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Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses

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Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses

ARTICLES

CONTRACTING FOR HUMAN RIGHTS: LOOKING TO VERSION 2.0 OF THE ABA MODEL CONTRACT CLAUSES

SARAH DADUSH*

This Article offers a commentary on the American Bar Association's initiative to craft model contract clauses that U.S. buyer companies can include in their contracts with suppliers. The purpose of the model contract clauses ("MCCs") is to deepen the protection of human rights along the supply chain. This Article briefly explains how the MCCs work and highlights two valuable contributions of the MCCs to the business and human rights space. First, the MCCs effectively take buyers' non-binding human rights policies and put them into practice by incorporating them as contractually enforceable appendices to the supply agreements. Second, the MCCs serve to relax the legally outdated distinction between product and process regulation by treating a product's human rights conformity as being on contractual par with a product's technical conformity (e.g., quantity, size, design). Both of these contributions are hugely beneficial for purposes of advancing the protection of human rights within global supply chains. This Article then discusses a central shortcoming of the MCCs, which is that the clauses shift all responsibility for human rights violations onto the supplier, ignoring the reality that the buyer's purchasing practices can be a serious contributing factor to the occurrence of violations. It concludes with some preliminary recommendations for improving the MCCs, in anticipation of a possible version 2.0 of the clauses.

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INTRODUCTION

The American Bar Association’s (ABA) 2018 Report on Human Rights Protections for Workers in International Supply Chains (“ABA Report”) provides model contract clauses (“MCCs”) for U.S. buyer companies (“Buyers”) (e.g., The Gap, Hershey’s, Wal-Mart) to include in agreements with their suppliers (“Suppliers”).¹ The objective of the MCCs is to bolster human and worker rights across the supply chain, reduce the incidence of human rights violations within the supply chain, and enhance the legal protections for Buyers in the event that their Suppliers engage in human rights violations. The ABA’s Business Law Section identified international supply agreements as promising vehicles for achieving this multi-faceted objective and embarked on the MCC initiative to make these contracts work better and harder for human rights.² This is a highly innovative and important effort within the business and human rights arena, and, as such, it is deserving of both critical attention and constructive support.

1. David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk*, 73 BUS. LAW. 1093 (2018) [hereinafter *Model Contract Clauses*].

2. See *id.* at 1094 (“The hope is that following the steps outlined in the ABA Model Principles will help eradicate labor trafficking and child labor from supply chains . . .”).

As currently drafted, a central shortcoming of the MCCs is that they place all responsibility for human rights violations on Suppliers and completely shield Buyers from liability, even in situations where the latter contribute to creating the conditions for violations to occur. In other words, the MCCs ignore the possibility, and frequent reality, that Buyers contribute to the occurrence of human rights violations by engaging in irresponsible purchasing practices (e.g., last minute changes to order quantities, delivery schedules, or product specifications) that create pressure on Suppliers to squeeze their workers, sometimes to the point of violating their human rights. This Article argues that the contractual obligation to comply with the Buyer's human rights policies should extend to both parties to the supply agreement, namely, the Supplier *and* the Buyer. This would serve two purposes. First, sharing contractual responsibility for human rights compliance would encourage Buyers to cultivate more communicative and collaborative relationships with their Suppliers, which would improve the identification of human rights risks, the quality of monitoring, the detection of violations, and the pursuit of better remediation strategies when violations do occur. Second, it would create meaningful incentives for Buyers to better police their supply chains, which could reduce the circulation of rights-violating goods in the U.S. marketplace, and, down the line, protect consumers from making purchases that implicate them in human rights abuses.

In earlier work, I coined the term “identity harm” to refer to the distress experienced by consumers who learn that a company they purchased from has failed to honor the environmental, social, or other “virtuous promises” made about its wares.³ Virtuous promises are increasingly prevalent in today's marketplace⁴ and, because they are not adequately policed by government regulation, it is relatively easy for companies to say that they are doing good, when in fact they are not. This can expose consumers to “virtuous duperies,” a type of deceit that makes consumers act against their values and generates identity

3. Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 865 (2018); Sarah Dadush, *The Law of Identity Harm*, 96 WASH. U. L. REV. 803, 803 (2019) (recognizing green, eco-friendly, fair-trade, cruelty free, conflict free, Made In America, and Kosher as types of virtuous promises).

4. Alison Moodie, *Has Corporate Social Responsibility Become the Modern Gold Rush?*, GUARDIAN (Oct. 22, 2015, 10:20 AM), <https://www.theguardian.com/sustainable-business/2015/oct/22/corporate-social-responsibility-dove-chipotle-patagonia> (discussing Starbucks' “Shared Planet” slogan, Chipotle's “Food With Integrity” commitment, and Dove's “Real Beauty” campaign, among others).

harm.⁵ A major concern with the MCCs is that they operate to de-responsibilize Buyers for human rights violations contractually, shielding even those who engage in irresponsible purchasing practices from liability. Such contractual impunity could have the perverse effect of increasing the prevalence of bad purchasing practices; and, by extension, the incidence of human rights abuses; and, by further extension, the occurrence of identity harm. To correct course, and with a keen eye toward future versions of the MCCs, Buyers' contractual obligations should be upgraded along with Suppliers'.

Part I of this Article proceeds by briefly describing the MCCs and the important positive contributions that the ABA initiative is making to the business and human rights field.⁶ Part II discusses the central shortcoming of the clauses, namely that they do not adequately account for the role of Buyers in creating the conditions for human rights violations to occur.⁷ It further identifies certain human rights risks that the MCCs may inadvertently create as a result of their excessively Buyer-friendly approach. Part III offers preliminary recommendations for making better use of supply contracts as vehicles for protecting human rights.⁸ Specifically, it proposes adding provisions to the MCCs that would activate the Buyer's own (contractual and institutional) commitments to the soundness of their supply chains. It also recommends that the MCCs incorporate the UN Guiding Principles on Business and Human Rights ("UNGPs") and the Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises ("OECD Guidelines") as a floor for human rights-related norm making across the supply chain, not a ceiling.⁹ Lastly, this Article briefly outlines a comparative fault mechanism that would identify an irresponsible Buyer as a "co-breaching party" of the supply contract and reduce their damages in proportion to their contribution to the human rights violation. This

5. Dadush, *Identity Harm*, *supra* note 3, at 865–66.

6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* Part III.

9. U.N. Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, princ. 15, U.N. Doc. HR/PUB/11/04 (Mar. 21, 2011), https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf [hereinafter *U.N. Guiding Principles*]; ORG. FOR ECON. CO-OPERATION & DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 31–34 (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter *OECD GUIDELINES*].

mechanism would allocate responsibility for human rights violations more fairly between the parties and seek to bring the remedies for breach in line with the UNGPs and the OECD Guidelines, which prioritize remediation for victims over money damages to contract parties.¹⁰

I. THE POWER OF CONTRACT: INNOVATING FOR HUMAN RIGHTS

The MCCs were developed by the ABA's Business Law Section, specifically its Working Group to Draft Human Rights Protections in International Supply Contracts (the "Working Group"). The stated objective for the initiative is twofold: "The mission of the Working Group is to make available well considered clauses that protect workers and that are sensitive to the legal and business risks that companies face."¹¹ Thus, the MCCs are designed to protect workers' human rights, on the one hand, and to help companies mitigate their legal exposure, on the other. The intended audience and ultimate users of the MCCs are U.S. Buyers, companies that place orders with domestic and international Suppliers (e.g., factories, farms). Importantly, the MCCs are agnostic regarding the Buyer's industry, meaning that the clauses could be incorporated into any type of supply agreement, whether dealing with apparel, agricultural products, electronics, or car manufacturing. While this versatility is appealing in that any business can adopt the MCCs and tailor them to their own needs, it is also problematic because Supplier-Buyer bargaining dynamics are likely to differ substantially depending on the industry and on the Buyer's leverage within its industry. Suppliers tend to be in a weaker bargaining position in the garment and agricultural industries; by contrast, Suppliers tend to be in a stronger position in industries that require a higher degree of technical capacity, expertise, and greater access to the Buyer's intellectual property, such as the electronics and automotive industries.¹² As discussed below, however, bargaining power

10. "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: . . . (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute." *U.N. Guiding Principles*, *supra* note 9, princ. 15(c); OECD: "Enterprises should . . . provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts." OECD GUIDELINES, *supra* note 9, at 31.

11. *Model Contract Clauses*, *supra* note 1, at 1094–95.

12. *The Five Forces*, HARV. BUS. SCH., <https://www.isc.hbs.edu/strategy/business-strategy/Pages/the-five-forces.aspx> (last visited June 1, 2019) (exploring renowned

dynamics can have serious implications for the protection of human rights—this is what renders the MCCs’ industry agnosticism problematic.

A. *How Do the MCCs Work?*

Buyers interested in adopting any or all of the MCCs would begin by adding their human rights policy, supplier code of conduct, or some equivalent document that captures the company’s responsible supply chain commitments as an appendix to their supply agreement(s). For ease of reference, this human rights appendix is referred to throughout the ABA Report and this Article as “Schedule P.” The Report explains that the letter “P” was chosen to stand for “Principles” or “Policies,” but the schedule can of course be renamed at will.¹³ By incorporating the human rights policies into the supply agreement as contract schedules, the obligations contained therein become a part of the contract, and, as such, are binding and enforceable.¹⁴ From here, the next task for the MCCs is to set out the terms for enforcing and operationalizing Schedule P, contractually. Buyers can pick and choose which MCCs to include in their supply agreements and can adapt any clauses they decide to include. For purposes of explaining how the MCCs operate, however, this section assumes that all of the clauses make it into the contract. The two examples below should help to illustrate how the MCCs work.

