

# THE BUSINESS CASE FOR LAWYERS TO ADVOCATE FOR CORPORATE SUPPLY CHAINS FREE OF LABOR TRAFFICKING AND CHILD LABOR

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*This Article considers the legal and ethical obligations that should propel lawyers to advocate for a corporate supply chain free of labor trafficking and child labor—both of which this piece will expose as an extension of the workforce of many corporations. By embracing the business case supported in the Carrol Corporate Social Responsibility Model, this Article continues to champion the Corporate Social Responsibility Model’s economic groundings. Why lawyers? Because lawyers are the guardians of the rule of law, and both human trafficking and child labor are gaps in the rule of law that taint a client’s supply chain and its goods. Despite many excellent laws in this area, the lack of enforcement contributes to this gap in the rule of law. As such, this Article illustrates why lawyers need to be on the vanguard of eradicating human trafficking and child labor in supply chains. It does so by describing, as noted by Professor David Snyder in *The New Social Contracts for International Supply Chains*, a set of Model Clauses designed to incorporate human rights protections in supply contracts developed by the ABA Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts. This Article also discusses why other ethical business case rationales such as the rule of law, moral, and legal ethics considerations likewise support the legal profession taking the lead on eradicating labor trafficking and child labor. Finally, the issue of diversity is advanced as a new way to think about solutions to this problem.*

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## INTRODUCTION

Labor trafficking, forced labor, and child labor exploit almost 200 million men, women, and children around the world. Such large numbers make it likely that everyone is indirectly capitalizing on this exploitative labor—anywhere from the supply chain fueling a client’s business profits to the clothes, food, technology, and other products one uses on a daily basis.<sup>1</sup> However, these numbers all represent people. As such, there is a human toll because many of these men, women, and children are suffering without pay to help us live our relatively comfortable lives. This Article will discuss how, in addition to an economic basis,<sup>2</sup> legal<sup>3</sup> and ethical<sup>4</sup> principles should encourage lawyers to be on the vanguard of ending these and other exploitative practices in supply chains. With respect to the latter, at the top of this list is a wonderful new tool introduced by the ABA Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts (the “Working Group”) consisting of Model Contract Clauses (“MCCs”) that will allow businesses to incorporate human rights protections into purchase orders and other supply contracts.<sup>5</sup> These MCCs are discussed at length by many of the contributors to the *American University Law Review* Symposium Issue,

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1. INT’L LABOUR ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE—EXECUTIVE SUMMARY 7 (2017) [hereinafter GLOBAL ESTIMATES OF MODERN SLAVERY], [www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_575540.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575540.pdf); *Child Labor*, INT’L LABOUR ORG. (2018), <https://www.ilo.org/global/topics/child-labour/lang-en/index.htm>.

2. See *infra* Section II.D.

3. See *infra* Section II.C.

4. See *infra* Section II.B.

5. See generally David Snyder & Susan Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts*, ABA Business Law Section, 73 BUS. LAW. 1093 (2018) [hereinafter *Model Contract Clauses*].

including in the articles by Professor David Snyder,<sup>6</sup> Jennifer Martin,<sup>7</sup> and Ramona Lampley.<sup>8</sup> In this respect, the MCCs are different from other excellent tools such as the ABA Model Principles on Labor Trafficking and Child Labor,<sup>9</sup> the UN Guiding Principles on Business and Human Rights,<sup>10</sup> the Organisation for Economic Co-Operation and Development (OECD) Guidelines for Multinational Enterprises,<sup>11</sup> the Ethical Trading Initiative Base Code,<sup>12</sup> and other similar norms and guidelines that offer excellent directions on the policy side.<sup>13</sup> Only the MCCs are agnostic to the precise human rights protections that different businesses within different sectors may elect to incorporate in Schedule P, which could be any of the foregoing, a company code of conduct (“Code of Conduct”), or other protections chosen by the issuer of the purchase order or buyer on the supply contract.<sup>14</sup> In addition, there are strong rule of law arguments concerning a situation where there are many laws on the books that countries are not fully enforcing or, in some cases, that are not enforced at all.<sup>15</sup> As one might also expect, there is a strong moral case surrounding these issues of labor exploitation.<sup>16</sup> Further the Model Rules of Professional Conduct (MR) support lawyers being proactive in

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6. David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 AM. U. L. REV. 1869 (2019).

7. Jennifer S. Martin, *Private Law Remedies, Human Rights, and Supply Contracts*, 68 AM. U. L. REV. 1781 (2019).

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

9. See generally *The Principles*, AM. BAR. ASS’N, (Jan. 14, 2019), [https://www.americanbar.org/groups/business\\_law/initiatives\\_awards/child\\_labor/principles](https://www.americanbar.org/groups/business_law/initiatives_awards/child_labor/principles) (listing the ABA’s Model Principles under the Model Business and Supplier Policies on Labor Trafficking and Child Labor).

10. See generally UN Human Rights Council, UN Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (June 16, 2011) [hereinafter UN Guiding Principles], [https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf).

