

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



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CORPORATE RESPONSIBILITY INITIATIVE

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Unfortunately, many multinational buyers have responded with panic to the ongoing COVID-19 pandemic by exercising *force majeure* ('greater force') clauses in their contracts to abandon their suppliers, without regard to harm to their most vulnerable workers. Failing to identify and attempt to avoid or mitigate these impacts is at odds with their responsibility to respect human rights. My colleague Anna Triponel and I have addressed this immediate problem elsewhere.¹

However, underlying this immediate concern is the fundamental contractual question of how buyers can achieve the right balance between their desire to avoid involvement in supply chain human rights abuse, and their desire to protect themselves from liability. Just because a buyer can exercise a contractual clause does not mean that it should do so, particularly where the result will harm vulnerable workers. This issue preexisted the pandemic and will remain after it is long past. This paper examines the efforts of the American Bar Association to strike that balance in the context of its proposed Model Contract Clauses on Modern Slavery and Child Labor.

To start, no business wants to be surprised to learn from social media that the goods that it purchased have been produced with slave or child labour, that it has done little to prevent that harm, and that it has even contributed to this harm through its purchasing practices. The business case for avoiding involvement in such harm is strong. It includes ensuring the license to operate, securing sustainable supply chains, increasing productivity, acquiring and maintaining customers, improving reputation, engaging and retaining talented employees, strengthening consumer loyalty, anticipating new regulations, honoring commitments to business partners, reducing the cost of capital, and minimizing the risk of litigation.²

* This paper reflects my personal views only, and not necessarily those of any organization or person with whom I am or have been affiliated, which are listed below only for identification. Since 2008, I have acted as: senior legal counsel to Harvard Kennedy School Professor John Ruggie, who was the Special Representative of the UN Secretary General on Business and Human Rights and the author of the UN Guiding Principles on Business and Human Rights ("UNGPs"); general counsel and senior advisor to Shift (the leading center of expertise on the UNGPs); Senior Program Fellow of the Corporate Responsibility Initiative at the Harvard Kennedy School of Government; co-chair of the International Bar Association's Corporate Responsibility Committee and chair of the IBA's Business and Human Rights Working Group; and a member of the Business and Human Rights Advisory Group to the ABA Human Rights Center. Prior to 2008, I was deputy general counsel of National Grid USA.

The ABA's draft Model Contract Clauses on Modern Slavery and Child Labor ("MCC's")³ constitute a hugely important and innovative contractual mechanism to help buyers to remove the taint of human rights abuse from their supply chains. In implementing them, company lawyers will still need guidance on how to use the MCC's in order to achieve their intended purpose. Since the 2011 UN Guiding Principles on Business and Human Rights ("UNGPs") are the authoritative global standard on business and human rights, the MCC's should be mapped to them.⁴

The MCC's are intended to balance a buyer's desire to eliminate human rights harm from its supply chain with its desire to minimize the risk of legal claims. Of course, buyers should take steps in their contracts to protect themselves from legal claims. At the same time, they should avoid going so far that the contracts do not improve the human rights performance of suppliers, or worse, incentivize them to hide and cheat. This argues in favor of a more proactive approach by buyers that will not only decrease the likelihood of such abuse, but also count in the company's favor in court should it be sued.⁵

In her excellent commentary on the MCC's, Professor Sarah Dadush rightly praises the MCC's because they enable buyers to require their suppliers, and their representatives, to ensure that goods are not made with modern slavery or child labor anywhere in the supply chain.⁶ However, she also criticizes the MCC's because they offload the buyer's human rights responsibilities onto suppliers, which is at odds with the UNGPs. She therefore recommends that the MCC's be modified by:⁷

- Requiring buyers to assess the financial and managerial capacity of suppliers to meet the human rights performance requirements of the MCC's;
- Supporting the supplier's efforts to perform under the MCC's;
- Requiring suppliers to report not only on existing human rights problems, but also on potential ones;
- Encouraging buyers to take, as the first step, collaboration between buyers and suppliers to solve problems, rather than take a retaliatory and punitive approach to supplier contract violations;
- Taking steps to ensure that victims of human rights harm are provided with remedy; and
- Adjusting buyer responsibility in the event that it contributes to harm by the buyer.⁸

I second her praise, criticism, and suggested modifications to the MCC's. But rather than repeat her legal analysis, I attempt to view the MCC's solely through the lens of the UNGPs. Although the UNGPs are a soft law standard, they have hardened into law in many cases, and will greatly influence how public and commercial law will be applied and interpreted in the field of business and human rights.

The remainder of this note explains why and how the MCC's should reflect the UNGPs: section I summarizes the background, content, and uptake of the UNGPs; section II

explains the importance of the UNGPs to legal advice; and section III describes the application of the UNGPs to the MCC's.