As a first example, the MCCs include compliance with Schedule P in the supply agreement’s section on representations and warranties, which is titled, “Representations, Warranties, and Covenants on Abusive Labor Practices.”¹⁵ MCC 1.1 treats each shipment by the Supplier, on its own (i.e., without a separate certification of compliance), as a representation of compliance with Schedule P.¹⁶ This example illustrates the importance of Schedule P and also the

economist Michael Porter’s “Five Forces” theory for evaluating strategic competitiveness within industries); *see also infra* notes 54–56 and accompanying text; BUYING YOUR WAY INTO TROUBLE? THE CHALLENGE OF RESPONSIBLE SUPPLY CHAIN MANAGEMENT, INSIGHT INVESTMENT 16–18, 23 (2004), <http://etiskhandel.no/Artikler/1430> [hereinafter BUYING YOUR WAY INTO TROUBLE] (“Almost all supply chains seem to be under continual pressure to produce goods faster This tendency is particularly pronounced in manufacturing and retailing apparel, footwear, home-ware and gifts, and in other sectors that produce for markets driven by rapidly changing consumer trends.”).

13. *Model Contract Clauses*, *supra* note 1, at 1096 n.13.

14. *See id.* at 1096 (explaining the intent to make human rights clauses binding by inserting them into supply contracts as appendices).

15. *Id.* ¶ 1.

16. *Id.* ¶ 1.1.

MCCs' agnosticism as to the Schedule's content. For MCC 1.1 to have any human rights value, Schedule P must be fairly robust; if the Buyer's human rights policy (i.e., Schedule P) is weak, then any representations made under MCC 1.1 will be relatively shallow. Put another way, the human rights protections afforded by the representation of compliance are only as expansive or limited as the Buyer's human rights policy. In spite of this, the Working Group takes no position on the content of Schedule P, explaining that the latter is for the company to define.¹⁷

As a second example, still in the representations and warranties section, MCC 1.2 requires that the Supplier ensure that any entity, be it the Supplier, its representatives, or any of its representatives' representatives acting in connection with the contract, "do so . . . only on the basis of legally binding and enforceable written contracts that impose on and secure from the Representative terms [in compliance with] [equivalent to those imposed by] [at least as protective as those imposed by] Schedule P."¹⁸ This MCC operates in two ways. First, it forbids informal subcontracting by the Supplier. Informal subcontracting has been identified as a major source of human rights risk; when production moves out of the line of sight of the original Buyer-Supplier contract and into the shadows of subcontracting, it becomes much harder to know, let alone regulate, how workers are being treated.¹⁹ Second, MCC 1.2 requires that any supplier subcontracted by the original Supplier also comply with Schedule P (or an equivalent set of human rights standards). Thus, the MCCs work by setting out specific rules of their own (e.g., prohibition against subcontracting) and incorporating the rules and standards contained in Schedule P into the contract via the representations and warranties.

MCC 1.2 also highlights the MCCs' modularity feature: Buyers can choose any one of the formulations included in the brackets or indeed come up with a formulation of their own. This modularity gives Buyers flexibility to select whatever wording is best suited to their needs. It

17. *See id.* at 1096 ("The content of Schedule P will likely vary significantly by industry and is beyond the scope of this Working Group.")

18. *Id.* ¶ 1.2.

19. 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 ("While the lead contractors with direct relationships with Western companies are subject to the code and audit system, companies further down the subcontracting often are invisible to Western brands."). This lack of oversight makes the subcontractor susceptible to human rights violations including low pay, forced overtime, child labor, and failure to meet "the bare minimum of Western safety requirements." *Id.*

also gives Buyers a sense for the negotiation options available to them. For instance, a stricter Buyer could choose to make its human rights policy (Schedule P) applicable to all subcontracts and subcontractors. Conversely, a less strict Buyer might give the Supplier more leeway by allowing them to include their own human rights policy in their subcontract, so long as that policy is equivalent to, or at least as protective as the Buyer's policy.

Other MCCs will be discussed below, but for present purposes, consider some of the key takeaways from this brief overview. First, the MCCs' agnosticism both to industry and to the content of Schedule P. Second, the MCCs' two-pronged approach, which consists of offsetting out their own contractual obligations (in the text of the MCCs) and incorporating the pre-contractual obligations contained in the Buyer's human rights policy (Schedule P) into the supply agreement. Finally, the MCCs' modularity feature, which is useful for negotiation purposes, but also for signaling to the Buyer where the more serious human rights risks and liabilities lie. With this background, we can now turn to assessing the MCCs' potential for protecting human rights in the supply chain.

B. What the MCCs Do Well

This section discusses two major contributions that the MCC project makes to the business and human rights space. Specifically, the project innovatively uses contract as a technology for making soft policies hard. It also supplies MCC adopters with a new framework for understanding product conformity. This new framework accounts not only a product's conformity with technical expectations, such as quantity and design, but also conformity with expectations about how the product was made, and specifically, how workers were treated throughout the production process. In this way, the ABA project is helping to erode an outdated and problematic distinction between conformity of product and conformity of process.

1. Making soft policies hard

A first hugely important and positive contribution that the MCCs make to the business and human rights space is that they operate to make soft policy commitments hard by incorporating Buyers' human rights policies into the contract as Schedule P. The effect of this simple but powerful move is to render binding and enforceable the content of a company's supply chain commitments. The MCCs transplant whatever commitments companies make about human rights and labor rights from their corporate policies "[into] the actual contract documents

where those policies may have greater impact.”²⁰ “Contractualizing” Buyers’ human rights policies in this way is a foundational strategy of the MCCs, and it stems from the recognition that company policies, on their own, can be quite airy as commitment devices.²¹

In previous work, I have described the social and environmental policy commitments that companies market to consumers as generating loud “sustainability noise.”²² Companies often surround sound themselves in talk of sustainability without actually walking the walk of sustainability; a danger of sustainability noise is that it can lull consumers into believing that a company is doing good in the world, when the reality may be quite different.²³ This is problematic because sustainability noise is, for the most part, not actionable. If a promise contained in “side communications” to consumers, meaning communications that are made off-label and not through direct advertising, turns out to be empty or false, consumers generally have very little legal recourse—under either tort, contract, or state consumer law.²⁴ Thus, the sustainability promises that a company makes about its treatment of workers, the planet, and animals in side communications (e.g., in corporate social responsibility reports, news articles or press releases, supplier codes of conduct, company websites, or by virtue of subscribing to a voluntary initiative such as the UNGPs) are generally viewed as being non-actionable, even though these promises matter to consumers.²⁵ Rather than being treated as

20. *Model Contract Clauses*, *supra* note 1, at 1094.

21. *Id.* (“Adoption of policies at the corporate level, while a good start, is not always enough: principles need to be put into practice.”).

22. Dadush, *Identity Harm*, *supra* note 3, at 880–81; Dadush, *The Law of Identity Harm*, *supra* note 3, at 833–36.

23. Dadush, *The Law of Identity Harm*, *supra* note 3, at 834–36.

24. *Id.* at 835–39 (describing case law wherein corporate statements on social policy were not deemed a type of enforceable warranty, unless, as explained in one case, the statement was sufficiently specific).

25. *See, e.g.*, *Sud v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1079–80 (N.D. Cal. 2017), *aff’d*, 731 F. App’x 719 (9th Cir. 2018) (dismissing plaintiff’s claims that defendant used its corporate social responsibility reports, supplier codes of conduct, and website disclosures to deceive consumers into buying products they otherwise would not have under the belief that no slave labor was used to harvest the product); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 654–56 (N.D. Cal. 2016), *aff’d*, 730 F. App’x 460 (9th Cir. 2018) (dismissing plaintiff’s allegations that Hershey violated California’s False Advertising Law for failure to disclose the use of forced child labor in the chocolate supply chain despite misleading assertions on Hershey’s website regarding its commitment to eradicate labor and human rights violations); *Wirth v. Mars Inc.*, No. SA CV 15-1470-DOC (KESx), 2016 WL 471234, at *1–3 (C.D. Cal. Feb. 5, 2016),

enforceable promises or as statements of fact, the commitments contained in side communications are generally treated only as aspirational expressions of a company's vision, of what it *wants* to achieve, not what it actually is achieving.²⁶

In case law, the only meaningful exception to the general non-actionability of sustainability noise "rule" is *National Consumers League v. Wal-Mart Stores, Inc.*²⁷ There, the court denied in part and granted in part the defendants' motion to dismiss where the National Consumers League alleged that the defendants had violated the D.C. Consumer Protection Procedures Act by not enforcing "their own Corporate Statements in dealing with suppliers, thereby violating their promises to the general public."²⁸ Each company had made statements on its website expressing an expectation that: (1) its suppliers comply

aff'd, 730 F. App'x 468 (9th Cir. 2018) (dismissing plaintiffs' allegations that Mars violated California UDAP statutes when Mars did not disclose that its pet food could contain seafood fished by slave labor in Thailand); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1019–20 (N.D. Cal. 2016), *aff'd*, 891 F. App'x 857 (9th Cir. 2018) (dismissing plaintiff's suit alleging the use of forced child labor in chocolate production because the company did not have a duty to disclose tainted supply chains); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 956–57 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 462 (9th Cir. 2018) (dismissing plaintiff's claims alleging that statements in corporate social responsibility reports, codes of conduct, and website assurances were misleading regarding the use of forced child labor in chocolate production); *Barber v. Nestlé USA, Inc.*, 154 F. Supp. 3d 954, 956–57 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018) (dismissing plaintiffs' False Advertising Law claims alleging that Nestlé had duty to disclose the use of forced labor in its Fancy Feast cat food supply chain); *Hall v. Sea World Entm't, Inc.*, No. 3:15-CV-660-CAB-RBB, 2015 WL 9659911, at *1 (S.D. Cal. Dec. 23, 2015) (dismissing plaintiffs' claim based on the allegation that had they known the omitted information concerning the health and living conditions of whales at Sea World, they would not have purchased tickets to enter the park); *Ruiz v. Darigold, Inc.*, No. C14-1283RSL, 2014 WL 5599989, at *1–3 (W.D. Wash. Nov. 3, 2014) (dismissing consumer plaintiffs' allegations that defendants used their corporate social responsibility report to mislead consumers into thinking company's dairies treated their workers and cows well); *Kasky v. Nike, Inc.*, 45 P.3d 243, 247–48 (Cal. 2002) (reversing a lower court's dismissal of plaintiffs' suit against Nike on behalf of California citizens for misrepresenting its labor practices when they said they were free from human and labor rights violations and made misleading statements to this effect in documents, including press releases and letters to newspapers, university presidents, and athletic directors) [together, the "Identity Harm Cases"].

