding any other provision of this Agreement:

(a) Buyer does not assume a duty under this Agreement to monitor Supplier or its Representatives, including, without limitation, for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like, except as stated in Articles 1 and 2.[97]

(b) Buyer does not assume a duty under this Agreement to monitor or inspect the safety of any workplace of Supplier or its Representatives nor to monitor any labor practices of Supplier or its Representatives, except as stated in Articles 1 and 2.[98]

(c) Buyer does not have the authority and disclaims any obligation to control (i) the manner and method of work done by Supplier or its Representatives, (ii) implementation of safety measures by Supplier or its Representatives, or (iii) employment or engagement of employees and contractors or subcontractors by Supplier or its Representatives. The efforts contemplated by this Agreement do not constitute any authority or obligation of control. They are efforts at cooperation that leave Buyer and Supplier each responsible for its own policies, decisions, and operations. Buyer and Supplier and Representatives remain independent and are independent contractors. Nor are they joint employers, and they should not be considered as such.[99]

(d) Buyer assumes no duty to disclose the results of any audit, questionnaire, or information gained pursuant to this Agreement other than as required by applicable law, except to the extent Buyer must disclose information to Supplier as expressly provided in this Agreement.[100]

97. Federal contractors should note the FAR, 48 C.F.R. §§ 52.222-56, 22.1703(c), which requires contractors, within threshold limits, to "monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities." This disclaimer does not negate a duty arising under the FAR or any other regulation or law; it simply disclaims any such *contractual* duty by Buyer. As discussed in the introduction, buyers may have duties under applicable laws, regulations, and their own corporate commitments; the purpose of these disclaimers is to negate liability based on this Agreement, except as stated in Articles 1 and 2.

98. Again, note the FAR, *see* 48 C.F.R. §§ 52.222-56, 22.1703(c), and again, note that buyers may be subject to duties that do not arise by contract, as explained in *supra* note 97.

99. *Note the possible conflict here with Buyer's remedies under Section 6.2(c). See also supra* note 90. This disclaimer is included to help negate claims of undertaking liability or liability under the peculiar risk doctrine. It could conflict, however, with some legislative efforts currently being considered and debated in the European Union.

100. This provision emphasizes that Buyer is assuming a limited contractual duty to disclose, although Buyer may have duties to disclose under other standards (legal or nonlegal). For example, Buyer must determine if it provided false or misleading information to Customs and Border

7.2 *Third-Party Beneficiaries.* [All buyers and suppliers in the supply chain have the right to enforce the relevant provisions relating to the human rights protections set forth herein and in Schedule P [and Schedule Q] and privity of contract is hereby waived as a defense by Buyer and Supplier provided, however, that there are otherwise no third-party beneficiaries to this Agreement. Individuals or entities, including but not limited to associations, workers, land owners, property owners, those residing, working and/or recreating in proximity to supply chain activities and any individual who is injured or suffers damages due to a violation of human rights have no rights, claims, causes of action or entitlements against Buyer or Supplier arising out of or relating to this Agreement, Schedule P, [Schedule Q] or any provision hereunder.] [There are no third-party beneficiaries to this Agreement].[101]

8 ***Dispute Resolution.***[102]

8.1 *Dispute Resolution Procedures.* The parties agree that the procedures set forth in this Article shall be the sole and exclusive remedy in connection with any dispute arising in whole or in part from or relating to

Protection and other officials in the event that goods are initially accepted and removed from the dock but are later determined to be tainted by forced or child labor. If the original information provided to CBP is false, a duty to amend may arise. *See, e.g.,* 18 U.S.C. § 541 (2018); 19 C.F.R. § 12.42(b) (2021). As another example, under the FAR, contractors and subcontractors must disclose to the government contracting officer and agency inspector general "information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct." 48 C.F.R. § 22.1703(d) (2021).

101. Third-party beneficiaries are a controversial issue. Two alternatives are given here. When licensing is involved, those parties choosing the first bracketed option will want to consider giving enforcement rights to licensors and/or licensees and not only buyers and suppliers. See also *supra* note 69 for a third alternative affirmatively granting third-party beneficiary status to stakeholders. The ultimate decision may be affected by the outcome of discussions with respect to a possible mandatory treaty on business and human rights. *See* The Second Revised Draft of a Treaty on Business and Human Rights by the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), established by U.N. Human Rights Council Resolution 26/9 (Aug. 6, 2020). It could also be affected by legislative developments in the European Union.

102. These dispute resolution options should be considered in light of the dispute resolution clauses in the sales contract. Article 8 may or may not be suitable for all applications and should be considered in the context of Buyer's existing internal policies and Buyer's customary contractual terms regarding the resolution of disputes and claims, including Buyer's standard form and template procurement agreements; the standard terms and conditions of Buyer's purchase orders; and the Buyer's supplier codes of conduct (Schedule P) or analogous documents that include, *inter alia,* administrative, operational, remedial and/or corrective action procedures, processes, sanctions, and penalties. Dialogue, settlement, and remediation of any controversy arising from a human rights abuse offer victims the most favorable and expeditious resolution, but it is also possible that both human rights abuse and other contractual breaches could be involved. The corporate culture of a company will likely determine whether arbitration or litigation is the preferred route to follow for breaches unrelated to Schedule P [or Schedule Q], provided that under no likely circumstance would a party agree to bifurcate its chosen resolution of such multiple disputes. A mediation-during-the-pendency-of litigation clause is therefore included here.

Articles 1 through 7 or Schedule P [or Schedule Q], whether such dispute involves Buyer, Supplier, or a Representative[103] (a "Dispute"). Buyer and Supplier irrevocably waive any right to commence any action in or before any court or governmental authority, except as expressly provided in this Article 8. Notwithstanding anything contained herein to the contrary, however, at any point in the proceedings under this Article 8, the parties may agree to engage the services of a neutral facilitator to assist in resolving any Dispute.

8.2 [*Confidentiality*.[104] All documents and information concerning the Dispute, including all submissions of the parties, all evidence submitted in connection with any proceedings, all transcripts or other recordings of hearings, all orders, decisions and awards of the arbitral tribunal and any documents produced as a result of any informal resolution of a dispute, shall be confidential, except with the consent of both parties or where, and to the extent, disclosure is required of a party (a) by legal duty, (b) to protect or pursue a legal right, or (c) in relation to legal proceedings before a court or other competent authority.]

8.3 *Joinder of Multiple Parties.* If one or more other disputes arise between or among parties to other contracts that are sufficiently related to the same or similar actual or threatened human rights violations, the

103. This Agreement explicitly provides that every supplier and buyer in the chain is bound to Schedule P [and Schedule Q] and the Agreement provisions relating to human rights protections. Involvement of Representatives is therefore contemplated in this clause. *See generally* Int'l Chamber of Commerce Rules of Arbitration art. 7 (2017) ("Joinder of Additional Parties"); GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1645–45, 1648 (2020) (finding that in certain circumstances, nonsignatories may compel arbitration of international disputes and equitable estoppel may apply).

104. Confidentiality is usually perceived as among the advantages of arbitration, including international commercial arbitration, over litigation and public filings. Confidentiality comes with drawbacks, however, particularly where the proceeding affects the public interest, as is likely true when a dispute relates to human rights. This provision is bracketed, and the parties should carefully negotiate and omit or adapt the text to reflect the form of confidentiality or transparency that best suits their efforts to mediate or arbitrate. Note that the UNGPs do not require full transparency. UNGP 31(e), *supra* note 7, expects that nonjudicial grievance mechanisms will keep parties informed and "provid[e] sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake." The commentary states, "Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism's performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary." *Id.* (quoting commentary). The Hague Rules on Business and Human Rights (BHR) Arbitration, *supra* note 45, call for total transparency of all proceedings. The Hague BHR Rules aim to fill the judicial remedy gap in the UNGPs and should be considered by those companies committed to the UNGPs. In any case, those who are not legally required to disclose discovered human rights abuses and who hope to protect any Dispute from public dissemination, especially before cure or remediation is in place, must verify the applicable chosen rules regarding confidentiality or should include express provisions in the arbitration provisions that deal with confidentiality. This section requires total confidentiality unless otherwise required. The bracketed portion of Section 8.8 below, however, allows for an agreed-upon release of redacted final orders and awards.

parties shall use their best efforts to consolidate any such related disputes for resolution under this Article 8.