I. The Background, Content, and Uptake of the UNGPs

The UNGPs reflect a strong consensus by states, businesses, and civil society on how to address business involvement in human rights abuse. This problem arose following the expansion of global trade in 1990s, due to the fragmentation and outsourcing of production processes into lengthy and complex global supply chains, and the inability to global society to address the problem effectively. The increase in global trade has raised the standard of living for many around the world, and reduced poverty levels. However, hundreds of millions of people have been cut off from the benefits of development, and suffered human rights harm.⁹

A. Background¹⁰

The UNGPs were drafted by Harvard Kennedy School Professor John Ruggie, the Special Representative to the UN Secretary General on Business and Human Rights, following a six year period of multistakeholder consultations, research, and pilot projects. They reflect a strong consensus among governments, business groups, and civil society that led to the unanimous endorsement of the UNGPs in 2011 by the UN Human Rights Council, and their subsequent wide global uptake.

B. The UNGPs

The UNGPs consist of 31 principles and integrated commentary that operationalize Ruggie's "Protect, Respect, and Remedy" framework, which are based on three mutually supporting pillars:

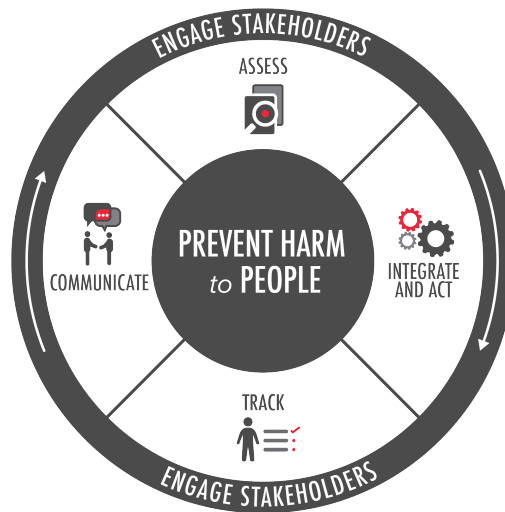
Pillar	Comment
I. The state duty to respect human rights from abuse by third parties, including businesses. (UNGPs 1-10)	<p>This duty is discharged through effective policies, regulation, and adjudication.</p> <p>The UNGPs do not create new legal obligations for states. Rather, they recognise <i>existing</i> obligations that international human rights law imposes on states to protect people from human rights harms committed by third parties, including businesses.</p>

Pillar	Comment
<p>II. The corporate responsibility to respect human rights (UNGPs 11-24)</p>	<p>The responsibility to respect applies to all business enterprises, regardless of size, sector, location, and organizational structure.</p> <p>This means not infringing on internationally recognized human rights both in a business’s own operations and in its business relationships, including in its supply chain.</p> <p>This responsibility is not by itself a legal duty and is not limited by local law. However, it does not exist in a law free zone.</p> <p>It is not a voluntary sign-up standard.</p> <p>Businesses are expected to</p> <ul style="list-style-type: none"> • Publicize a high level commitment to respect human rights and embed it in the organization. • Conduct human rights due diligence. • Remedy harm that they caused or contributed to.
<p>III. The need for greater access to remedy by victims (UNGPs 25-31)</p>	<p>This is addressed to both states and businesses, and includes both judicial and nonjudicial remedies.</p> <p>States have the primary obligation under international human rights law to ensure that those who are affected by human rights abuses in their territory and/or jurisdiction have access to effective remedy, both judicial and non-judicial.</p> <p>As part of their responsibility to respect human rights, businesses are expected to remedy human rights impacts that they caused or contributed to, in proportion to their contribution.</p> <p>Businesses should also establish or participate in operational level grievance mechanisms in order to resolve grievances quickly and serve as a feedback loop</p>

1. Human Rights Due Diligence

Understanding human rights due diligence is critical. Pillar Two expects that companies will conduct human rights due diligence from the perspective of the affected stakeholder to determine the human rights risks of a company’s operations and business relationships. Unlike commercial or legal due diligence, human rights due diligence does not look at human rights risks from the perspective of the business, although in the mid- to long-term, harm to people and harm to business will converge.