26. Dadush, *The Law of Identity Harm*, *supra* note 3, at 835–36.

27. No. 2015-CA-007731 B, 2016 WL 4080541, at *3 (D.C. Super. Ct. July 22, 2016) (explaining that because the defendants had sourced supplies from Rana Plaza, a factory in Bangladesh that collapsed in 2013 killing over 1000 workers, including children, plaintiffs could rely on the collapse to support the inference that defendants had failed to honor their corporate social responsibility promises).

28. *Id.* at *1.

with applicable laws and regulations; (2) its suppliers provide a safe and healthy working environment, free of child labor; *and* (3) a commitment to audit supplier compliance with its (buyer-company) standards.²⁹ The court granted the defendant's motion to dismiss for statements falling under (1) and (2) because they "are generally aspirational in nature" and, as such, cannot be "recast . . . into promises."³⁰ However, with respect to statements under (3), the court denied the motion, saying that those statements are "more specific and contain verifiable facts that may be material to a consumer's purchasing decisions."³¹ In other words, because the auditing statements were specific and verifiable, they were sufficient for purposes of stating an actionable claim under D.C. consumer law. The court did not reach the merits of the allegations and the case eventually settled, but the recognition that corporate social responsibility commitments contained in websites can be actionable is a big precedential step in the right direction for aggrieved consumers.³² As Ramona Lampley correctly highlights, this case is also a big precedential step in the wrong direction for transnational corporations concerned about their exposure to liability for human rights violations; going forward, companies are likely to strip their sustainability commitments of any verifiable statements of fact.³³

Even with *National Consumers League* on the books, however, the vast majority of virtuous promises will continue to be treated as aspirational and not enforceable. This state of legal affairs is problematic because it creates too much room for noisy sustainability promises to proliferate, with no accountability if they turn out to be vacuous or exploitative of consumers' virtuous expectations. The challenge is therefore to cast a wider net over companies' virtuous promises so that more sustainability-related claims, including those made in side communications, can be treated as actionable. The more these promises are taken seriously, the more likely it is that the companies making them will honor them. This would create a virtuous circle wherein the circulation of tainted goods in the U.S. marketplace would diminish, and consumers would be able to consume with greater confidence that they are not (inadvertently) supporting human rights abuses with their purchases.

29. *Id.*

30. *Id.*

31. *Id.* at *7.

32. *Statement on Resolution of Lawsuit Against Walmart, JC Penney, and The Children's Place*, NAT'L CONSUMERS LEAGUE, https://www.nclnet.org/resolution_walmart (last visited June 1, 2019).

33. Ramona Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. U. L. REV. 1707, 1747 (2019).

This context should help to frame the “bigness” of the MCCs’ contribution to the business and human rights space. By including company human rights policies as an appendix to the supply contract, and making the commitments contained in the policy contractually enforceable, the MCCs go a long way toward addressing the actionability challenge.³⁴ However, the MCCs do not go far enough because they only make the commitments contained in Schedule P actionable against the Supplier, not the Buyer. As currently drafted, the MCCs make the Supplier the only party capable of breaching Schedule P, and so, the supply agreement, because of a human rights violation. Furthermore, as concerns the prospects for consumers to bring claims against Buyers with dirty (or not as clean as promised) supply chains, the MCCs leave Buyers’ liability exposure largely intact. Aggrieved consumers are no better off bringing claims against an MCC-adopting Buyer than against a company with only a standalone human rights policy on its corporate governance books. In fact, MCC 5.7 includes a disclaimer that “[t]here are no third-party beneficiaries to this Agreement.”³⁵ Presumably, this clause is intended to preclude consumers, as well as Supplier employees, from bringing a claim against the Buyer for a breach of Schedule P.

While this Article is critical of the MCCs in some respects, no amount of criticism should downplay the importance of putting policy into action contractually, as they propose to do. This is a major contribution to the business and human rights space, especially given that this area is generally under-regulated by governments.³⁶ The Working Group’s strategy of hardening otherwise soft human rights policies via contract is a powerful demonstration of how private ordering can be put to the service of human rights.

2. *Relaxing the product/process distinction*

A second valuable contribution of the MCC project is that it begins to tear away at the distinction between product and process, a distinction that permeates U.S. contract, sales, and products liability law. While U.S. law is relatively well-equipped to deal with the quality or safety of a product, it is much less adept at regulating the *process* by

34. See *supra* note 14 and accompanying text.

35. *Model Contract Clauses*, *supra* note 1, ¶ 5.7.

36. See David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. & SOC’Y 68, 73 (2010) (explaining that private, civil regulation “proposes to fill the regulatory gap” between global markets and government regulation).

which a product comes into being. Indeed, there is a large and stubborn gap in U.S. commercial law between product and process regulation, or between *product regulation* and *producer protection*, with the latter receiving almost no attention.³⁷ The ABA Report identifies this regulatory gap at the outset: “Sales law and contract law are keyed to production of conforming goods, like well-stitched soccer balls[, but] the background law does not deal easily with the problem of soccer balls that are *perfectly stitched but that were sewn by child slaves*.”³⁸ The MCCs step into this gap with an explicit intention to address process.

The MCCs begin to bridge the product-process divide by treating process obligations as being on par with product specifications. This is achieved by adding Schedule P as an appendix to the supply agreement alongside other appendices that deal with more technical product-specific matters (e.g., design, cotton content, rotation speeds, etc.). Human rights commitments thus “appear in an appendix to the agreement, Schedule P, just as the buyer’s specifications for goods themselves are likely to appear in an appendix” and become binding as a result, with the MCCs providing “enforceable remedies for their violation.”³⁹

MCC 3.1 illustrates how a violation of Schedule P, a process-focused appendix, would constitute a breach of the supply agreement, just like a violation of a more product-specific appendix. This MCC allows a Buyer to “revoke its acceptance, in whole or in part, upon . . . Buyer’s discovery of Supplier’s noncompliance with Schedule P, which the parties have agreed in Section 2 above *is a nonconformity that substantially impairs the value of the Goods and this Agreement to Buyer*.”⁴⁰ Here again, the Working Group is employing the legal technology of contract in a highly innovative fashion, this time to transform an otherwise unenforceable process commitment into a contractual binding obligation. This elegantly simple move has a couple of important legal effects. First, as just explained, it places product and process obligations on the same enforceability plane, making both equally binding. The second, and perhaps even more profound legal effect of making process commitments enforceable, is that it creates an opening for a fundamental rethinking of “conformity.” Under U.S. contract law, product conformity generally refers only to conformity

37. “Producer” refers here to the people who work in supply chains and whose human rights are at risk. The planet is also a producer whose health is jeopardized when supply chains are poorly managed, but for present purposes, the focus is on human producers.

38. *Model Contract Clauses*, *supra* note 1, at 1095 (emphasis added).

39. *Id.* at 1096.

40. *Id.* at 1100 (emphasis added).

with the Buyer's technical product specifications.⁴¹ But the MCCs add a process dimension to conformity, a human rights and worker protection dimension. This move has the potential to revamp common understandings of conformity altogether.

The call for expanding conformity to include process, as well as product, is not new. Professor Douglas Kysar compellingly advocated for such an expansion over a decade ago.⁴² However, the idea of employing a contractual solution for operationalizing more inclusive notions of conformity is new. The idea is valuable in part because it could help to fill a protective gap in U.S. consumer law wherein companies are not required to disclose process-information or human rights problems in their supply chains. Yet non-disclosure can hurt consumers by making them unwittingly complicit in supporting tainted supply chains and so in hurting others, albeit indirectly.

In a recent string of cases that can be collected under the umbrella, "identity harm cases," consumer plaintiffs argued that they would not have bought what turned out to be, for example, "slave chocolate," "slave pet food," and "slave shrimp," had they known the truth about these items' process-history prior to purchase.⁴³ Although the plaintiffs in these cases were able to establish standing, they ultimately failed to make out their consumer law claims because the courts found no duty

41. Pursuant to the perfect tender rule, a buyer may reject goods "if the goods or the tender of delivery fail in any respect to conform to the contract." U.C.C. § 2-601 (AM. LAW INST. & UNIF. LAW COMM'N 2017). "Thus a buyer may cancel a single-delivery contract for any nonconformity, including those respecting quality, quantity, title, and the timeliness of delivery." JEFFREY D. WITTENBERG, COMMERCIAL CONTRACTING: SALES UNDER THE UCC § 5.01 (2009).

42. See generally Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 526–640 (2004) (examining the conceptual distinction between product-related information [e.g., whether a consumer good is unsafe for the user] and process-related information [e.g., whether a good's production harmed workers, animals, or the environment] that appears in much of domestic and international law). Professor Kysar ultimately found that the "distinction proves far too thin and formalistic of a conceptual device," in particular "once one examines the full panoply of reasons why consumers might express preferences for processes." *Id.* at 526. Professor Kysar argues for expanding the integration of the global regulatory system by accommodating consumers' preferences for less dangerous processes, particularly since process preferences may come to "serve as indispensable outlets for public-regarding behavior." *Id.* I have echoed Prof. Kysar's arguments in my own work, Dadush, *The Law of Identity Harm*, *supra* note 3, at 821–29 (arguing that the dangers of a good's production history are material to consumers and that products liability law should adopt a more expansive definition of product defect to include defective, human, or environmental harm-generating processes).