8.4 *Informal Good Faith Negotiations Up the Line.* The parties shall try to settle their Dispute amicably between themselves by good faith negotiations, initially in the normal course of business at the operational level. If a Dispute is not resolved at the operational level, the parties shall attempt in good faith to resolve the Dispute by negotiation between executives who hold, at a minimum, the office(s) of [TITLE(S)]. Either party may initiate the executive negotiation process at any time and from time to time by providing notice [in accordance with Section 2.1(c)] (the "Dispute Notice"). Within no more than five (5) days[105] after the Dispute Notice has been given, the receiving party shall submit to the other a written response (the "Response"). The Dispute Notice and the Response shall include (a) a statement of the Dispute, together with a recital of the alleged underlying facts, and of the respective parties' positions and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. The parties agree that such executives shall have full and complete authority to resolve the Dispute. All reasonable requests for information made by one party to the other will be honored. If such executives do not resolve such dispute within [twenty (20)] days of receipt of the Dispute Notice for any reason, the parties shall have an additional [ten (10)] days thereafter to reach agreement as to whether to seek to resolve the Dispute through mediation under Section 8.5.[106]

8.5 *Mediation.* If the parties do not resolve any Dispute within the periods specified in Section 8.4, either party may, by notice given in accordance with Section 2.1(c) (the "Mediation Notice"), invite the other to resolve the Dispute under the [insert name of rules] as in effect on the date of this Agreement (the "Mediation Rules"). The language to be used in the mediation shall be [language]. If such invitation is

105. The number of days appropriate for good faith negotiations may vary based on the severity or breadth of the Schedule P Breach as well as Buyer's ability to find another source for the products at issue.

106. A commitment to enter into mediation need not be complex, and these Model Clauses use the short and simple clauses recommended by such institutions as the PCA and UNCITRAL. Other institutions that provide mediation services may not accept clauses such as these, and the drafter should consult with such other institutions to determine what text to employ. Reference should be made to Model Arbitration Clauses for the Resolution of Disputes Under Enforceable Brand Agreements at https://laborrights.org/sites/default/files/publications/%20Model%20Arbitration%20Clauses%20for%20the%20Resolution%20of%20Disputes%20under%20Enforceable%20Brand%20Agreements.pdf. *See also* Clean Clothes Campaign et al., *Model Arbitration Clauses for the Resolution of Disputes Under Enforceable Brand Agreements*, Int'l Lab. Rts. F. (June 24, 2020), https://laborrights.org/publications/model-arbitration-clauses-resolution-disputes-under-enforceable-brand-agreements.

accepted, a single mediator shall be chosen by the Parties. If, within [_____] days following the delivery of the Mediation Notice, the invitation to mediate is not accepted, the parties shall resolve the Dispute through [arbitration][litigation] under Section 8.6. [If the parties are unable to agree upon the appointment of a mediator, then one shall be appointed by the [insert title of official at the named institution].]

8.6 *[In this clause, companies choose between arbitration (Alternative A) and litigation (Alternative B).] [Arbitration] [Litigation].* If and only if the parties (a) have chosen not to make use of Mediation under Section 8.5 to resolve the Dispute, or (b) have not, within [____] days following the delivery of the Dispute Notice, resolved the Dispute using such Mediation, then the Dispute shall be settled

[Alternative A for arbitration.] [by arbitration in accordance with the [name of rules of the arbitration institution] (the "Arbitration Rules") in effect on the date of this Agreement.[107] The number of arbitrators shall be [one] [three]. The seat of arbitration shall be [seat] and the place shall be [place]. The language of the proceedings shall be [language]. [The provisions for expedited procedures contained in [section or article] of the Arbitration Rules shall apply irrespective of the amount in dispute. The parties further agree that following the commencement of arbitration, they will continue to attempt in good faith to reach a negotiated resolution of the Dispute.[108]]

[Alternative B for litigation.] [in accordance with ____ [here refer to the choice of forum and related clauses of the main supply contract].[109] Notwithstanding the commencement of litigation, if the parties are subsequently able to resolve the Dispute through negotiations or mediation,

107. In selecting the applicable Arbitration Rules, the parties must be sure the scope of discovery and the cost allocation are acceptable and can add text deviating from what is provided within such provisions if not.

108. *Singapore Arb-Med-Arb Clause*, Sing. Int'l Arb. Ctr., siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause (last visited Feb. 15, 2021) ("Arb-Med-Arb is a process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.").

109. If the parties do not wish to include mediation and/or arbitration provisions, the Model Clauses assume somewhere in the underlying master agreement they have included standard text addressing litigation issues such as the choice of law and choice of forum, consent to jurisdiction and service of process, and any desired waivers (e.g., of objection, of defense, of jury trial); these litigation provisions are not included in these Model Clauses.

any resultant resolution may be made a consent judgment on agreed terms.]

8.7 [Only for use with Alternative A for arbitration.] *[Emergency Measures.* Notwithstanding any provision of this Agreement or any applicable institutional rules, any party may obtain emergency measures at any time to address a Zero Tolerance Activity or any other imminent threat to health, safety, or physical liberty (including without limitation the holding of workers in locked barracks or the unavailability of accessible and unlocked emergency exits). In addition, a party may make an application for emergency relief to the [name of institution] (the "Arbitration Institution") for emergency measures under the arbitration rules of the Arbitration Institution as in effect on the date of this Agreement.[110] If and only if the arbitral tribunal does not have the power to grant effective emergency measures or other specific relief may a party apply for relief to a court of competent jurisdiction that possesses the power to grant effective emergency measures.]

8.8 [Only for use with Alternative A for arbitration.] [*Arbitration Award.* The arbitrator(s) may grant any remedy or relief set forth in Article 6 or elsewhere in this Agreement that a court of competent jurisdiction could grant, except that the arbitrators may not grant any relief or remedy greater than that sought by the parties, nor any punitive damages. The award shall include compliance with a Remediation Plan as contemplated by Article 2 above. [The arbitration tribunal shall send a copy of each final order, decision and award to [title of official and name of institution] so that the public may have access to such documents, provided that, prior to sending any such document to such repository, such arbitration tribunal, in consultation with each of the parties, shall redact any information from such document that (a) would reveal the identity of any party that wishes to remain anonymous; or (b) disclose any other information (including without limitation the amount of any award, any proprietary information or any trade secrets) that a party wishes to remain confidential.]]

110. Several standard arbitration systems contemplate a financial harm ceiling for the application of expedited procedures, which will not be applicable in the context of the discovery of human rights abuses where the harm is not necessarily or primarily a financial harm to be suffered by one of the parties. The following alternate wording could be added: "The provisions for expedited procedures contained in the Arbitration Rules shall apply, provided the discovered harm is ongoing and steps to immediately address and cure are possible but not being voluntarily implemented."

Schedule P Building Blocks

The development of an enterprise-wide culture to address human rights violations in the workplace is essential. These violations include not only modern slavery and child labor but also recruitment fees, confiscation of travel documents, travel permits, or room and board fees, insufficient pay, harassment, brutal hourly demands, restrictions on freedom of association, toxic exposure on the job site, and dangerous facility conditions. Only such a pervasive culture can identify the risks of a company's involvement in potential human rights harms that could violate both current and emerging global regulations.[1] A generalized reference in Schedule P to observance by the supplier of all international human rights or a boilerplate reference to supplier codes cannot yield an effective tool to identify and manage the appropriate response to very real and ongoing threats to human rights given "salient risks" within a supply chain.[2]

Overview

The UN Guiding Principles on Business and Human Rights ("UNGPs") were unanimously adopted by the UN Human Rights Council in June 2011. The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises ("OECD MNE Guidelines") were revised to include a new human rights chapter that was consistent with the UNGPs that same year. Since 2011, the UNGPs and the OECD MNE Guidelines have enjoyed ever-growing recognition in the international business community across sectors as documents that define responsible business conduct ("RBC"), notwithstanding characterization as voluntary standards and therefore "soft law."

1. *See* Elise Groulx Diggs, Mitt Regan & Beatrice Parance, *Business and Human Rights as a Galaxy of Norms*, 50 Geo. J. Int'l L. 309, 312 (2019) (articulating a "Galaxy of Norms" that supports the mapping of liability and the rings of responsibility arising from the rapidly evolving discussion of business and human rights (BHR) that includes both hard law and soft law norms).