Human rights due diligence is an ongoing process with four stages, in which businesses should identify their risks of harm to people, integrate their findings into their businesses operations and their responses to the risks, track their human rights performance, and be prepared to communicate their performance as appropriate (for example, to persons who are at risk).¹¹ Here is a diagram:



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2. Involvement in supply chain human rights abuse

How a buyer should respond to involvement in human rights abuse depends on its mode of involvement. There are three modes of involvement: cause, contribution, and linkage. The ILO-IOE Child Labour Guidance Tool for Business¹² shows how these modes of involvement applies to child labor:

Description	Examples
A company may cause a child labour impact through its own actions or decisions.	Employing children below the minimum age provided for in ILO Convention No. 138. Exposing children under 18 to hazardous working conditions.
A company may contribute to a child labour impact through a business relationship (e.g., with a supplier, customer or government) or through its own actions in tandem with other parties' actions.	Repeatedly changing product requirements for suppliers without adjusting production deadlines or prices, thus incentivizing them to engage subcontractors who rely on child labour. Contributing to the cumulative pollution of a river, negatively affecting local farmers' livelihoods, leading them to send their children to work to compensate for loss of income.
A company neither causes nor contributes to a child labour impact, but the impact is linked to its operations, products or services	Embroidery on a retail company's clothing products that is subcontracted by a supplier to child labourers in homes, in violation of

Description	Examples
because it is caused by an entity with which the company has a business relationship.	contractual obligations and not incentivized by the retail company. Procuring raw materials or commodities produced with child labour on the spot (cash) market or through an agent.

Contribution and linkage are the two modes of involvement that are likely the most pertinent to buyer-supplier relationships. These are the appropriate responses for the buyer under the UNGPs in such circumstances:

- Where a buyer **contributes** to an impact, the UNGPs expect that it will
 - **Stop** its actions in order to prevent or mitigate the impact in the future,
 - Use or increase its **leverage** with the supplier to do so, and
 - Contribute to **remediate** the harm if it has occurred to the extent of its contribution.
- Where a buyer is **linked** to a child labor impact that it did not cause or contribute to, the UNGPs expect that it will:
 - Use or increase its **leverage** with the supplier to prevent or mitigate the impact.
 - It is **not** expected to provide remedy, although it can do so if it wishes.
- If leverage does not work in either mode (contribution or linkage), the buyer should consider **termination** of the relationship, if practicable, taking into account the adverse human rights impacts of doing so. (For example, it is dangerous to dismiss child laborers without taking into consideration the loss of income to families and the likelihood that children will be exposed to additional dangers; e.g., being forced into prostitution to replace lost wages).¹³

3. Prioritization based on salient risks of human rights harm

Businesses are expected to prioritize their attention to the most severe likely human rights risks, in the absence of legal guidance.¹⁴ The UNGPs define severity based on scale (the gravity of the impact), scope (the number of people affected), and irremediability (the inability of people to made whole). A severe likely human rights risk (with primary emphasis on severity) is called a “*salient risk*”.¹⁵ Therefore, the supply chain contract should identify the salient risks of human rights harm.

4. Exercising leverage

Leverage—i.e., influencing others to change their behavior—is at the heart of what companies can reasonably be expected to do in practice when faced with human rights challenges in their business relationships. Contracts such as the MCC’s are a primary example of the type of leverage that buyers can exercise to influence suppliers to

respect human rights. In addition, where the contract isn't sufficient to solve the problem, companies have engaged in more collaborative approaches.¹⁶

C. Uptake of the UNGPs

The UNGPs have cascaded far beyond their UN origins. They are reflected in or incorporated in international multistakeholder norms (e.g., the OECD Guidelines for Multinational Enterprises, ISO Corporate Responsibility Standard 26000, the International Finance Corporation's revised performance standards), public policy (e.g., statements by the G7, the G20, the EU, the African Union, ASEAN, the OAS, and national action plans issued by dozens of countries to implement the UNGPs); reporting and disclosure requirements (e.g., from the EU, the UK, the U.S., Australia and elsewhere); mandatory human rights due diligence laws (e.g., as enacted by France and The Netherlands and under consideration in Switzerland, Germany and elsewhere); investor pressure to report meaningfully on human rights performance, as seen by the skyrocketing use of ESG by investors; the practices and policies of leading companies; and endorsement by international and national bar associations¹⁷.

This wide and rapid uptake (compared to other contested global initiatives, such as climate change) indicates that the UNGPs predict how the law will evolve in the future when it comes to human rights.

II. The importance of soft law to hard law legal advice

Some lawyers are reluctant to advise on soft law standards, which they may view as too ambiguous. However, the UNGPs are so ubiquitous and woven into the field of business and human rights that lawyers should do more than just rely on statutes and regulations that relate to human rights abuse in supply chains. They should be prepared to understand and advise on the relevance of the UNGPs.

The ABA endorsed the UNGPs in 2012,¹⁸ and in so doing, its Human Rights Center referred to the ABA's Model Rule of Professional Conduct 2.1.¹⁹ The commentary to Model Rule 2.1 emphasizes the importance of providing advice on non-legal context "especially where practical considerations, such as cost or effects on other people, are predominant." It notes that "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." The report of the Human Rights Center identified the UNGPs as an example of the type of considerations contemplated by Model Rule 2.1.