43. See *supra* note 25 (summarizing the Identity Harm Cases).

for the defendant companies to disclose process-information or anything pertaining to the “dangerosity” of the production process.⁴⁴ The duty to disclose applies only to those aspects of the product that make it dangerous for the consumer to use, not dangerous for producers to make.⁴⁵ To date, then, the identity harm cases have only entrenched the product/process divide. This outcome is deeply troubling given that process-information clearly matters to consumers; if it did not matter, these cases would not have been brought in the first place. And because companies are not required to disclose process-information, consumers must choose between blindly purchasing goods that may turn out to have horrible—identity harming—process histories, and doing their own due diligence, which is a significant undertaking, especially for small ticket items like chocolate. That is not a fair choice. The under-protectiveness of U.S. consumer law could be corrected by expanding disclosure rules to require more process-information. More disclosure, which could take the visually digestible form of certifications, would allow consumers to make values-aligned purchasing choices and to better protect themselves from identity harm.

Now, the MCCs do not speak to enhancing process-information disclosures to consumers—this is not in their mandate and making it so would likely jeopardize the success of this important and already groundbreaking initiative. But, by bringing process conformity on par with product conformity, the MCCs get at the problem another way: if the supply contracts that bring goods to the U.S. consumer shelves regulate process as well as product, that could help to cleanse the marketplace of rights-violating goods at the outset. Additionally, if the MCCs come to be widely adopted, that could influence trade usage in terms of how conformity is defined, interpreted, and enforced.⁴⁶ Down the line, the MCCs could also help generate debate about mandatory process-information disclosure. Going even further, upgraded process standards could become incorporated into the implied warranty of merchantability⁴⁷ (again through usage), which would create another,

44. Dadush, *The Law of Identity Harm*, *supra* note 3, at 841–46; *see, e.g.*, *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 664 (N.D. Ca. 2016) (“[T]he weight of authority limits a duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to counter an affirmative misrepresentation.”).

45. Dadush, *The Law of Identity Harm*, *supra* note 3, at 841–46.

46. For an illuminating discussion of the limited value of usage in contract disputes, *see* Lisa Bernstein, *The Myth of Trade Usages: A Talk*, 23 BARRY L. REV. 119 (2018).

47. U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

perhaps more viable, avenue for consumers to bring claims against companies with tainted supply chains.

II. WHAT THE MCCs DO POORLY: OFFLOADING HUMAN RIGHTS OBLIGATIONS ONTO SUPPLIERS

Part I of this Article highlighted two major contributions of the ABA initiative to the business and human rights space, that it makes innovative use of contract as technology in order to harden soft policies and erodes the outdated and problematic distinction between process and product. This Part addresses a central shortcoming of the initiative, which is that the MCCs go too far in terms of protecting Buyers from the risk of human rights violations in their supply chains, and conversely, that they put too much of the accountability burden for non-compliance on Suppliers. Under-responsibilizing Buyers and over-responsibilizing Suppliers means that the MCC project changes only one piece of the human rights violating machinery, the Supplier side, without changing the other really important piece, the Buyer side. This lopsidedness undermines not only the integrity of the MCC project, but also its potential for reducing human rights violations in global supply chains.

A. *Entrenching Dangerous Dynamics*

To begin, it is important to get a sense for the Buyer-Supplier dynamics that are at work within global supply chains. The ABA Report's introduction states, "[w]e cannot stand by when children are trafficked and traded or when workers die in factory collapses and fires."⁴⁸ This suggests the MCCs are particularly concerned with Suppliers such as the Rana Plaza factory in Bangladesh, which collapsed in 2013 leaving over a thousand workers—mostly women and also some children—dead in its wake,⁴⁹ or the Tazreen Fashions factory, where an electrical fire led to the deaths of over one hundred workers who, because of blocked fire exits, could not make their way out of the building in time.⁵⁰ The MCCs' preoccupation with forced adult and child labor would extend to Suppliers working in the agriculture and fishing industries, where human rights abuses are

48. *Model Contract Clauses*, *supra* note 1, at 1094.

49. Padmanabhan et al., *supra* note 19.

50. Julfikar Ali Manik & Jim Yardley, *Bangladesh Finds Gross Negligence in Factory Fire*, N.Y. TIMES (Dec. 17, 2012), <https://www.nytimes.com/2012/12/18/world/asia/bangladesh-factory-fire-caused-by-gross-negligence.html>.

frequent, and also to the electronics industries, where Suppliers notoriously overwork their employees, sometimes to the point of suicide.⁵¹ Generally, Suppliers working in industries where labor and human rights violations are an issue tend to be based in developing countries with weak labor laws, weak enforcement of international human rights norms, including norms pertaining to the protection of workers' freedom of association, and weak rule of law.⁵² Such Suppliers often face serious operational challenges, including systemic corruption (e.g., factory inspectors and building license issuers expect bribes), civil unrest, and inadequate infrastructure (e.g., access to electricity and to reliable transportation networks)—all forces that increase the costs of production.⁵³

The Suppliers that are of concern to the MCC project are likely to be financially, technologically, and administratively under-resourced. As such, they are likely to be vulnerable to fluctuations in market demand and in a weak bargaining position relative to Western Buyers. However, not all Suppliers are created equal. Suppliers engaged in high-value or specialized production, such as in the automotive or electronics industry, may have greater bargaining power vis-à-vis Buyers than less specialized Suppliers in the garment (especially fast fashion), agriculture, or fishing industries. In specialized industries, Buyers are more likely to invest in their Suppliers (e.g., training, capital

51. TULANE UNIV. SCH. OF PUB. HEALTH & TROPICAL MED., 2013/14 SURVEY RESEARCH ON CHILD LABOR IN WEST AFRICAN COCOA GROWING AREAS 81 (2015) ("In the aggregate more than 2 million children between 5–17 years are estimated to be in hazardous work in cocoa in 2013/14."); Brian Merchant, *Life and Death in Apple's Forbidden City*, GUARDIAN (June 18, 2017), <https://www.theguardian.com/technology/2017/jun/18/foxconn-life-death-forbidden-city-longhua-suicide-apple-iphone-brian-merchant-one-device-extract>; Alexandra Wexler, *Chocolate Makers Fight a Melting Supply of Cocoa*, WALL ST. J. (Jan. 13, 2016, 9:30 PM), <https://www.wsj.com/articles/chocolate-makers-fight-a-melting-supply-of-cocoa-1452738616> (hazardous conditions include using dangerous instruments like machetes, "clearing land, carrying heavy loads, or [working] for long hours, at night or with exposure to agrochemicals").

52. Padmanabhan et al., *supra* note 19 (explaining that in Bangladesh, which is the second largest exporter of garments behind China, workers often do not receive a living wage, are forced to work overtime, and child labor is rampant, with many factories not meeting the bare minimum of Western safety requirements, and that, because cheap labor is a major selling point, labor laws tend to be lax, not up to international standards, and poorly enforced due both to a lack of political will and a lack of capacity).

53. *Id.* (describing conditions in Bangladesh specifically, though the realities depicted in that context are common in other developing countries, as well). The ETI Report explains that "an estimated 60 m[illion] workers (largely women) are employed by the garment industry alone. While not all of these form part of global supply chains they form the context for conditions for many." *ETI Report, infra* note 59, at 1.

improvements, technology upgrades, sharing intellectual property). Once a Buyer has invested in a particular Supplier, its “switching costs” increase, meaning that changing Suppliers becomes a more costly proposition.⁵⁴ The higher the switching costs, the more leverage the Supplier has to negotiate better deals with the Buyer.⁵⁵ But in less specialized industries where switching costs are lower, such as garment manufacturing and agriculture—industries that employ many of the world’s poor—Buyers can more easily “factory shop” and swap Suppliers out and in.⁵⁶ This diminishes Suppliers’ bargaining power and creates pressure on them to engage in a race to the bottom, both in terms of offering competitive (often below production cost) prices and in terms of under-protecting workers’ human rights.⁵⁷ Indeed, a major reason why Suppliers engage in problematic human rights behavior is to keep their production costs low, so that they can keep their prices low, so that they can improve their chances of getting and keeping contracts with foreign Buyers.⁵⁸

The point is that we should not assume that all Suppliers are weak and all Buyers are strong, or conversely, that all Suppliers are strong and all Buyers are weak.⁵⁹ Yet, the MCCs appear to operate on exactly

54. See Juliet P. Kostritsky, *A Bargaining Dynamic Transaction Cost Approach to Understanding Framework Contracts*, 68 AM. U. L. REV. 1621, 1660 (2019).

55. But see Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 765 (2014) (explaining that not even the high-value players are invulnerable to the risk of substitution).

56. *ETI Report*, *infra* note 59, at 6 (stating that “responsible purchasing is integral to building supply chain resilience and improving lives. It can have a significant impact on workers: nearly two thirds of the world’s poor make a living from agriculture and an estimated 60 m[illion] workers are employed in the global garment industry, most of whom are women”).