2. *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, annex, U.N. Doc. A/HRC/RES/17/31, Principle 24 (Mar. 21, 2011) [hereinafter UNGPs]. The UNGPs expect businesses to prioritize their attention to salient risks of harm. A salient risk is a likely risk of *severe harm* to individuals, as seen from the perspective of the affected person. Greater weight is given to severity than to likelihood; a severe human rights harm has three attributes: (i) scale (the gravity of the harm, e.g., death, rape, or torture); (ii) scope (a large number of people harmed, e.g., poisoning of a community water supply, a factory collapse); and (iii) irremediability (the harmed person cannot be restored to the same position ex ante). To be considered severe, harm need not have all three attributes. *See* Office of the High Comm'r for Human Rights, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide 8 (2012), https://www.ohchr.org/Documents/Publications/HR.PUB12.2 En.pdf [hereinafter Interpretive Guide].

The UNGPs consist of thirty-one principles grounded in recognition of the following three pillars: (1) states' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms (UNGPs 1–10); (2) the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights (UNGPs 11–24); and (3) the need to match rights and obligations to appropriate and effective remedies (UNGPs 25–31).

Schedule P must focus on the second of the three mutually supporting pillars of the "Protect, Respect, and Remedy" framework from the UNGPs: corporate responsibility to respect human rights. The UNGPs insist that corporate responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate and independently of any states' abilities and/or willingness to fulfill their own human rights obligations. The UNGPs further explain that such corporate responsibility also exists over and above compliance with national laws and regulations. To protect human rights and address adverse human rights impacts, companies must take adequate measures for the prevention, mitigation, and, where appropriate, remediation of adverse impacts. Businesses are expected to (1) publicize a high-level commitment to respect human rights and embed it in the organization; (2) conduct human rights due diligence ("HRDD"); and (3) remedy harm that it caused or contributed to through a business relationship or through its own actions in tandem with another actor or harm linked to its operations, products, or services.

To comply with the UNGPs, a company must conduct due diligence to measure its human rights impacts according to substantive human rights benchmarks expressed in the International Bill of Human Rights ("IBHR") and International Labour Organization ("ILO") Declaration on Fundamental Principles and Rights at Work.[3]

Identifying a need to promote a common understanding of the meaning and scope of due diligence for RBC, the OECD developed OECD Due Diligence Guidance for Responsible Business Conduct ("Guidance") in 2018 to provide practical support to enterprises on implementation of the OECD Guidelines, with explanations of its due diligence recommendations. The Guidance seeks to align with the UNGPs, the ILO Declaration on Fundamental Principles and

3. ILO, ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up (2010), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_467653.pdf [hereinafter ILO Declaration]. The ILO published ILO Indicators of Forced Labour in October 2012, which presents the most common signs or "clues" that point to the possible existence of forced labor, in an effort intended to help "frontline" criminal law enforcement officials, labor inspectors, trade union officers, NGO workers, and others who need to identify persons who are trapped in forced labor and who may require urgent assistance. In addition, companies must be aware of the International Recruitment Integrity System (IRIS) Standard created by ILO and IOM, which provides that labor recruiters comply with all applicable legislation, regulations, multilateral and bilateral agreements on labor migration, and policies related to the recruitment of migrant workers in the jurisdictions of origin, transit, and destination, including those pertaining to the immigration or emigration of migrant workers.

Rights at Work, the ILO Conventions and Recommendations referenced with the OECD MNE Guidelines, and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. Note that the OECD has also developed sector-specific due diligence guidance for the minerals, agriculture, and garment and footwear supply chains and good practice papers for the extractives and financial sectors.[4]

The Guidance explains that enterprises should carry out due diligence to identify, prevent, mitigate, and account for how they address actual and potential adverse impacts in their own operations, their supply chain, and other business relationships as recommended in the OECD MNE Guidelines. Effective HRDD should, per the Guidance, be supported by efforts to embed RBC into policies and management systems to enable enterprises to remediate adverse impacts that they cause or to which they contribute. HRDD is an ongoing process that should commence prior to contracting and must continue during the life cycle of the contract, including its end. It should be designed to assess and govern a business enterprise's impact on human rights and not the impact of human rights on a business enterprise. After properly diagnosing risks, ongoing HRDD should ensure that corporate responses are fit to context and provide individuals with the type of support they need, actually mitigating and preventing further harm and producing positive human rights outcomes.

Schedule P should refer specifically to the salient risks that the business discovers in its supply chain after extensive HRDD, including not only the possibility of modern slavery and child labor but also, for example, environmental catastrophe, violence from company security forces, compromised workplace safety, or discrimination and harassment. Schedule P should be as clear as possible when defining salient risks within the supply chain.

Such clarity is not possible without comprehensive HRDD. Due diligence is mandatory in some European countries, and many other countries are now considering similar bills.[5] On April 29, 2020, the European Commissioner of Justice, Didier Reynders, announced that the European Union would propose new mandatory HRDD legislation. Whether that legislation or regulations promulgated under it will identify specific HRDD acts or a safe harbor process is yet to be seen.

4. *See* OECD, OECD Due Diligence Guidance for Responsible Business Conduct (OECD Publishing, 3d ed. 2018), https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf; for more information on sector-specific publications, see *Due Diligence Guidance for Responsible Business Conduct*, OECD, https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm (last accessed Nov. 21, 2021).

5. The French law on the Duty of Vigilance, the Swiss Responsible Business Initiative, and the German Supply Chain campaign embed the UNGPs and OECD due diligence standards into law. Mandatory due diligence laws require companies to "identify, prevent, mitigate, and account for the negative human rights impacts of their activities or those linked to their business relationships." Eur. Coal. for Corporate Just., Key Features of Mandatory Human Rights Due Diligence Legislation (2018), https://corporatejustice.org/eccj-position-paper-mhrdd-final_june2018_3.pdf. Find the latest news on mandatory HRDD at www.business-humanrights.org/en/mandatory-due-diligence. As these materials were being prepared for press, legislative developments continued. Some updates as of that time can be found in *supra* notes 5 and 6.

The ETI Base Code,[6] founded on ILO conventions[7] and used widely across sectors, is an "internationally recognized code of good labor practice . . . used as a benchmark against which to conduct social audits and develop ethical trade action plans."[8] "The provisions of the Base Code constitute minimum and not maximum standards" but nevertheless include nine categories, as follows: "1. Employment is freely chosen [i.e., no forced labor]; 2. Freedom of association and the right to collective bargaining are respected; 3. Working conditions are safe and hygienic; 4. Child labor shall not be used;[9] 5. Living wages are paid; 6. Working hours are not excessive; 7. No discrimination is practiced; 8. Regular employment is provided; and 9. No harsh or inhumane treatment is allowed."[10] Some codes expand on these categories to include community-wide impact, environmental issues, and land rights. SMETA[11] is an audit methodology providing a compilation of what are recognized as practical and ethical techniques.[12] It includes a rating system for the severity of non-compliance when evaluating any one of the nine categories above, from "[b]usiness critical non-compliance" being the most severe to "[c]ritical non-compliance," "[m]ajor non-compliance," or "[m]inor non-compliance," the last-named being the least severe.[13] The corresponding timescales for remediation range from zero to ninety days, with "business critical issues" requiring an immediate response (i.e., zero days) to correct the issue.[14] Once a customer begins or takes corrective action, an auditor verifies the adequacy of the business's actions either remotely or onsite.[15] SMETA should be used to supplement a business's systems, as it is not "intended as a standalone document."[16]

6. The Ethical Trading Initiative (ETI) is an "alliance of companies, trade unions, and NGOs that promotes respect for workers' rights around the globe." *About ETI*, Ethical Trading Initiative, https://www.ethicaltrade.org/about-eti (last visited Feb. 2, 2021).

7. *See* ILO Declaration, *supra* note 3.

8. *See* Ethical Trading Initiative, The ETI Base Code (2018), https://www.ethical trade.org/sites/default/files/shared_resources/ETI%20Base%20Code%20%28English%29_0.pdf (introduction).

9. The UN Convention on the Rights of the Child (1989) provides: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3. "In Spanish-speaking countries in Latin America, it is usual practice to distinguish between the boys and girls, on the one hand, and older adolescents, thereby recognizing that adolescents are more mature and can take on more responsibilities than younger children." ETI Base Code, *supra* note 8, at 12.

10. ETI Base Code, *supra* note 8, at 1.

11. The Sedex Members Ethical Trade Audit (SMETA) "is designed to help auditors conduct high quality audits that encompass all aspects of responsible business practice," including "labor, health and safety, environment and business ethics." *SMETA Audit*, Sedex, https://www.sedex.com/our-services/smeta-audit/ (last visited Feb. 2, 2021); *SMETA*, Sedex, https://www.sedex.com/wp-content/uploads/2021/01/SMETA-flyer-1-1.pdf (last visited Feb. 2, 2021) (referencing general flyer about SMETA).