This means recognizing that the lawyer's role is not merely to act as a technical expert, but also as a wise counselor. The International Bar Association took this approach when in 2016 it endorsed and provided a Practical Guide on how lawyers should implement the UNGPs in their practice.²⁰ The approach draws support not only from ABA Model Rule of Professional Conduct 2.01, but also from the well-known report of the Harvard Law School Center on the Legal Profession's 2014 report, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*.²¹

III. The UNGPs should guide the formation, interpretation and application of the MCC's

The UNGPs should inform the content and structure of the MCC's. In particular, the MCC's should be viewed through the lens of human rights due diligence, and be interpreted and modified appropriately.

A. The UNGPs should inform the content and structure of the MCC's

Schedule P of the MCC's is intended to articulate the human rights performance standards of the contract. However, it is an empty container, to be filled by the contract drafters. The MCC's are agnostic as to subject matter, and provide no guidance as to its content, other than to give examples of laws addressing modern slavery and child slavery, and normative standards such as the UNGPs.

However, consideration of the UNGPs should inform the content and structure of the MCC's, because the UNGPs constitute "the global authoritative standard" that provides "a blueprint for the steps all states and businesses should take to uphold human rights."²² The MCC's explicitly derive from, and are intended to operationalize, the 2014 ABA Model Business Principles ("ABA Model Principles"), which in turn are based on the UNGPs.²³ The 2018 Report supporting the endorsement of the Model Principles explicitly acknowledges the foundational status of the UNGPs, and notes that in 2012, the ABA endorsed the UNGPs, urging the legal community to integrate them into them into its practices.²⁴

B. The performance standards of Schedule P should not be tied exclusively to legal compliance.

As noted earlier, the responsibility to respect human rights is not limited by local law. This is intended to avoid a race to the bottom, where companies compete to outsource production to countries with the least protection for human rights.

However, the responsibility to respect human rights doesn't exist in a law-free zone. As noted in the MCC's Report by the Working Committee, existing laws and regulations require disclosure of the presence of modern slavery and child labor in supply chains and mandatory due diligence laws requiring businesses to take affirmative steps to end such abuse.

Unfortunately, these laws are neither uniform nor comprehensive. They constitute a loose patchwork of efforts by different states in different industries and sectors to regulate different business behaviors. And yet the presence of human rights abuse in supply chains is a global problem that extends across different tiers in a single supply chain and subjects buyers and suppliers to multiple legal requirements.

For example, Apple leads a vast international supply chain network. In 2014, a finished iPhone sat atop a supply chain pyramid consisting of 785 suppliers in 31 countries. The network included 60 US suppliers, who outsourced the fabrication of their components to supplies in Japan, South Korea, and Taiwan, which in turn sourced from lower cost

locations in Southeast Asia. Foxconn, based in Taiwan with operations in China, assembled the final product.²⁵ No single set of legal standards applies to all of these transactions.

C. Schedule P should refer to the salient risks of human rights of abuse that human rights due diligence reveals in a buyer's supply chain

As a result, Schedule P should refer specifically to the salient risks that the business discovers in its supply chain as a result of human rights due diligence, whether or not they are effectively regulated by state law. The MCC's are focused on modern slavery and child labor. Those are salient risks, and it is appropriate for the buyer to focus contractual attention to them by defining such risks explicitly in Schedule P.

1. Other salient risks should be included in Schedule P besides modern slavery and child labour

However, there may be other salient risks in the supply chain, such as the risk of death and serious accidents in the workplace, the risks of rape in the workplace, the risk of environmental catastrophe, and the risk of violence from company security forces, to name a few. If human rights due diligence reveals that those risks exist in the supply chain they should be included in Schedule P.

For example, the Rana Plaza factory collapse in 2013 killed over 1,100 workers, as a result of deficiencies in the factory's structure. This was not a modern slavery or child labor risk, but a workplace safety risk. If a company has such risks in its supply chain that are not related to modern slavery and child labor, they should also be included. It makes little sense to include some salient risks in Schedule P and exclude others.

2. All salient risks should be defined with clarity and precision

When defining salient risks, contract drafters should aim for clarity and precision²⁶. For example, not all work performed by children is considered child labor. As described by the ILO-IOE Guidance, child labor means all unacceptable work performed by children; i.e., work that exposes them harm or abuse because: 1) it is likely to impede the child's education and full development (due to the child's age); and/or 2) it jeopardizes the physical, mental or moral wellbeing of a child (due to the nature of the work).²⁷ Therefore, Schedule P should be as clear as possible when defining salient risks within their scope.