57. *Id.* (“The opportunity to sell to international buyers helps to lift people out of poverty. However, conventional purchasing practices can undermine relationships with suppliers and produce negative consequences for workers. For example, intense competition for customers’ business can push suppliers to engage in a ‘race to the bottom’ on price.”). Indeed, “39% of suppliers responding to our survey said they accepted orders below the cost of production in 2015, 29% of whom then struggled to pay workers.” *Id.*

58. In actuality, many factors affect a Buyer’s leverage over its Supplier. For instance, how much the Buyer actually purchases from its Supplier matters for determining who has the most bargaining chips. A Buyer that purchases only a small share of a Supplier’s product will have less say over the latter’s human rights behavior than a larger Buyer. Moreover, Buyers themselves often act as Suppliers for other Buyers. Thus, a Buyer’s leverage position can differ substantially within a single supply chain.

59. Katharine Early, *The Joint Ethical Trading Initiatives’ Guide to Buying Responsibly*, ETHICAL TRADING INITIATIVE 33 (Katrine Karlsen et al. eds., 2017), <https://www>

this last assumption, that Buyers are weak and Suppliers are strong. As a result, the MCCs work to bolster Buyers' rights under the supply contract in order to increase their leverage over Suppliers. This bias highlights the central shortcoming of the MCCs: they overlook the reality that Buyers often hold many (if not all) of the bargaining chips in supply agreement negotiations and that their Buyers' contractual behavior accounts for a large part of the human rights in global supply chains story. As explained more fully below, in certain situations, the MCC approach of bolstering Buyers' contractual rights and restricting Suppliers' rights is not only unjustified, it is also dangerous.

To illustrate the problem, consider the case study prepared by the New York University (NYU) Center for Business and Human Rights.⁶⁰ The study (reproduced here with minor variations) focuses on the fast fashion industry in Bangladesh, but similar studies could focus on contract farming or contract fishing arrangements, for example. The case study introduces readers to a Buyer called Basic Black that has a supply agreement with a garment factory in Bangladesh called Raz. The relationship between Basic Black and Raz is "on demand," meaning that Basic Black notifies Raz of the quantity, specifications, price per unit, and expected delivery times of orders at its convenience. The agreement indicates that when presented with an order from Basic Black, Raz has only two choices: accept or reject. Raz has no opportunity to negotiate the terms of the order, and any attempt to negotiate or modify the order will be treated as a rejection. The agreement contains a human rights-oriented provision (similar to MCC 1.2, quoted above) that forbids Raz from subcontracting production under the order without first obtaining written consent from Basic Black. For several years, Basic Black and Raz have a good relationship, with a steady and consistent stream of orders from Basic Black and a reliable supply of quality products by Raz. One day, Basic Black makes a big splash with the launch of the world's most perfect T-shirt and, to take advantage of the additional demand, it decides to triple its order from Raz, without extending the production timeline and without increasing the per unit price that could be used to pay overtime wages to factory workers. Raz accepts and fills the order, and months

.ethicaltrade.org/sites/default/files/shared_resources/guide_to_buying_responsibly.pdf [hereinafter *ETI Report*].

60. Padmanabhan et al., *supra* note 19.

later, Basic Black discovers that Raz had subcontracted a portion of the production to another factory, thus violating the supply agreement.⁶¹

The case study leaves readers with the questions, how should Basic Black respond to the violation of the agreement by Raz? Should they cancel the contract and sue Raz for breach? Should they drop Raz as a Supplier and find another factory to work with? Or should they seek to understand what went wrong and attempt to remediate the issue? Building on the last question, are there ways in which Basic Black is responsible for the decision by Raz to resort to unauthorized subcontracting? And could the supply agreement, or Basic Black's ordering practices, be modified to reduce the pressures on Raz to "cheat" by subcontracting? These are all important questions, but the last are of particular interest because they draw attention to the reality that a Buyer's (bad) conduct can explain, and even be a catalyst for, Supplier behaviors that put human rights at risk.

To clarify, "Buyer conduct" does not refer to Buyer monitoring or auditing of their Suppliers; monitoring and auditing tend to be expensive, difficult to implement, and often not terribly effective as compliance tools.⁶² Rather, Buyer conduct refers to something much more basic and simple, namely, how Buyers actually engage with their Suppliers on day-to-day, human-to-human basis, contractually and extra-contractually. It refers to, for instance, how the Buyer negotiates with the Supplier; how much room the Buyer gives the Supplier to say, "no, we can't meet your requirements on this timeline, but we could on a longer timeline or with a higher per unit price;" how much production lead time a Buyer gives its Supplier, especially when making changes to an existing order; how often a Buyer makes changes to its orders, in terms of quantity or product specifications (e.g., design specs); but also, whether the Buyer rewards "good" suppliers (meaning those that perform well with respect to product *and* process) with longer term contracts.

The NYU case study and various reports published by non-governmental organizations such as the Ethical Trading Initiative

61. *Id.*

62. See Parella, *supra* note 55, at 787–88. Note too that the MCCs include several provisions that disclaim the Buyer's obligation to monitor or inspect their Suppliers. See *Model Contract Clauses*, *supra* note 1, ¶ 5.7 (“(a) Buyer does not assume a duty 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; (b) Buyer does not assume a duty 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 . . .”).

(“ETI”) and international organizations such as the International Labor Organization, persuasively argue that one of the root causes of human rights violations is the Buyer’s purchasing practices.⁶³ This means that even the most innovative efforts to root out human rights violations along the supply chain and to clean up the consumer marketplace will be far less effective for focusing only on Suppliers, rather than on both contract parties, Suppliers *and* Buyers. Based on a survey with 1500 Suppliers about their experiences dealing with Western buyers, the ETI finds that conventional—not exceptional—purchasing practices include:⁶⁴ aggressive price negotiation; inaccurate product specifications and forecasting of production needs; late orders, short lead times, and last minute changes to orders; lack of support to meet ethical standards, including no reward for good performance;⁶⁵ and siloing of Buyer purchasing teams and ethical trading or corporate social responsibility teams, leading to Suppliers receiving conflicting direction.⁶⁶

These practices, the ETI explains, “put suppliers under intense pressure” to produce quickly and cheaply, which “lead[s] directly to poor working conditions and low pay for workers.”⁶⁷ The impact on workers can run a wide range, including “[s]uppressed wages, [p]oor health and safety measures, [i]rregular working hours and excessive overtime, [u]nrealistic performance targets, [l]ack of breaks, [l]ack of

63. *ETI Report*, *supra* note 59, at 4–5; Daniel Vaughan-Whitehead & Luis Pinedo Caro, International Labour Office, Purchasing Practices And Working Conditions In Global Supply Chains: Global Survey Results, Inwork Issue Brief No. 10, 11 (2017); Padmanabhan et al., *supra* note 19; BUYING YOUR WAY INTO TROUBLE, *supra* note 12, at 33–34.

64. *ETI Report*, *supra* note 59, at 5.

65. Recent (unpublished) research by Greg Distelhorst suggests that suppliers who do well on human rights protection may actually price themselves out of contracts with Western buyers, meaning that suppliers could be punished for protecting human rights (at a higher production cost that is passed on to buyers) by losing their contracts. In other words, *both* compliance and non-compliance increase the substitution risks for suppliers. Furthermore, the ETI has found that the suppliers who receive repeat orders from Western buyers receive new contracts on the basis of their price-point, not their human rights protection record. Telephone Interview with Casey O’Connor Willis, Sani Fellow, Research and Adjunct Professor, NYU Stern Center for Business and Human Rights (Jan. 22, 2019); *see also* Telephone Interview with Peter McAllister, Executive Director, Ethical Trading Initiative (Jan. 18, 2019).

66. *ETI Report*, *supra* note 59, at 5, 7 (“While many companies require suppliers to respect their codes of conduct (CoC) and monitor suppliers’ labour rights performance, their buying practices often sit at odds with these initiatives. As a buyer, you may have been trained to negotiate on margin, delivery times and product quality, rather than ethical criteria. Similarly, you are not typically incentivized to make ordering decisions based on respect for human rights.”).

67. *ETI Report*, *supra* note 59, at 4.

regular or permanent work, [and] [h]arassment and abuse from management.”⁶⁸ In sum, the more a Buyer squeezes its Supplier, the more the Supplier will squeeze its own and other factories’ workers, which can lead to human rights abuses.

In part because of their already vulnerable position, on-demand Suppliers that survive on an order-to-order basis may find it difficult *not* to cheat by subcontracting production to other factories (or farms, or whatever the production unit may be). Subcontracting—especially non-transparent, unsupervised subcontracting—can have negative implications for human rights by pushing production into the shadows and impairing the Buyer’s visibility into its supply chain. But the NYU case study highlights that subcontracting can also be a simple economic decision. That is, the decision to subcontract may be driven less by lack of concern for human rights than by the need to achieve efficiency gains against a backdrop of inadequate capacity and intense competition⁶⁹:

Subcontracting does not inherently increase human rights risks and can be a good way to increase efficiency and lower costs, when done with transparency and oversight. But the human rights risks associated with production outside the audit system, and the resulting business risks, has led many Western brands to formally ban subcontracting without the brand’s approval in their supplier agreements. The efficiency gains from subcontracting for lead manufacturers often outweigh the risks of being detected and the practice persists throughout the [garment] industry. *Officially banning non-transparent subcontracting has at this point merely resulted in a hidden production system that is removed from any form of oversight.*⁷⁰

This quote highlights that banning subcontracting outright, as Buyers are increasingly wont to do, can actually push subcontracting deeper underground where workers’ human rights are at even greater risk of being violated. Why would a ban on subcontracting increase the risk of human rights violations? In part because the more serious the consequences for the Supplier of being caught, the greater the incentive for them to conceal their breach by pushing production deeper into the shadows. In this regard, the MCCs are highly

68. *Id.* at 5.

69. Padmanabhan et al., *supra* note 19 (explaining that reasons for subcontracting include the need to spread manufacturing across several factories in order to mitigate the risks of infrastructure limitations, such as transportation delays, electrical blackouts, and civil unrest, that can slow production to a halt). Otherwise put, subcontracting is sometimes necessary in order to meet the tight deadlines imposed by Western buyers.