12. *See SMETA*, SGS (Apr. 1, 2019), https://www.sgs.com/en/news/2019/04/safeguards-03619-smeta-audits-an-introduction#:~:text=SMETA%20is%20an%20audit%20methodology,%2C%20environment%2C%20and%20business%20ethics.

13. Sedex, Sedex Members Ethical Trade Audit (SMETA) Non-Compliance Guidance 3 (2018), http://www.sipascr-peru.com/wp-content/uploads/2018/09/Sedex-Members-Non-Compliance-Guidance-v.2-2018.pdf

14. *Id.* at 4.

15. *See id.* at 5.

16. *Id.* at 1.

Almost all codes adopt a similar approach, with varying emphasis and different levels of tolerance for certain non-compliances. The drafters of a company's Schedule P could use the ETI Base Code and SMETA audit framework as a starting point to identify and map risks determined in the company's essential, pre-contract due diligence. Schedule P should define what the buyer and supplier agreed will constitute important terms, such as "severity," "salient risks," and "child labor." Schedule P also should include a process for handling discovered non-compliances that prioritizes attention to salient risks and expects buyer and/or supplier to respond based on their level of involvement depending on findings of "cause," "contribution," and "linkage." A finding of "cause" should trigger a need to fix, remedy, and prevent, while a finding of "contribution" triggers a need to fix, remedy, and prevent through leverage and possible contract suspension and even termination. A finding of "linkage" should trigger efforts to prevent through leverage and possible contract suspension or termination.

Moving Beyond Abstract to the Concrete

The contents of each company's Schedule P policy statement will vary depending on the parties, the contract, and the salient risks at different tiers of the chain. Schedule P should be the result of extensive, ongoing HRDD. UN Guiding Principles 17 through 21 enumerate the due diligence process: (1) identify risks of harm to people and their environment; (2) respond to risk in an integrated fashion (which varies according to the mode of involvement; that is, cause, contribution, or linkage); (3) monitor and track performance; and (4) disclose risks and impacts to affected stakeholders.[17] This same process can be broken down to include: (a) risk mapping; (b) regular assessment; (c) actions to mitigate; (d) alert mechanisms; and (e) monitoring and evaluating for specific issues and possible routes to address those issues.[18] For example, there may be pollution of drinking water at one tier, security force violence at a second tier, and dangerous working conditions at a third. Boilerplate text to cover all potential risks will not result in the parties' clear understanding of what needs to be done and may be useful only to identify a breach rather than guide conduct. Schedule P should not consist solely of a list of possible internationally recognized human rights that the supplier reviews and checks off as an assurance of current and ongoing compliance without true investigation. Rather, it should specify in practical and concrete terms the types of conduct by the parties that would constitute human rights abuse and identify which abuses justify suspension or even termination of the contract. Schedule P must also acknowledge the potential existence of other risks or abuses in the supply chain identified later or inadequately during the initial due diligence processes that may have to be

17. *See* Interpretive Guide, *supra* note 2, at 31–63 (discussing UNGPs 17–21).

18. *See Our Solutions*, Sedex, https://www.sedex.com/our-services/ (last visited Feb. 2, 2021) (linking to categories).

addressed with a response other than, or including, suspension or termination.[19] Sector- and conduct-specific multi-stakeholder human rights standards, such as the Voluntary Principles on Security and Human Rights[20] and the Fair Labor Association's revised Principles of Fair Labor and Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas, as supplemented, might be incorporated or referenced where appropriate. A meaningful Schedule P is the result of extensive and ongoing due diligence and a history of dialogue between buyer and supplier that establishes clear and enforceable standards preserved in a written and understood action plan.

Critical Components of a Compliance Program

At a minimum, the content of a Schedule P, which is consistent with international standards, should:

(1) specify and define clearly the salient human rights risks that the parties have identified in HRDD, the manifestation of which will constitute a breach of Schedule P, leaving flexibility for salient risks that were missed in any precontract HRDD;

(2) specify relevant statutes and regulations that the parties and all subcontractors or other agents are expected to comply with during the course of the contract or other relationship;

(3) specify the parties' internal codes that all those in the supply chain are expected to know and honor;

(4) specify any multi-stakeholder standards that are relevant; and

(5) specify any relevant auditing protocols.

For companies looking for a more comprehensive list of Schedule P building blocks, a number of concrete tools are available to assist a company in designing an effective Schedule P statement that articulates its human rights policies. Schedule P should address precontract due diligence at length, and a concrete remediation plan should be derived therefrom. This seems logical: buyer and supplier should both be reluctant to enter into agreements without knowing in advance whether they might, and how they might, address hypothetical, let alone known, existing problems. Hence, Schedule P is expected to lead to some form of "remediation plan" that exists at the outset or that the parties agree to develop soon after signing. This plan would articulate long-term goals

19. *See* OECD, OECD Due Diligence Guidance for Responsible Business Conduct 74–81 (2018), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf (recommending training, implementing new policies, or "linking business incentives" to prevent and mitigate risks and ongoing human rights abuses).

20. Voluntary Principles Initiative, Voluntary Principles on Security and Human Rights (2000), http://www.voluntaryprinciples.org/wp-content/uploads/2019/12/TheVoluntaryPrinciples.pdf.

(on a prioritized basis) and interim steps that each party will take, either alone or in conjunction with others, as well as dates for achieving these steps and reporting and monitoring requirements.

One highly useful practical tool is the 2016 report, *Doing Business with Respect for Human Rights: A Guidance Tool for Companies*,[21] a collaboration between the Global Compact Network Netherlands, Oxfam, and Shift. The report provides practical guidance on how a company can set the overall tone on human rights through its policy commitments, how it can embed those commitments into the company's DNA, how it can move from reactively to proactively assessing its impacts, how it can integrate its human rights policy into its interactions with business partners and act in response to discovered human rights risks, how it can evaluate its successes and failures, how it can make the stated commitments meaningful by engaging with stakeholders, and how to respond promptly and effectively to solve human rights problems.[22] Appendix B to the report provides a detailed summary of what should go into a policy commitment, including types of general and specific statements, implementation processes, and who is responsible for implementation, evaluation, and updates to the policy.[23]

Another widely used resource is the 2017 UN Guiding Principles Reporting Framework,[24] a collaboration between the Shift Project and international accounting firm, Mazars LLP. It consists of a short list of targeted questions designed to increase internal and external understanding of a company's human rights policies and practices by assessing the quality of how the company identifies and manages each of its salient human rights risks.[25]

To be effective, the human rights expectations of Buyer in the Model Clauses have to be articulated and then enforced at every level of the supply chain. Supplier, as well as every lower tier supplier, must certify that it is fully familiar with all of the terms of the agreed upon Schedule P and the conditions under which the services are to be performed. Each tier supplier must enter into its agreement based on its own ongoing investigation of all human rights matters within the scope of its operations and cannot rely on the opinions or representations of other suppliers. Schedule P must, therefore, include a "perpetual clause" such that each supplier binds its lower tier supplier(s) to all of the performance obligations and responsibilities that Supplier assumes toward Buyer under Schedule P.

In this manner, Schedule P would be incorporated into every subsequent agreement or arrangement in the supply chain, insofar as it relates in any way,

21. Shift et al., Doing Business with Respect for Human Rights: A Guidance Tool for Companies (2d ed. 2016), https://shiftproject.org/wp-content/uploads/2020/01/business_respect_human_rights_full-1.pdf.

22. *See id*. at 4–5.

23. *See id*. at 123–29.

24. Shift Project Ltd. & Mazars LLP, UN Guiding Principles Reporting Framework (2015), https://www.ungpreporting.org/; *see also* Shift Project Ltd. & Mazars LLP, UN Guiding Principles Reporting Framework with Implementation Guidance (2015), https://www.ungpreporting.org/wp-content/uploads/UNGPReportingFramework_withguidance2017.pdf.

25. *See* UN Guiding Principles Reporting Framework, *supra* note 24, at 2–3.

directly or indirectly, to the services or products in the chain. Each supplier agrees to be bound to the supplier that engaged its services in the same manner and to the same extent as the Supplier who contracted with Buyer in the master agreement. Where, in Schedule P and the Model Clauses, reference is made to Supplier and the work or specifications pertain to Supplier's trade, craft, or type of work, such work or specifications shall be primarily interpreted to apply to the next tier supplier. To be precise, there would be a general reference to a requirement, say, for example, no forced labor, and a more specific section prohibiting the use of conflict minerals in a contract for electronics or, in a contract for garments, no cotton from particular named places.