3. Schedule P should retain flexibility to cover salient risks not discovered in pre-contract human rights due diligence

Human rights due diligence is an ongoing process, which extends through the life of the contract. The parties may discover additional, unanticipated salient risks after the contract is signed. Therefore, Schedule P should contain some flexibility in contract language to allow the buyer to include such unanticipated risks within the contract's scope. Reference in Schedule P to the UNGPs and the need to conduct human rights due diligence during the contract would be useful in this regard.

D. Schedule P should result from a dialog between buyer and supplier, and not be imposed by buyer on a take-it-or-leave-it basis

Section P's agnosticism to content is a source of potential strength that can enhance its effectiveness. That is, it allows the parties to adapt Schedule P to the unique circumstances of the buyer-supplier relationship; i.e., the applicable internal and external standards (e.g., laws, sector specific standards, internal company codes, etc.), the financial and managerial capacities of the buyer and supplier, the sector, the country, and the position of the supplier in the chain.²⁸

In large organizations with complex and lengthy supply chains, it may be tempting to standardize the MCC's as much as possible by disregarding these variables. However, doing so may lead to a tick-box approach to contract compliance that would make the MCC's not fit for purpose. It is therefore critical for buyers and suppliers to talk to each other to ensure that both parties know what is expected of them, and that the expectations are reasonable. Otherwise, it is likely that the supplier will not take the MCC's seriously on the grounds that they are too one sided, unrealistic based on the supplier's limited resources, and constitute "green washing".²⁹

Moreover, a one-sided, take-it-or-leave-it approach by buyers to the MCC's might subject them to attack in litigation based on lack of mutuality, lack of consideration, contracts of adhesion, and similar arguments.³⁰

E. The MCC's should not encourage the buyer to offload its human rights responsibilities to the supplier.

As noted earlier, human rights due diligence is an ongoing process. It starts prior to contract negotiation and extends through the life of the contract. It expects that buyers will undertake a proactive role in identifying and addressing human rights abuse by suppliers. However, the MCC's encourage a largely passive approach. For example:

- Section 2.4 provides that the supplier has no right to cure delivery of goods that are produced in violation of Schedule P, as otherwise would be provided by U.C.C. section 2-508 and CISG articles 37 and 38. The practical effect of this is to trigger the buyer's right to terminate the supplier and seek damages based on the buyer's right to seek indemnification from the supplier.³¹
- Section 5.7a disclaims any obligation of the buyer to monitor any supplier tier for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like.
- Section 5.7.b disclaims any obligation of the buyer to inspect the safety of any workplace in any supply chain tier.
- Section 5.7.c disclaims any obligation to control the manner of work done, safety measures, or engagement of employees and contractors or subcontractors at any supply chain tier.
- Section 5.7.d disclaims any liability to third parties.

Collectively, these provisions effectively offload a buyer's human rights responsibilities onto its suppliers, as Prof. Dadush correctly notes.³² Such an approach is at odds with the buyer's responsibility to conduct human rights due diligence for three reasons:

- First, a buyer is responsible for its own actions that contribute to human rights harm caused by the supplier.
- Second, offloading encourages a top-down compliance approach to human rights performance, which is ineffective and counterproductive.
- Third, persons injured by supply chain harm may likely be left without remedy.

These points are explained in further detail below.

1. A buyer is responsible for its own actions that contribute to human rights abuse by the supplier

As noted earlier, a buyer's purchasing practices may contribute to supplier human rights abuse. This is particularly likely where the supplier lacks the financial and managerial capacity to perform under the MCC's, and the buyer's business model induces the supplier to cheat and cut corners in order to meet contractual price, quality, and delivery requirements.

a) The "Fast Fashion" business model

The so-called "fast fashion" business model of the garment industry is a good example. This is shown by the April 2019 report from Human Rights Watch, *Paying for a Bus Ticket and Expecting to Fly: How Apparel Brand Purchasing Practices Drive Labor Abuses* ("HRW Report")³³ and by the Better Buying Index 2018 report ("Better Buying Index")³⁴.

The HRW Report identifies how buyer purchasing and sourcing practices in the apparel industry can incentivize suppliers to engage in dangerous conduct, such as subcontracting to unauthorized sources, the most notorious example of which is the Rana Plaza tragedy in 2014. The Better Buying Index is an independent, supplier-centric rating agency that identifies and ranks buyers based on seven purchasing and sourcing practices in the apparel industry that could contribute to human rights harm by suppliers: planning and forecasting, design and development, cost and cost negotiation, sourcing and order placement, payment and terms, management of the purchasing process, and harmonization with the company's CSR practices. These practices, if not carefully paid attention to, can result in buyer contribution to human rights harm.

b) The weakness of a top-down approach

The current version of the MCC's lack commitments by buyers to support the actions of buyers in respecting human rights, or to refrain from taking action that will contribute to supply chain human rights abuse. Instead, they treat the elimination of human rights abuse in supply chains as a supplier problem to be resolved by compliance audits, by the exercise of contractual penalties and remedies, such as rejection of nonconforming goods, claims for damages, or by termination.