70. *Id.* (emphasis added).

problematic because they make the consequences of being caught very severe indeed. By attaching punishingly stiff penalties to Supplier breaches of Schedule P, the MCCs may inadvertently increase the incentives for Suppliers to hide their subcontracting practices—practices that, again, are often pursued because of production pressures coming from Buyers. Ironically, then, the MCCs could generate an increase the occurrence of human rights abuses within the supply chain. To see this, consider that the primary tool with which the MCCs equip Buyers to deter Suppliers from cheating is a very large stick—albeit one that Buyers might not be able to hit much with because many Suppliers are under-resourced and judgment proof.

The stick is unmissable in MCCs 2.2 (Rejection), 2.3 ([Cancellation] [Avoidance]),⁷¹ 2.5 (No Right to Cure), and 5.6 (Indemnification). MCC 2.2 states that if the Buyer “has reason to believe” that there is a violation of Schedule P, “[it] shall have the right to reject *any* Goods produced by or associated with Supplier . . . [r]egardless of whether the rejected [g]oods were . . . produced . . . under this or other contracts.”⁷² In other words, under the vaguely worded “reason to believe” standard, an aggrieved Buyer has the right to cancel the problematic supply contract, but also any other contracts that the Buyer and the Supplier may have together. One suspected breach could therefore operate to destroy the entire contractual relationship, even if only one contract was (maybe) problematic, and even if the relationship was otherwise good. In this way, the MCCs give Buyers a blank permission slip to unilaterally wipe their hands clean of any suspected human rights violation, even if their own hands were not clean, and even if destroying the contractual relationship could cause further harm to workers. Indeed, workers could be harmed if they are put out of a job, or if factory managers move to squelch workers’ associational rights to stop word of human rights abuses from getting out.

MCC 2.3 creates additional penalties for Suppliers suspected of having breached Schedule P:

71. *Model Contract Clauses*, *supra* note 1, at 1099 n.26 (clarifying that “Avoidance” applies to agreements under the CISG, whereas “Cancellation” applies to contracts under the U.C.C., hence the bracketed options).

72. *Id.* at 1099 (emphasis added).

Noncompliance with Schedule P [substantially impairs the value of the Goods and this Agreement to Buyer] [is a fundamental breach of the entire Agreement] and Buyer may immediately [cancel] [avoid] this entire Agreement with immediate effect and without penalty and/or may exercise its right to indemnification and all other remedies.⁷³

Under this clause, a suspected breach of Schedule P triggers not only the right of the Buyer immediately to cancel this and all of its contracts with the Supplier—without any penalty for cancelling even unproblematic contracts—but also triggers the Buyer’s right to seek damages beyond cancelation, including by activating the indemnification clause, which we return to below.

MCC 2.5 states, “Supplier hereby acknowledges that it shall have no right to cure by substitution and tender of Goods created and/or delivered without violation of Schedule P if Buyer elects to refuse such tender, in Buyer’s sole discretion.”⁷⁴ This clause says that the Supplier will have no opportunity to address or correct the (suspected) human rights violation; one strike and you’re out, in other words. This approach is problematic for a few reasons, including because it is entirely inconsistent with the approach of the UNGPs and the OECD Guidelines.⁷⁵ These widely adopted principles, which, it is important to stress, were developed with substantial input from transnational corporations, promote collaboration and remediation over retaliation, contractual or otherwise.⁷⁶ Indeed, the famous “three pillars” of the UNGPs include, the nation state’s responsibility to protect human rights, the business responsibility to respect human rights, and the joint responsibility to *remedy*.⁷⁷ What form could remediation take in a scenario where the Buyer suspects that a violation has occurred at the Supplier level? Well, for a start, the Buyer would be expected to work with the Supplier to create an internal grievance mechanism to address

73. *Id.*

74. *Id.* at 1100.

75. *U.N. Guiding Principles*, *supra* note 9; OECD GUIDELINES, *supra* note 9.

76. *U.N. Guiding Principles*, *supra* note 9, princ. 13(b) (“The responsibility to respect human rights requires that business enterprises . . . (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”); OECD GUIDELINES, *supra* note 9, at 19–20 (“Enterprises should . . . seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations.”).

77. *U.N. Guiding Principles*, *supra* note 9, princ. 13(b).

the workers' (or their representatives') complaints.⁷⁸ The mechanism would operate to, for example, pay workers any unpaid overtime wages and change internal procedures so that the conditions that gave rise to the grievances can be improved going forward. It could lead to the firing of managers who have squelched the rights of whistleblowers or of workers to associate. It could also involve instituting new procedures to improve communications between the Buyer and the Supplier.

Through the no right to cure clause, the MCC project unnecessarily undermines the UNGPs and the OECD Guidelines, as well as the consensus-driven process that led to their development. Footnote 30 of the MCCs fairly captures the remediation approach enshrined in the UNGPs and the OECD Guidelines, but offers this option only as a visually distant alternative to what is above the line (MCC 2.5).⁷⁹ While most of the recommendations for upgrading the MCCs appear in the next section, one that deserves mention here is to reverse the order between the text of MCC 2.5 and the accompanying footnote 30 placing the footnote text as the primary option above the line and the no right to cure language as the secondary option, below the line. As Professor Diane Orentlicher pointed out in her remarks at the New Perspectives: A Discussion on Modern Global Supply Chains Symposium, the way in which the MCCs present contractual options to Buyers serves a signaling function, and the current order sends the signal that retaliation, not remediation, should be the first port of call.⁸⁰ If the proposal of

78. *U.N. Guiding Principles*, *supra* note 9, princ. 29 (“To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”); *OECD GUIDELINES*, *supra* note 9, at 34. Once there is a need for remediation, “operational-level grievance mechanisms for those potentially impacted by enterprises’ activities can be an effective means of providing for such processes when they meet the core criteria of: legitimacy, accessibility, predictability, equitability, compatibility with the *Guidelines* and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions.” *Id.*

79. *Model Contract Clauses*, *supra* note 1, at 1100 n.30 (“Many parties, however, may prefer to provide a right to cure . . . the parties may prefer to institute a program to alleviate the problems (e.g., by providing for appropriate working conditions) rather than to end the Agreement and throw the employees out of work. For these reasons, a ‘notice and cure’ clause may be preferable to the elimination of any cure right for Supplier.”).

80. Diane Orentlicher, Professor, Am. Univ. Wash. Coll. of Law, Remarks at the American University Law Review Symposium: New Perspectives: A Discussion on Modern Global Supply Chains (Jan. 25, 2019) [hereinafter Orentlicher Remarks].

reversing the order is unpalatable, then at a minimum the text of footnote 30 should be added above the line as a (preferably first) bracketed option.⁸¹

Finally, for purposes of sizing the Buyer's stick under the MCCs, MCC 5.6 seals all remaining outs for the Supplier, stating:

Supplier shall indemnify, defend and hold harmless Buyer . . . 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, or destruction of Goods, the difference in cost between Buyer's purchase of Supplier's Goods and replacement Goods, reasonable attorneys' fees, audit fees, 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.⁸²

This clause is designed to shield the Buyer from having to pay damages to anyone bringing a lawsuit against it as a result of a human rights violation at the Supplier level. The Supplier would indemnify the Buyer by taking full responsibility for any and all claims brought against the Buyer, whether by workers, consumers, investors, other businesses, or the government. This is a sweeping indemnification clause that ignores the Buyer's role in creating the conditions on the ground for human rights violations to occur. What explains this degree of Buyer bias, especially given the high probability that the

81. *Model Contract Clauses*, *supra* note 1, ¶ 5.3 does speak to non-compensatory remedies for Buyers, including asking Suppliers to provide adequate assurances of Schedule P compliance; demanding injunctive relief to stop the non-compliance; requiring the Supplier to terminate certain employees or subcontracts; and, suspending payments during the Buyer's investigation of the Schedule P breach. However, this MCC does not go far enough in terms of putting remediation first or countering the retaliatory approach advanced in the other MCCs. For a start, MCC 5.3 is difficult to reconcile with MCC 2.5 (no right to cure), which comes earlier in the ABA Report. Could non-compensatory remedies be sought if the Supplier has no right to cure? More words are needed to integrate these two clauses. Further, MCC 5.3 does not recommend non-compensatory remedies as a default, it merely lists them as "[i]n addition to the right to [cancel] [avoid] this Agreement" possibilities. Moreover, the content of MCC 5.3 is not sufficiently reflective of the UNGPs or the OECD Guidelines to offer Buyers a recognizable point of reference for remediation. Finally, the remedial focus of MCC 5.3 remains squarely on the Supplier and says nothing of the Buyer's responsibility to remediate human rights abuses in its supply chain, again, contrary to the UNGPs and the OECD Guidelines.

82. *Model Contract Clauses*, *supra* note 1, ¶ 5.6.

Supplier will turn out to be judgment proof? Likely the answer is that the bigger the (even unusable) stick, the more probable it is that Suppliers will be vigilant about complying with Schedule P.

Contracting to make Suppliers more vigilant about human rights is no doubt a good thing. But, when taken together, MCCs 2.2., 2.3, 2.5, and 5.6 create such stiff penalties for a breaching Supplier that they will likely do whatever they can to avoid detection by concealing any deviation from Schedule P. Put another way, when the consequences of detection are as elevated as they are here, the incentives to avoid detection at all costs are also heightened. Perversely, then, the MCCs could create an over-deterrence dynamic that leads to more human rights violations, not fewer. The MCCs would be much stronger if they adopted a collaborative, remediation-oriented model, rather than a retaliatory model. After all, the victims of human rights violations are the *workers* and what they need to be made whole is remediation, not contractual retaliation. Yet, as currently drafted, the MCCs treat the Buyer as the victim and equip them with a stick so large that even its hypothetical wielding could cause more harm than good to those in need of protection—workers. This is a most unfortunate outcome of the MCCs' Buyer bias. To correct course, the true victims of human rights abuses in the supply chain must move from the wings to center stage; otherwise, the integrity of this important and valuable initiative will be grossly undermined. This point will be returned to in Part III.