It is the Working Group's intention that Supplier shall have the benefit of all rights, remedies, and redress against a subsequent tier supplier that Buyer has against Supplier under the prime contract, and each lower tier supplier shall have the benefit of all rights, remedies, and redress against Supplier that Supplier has against Buyer under the prime contract, subject to the restrictions and limitations of the Model Clauses and only insofar as any of the foregoing is applicable to Schedule P. If deemed desirable and appropriate, both Schedule P and the Model Clauses can make it clear that Buyer has the direct right to claim a human rights breach by a supplier within the chain below the Supplier that is a party to the master agreement and that Supplier and each lower tier supplier has the same right in its role as a lower tier buyer vis-à-vis the lower tier supplier.

Even if Schedule P goes beyond traditional privity and applies up and down the chain, many insist that there is little likely enforcement of the Model Clauses or Schedule P that effectively addresses human rights representations without the inclusion of impacted stakeholders. "Next Generation Supplier Codes," a phrase adopted by the Corporate Accountability Lab, include provisions and enforcement mechanisms that:

- allow workers, survivors of deceased workers, land owners and impacted community members to enforce Schedule P [or Schedule Q], that is, provide third-party beneficiary language, and grant these third-party beneficiaries the ability to assign their rights to a labor union, nongovernmental organization, or other organizations providing legal assistance;
- require notification and education of workers with respect to their rights;
- require the supplier to disclose all its production factories so that the buyer may access and facilitate compliance monitoring; and
- require the supplier to commit to refraining from retaliation against stakeholders who bring or consider bringing enforcement actions.

Sample third-party beneficiary clauses to be added to a buyer-supplier agreement can be found at Corporate Accountability Lab, "Towards Operationalizing Human Rights and Environmental Protection in Supply Chains:

Worker-Enforceable Codes of Conduct" (Feb. 2021), https://corpaccountabilitylab.org/publications.

A. Organizational Standards

1. UN Guiding Principles on Business and Human Rights (2011)

a. Sponsor Organization: United Nations

b. Link:
https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

c. Description: The UNGPs are the authoritative global standard on business and human rights, and resulted from a six-year process of multi-stakeholder consultations, research, and pilot projects, under the direction of their author, Harvard Kennedy School Professor John Ruggie, then the Special Representative of the UN Secretary-General on Business and Human Rights (SRSG). The UNGPs rest on three interrelated pillars: "the state duty to protect human rights, the business responsibility to respect human rights, and the need for greater access to remedy for victims of business-related abuse."

d. Supplementary/Interpretive Documents:

i. The Corporate Responsibility to Respect Human Rights (2012) (https://www.ohchr.org?Documents/Publications/HR.PUB.12.2_En.pdf).

The UN Office of the High Commissioner on Human Rights (OHCHR) drafted this document with the full approval of the SRSG, providing a comprehensive guide to the understanding and application of the second pillar of the UNGPs.

2. OECD Guidelines for Multinational Enterprises (2011 edition)

a. Sponsor Organization: Organisation for Economic Co-operation and Development (OECD)

b. Link:
https://www.mnguidelines.oecd.org/mneguidelines

c. Description: The OECD MNE Guidelines "provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable standards." They were revised in 2011 to substantially augment their human rights section, in order to align with the UNGPs. In doing so, the OECD imported virtually intact the HRDD process of the UNGPs. The OECD has

continued to play an important role in providing concrete guidance to companies that do business in or with the OECD and resolves business and human rights disputes through its nonjudicial National Contact Process dispute resolution system.

d. Supplementary/Interpretive Documents:

i. OECD Due Diligence Guidance for Responsible Business Conduct (2018) (https://www.mneguildelines.oecd.org/OECD-Due-Diligence-Guildance-for-Responsible-Business-Conduct.pdf).

3. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) (1977, amended 2017)

a. Sponsor Organization: International Labour Organization (ILO)

b. Link:
https://www.ilo.org/empent/Publications/WCMS_094386/lan–en/index.htm

c. Description: The MNE Declaration is the ILO instrument influencing and guiding a number of international and regional organizations, national governments, and employers' and workers' organizations around the world. It provides direct guidance on social policy and inclusive, responsible, and sustainable workplace training and practices and includes international labor standards and principles addressing specific work issues relating to forced labor, transition from the informal to formal economy, wages, safety and health, access to remedy, and compensation of victims.

4. ILO Declaration on Fundamental Principles and Rights at Work (1998)

a. Sponsor Organization: ILO

b. Link:
https://www.ilo/declaration/thedeclaration/textdeclaration/lang–en/index.htm

c. Description: The ILO Declaration commits member states to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are: "freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced or compulsory labor; the abolition of child labor; and the elimination of discrimination in respect of employment and occupation." Member states that have not ratified one or more of the core Conventions are asked each year to report on the status of the relevant rights and principles within their borders, noting impediments to ratification

and areas where assistance may be required. These reports are used to create a compilation of baseline tables, by country, and periodic global reports relating to the promotion of the fundamental principles and rights at work.

d. Supplementary/Interpretive Documents:

i. ILO Indicators of Forced Labour (2012) (https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang–en/index).

5. IRIS Standard (Version 1.1, 2019)

a. Sponsor Organization: International Organization for Migration (IOM)

b. Link:
https://www.iris.iom.int/iris-standard

c. Description: The International Recruitment Integrity System (IRIS) is the IOM's global, multi-stakeholder initiative to promote ethical recruitment of migrant workers. IRIS is referred to under Objective 6 of the Global Compact for Safe, Orderly and Regular Migration and other intergovernmental frameworks. The IRIS Standard articulates what ethical recruitment means in practice and how labor recruiters can demonstrate compliance. The IRIS Standard and corresponding guidelines serve as a reference point for labor recruiters, employers, and state actors on how to integrate ethical recruitment principles into recruitment-related management systems, policies, regulations, processes, and procedures. To achieve this integration, the IRIS Standard defines operational indicators against which labor recruiters can be measured to assess compliance.

6. Human Rights Principles for Companies (January 1998)

a. Sponsor Organization: Amnesty International

b. Link:
https://www.amnesty.org/download/Documents/148000/act700011998en.pdf

c. Description: Amnesty International asserts that "the business community has a wide responsibility—moral and legal—to use its influence to promote respect for human rights. . . . [It] therefore developed an introductory set of human rights principles, based on international standards, to assist companies in developing their role in situations of human rights violations or the potential for such violations." Its document deals with the responsibility

multinational companies have to promote and protect human rights in their own operations.

d. It recommends the development of explicit company policies, training, consulting nongovernmental organizations, and impact assessments. A checklist for use by companies forms part of the document.

7. ISO 26000: Guidance Standard on Social Responsibility (2010)

a. Sponsor Organization: International Organization for Standardization (ISO)

b. Link:
https://www.iso.org/iso-26000-social-responsibility.html

c. Description: ISO 26000:2010 is both an international consensus and guidance for assessing an organization's commitment to sustainability and overall ESG performance. It is not a certification process "unlike some other well-known ISO standards. Instead, it helps clarify what social responsibility is, helps businesses and organizations translate principles into effective actions and shares best practices relating to social responsibility, globally. It is aimed at all types of organizations regardless of their activity, size or location."

d. Supplemental/Interpretive Documents:

i. Communication Protocol—describes appropriate wordings organizations can use to communicate about their use of ISO 26000 (https://www.iso.org/files/live/sites/isoofg/files/standards/doc/en/iso_26000_comm_protocol_n.15.pdf).

ISO 26000 basic training materials in the form of a PowerPoint and training protocol guidance (https://www.iso.org.files/live/sites/isoorg/files/standards/docs/en/ISO_26000_basic_training_material_annexslides_2017.pptx).

ii. Documents that link ISO 26000 with the OECD Guidelines for Multinational Enterprises and the United Nations 2030 Agenda (Sustainable Development Goals)

A. ISO 26000 and OECD Guidelines—Practical Overview of the Linkages (https://www.iso.org/publications/PUB100418.html).

B. ISO 26000 and SDGS (https://www.iso.org/publication/PUB100401.html).

8. **Doing Business with Respect for Human Rights: A Guidance Tool for Companies (2010, updated 2016)**

   a. Sponsor Organization: Shift/Oxfam/Global Compact Network Netherlands

   b. Link:
   https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf

   c. Description: This is a paper on how to apply business responsibility to respect human rights under the UNGPs in practice. It provides practical guidance on how to prevent and address human rights impacts for use by company staff in the "sustainability or CSR function" as well as "procurement, sales, legal, and public affairs or risk and in different areas of operation, including business units and country subsidiaries."