Recent learning, however, has shown that such a top-down compliance approach is unlikely to result in improved human rights performance by suppliers. Instead, it is more likely to encourage cheating by suppliers or the use by suppliers of unauthorized subcontractors.³⁵

As a result, the MCC's disregard of buyer contribution to human rights harm may be counterproductive. To avoid this problem, the MCC's should, as recommended by Prof. Dadush, contain commitments by buyers to support suppliers and to avoid undermining them. Otherwise, the use of MCC's could be seen as window-dressing in the event that human rights abuse occurs notwithstanding the contract.

2. Offloading human rights to suppliers encourages a top-down compliance approach that discourages collaboration and is likely to be ineffective and counterproductive

The experience of leading companies indicates that a collaborative approach to solving human rights supply chain problems is much more likely to produce sustainable improvement in human rights performance than a top-down, compliance approach.³⁶ As Shift observed in its 2013 report, *From Audit to Innovation: Advancing Human Rights in Global Supply Chains*,³⁷ buyers often have limited visibility into their supply chains, many suppliers lack capacity to fix problems, and many suppliers lack incentives to commit to improve social performance. Moreover:

- ***“Many [supply chain] issues are systemic in nature, beyond the direct control of suppliers:*** While audits may reveal issues related to unsatisfactory working conditions, the root causes of many of these practices can be traced to structural or systemic issues, beyond the direct control of individual suppliers, requiring systemic responses – including social context, regulatory environments, and the broader labor relations context in the country.”
- ***“Companies often fail to recognize their own role in contributing to adverse impacts on workers:*** At the same time that brands and retailers preach social compliance, their own purchasing practices too often undercut their stated commitments to better social performance in their supply chains and contribute directly to the impacts they are intent on preventing. Companies may change designs, production volumes, and production schedules, without adjusting prices or timeframes, and without a clear understanding of the implications of these practices for their suppliers.”

Similarly, determining the right response to a supplier violation of Schedule P should require a collaborative approach by buyer and supplier to determine the root cause of the problem, in order to determine how and if it can be fixed. It makes little sense to terminate a supplier without first doing such an analysis, since substitution of a different supplier facing the same pressures may yield the same result. Moreover, terminating a supplier runs the risk of causing human rights harm by shutting down a factory and throwing people out of work.

In the event that collaboration doesn't work to solve a problem, the contract should also provide for mediation or other alternative dispute resolution techniques designed to facilitate dialog, rather than jumping straight to breach, termination, and then litigation.³⁸

3. Offloading human rights responsibilities may likely leave victims of harm without access to remedy

As shown earlier, Pillar Three of the UNGPs expects that businesses should provide or participate in legitimate remedial processes (which can be judicial or nonjudicial), to enable access to remedy for stakeholders, where the business identifies that it has caused or contributed to such harm.³⁹ This includes harm that occurs beyond the first tier of the supply chain.

Providing remedy for contribution to human rights harm does not mean that a buyer should write a blank check to claimants. Nor does it mean disregarding the primary responsibility of suppliers to remedy the harm that they directly caused. It applies only where the buyer agrees that it has contributed to harm. The extent of remedy should be proportionate to the business's contribution to the harm. And where the business disagrees that it contributed to the harm, or the extent of its contribution to the harm, it is entitled to insist upon an adjudication of the issue by a legitimate third party (such as a judge or arbitrator, for example).⁴⁰

Providing remedy under the UNGPs for buyer contribution to harm can be accomplished by providing or cooperating in legitimate processes, which can include judicial and nonjudicial dispute resolution mechanisms such as: company based operational level grievance mechanisms, provided that they meet specified criteria;⁴¹ multistakeholder sector-based initiatives such as the Child Labour Monitoring and Remediation System (CLMRS);⁴² participation in arbitration conducted under the developing Hague Rules on Business and Human Rights Arbitration;⁴³ and similar nonjudicial remedial processes.

However, Disclaimer 5.7(d) of the MCC's provides that "there are no third-party beneficiaries to this Agreement". This explicitly disclaims any duty to provide remedy to any persons harmed, whether or not the buyer contributes to their harm through its purchasing practices (such as the fast fashion business model described earlier).⁴⁴

This disclaimer may be typical in some commercial contracts. But without balancing it with other provisions designed to ensure that persons harmed have access to remedy, it is problematic. To offset this imbalance, the buyer should also require a commitment from the supplier, backed by evidence of its capacity and resources, to provide access to remedy for harm to victims. It should also commit to contribute to provide or participate in remedy where it agrees that it contributed to the harm. And, as Professor Dadush recommends, where the buyer contributes to harm, it should not be able to insist on its right to a total indemnity from supplier for such claims.