A last critical observation pertains to the MCCs' agnosticism concerning Schedule P. There are definite advantages to staying away from prescribing specific Schedule P content, including that this flexibility invites Buyers to engage in the important exercise of determining what human rights policies matter most to them given their particular circumstances. But there are also disadvantages to agnosticism in this setting. Specifically, without some degree of Schedule P uniformity, production could become even more expensive for Suppliers who will be contractually obligated to comply with human rights standards that differ from Buyer to Buyer.⁸³ Typically, compliance costs are assumed by the Supplier, not the Buyer, and, without encouragement—for example, from the ABA—to proceed otherwise, it is unlikely that these costs will be passed on to the Buyer since that would make the Supplier less competitive. Moreover, price pressures are today greater than ever, meaning that to

83. *ETI Report, supra* note 59, at 7 (addressing the issue of high ethical demands being made on suppliers with little to no support from buyers).

be competitive, Suppliers must charge lower prices than ever.⁸⁴ It is not difficult to see how this cocktail of increased production costs and lower prices could incentivize more cost-cutting by Suppliers, and thus lead to more human rights abuses. To mitigate this risk, it is once again important to cultivate a more collaborative relationship between Buyers and Suppliers. The more Buyers can harmonize the content of Schedule P (perhaps according to their industry?) the more financially feasible it will be for Suppliers to comply, and the greater the likelihood that they will in fact comply.

The capital “S” solution is therefore not to retaliate against Schedule P breaching Suppliers, but rather to improve the Buyer-Supplier relationship in order to increase collaboration in protecting human rights all along the supply chain. Implementing this Solution will require finding ways to make Buyers take more responsibility for their own behavior under the supply agreement and placing the actual victims of human rights abuses—the workers—at the contractual center stage. As currently drafted, the MCCs tend to entrench separation, and even opposition, between Buyers and Suppliers. This approach comes at the unfortunate cost of jeopardizing the effectiveness and integrity of the MCCs as a tool for protecting human rights in the supply chain. Part III offers some recommendations for correcting course.

III. MAKING BETTER CONTRACTS BY MAKING THE CONTRACTING PARTIES BETTER

Part II of this Article cast light on the central shortcoming of the MCCs, that they are too biased in favor of the Buyer and that they overlook the real and frequent reality that Buyers are deeply implicated in creating the conditions that make human rights violations possible. Furthermore, the MCCs create so much contractual room and cover for Buyers to engage in irresponsible purchasing practices that they could inadvertently generate an increase the occurrence of human rights violations. For these and other reasons, it is imperative to correct course in order to protect the hugely valuable contributions that the ABA’s initiative is making to the business and human rights space and to improve its chances of transformational success.

The recommendations that follow seek to make the supply agreement a more robust instrument for improving the human rights conduct of *both* Suppliers and Buyers. This could be achieved by

84. Padmanabhan et al., *supra* note 19.

making both parties subject to Schedule P and activating their respective human rights obligations contractually at the outset of their contractual relationship. On the back end, the MCCs could be adjusted to hold both parties accountable for human rights violations, to the extent of their respective fault. This Part thus offers recommendations for recalibrating the MCCs under two general categories: *ex ante* contractual regulation and *ex post* contractual regulation. The first set of recommendations focuses on regulating the conduct of the parties before the occurrence of a human rights violation, while the second focuses on regulating the conduct of the parties after such an occurrence.

A. Ex Ante Contractual Regulation

The recommendations in this Section aim to reformulate the MCCs so that they can better fulfill their mission to protect human rights in the supply chain. The focus here is on improving the Buyer-Supplier relationship *at the outset*.

In this regard, a first recommendation is to relax some of the agnosticism with respect to the content of Schedule P. Simply, the Introduction to the ABA Report, which currently serves as a kind of preamble for the MCCs, should be expanded by a few sentences to highlight that it is crucially important for Buyers to adopt a “do no harm” commitment that is rooted in sound purchasing practices. Buyers should make their employees aware of this commitment and provide appropriate training. More specifically, employees staffed on the Buyer’s purchasing team should be trained on sound purchasing practices and on navigating possibly conflicting directives coming from their superiors. This would help ensure that ethical commitments do not get sidelined in the hunt for the best deal and to mitigate the silo problem identified by the ETI and others.⁸⁵ This additional language should get Buyers thinking about what they can do to improve their own human rights performance, independently of Suppliers.

Going further, the Introduction could suggest that Buyers, particularly those engaged in less sophisticated industries with lower switching costs, expressly include responsible purchasing commitments in their human rights policy, and, by extension, in Schedule P. Buyers could also be referred to documents such as the ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor (which

85. See *supra* note 66 and accompanying text.

include principles for Buyers),⁸⁶ the ETI Report (which contains a sample Buyer code of conduct),⁸⁷ and of course, the UNGPs⁸⁸ and the OECD guidance on due diligence for responsible supply chains in the garment and footwear sector,⁸⁹ all of which provide guidance for drafting a responsible Buyer policy.

If Buyers' responsible buying commitments are included in Schedule P, the next question becomes, how to operationalize them contractually. As already mentioned, under the current MCCs, Schedule P is binding only on Suppliers, not Buyers.⁹⁰ To correct this imbalance, a new MCC in the representations and warranties section could be drafted to say, for instance, that with every order submitted to the Supplier, the Buyer warrants that, in accordance with Schedule P, it has taken the Supplier's production capacity into account in finalizing the terms. Another MCC could be added to this section, saying that the Buyer will support the Supplier's efforts to comply with Schedule P to the extent reasonable for similarly situated Buyers. This clause would kill two birds with one stone. First, it would more equitably apportion the technical and financial responsibility for complying with Schedule P, which is important since Supplier production costs rise when different Buyers impose different human rights standards and requirements; and, when costs rise, so too do the incentives for cutting compliance corners. Second, the "similarly

86. ABA, MODEL BUSINESS AND SUPPLIER POLICIES ON LABOR TRAFFICKING AND CHILD LABOR 4, 6–8 (2014).

87. *ETI Report*, *supra* note 59, at 4 (defining responsible purchasing as "purchasing in a way that enables positive change at the supplier level, so that every part of the supply chain benefits. It requires a trusting, direct and honest relationship where both parties are able to negotiate and share risks equally, and a purchaser who is committed to supporting human rights within the supply base"). The ETI buyer code of conduct contains ten provisions, including: "Communicating clearly, promptly and accurately on all issues concerning orders"; "Never negotiating a price that is below the cost of production, as this will impact on the wages and working conditions of workers"; "Staying with our current supplier if a higher price will ensure decent wages and working conditions for workers, rather than moving our business elsewhere purely on the basis of price"; "Placing orders with lead times that do not trigger excessive working hours or sub-contracting"; "Refraining from changing orders repeatedly and with short notice. If changes are unavoidable, amending target delivery times accordingly"; and "Providing material and practical support to our suppliers in striving to meet their obligations under this code of conduct." *Id.* at 31.

88. *U.N. Guiding Principles*, *supra* note 9, princ. 16.

89. ORG. FOR ECON. COOPERATION AND DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS IN THE GARMENT AND FOOTWEAR SECTOR 37 (2018), <https://doi.org/10.1787/9789264290587-en> [hereinafter OECD GARMENT GUIDANCE].

90. *Model Contract Clauses*, *supra* note 1, at 1096.

situated” language would help address the industry differentiation issue—that different industries involve different Supplier-Buyer dynamics—by tacking the Buyer’s support to the practices and usages within its own trade. These clauses could be added (even only as bracketed options) to the representations and warranties section, in order to signal to Buyers that their behavior matters for protecting human rights.

A last *ex ante* recommendation is to add another clause to the representations and warranties section allowing the Supplier and workers to report not only existing human rights violations (as stipulated in MCC 1.3), but also any potential violations that could materialize as a result of problematic Buyer behavior. This would serve as an alert system, signaling to the Buyer that the Supplier is entering a human rights “danger zone” and that the Buyer can help by returning to the negotiating table, or perhaps just by making a phone call. Going a bit further, perhaps a third party, such as the ETI, could be designated in the contract to receive the Supplier’s alerts and to mediate between the Buyer and the Supplier, before the identified human rights risk materializes into a violation.

B. Ex Post Contractual Regulation

This set of recommendations aims to reformulate the MCCs so as to improve the behavior of Buyers and Suppliers *after a human rights violation has occurred*. More specifically, the proposals below would have the MCCs direct the parties to remediate human rights violations, rather than engage in contractual retaliation. This would address the problem discussed in Part II, that by steering the Buyer in the direction of retaliation, the MCCs undermine both the remediation principles enshrined in the UNGPs and the OECD Guidelines⁹¹ and the MCCs’ own mission to ameliorate human rights in global supply chains.

As currently drafted, the MCCs adopt a dangerously punishing stance toward breaching Suppliers. Dangerous because, as discussed above, the fear of being caught breaching Schedule P could cause Suppliers to push production deeper into the shadows of illicit subcontracting, where workers’ human rights are most at risk. The retaliatory approach is also problematic in that it asks far less of Buyers than the UNGPs and the OECD Guidelines in terms of taking responsibility for the human rights violations that occur in their supply chains. The UNGPs and the OECD Guidelines, along with other widely

91. *U.N. Guiding Principles*, *supra* note 9, princ. 22; OECD GARMENT GUIDANCE, *supra* note 89, at 72–73.

adopted norms such as the Global Compact, all converge on the notion that, in the event of a human rights violation, the first step should be for the businesses involved, namely, the Buyer and the Supplier, to remediate the grievances of the victims—the workers—and to address the root causes of the violations. Although these documents contain only voluntary norms, not binding rules, they are widely regarded as influential and legitimate, in large part due to the consensus-driven process that led to their development.⁹² The remediation directive should therefore be taken seriously, yet it conflicts quite dramatically with the retaliatory approach adopted by the MCCs.