9. **Blueprint for Embedding Human Rights in Key Company Functions (2016)**

   a. Sponsor Organization: European Business Network for Corporate Social Responsibility (CSR Europe)

   b. Link:
   https://respect.international/wp-content/uploads/2019/11/Human_Rights_Blueprint_0.pdf

   c. Description: This blueprint by CSR Europe provides guidance for "embedding human rights across . . . [organizational functions]." Focusing predominantly on three key functions—human resources, risk management, and procurement. It provides examples of current practices taken by companies around each element and explains how these functions can contribute to the overall process of "effectively integrat[ing] human rights" into the corporate culture.

10. **Children's Rights and Business Principles (2012)**

    a. Sponsor Organization: UNICEF/Save the Children/UN Global Compact

    b. Link:
    https://childrenandbusiness.org

    c. Description: Children's Rights and Business Principles articulate the difference between the responsibility of business to respect, that is, doing the minimum required to avoid infringing on children's rights; and to support, that is, taking voluntary actions that seek to advance the realization of children's rights. These Principles call on businesses to put in place appropriate policies and processes, as set out in the UNGPs, including a policy commitment

and a due diligence process to address potential and actual impacts on human rights. The Principles identify a comprehensive range of actions that all businesses should take to prevent and address risks to child rights and "maximize positive business impacts" in the "workplace, the marketplace and the community."

11. FWF Code of Labor Practices (2016)

a. Sponsor Organization: Fair Wear Foundation (FWF)

b. Link:
https://www.fairwear.org/wp-content/uploads/2016/06/fwfcodeoflabourpractices.pdf

c. Description: The core of this Code is made up of eight labor standards derived from the ILO Conventions and the UN Declaration on Human Rights. The Code's articulation of workers' rights includes additional context for: (i) the limitation of working hours; (ii) the free choice of workplace; (iii) no exploitative child labor; (iv) no discrimination in employment; (v) a legally binding employment contract; (vi) safe and healthy working conditions; (vii) unrestricted freedom of association and the right to collective bargaining; and (viii) payment of a living wage.

12. GRI Sustainability Reporting Standards (2016, updated 2020)

a. Sponsor Organization: Global Reporting Initiative (GRI)

b. Link:
https://www.globalreporting.org/standards

c. Description: A flexible framework for creating standalone sustainability or non-financial reports, including ESG reports, which assist businesses, governments, and other organizations to understand and communicate their impacts on issues such as climate change, human rights, and corruption. Available as a free public good, "organizations can either use the GRI Standards to prepare a sustainability report in accordance with the Standards. Or they can use selected Standards, or parts of their content, to report information for specific users or purposes, such as reporting their climate change impacts for their investors and consumers." Using reference to global standards of sustainability, the resultant report provides an inclusive picture of material topics, their related impacts, and how they are managed. There is a GRI Standards Report Registration System to register information reported using the GRI Standards.

d. Supplementary/Interpretive Documents:

i. Universal Standard (October 15, 2021), in effect from January 2023

ii. Oil and Gas Sector Standard 2021

13. International Criminal Court (Rome) Statute, Article 7 (1998)

a. Sponsor Organization: International Criminal Court (ICC)

b. Link:
https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

c. Description: The Rome Statute is the treaty that established the International Criminal Court (ICC). As of November 2019, 123 states are party to the statute, which, among other things, establishes the court's functions, jurisdiction, and structure. The Rome Statute established four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Article 7 defines "crime against humanity" to include "enslavement," "deportation or forcible transfer of population," "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law," and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health," "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." "'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

14. The Essential Elements of MSI (Multi-Stakeholder Initiative) Design (2017)

a. Sponsor Organization: Institute for Multi-Stakeholder Initiative Integrity

b. Link:
https://www.msi-integrity.org/wp-content/uploads/2017/11/Essential_Elements_2017.pdf

c. Description: This is a guide for how to craft a voluntary policy addressing business and human rights. It does not suggest specific areas of human rights to focus on or provide a framework for the topics that an initiative such as this should cover, but it does identify ideal qualities of the design and structure of such a policy. This guide is used by MSI Integrity to evaluate the strengths and weaknesses of a company's initiative, but using an evaluation form such as this can provide guidance on how to write a comprehensive policy initiative for business and human rights.

15. UN Guiding Principles Reporting Framework (2015)

a. Sponsor Organizations: Shift and Mazars

b. Link:
https://shiftproject.org/resource/un-guidling-principles-reporting-framework

c. Description: The UNGPs Reporting Framework is a comprehensive reporting framework focused on the internal understanding and external reporting of a company's human rights performance under the UNGPs. The Reporting Framework is a short series of questions to which any company should have answers, both to know whether it is doing business with respect for human rights and to show others the progress made. The Reporting Framework is supported by two kinds of guidance: implementation guidance for companies that are reporting, and assurance guidance for internal auditors and external assurance providers. It is used by over 150 major multinational publicly traded companies and is backed by governments, investor coalitions with approximately "$5.3 trillion assets under management," investors, stock exchanges, law firms, and other reporting initiatives.

d. Supplementary/Interpretive Documents:

i. UNGPs Assurance Guidance (2017)

The UNGPs Assurance Guidance is a "subject matter guidance that serves two purposes: one, to help internal auditors assure companies' human rights performance, and two, to support external assurance providers' assurance of companies' human rights reporting." (https://ungpreporting.org/assurance).

16. International Bar Association, *Practical Guide on Business and Human Rights for Business Lawyers* and the companion *IBA Reference Annex to the Practical Guide on Business and Human Rights for Business Lawyers* (2016)

a. Sponsor Organization: International Bar Association

b. Link:
https://www.ibanet.org/Document/Default.aspx?DocumentUid+d6306c84-e2f8-4c82-a86f-93940d6736c4

c. Description: The first comprehensive practical guide for implementing the UNGPs into the practice of law worldwide. It was drafted by a team of international legal experts, following nearly two years of research and consultation, and was endorsed by all of the nearly 200 international bar associations and law societies that comprise the IBA.

B. Examples of Companies with Human Rights Initiatives

1. Adidas

   https://www.adidas-group.com/en/sustainability/managing-sustainability/human-rights

2. BHP Billiton

   https://www.bhp.com/our-approach/operating-with-integrity/respecting-human-rights

3. H&M

   https://hmgroup.com/sustainability/fair-and-equal/human-rights

4. Kellogg's

   https://crreport.kelloggcompany.com/human-rights-employee-safety

5. Marks & Spencer

   https://corporate.marksandspencer.com/sustainability/business-wide/human-rights#5abe14057880b264341dfbf3

6. Nestlé

   https://www.nestle.com/csv/impact/respecting-human-rights

7. Patagonia

   https://www.patagonia.com/corporate-responsibility.html

8. Rio Tinto

   https://www.riotinto.com/en/sustainability/human-rights

9. Total

   https://www.total.com/sites/default/files/atoms/files/human_rights_internal_guide_va.pdf

10. Unilever

    https://www.unilever.com/sustainable-living/enhancing-livelihoods/fairness-in-the-workplace/advancing-human-rights-in-our-own-operations/

C. Other Resources

1. Alliance 8.7

   Alliance 8.7 is a global partnership, chaired by the ILO, which fosters multi-stakeholder collaboration to support governments in achieving target 8.7 of the 2030 Sustainable Development Goals designed by the United

Nations General Assembly in 2015 and part of UN Resolution 70/1, known as the "2030 Agenda." It promotes (a) "accelerat[ed] action" "to eradi[cate] forced labour, modern slavery, human trafficking and child labour"; (b) research, data collection, and knowledge sharing on prevalence and "what works"; and (c) "driving innovation and leveraging resources." The Alliance works globally through four thematic Action Groups and a Communication Group and supports the national efforts of countries that have committed to accelerate action, organize national multi-stakeholder consultations, and set up respective time-bound action plans with measurable targets.

https://www.alliance87.org

2. Business & Human Rights Resource Centre

An independent, nonprofit global organization that provides resources and guidance for businesses "to advance human rights . . . and eradicate abuse." Its website is in eight languages: English, Arabic, Chinese, French, German, Portuguese, Russian, and Spanish. The Centre has regional researchers based in Australia, Brazil, China, Colombia, India, Kenya, Jordan, Mexico, Myanmar, Philippines, Senegal, South Africa, Tunisia, the United Kingdom, Ukraine, and the United States of America. It draws global attention to businesses' human rights impacts (positive and negative), seeks responses from companies when civil society raises concerns, and establishes close contacts with grassroots NGOs, local businesspeople, and other stakeholders.