Summary and Conclusion

To summarize, I strongly support and congratulate the Working Group for drafting the MCC's. However, in many cases the MCC's do not achieve the right balance between a buyer's desire to eliminate human rights abuse from its supply chain, with its need to protect itself against legal claims. In my view, the MCC's lean too far in the direction of legal protection. To address these issues, I make the following recommendations, many of which echo those of Professor Dadush:

1. The commentary to the MCC's should advise drafters to use the UNGPs to inform the content and structure of the MCC's, in order to ensure that the MCC's are not limited to legal compliance alone, and are fit for purpose.
2. Schedule P should cover all salient risks of supply chain human rights risks, define them with clarity, and provide flexibility to cover unanticipated salient risks human rights due diligence identifies after the contract is formed.
3. Schedule P should result from a dialog between buyer and seller, in order to ensure that both sides fully understand what is expected of them, in order to avoid a counterproductive tick-box approach, and to ensure that the supplier takes its human rights obligations seriously.
4. The MCC's should recognize that a buyer has responsibilities for its own conduct that contributes to human rights harm by a supplier by committing to support and not undermine the supplier's efforts.
5. When performance problems arise, the MCC's should encourage a collaborative dialog between buyer and supplier, including a root cause analysis of the problem, rather than resort to retaliation and penalties, which can be counterproductive, particularly where the supplier lacks the capacity to perform its obligations under the MCC's on top of its other obligations under the contract.
6. The MCC's should recognize the need for buyers to ensure that suppliers have the capacity to remedy harm to victims of human rights abuse, and that the buyer commits to participate in legitimate remedial mechanisms when it contributes to such abuse.

As I pointed out at the beginning of this paper, the current pandemic shows that it is not enough for multinational buyers to ask "Can I?" when deciding whether to exercise their contractual rights in a manner that will harm vulnerable persons. It is also critical to ask, "Should I?" This is not a new issue. It existed before the pandemic, and will continue to exist afterwards. The ABA will be on the right track by recognizing the importance of asking both questions in framing the MCC's.

¹ Anna Triponel and John Sherman, *Moral bankruptcy during times of crisis: H&M just thought twice before triggering force majeure clauses with suppliers, and here's why you should too*, available at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/TriponelSherman_ForceMajeureArticle_31March2020_Final_0.pdf.

² See: (a) WBSCD, *CEO Guide to Human Rights* (2019), available at https://docs.wbcsd.org/2019/06/CEO_Guide_to_Human_Rights.pdf (“WBSCD”); and (b) Shift, *Business, Human Rights and the Sustainable Development Goals: Forging a Coherent Vision and Strategy*, (2016), commissioned by the Business and Sustainable Development Commission, (“SDGs and Human Rights”), available at <https://www.shiftproject.org/resources/publications/business-human-rights-sustainable-development-coherent-strategy/>, p. 9.

³ Sarah Dadush, *Contracting for Human Rights: Looking for Version 2.0 of the ABA MCC's*, American University Law Review Vol. 68:1519 at 1526-1534 (“Dadush”), at 1554.

⁴ United Nations, Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) (“UNGPs”) available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁵ See, Report of the United Nations High Commissioner for Human Rights, *Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability*, UN Human Rights Council (2018), available at <https://www.business-humanrights.org/en/un-high-commissioner-for-human-rights-reports-on-improving-accountability-access-to-remedy-for-victims-of-business-related-human-rights-abuse>

⁶ Dadush, *supra*, Section B (“What the MCC’s Do Well”). She also references the OECD Guidelines on Multinational Enterprises, available <http://www.oecd.org/corporate/mne/>, which were amended in 2011 to import the UNGPs’ concept of human rights due diligence under the UNGPs as a core corporate responsibility. To avoid redundancy, I will refer to only to the UNGPs rather than provide parallel references.

⁷ Dadush, *supra*, pp. 1522, 1550, 1554.

⁸ Dadush, *supra*, Section II (“What the MCC’s do Poorly: Offloading Human Rights Obligations onto Suppliers”).

⁹ SDGs and Human Rights, *supra*, pp. 8-9.

¹⁰ See generally, John G. Ruggie, *Just Business* (Norton, 2013)

¹¹ UN Office of the High Commissioner of Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), (“Interpretive Guide”), available at https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf .

¹² *ILO-IOE Child Labour Guidance Tool for Business*, International Organization of Employers, International Labor Organization (2016), p. 20, (“ILO-IOE Guidance”), available at <https://www.unglobalcompact.org/library/3881>. See also, Interpretive Guide, *supra*, pp. 15-18.