A first recommendation in this section is to add language to the MCCs and the Introduction indicating to Buyers that they should consider the obligations enshrined in the UNGPs and the OECD Guidelines as a normative floor, not a ceiling. To bring this message home, the MCCs should further communicate that remediation—not retaliation—is the first post-violation port of call.⁹³ As recommended in Part II, this could be achieved simply by moving the text of footnote 30 above the line, under a new “Right to Cure” section. Ideally, the current “No Right to Cure” language would be removed altogether, but it could also be moved below the line. If neither option is palatable, then the current language should at a minimum be bracketed to signal that it contains only a contractual option, not a default. Moving the remediation text above the line would send a much clearer signal to Buyers that remediation is a good first option. Additionally, an entirely new section could be inserted between Section 2 (“Rejection of Goods and [Cancellation] [Avoidance] of Agreement”)

92. See Parella, *supra* note 55, at 329 (“One of the key reasons that industry actors were more receptive to the Ruggie Framework and the Guiding Principles compared to the Global Norms was because of the consultation process used with the former”); see also U.N. *Guiding Principles*, *supra* note 9, ¶ 4 (describing the extensive research conducted, consultations, submissions, and reports generated); U.N. Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 1, U.N. Doc. HR/PUB/12/02 (2012) (“The Guiding Principles are based on six years of work by the former Special Representative, including in-depth research; extensive consultations with businesses, Governments, civil society, affected individuals and communities, lawyers, investors and other stakeholders; and the practical road-testing of proposals.”).

93. This could be achieved by moving much of the content of note 30 in the Model Contract Clauses, which discussed remediation as an option, above the line. *Model Contract Clauses*, *supra* note 1, at 1100 n.30. Such a move would send a much better signal to Buyer-companies than the current MCCs, which indicate that retaliation, not remediation, is the preferable default option for buyers confronted with human rights violations in their supply chain. See Orentlicher Remarks, *supra* note 80.

and the current Section 3 (“Revocation of Acceptance”). The new section could be titled, “Remediating Schedule P Breaches.” It could include clauses from the UNGPs⁹⁴ and the OECD Guidelines⁹⁵ that speak to setting up grievance mechanisms for victims and to addressing the root causes of violations in the resulting remediation plan, which the new MCC could refer to as the Joint Remediation Plan (“JRP”).

The transition to the new Section 4 could be accompanied by language saying, “In the event that remediation is unsuccessful or that Supplier proves unable or unwilling to meet the benchmarks set forth in the JRP, then Buyer will have the right to exercise rejection and termination rights as set out in this Section.” This reformulation achieves two goals: First, it places remediation and cooperation at the forefront of the response strategy for dealing with human rights violations.⁹⁶ Second, it preserves the Supplier’s right to cure unless and until that party demonstrates its incapacity or unwillingness to cure, at which point the retaliatory measures contained in the current MCCs become more justified.

Another ex post recommendation goes to the remedies that should be made available in the event of a Schedule P breach. Specifically, remedies should be adjusted where the Buyer is (in whole or in part) responsible for creating the conditions that led to the human rights violation on the ground. The general idea is to import the concept of contributory negligence or proportional liability from tort law into the supply contract. Rather than use the term contributory negligence, though, we would refer, as Professor Ariel Porat suggests, to “contributory fault.”⁹⁷ By “contorting”⁹⁸ the supply agreement in this way, breaches of Schedule P would include, not just nonconforming *production* processes, but also nonconforming *purchasing* processes. In practical terms, bringing contributory fault into the supply agreement would reduce any damages payable by the Supplier to the Buyer by whatever share of the

94. *U.N. Guiding Principles*, *supra* note 9, princ. 29.

95. OECD GARMENT GUIDANCE, *supra* note 89, at 94.

96. See Jennifer Martin, *Private Law Remedies, Human Rights, and Supply Contracts*, 68 AM. U. L. REV. 1781, 1811 (2019) (explaining that remediation and reparations for victims have the additional advantage of avoiding the unappetizing prospect of Buyers “benefit[ing] from a human rights abuse” by receiving large money damages).

97. Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397, 1397 (2009).

98. Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 SETON HALL L. REV. 390, 390 (1997) (noting that “contort,” a term developed by Grant Gilmore, describes the gray area of law where torts and contracts merge together).

violation-responsibility the Buyer bears. Thus, the Buyer would be liable under the contract, just like the Supplier.

And here is another reason to place remediation high up on the post-violation agenda: While Buyers might (understandably) be loath to pay human rights related damages to the Supplier, they should be more open to paying damages into a remediation fund dedicated to redressing the grievances of victims. Indeed, from the point of view of all of the parties involved—the Buyers, the Suppliers, and the actual victims—remediation should be viewed as a superior outlet for money damages—whether paid by the Supplier, the Buyer, or both—as compared with the prospect of one party paying the other.⁹⁹ Under the model proposed here, Buyers and Suppliers would pay the damages resulting from their breach, in proportion to their breach, into a JRP fund that would be disbursed to redress the grievances of the worker victims and improve the conditions on the ground.¹⁰⁰

To operationalize this model, an MCC should be included to indicate that the Indemnification provision (MCC 5.6)¹⁰¹ cannot be activated if the Buyer bears any responsibility for the Schedule P violation. This makes sense: if a Buyer engages in irresponsible purchasing practices that contribute to creating the conditions on the ground for a violation to occur, they should not then be allowed to offload their liability onto the Supplier or to have it otherwise eradicated by a sweeping indemnification clause. Additionally, a contributory fault MCC could be inserted to read: “In the event that a breach of Schedule P is attributable to both parties, they will develop a formula to determine what each party owes. Each party will then pay its share of damages into the JRP fund, the proceeds of which will be used to redress the grievances of the victims. The parties further agree that if they are unable to reach a formula, they will work with an independent third

99. See Martin, *supra* note 96, at 1810 (identifying the problem that allowing a non-breaching party to benefit financially from a human rights violation could compound the negative reputational effect of the violation for that party and proposing a special liquidated damages clause designed to direct compensation “to those impacted by human rights abuses in the supply chain” rather than to the contract parties).

100. See *U.N. Guiding Principles*, *supra* note 9, princ. 25 cmt. (“The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.”).

101. *Model Contract Clauses*, *supra* note 1, ¶ 5.6.

party to develop one.” Note, however, that, even without such a clause, it may be possible to activate a contributory fault mechanism through judicial interpretation and application of fairness and equity principles.¹⁰² And there is perhaps no better justification for “contorting” the supply agreement as proposed here than that of fairly allocating responsibility for a human rights violation, itself a type of tort.

CONCLUSION

This Article began by highlighting two major contributions that the ABA’s MCC project makes to the business and human rights space. Specifically, it supplies an elegantly simple solution for putting companies’ human rights policies into action by incorporating them into the supply agreement. By that same contractual incorporation device, the project begins to tear away at the problematic and outdated distinction between product-conformity and process-conformity, thus making room for an entirely new conception of conformity that includes the protection of workers’ human rights.

The Article then discussed the major shortcoming of the ABA initiative, which is that places all contractual responsibility for human rights violations on the Supplier, ignoring the reality that Buyers who engage in irresponsible purchasing practices play a major role in creating the conditions for violations to occur. Furthermore, the MCCs as currently drafted create such intense pressure on Suppliers *not* to get caught that they may cause Suppliers to push production deeper into the shadows of subcontracting where human rights risks are heightened.

The ABA Report recognizes its Buyer-friendly bias from the get-go.¹⁰³ This stance is justified on the basis that the MCCs must be “legally effective and operationally likely”¹⁰⁴ if they are to attract a risk-averse audience of corporate general counsels who, it is presumed, would pay no mind to the initiative if it did not promise to reduce their exposure to human rights liability. But this approach risks undermining the

102. Fairness considerations drive the application of other contract law doctrines, as well, including constructive conditions and the covenant of good faith. In a future piece, I will analyze the possibilities for using fairness doctrines as a means of fully contorting the supply agreement to better protect human rights in global supply chains.

103. *Id.* at 1096–97 (“The proposed text is buyer-friendly, sometimes extremely so, and it could be perceived by some suppliers as unduly aggressive. The drafters have crafted the text this way because some buyers may have the leverage to use the proposed text, and in any case, these clauses are aimed primarily at companies in the role of buyer.”).

104. *Id.* at 1094.

entire project because it converts a potentially transformative idea into a mere risk management tool. The MCCs compromise too much and do so unnecessarily. The UNGPs and the OECD Guidelines ask more of Buyers than the MCCs, and the norms they promote are widely viewed as being legitimate and worthy of compliance. As such, the Working Group would be on solid ground if it opted to refer to these norms as a floor, rather than a ceiling.

The piece concluded with some preliminary recommendations for improving the MCCs in anticipation of future versions of the clauses. The recommendations aim to make the supply agreement a more effective tool for protecting human rights. They seek to establish a contractual obligation for *both* Buyers and Suppliers to behave responsibly from the outset of their relationship and to achieve a fairer allocation of responsibility for remediating human rights violations that do occur. Were these recommendations to be taken on board, the MCCs would stand a better chance of achieving meaningful improvements in the human rights performance of global supply chains. As expressed throughout this Article, the ABA's MCC project makes valuable contributions to the business and human rights space, and any criticism expressed here aims only to help bring those contributions to fruition.