https://www.business-humanrights.org/en

3. Business for Social Responsibility

BSR™ is a global nonprofit organization "that works with its . . . network of more than 250 member companies [and other partners] to build a just and sustainable world. From its offices in Asia, Europe, and North America, BSR™ develops sustainable business strategies and solutions through consulting, research, and cross-sector collaboration. It has developed several "collaborative [industry] initiatives, . . . including the Global Network Initiative and the Electronic Industry Citizenship Coalition, which [it] then spun off into independent institutions. More recently developed collaborative initiatives, including the Future of Fuels and the Future of Internet Power, and HERhealth and HERfinance, help companies across industries and sectors focus on cross-cutting issues like energy and women's empowerment." Environmental issues, particularly energy and climate, ecosystems services, and water, are a growing focus of its time and resources, fostering a "growing recognition at the highest level of business that sustainability is core to success."

https://www.bsr.org

4. Fair Labor Association

   The Fair Labor Association (FLA) is "a collaborative effort" of universities, civil society organizations, and socially responsible companies dedicated "to protecting workers' rights around the world." It is headquartered in Washington, D.C., with offices in China and Switzerland. "FLA places the onus on companies to voluntarily meet internationally recognized labor standards wherever their products are made." It offers: (i) a "collaborative approach allowing civil society organizations, universities and socially responsible companies to sit at the same table and find effective solutions to labor issues"; (ii) "innovative and sustainable strategies and resources to help companies improve compliance systems"; (iii) "transparent and independent assessments, the results of which are published online"; and (iv) a "mechanism to address the most serious labor rights violations through a Third Party Complaint process."

   https://www.fairlabor.org/sites/default/files/sci-factsheet_7-23-12.pdf

5. Issara Institute

   Founded in 2014, Issara is non-profit organization based in Asia and the United States tackling issues of human trafficking and forced labour through worker voice, partnership and innovation. Issara is committed to collaborative partnerships with the private sector to create levers and opportunities for identifying and resolving adverse human rights impacts and risk, and at the same time committed to empowering workers to claim their rights. Issara's Inclusive Labour Monitoring (ILM) focuses on continuous workplace monitoring and systems strengthening, with on-the-ground technical teams to support workers and business, while innovations such as the Golden Dreams application provide a platform for workers and a recruitment marketplace to ensure ethical conditions for jobseekers. Recognizing that the people being exploited (job seekers and workers), the people doing the exploiting and the people mandated to stop the exploitation are the three key actors directly involved in the act and process of labour exploitation and human trafficking within global supply chains, it seeks to directly intervene and disrupt harmful behaviors and systems while empowering positive behaviors and systems. Issara partners directly with global brands and retailers, supports and coordinates with large networks of civil society organizations, grassroots actors, business and recruitment actors, and engages with hundreds of thousands of workers in Southeast and South Asia.

   https://issarainstitute.org

6. Labor Exploitation Accountability Hub

   "The Accountability Hub aims to improve both government and corporate accountability for human trafficking, forced labour and slavery in national

and global business supply chains. . . . The Hub . . . provides a platform for . . . research and advocacy on accountability issues, including by fostering connections and information sharing among key stakeholders from different parts of the world. The main feature of the Hub is the publicly accessible Labour Exploitation Accountability Database, which provides a broad inventory of national laws and regulations addressing corporate accountability for severe labor exploitation in supply chains. The database is searchable by country, legal topic, and by keywords, and includes brief notes on the implementation of the collected legal mechanisms. Country summary pages also provide an overview of the national context and legal framework, and highlight key implementation issues."

https://www.accountabilityhub.org

7. Modern Slavery Registry

Modern Slavery Registry was a central registry for statements published pursuant to Section 54 of the United Kingdom Modern Slavery Act, which requires commercial organizations that operate in the UK and that have an annual revenue over £36 million to produce a statement of the steps taken to address and prevent the risk of modern slavery in their operations and supply chains. The Registry was guided and supported by a governance committee which includes: Freedom Fund, Humanity United, Freedom United, Anti-Slavery International, the Ethical Trading Initiative, CORE Coalition, UNICEF UK, Focus on Labour Exploitation (FLEX), Trades Union Congress, UN Principles for Responsible Investment, and Oxfam GB. Modern Slavery Registry is now closed, however, because the government of the United Kingdom will launch its own registry in 2021. Historical records and guidance information are still available on their website.

https://www.modernslaveryregistry.org

https://www.gov.uk/government/publications/contacts-database-for-guidance-on-modern-slavery-reporting/contacts-database-for-guidance-on-modern-slavery-reporting

8. Responsible Business Alliance

"Founded in 2004 by a group of leading electronics companies, the Responsible Business Alliance (RBA), formerly the Electronic Industry Citizenship Coalition (EICC), is a nonprofit comprised of electronics, retail, auto and toy companies committed to supporting the rights and well-being of workers and communities worldwide affected by the global supply chain. RBA members commit and are held accountable to a common Code of Conduct and utilize a range of RBA training and assessment tools to support continual improvement in the social, environmental and ethical responsibility of their supply chains."

https://www.responsiblebusiness.org

9. Shift

   Shift, founded in 2011 by core members of Professor John Ruggie's United Nations Mandate Team, is internationally renowned as the "leading center of expertise on the UN Guiding Principles on Business and Human Rights." It was chaired by Professor John Ruggie. "Shift is a non-profit, mission-driven organization headquartered in New York City," whose purpose is to transform how "business gets done" to ensure respect for people's lives and dignity. It "works across all continents" with businesses to help shape their practices, culture, and behavior and works with governments, financial institutions, civil society, and other stakeholders to embed the right requirements and incentives into businesses' operating frameworks.

   https://shiftproject.org

10. Verité

    An "independent, non-profit, civil society organization, Verité . . . [has partnered,] since 1995[,] with hundreds of corporations, governments, and NGOs to illuminate labor rights violations in supply chains and remedy them to the benefit of workers and companies alike. . . . [It] provide[s] businesses with tools that help to eliminate labor abuses . . . , [endeavors] to empower workers to advocate for their rights . . . , create[s] publicly-shared resources that enlighten and drive action . . . [and] contribute[s] . . . to government labor and human rights policy." Verité assists companies in "benchmarking policy," "evaluating sourcing to field-based interviews," and "developing a portrait of their supply chain that identifies risk and labor rights abuses." "Verité has a history of work in over 70 countries, with a global network of experts in Africa, Asia, Europe, South America, North America and Australia."

    https://www.verite.org

RESPONSIBLE PURCHASING CODE OF CONDUCT: SCHEDULE Q

VERSION 1.0

1. Institutional commitments.

1.1 Buyer recognizes that it has an obligation to respect human rights throughout its supply chains, in particular with respect to those human rights and principles enshrined in the United Nations Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, and in applicable labor and employment laws.

1.2 Accordingly, Buyer commits to taking the human rights implications of its decisions into account at all times and to working towards the full implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs), the Organisation for Economic Co-Operation and Development's (OECD) Guidelines for Multinational Enterprises, and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

1.3 In particular, consistent with the UNGPs and the relevant OECD Due Diligence Guidance for Responsible Business Conduct (sector specific where available), Buyer will establish and maintain a human rights due diligence process appropriate to its size and circumstances to identify, prevent, mitigate, and account for how Buyer addresses the impacts of its activities on the human rights of individuals directly or indirectly affected by its supply chains.

1.4 Such due diligence will be both forward-looking and backward-looking, preventative, risk-based, and ongoing. It will involve meaningful engagement with stakeholders[1] through participation in regular, transparent, two-way consultation and the timely

1. Stakeholders are typically defined as those persons or groups who could be affected by a company's activities, actions, and decisions. This comprises a broad group, including workers, workers' representatives, trade unions (including Global Unions), community members, civil society organizations, investors, and professional industry and trade associations.

sharing of relevant information with stakeholders in a format that they can understand and access. Due diligence will also require Buyer to provide support for and participate in remediation where appropriate and necessary, in particular where it caused or contributed to an adverse impact.

1.5 All of the commitments undertaken by Buyer under this Responsible Purchasing Code of Conduct serve to advance and institutionalize human rights due diligence throughout Buyer's own operations and supply chains so as to achieve or exceed the internationally recognized human rights standards identified in 1.1.