¹³ ILO-IOE Guidance, *supra*, p. 56.

¹⁴ UNGP 24.

¹⁵ Interpretive Guide, *supra*, p. 8.

¹⁶ ILO-IOE Guidance, *supra*, p. 22.

¹⁷ See: (a) WBSCD Analysis of the Business and Human Rights Landscape, available at https://humanrights.wbcsd.org/wp-content/uploads/2017/11/WBCSD-Business-Human-Rights-analysis_Nov-2018.pdf; and (b) John F. Sherman, *Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?* Business Law International Vol. 19 No 1 (2018), pp. 30-33, available at https://www.shiftproject.org/media/resources/docs/ParentalLiability_BLI_Sherman-January2018.pdf .

¹⁸ ABA House of Delegates Resolution 109, endorsing the UNGPs (2014), available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.authcheckdam.pdf, p. 5 n. 16.

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- ¹⁹ ABA Model Rule of Professional Conduct 2.1, available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/ .
- ²⁰ IBA *Practical Guide for Business Lawyers on Business and Human Rights* and its companion *Reference* (2016), available at <https://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx>
- ²¹ Ben Heineman, William Lee, and David Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, Center on the Legal Profession, Harvard Law School, 2014, https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf .
- ²² Zeid Ra'ad Al Hussein, *Ethical Pursuit of Prosperity* (23 March 2015), available at <https://www.lawgazette.co.uk/comment-and-opinion/ethical-pursuit-of-prosperity/5047796.article>.
- ²³ ABA House of Delegates Resolution 102B, endorsing the Model Principles of the *ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor* (2014) (“Model Principles”), available at https://www.americanbar.org/content/dam/aba/administrative/business_law/hod_materials.pdf .
- ²⁴ Report in support of the ABA Model Principles, *supra* pp. 5 et seq.
- ²⁵ John G. Ruggie, *Multinationals as global institution: Power, authority and relative autonomy* (2017), p. 3, Regulation and Governance, available at https://www.business-humanrights.org/sites/default/files/documents/Ruggie-2017-Regulation_Governance.pdf
- ²⁶ Ecovadis and Affecto Mutandi, *Sustainability Clauses in Commercial Contracts: The Key to Corporate Responsibility, 2018 Study of CSR Contractual Practices Among Buyers and Suppliers*, (“CSR Contractual Practices”), available at <https://resources.ecovadis.com/buyers/sustainability-clauses-in-commercial-contracts-the-key-to-corporate-responsibility> .
- ²⁷ ILO-IOE Guidance, *supra*, p. 14.
- ²⁸ CSR Contractual Practices, *supra*, p. 38.
- ²⁹ CSR Contractual Practices, *supra*, p. 49.
- ³⁰ CSR Contractual Practices, *supra*, p. 36.
- ³¹ Dadush, *supra*, p. 1534. (Note that Footnote 30 to the MCC’s explains that the buyer may elect to provide the supplier a right of notice and cure in order to fix the problem, and suggests that buyers may consider appropriate language to that effect).
- ³² Dadush, *supra*, Section II.
- ³³ <https://www.hrw.org/report/2019/04/23/paying-bus-ticket-and-expecting-fly/how-apparel-brand-purchasing-practices-drive> .
- ³⁴ <https://betterbuying.org/better-buying-index-report-spring-2018-released/>
- ³⁵ Shift, *From Audit to Innovation: Advancing Human Rights in Global Supply Chains* (August 2013) (“From Audit to Innovation”), available at <https://www.shiftproject.org/resources/publications/audit-to-innovation-advancing-human-rights-global-supply-chains/>
- ³⁶ CSR Contractual Practices, *supra*, p. 48.
- ³⁷ From Audit to Innovation, *supra*, p. 6.
- ³⁸ CSR Contractual Practices, *supra*, p. 51.
- ³⁹ See UNGP 22 and commentary.
- ⁴⁰ See UNGP 22 and Interpretive Guide, *supra*, pp. 63-67.
- ⁴¹ See UNGPs 22 and 31, and Interpretive Guide, *supra*, pp. 73-76.
- ⁴² ICI, *A look into the child labour monitoring and remediation system (CLMRS)* June 17, 2018, available at <https://cocoainitiative.org/news-media-post/a-look-into-the-child-labour-monitoring-and-remediation-system-clmrs/> .
- ⁴³ *The Hague Rules on Business and Human Rights Arbitration* (2019) available at <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/>.
- ⁴⁴ As the footnote commentary acknowledges, subsections 5.7(a) and (b) are also in tension “with the requirements of the FAR, 48 C.F.R. §§ 52.222–56, 22.1703(c) (2018) (requiring contractor certification (within threshold limits) that it will ‘monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities”).’ MCC’s, note 48.