1.6 Buyer commits to improving alignment across its teams and business units on relevant aspects of human rights and procurement and to assign oversight and responsibility for the human rights performance of its supply chain to its senior management and executive board.

1.7 Buyer recognizes that its purchasing practices can either improve the human rights performance of its supply chains, or exacerbate and compound adverse human rights impacts for workers. Accordingly, Buyer will train and incentivize its procurement team to understand the direct links between Buyer's purchasing practices and the labor conditions in its supply chains.

1.8 Buyer will at all times foster a culture of cooperation and partnership with its suppliers. Buyer will treat its suppliers fairly and with respect and will communicate with them clearly and promptly throughout their relationship.

1.9 Buyer will communicate externally all relevant information pertaining to its human rights policies, processes, and activities.

2. Selecting suppliers.

2.1 Buyer will select suppliers that have the financial, managerial, and legal capacity to meet both the commercial and the human rights obligations under the contract.

2.2 Buyer will engage in dialogue with potential suppliers to ensure that they fully understand what is expected of them with respect to Buyer's own human rights standards. This will include Buyer informing potential suppliers that they will be contractually required to cascade Buyer's human rights standards to their own business relationships (i.e., beyond "tier 1"), that Buyer will expect to obtain, and supplier will be required to provide, throughout the life of the contract all relevant information regarding supplier's

own business relationships, and that Buyer will provide support for such activities, where appropriate and feasible.

3. Negotiating the contract.

3.1 Buyer will negotiate its supply contracts so as to meet its production requirements, while respecting and promoting human rights. Should a conflict arise between these objectives, the latter shall take priority.

3.2 Buyer will not offer contracts on a take-it-or-leave-it basis or treat suppliers' questions and negotiations as an automatic rejection of Buyer's offer. Buyer will give suppliers an opportunity to negotiate the terms of the contract to ensure that both parties have a voice in structuring the arrangement and in advancing the human rights objectives of said arrangement.

3.3 Buyer will collaborate with suppliers to agree on a contract price that accommodates all costs of production, including costs associated with upholding responsible business conduct. For the avoidance of doubt, such costs shall, at a minimum, include minimum wages, statutory benefits, and health and safety costs required by applicable law or collective bargaining agreements.

3.4 Buyer will collaborate with its suppliers to agree on a timeline that ensures that orders will not trigger excessive working hours or unauthorized and unregulated subcontracting. Should Buyer require short lead times, Buyer will negotiate contract terms that ensure that its suppliers can perform under the contract while meeting Buyer's own human rights standards.

3.5 Buyer will formalize its arrangements with its suppliers in a written contract.

4. Performing and renewing the contract.

4.1 Should change orders (e.g., quantity increases or decreases, design alterations, timeline adjustment) be sought by Buyer during the contract term, Buyer will communicate updated requirements to its supplier clearly, promptly, and accurately. In cases where oral instructions containing change orders are provided, Buyer will confirm such instructions in writing as swiftly as possible.

4.2 When making changes to an order, Buyer will engage in a dialogue with its supplier to establish that the latter can adjust to the new requirements without running afoul of Buyer's own human rights standards. If the supplier cannot adjust, Buyer will make commercially reasonable modifications to enable the

contract to conform to Buyer's own human rights standards, for example, by amending target delivery times and providing appropriate additional compensation. Likewise, should the supplier need to modify the contract/order so as to continue meeting Buyer's human rights standards, Buyer will collaborate with the supplier to identify appropriate modifications.

4.3 Throughout the contract term(s), Buyer will engage in regular communication with its suppliers and provide ongoing opportunities for suppliers to tell Buyer whether they can meet Buyer's timelines without undue negative impacts on the human rights performance of the contract. Should a supplier require more time to deliver a product in order to continue meeting Buyer's own human rights standards, Buyer will, where commercially practicable, endeavor to accommodate a new timeline.

4.4 If a new timeline cannot be agreed and the supplier elects not to perform under the contract in order to prevent or mitigate attending human rights risks, Buyer will not retaliate. Specifically, Buyer will not blacklist or sue a supplier that can establish that its decision not to perform under the contract was rooted in concern for upholding human rights standards.

4.5 Should a supplier need to engage in subcontracting to meet Buyer's changed requirements, then, as soon as reasonably practicable after receiving the subcontracting request from the supplier, Buyer will review the request, and, if satisfied that the subcontract would not increase the risk of adverse impacts, Buyer will authorize such subcontracting.

4.6 In the event of a significant unforeseen increase in input costs during the contractual relationship, Buyer and supplier will negotiate adjustments to the contract price and/or make other modifications to accommodate those increases. Such increases may be incurred as a result of, for example, minimum wage rises, collective bargaining agreements, Buyer's own commitments to paying a living wage, or unforeseen increases in material costs, other manufacturing costs, and/or currency fluctuations.

4.7 Buyer will regularly seek feedback from its suppliers on the impact of its purchasing practices on the human rights performance of their contracts and ensure that said feedback will not produce adverse consequences for suppliers. Recognizing that suppliers may be reluctant to provide such feedback candidly, Buyer may seek to collect information anonymously (e.g. via an annual survey) or partner with an independent third party that can aggregate the data and present its findings to Buyer. Buyer also

commits to providing feedback to its suppliers so that they are able to improve their own policies and programs.

4.8 To aid suppliers in meeting their obligations under Buyer's own human rights standards, Buyer will strive to provide reasonable material and practical assistance (e.g., financial, technological, training, capacity building) to suppliers throughout the contract term(s).

4.9 Buyer will collaborate with its suppliers to establish benchmarks for assessing the human rights performance of the contract(s), in order to enable Buyer's procurement team to make informed assessments regarding whether to award, renew, or terminate the contract(s). When it comes time to renew the contract(s), Buyer will seek to reward suppliers for superior human rights performance.

4.10 Buyer commits to paying all suppliers in accordance with the terms agreed at the outset of the contract, without attempting to change payment terms retroactively. Should changes to payment terms be necessary, Buyer will ensure that such changes are mutually agreed with, and not to the detriment of, suppliers. To support this commitment, Buyer will provide its suppliers with clear and easily accessible guidance—in supplier's own language—on payment procedures and corresponding dispute resolution mechanisms.

5. Remediation for human rights harms.

5.1 Buyer will ensure that effective, adequately funded, and governed operational level grievance mechanisms are in place to receive and address the concerns and grievances of affected or potentially affected stakeholders. These operational level grievance mechanisms will be consistent with the effectiveness criteria laid out in the UNGPs (legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue).

5.2 Where there is a risk of an adverse impact or where an adverse impact has occurred, Buyer will collaborate with its suppliers and with affected stakeholders to identify the "root cause" of the impact, so as to cease the impact and also prevent future harms.

5.3 In the event that a human rights harm occurs in connection with the contract(s), and Buyer caused or contributed to the harm, Buyer will participate in remediation, in collaboration with other buyers as appropriate, and in proportion to its responsibility for the adverse impact and/or its capacity to remediate the impact.

Where Buyer's activities did not cause or contribute to the adverse impact, but are directly linked to it, Buyer will use or build (in collaboration with other stakeholders) its leverage with its suppliers to prevent any future harms.

5.4 All remediation, whether carried out by suppliers or by suppliers in collaboration with Buyer (and other buyers as appropriate), will restore the affected person or persons to the situation they would have been in had the adverse impact not occurred, where possible. In all cases, remediation shall be proportionate to the scale and significance of the impact and shall be determined in consultation and engagement with impacted stakeholders and/or their representatives.

6. Disengagement and responsible exit.

6.1 Should Buyer wish to disengage from its suppliers because of a potential or already-occurred adverse impact, Buyer will do so responsibly and as a last resort where (i) attempts at preventing or mitigating adverse human rights impacts have failed, (ii) the adverse impact(s) is irremediable, or (iii) there is no reasonable prospect of change.

6.2 Any disengagement, whether for commercial reasons, in response to an unremediated human rights harm, a force majeure event, or for any other reason, will take into account Buyer's sourcing volume and the potential adverse impacts related to disengagement, so that Buyer may identify appropriate measures for disengaging responsibly and for mitigating the hardship that termination may bring upon stakeholders. Decisions regarding mitigation will involve reasonable consultations with affected stakeholders.

6.3 Should Buyer decide to disengage, it will clearly communicate its intent in writing to its suppliers with reasonable notice and a clear timeline.

6.4 If Buyer does disengage, it will pay its suppliers for any outstanding invoices and/or for costs already incurred in meeting the order prior to disengagement.