11. See generally OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

12. See generally ETHICAL TRADING INITIATIVE, THE ETI BASE CODE (2018), [https://www.ethicaltrade.org/sites/default/files/shared\\_resources/ETI%20Base%20Code%20%28English%29.pdf](https://www.ethicaltrade.org/sites/default/files/shared_resources/ETI%20Base%20Code%20%28English%29.pdf).

13. See *infra* Section II.B.5 (summarizing some of the voluntary norms and guidelines that help corporations develop ethical principles).

14. See *supra* notes 6–8.

15. See *infra* Section II.B.2 (addressing the rule of law and the role of corporations within the enforcement realm); see also *infra* notes 183–87 and accompanying text (acknowledging the lack of enforcement of anti-trafficking laws globally).

16. See *infra* Section II.B.4 (discussing the moral case for anti-trafficking laws and regulations in global supply chains).

this area,<sup>17</sup> Finally, the concept of diversity, which has done much to further the inclusion of minorities, women, lesbian, gay, bisexual, and transgender (LGBT) personnel, as well as other marginalized groups, could also form a basis for cooperation between multinational enterprises and overseas entities by expanding programs like minority and women supplier development programs.<sup>18</sup> These are just some of the ways that lawyers can be vigilant in trying to bring attention to and eliminate exploitative practices in global supply chains.

This Article begins with background that sets the stage for the discussion by defining human trafficking, forced labor and child labor, and the startling number of people who are caught in the web of those human rights atrocities.<sup>19</sup> It continues with describing what is a supply chain and how labor exploitation taints supply chains, and presents the evidence of pervasive labor trafficking and child labor in particular supply chains. This section closes by discussing examples of ruthless practices accompanying labor exploitation, which reveal the abusive working conditions and unjust recruitment practices that are the hallmarks of this exploitation.<sup>20</sup>

This Article then moves on to discussing the business case and Corporate Social Responsibility (CSR). First, this section defines CSR as the economic, legal, ethical, and discretionary or philanthropic expectations that society places on an organization.<sup>21</sup> This is certainly the underpinning of the Author's thesis that lawyers should be on the vanguard of ending exploitative labor practices in supply chains.

This is followed by the ethical business case, rather than starting at the base of the CSR pyramid with the economic and legal cases,<sup>22</sup>

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17. See MODEL RULES OF PROF'L CONDUCT r. 1.6, 1.13, 1.16, 2.1. (AM. BAR. ASS'N. 1983); see also *infra* Section II.B.3 (examining the ethical obligations of corporate lawyers to push back against trafficking practices).

18. See *infra* Section II.B.6 (discussing the impact of diversity programs on exploitative corporate behavior).

19. See *infra* Section I.A (defining the terms "human trafficking" and "child labor").

20. See *infra* Section I.B (addressing labor exploitation in supply chains).

21. See *infra* Section II.A (examining the concept of Corporate Social Responsibility).

22. See generally E. Christopher Johnson, Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083 (2015) [hereinafter Johnson, *Business Lawyers are in a Unique Position*]; E. Christopher Johnson, Jr. & Nathan J. Chan, *The ABA Model Principles: Not Only a Tool for Compliance, but Also One to End Slavery and Child Labor in Supply Chains*, AM. BAR ASS'N: BUS. L. TODAY (June 29, 2017), [https://www.americanbar.org/groups/business\\_law/publications/blt/2016/06/02\\_chan](https://www.americanbar.org/groups/business_law/publications/blt/2016/06/02_chan); E. Christopher Johnson Jr., *The Important Role for Socially Responsible Businesses in the Fight Against Human Trafficking and Child Labor in Supply Chains*, AM. BAR ASS'N: BUS. L. TODAY

because of the importance of the MCCs. The MCCs, are a ground breaking initiative in this space because they move the commitments that companies require of their suppliers from corporate policy statements to the actual contract documents where those policies may have legal implications. This section continues with a discussion of the rule of law recognizing that the failure of many countries to enforce the laws in this area has led to labor trafficking and child labor being a gap in this institution of which we as lawyers are guardians.

The Article next discusses the area of legal ethics under this ethics prong of CSR, recognizing that the Model Rules provide lawyers with opportunities to raise the many issues that arise from labor exploitation not only from a legal perspective but from an ethical one as well. This leads to the Article's next discussion area—the moral case—which is one of the issues lawyers can raise with clients under Model Rule 2.1. Next are the discussions of those voluntary norms and guidelines such as the UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises, and ABA Model Principles on Labor Trafficking and Child Labor, which not only can help companies design the right framework around codes of conduct, but also help lead to the eradication of labor exploitation in their supply chains.

The Article next discusses diversity, embraced by corporate America since the late 1960s, and its birth of minority and women supplier development programs which the Authors feel, based on some examples from interactions with Fair Trade, could be used to develop some of the downstream suppliers that now may harbor some of the exploited workers.<sup>23</sup>

The next prong of CSR is legal expectations. After pointing out that labor trafficking and child labor are illegal virtually everywhere, this Article discusses and depicts with a diagram, the increasing and uncertain legislative trend describing many of the laws in this area from the Trafficking Victims Protection Reauthorization Act

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(Sept. 19, 2018) [hereinafter Johnson, *Important Role for Socially Responsible Businesses*], [https://www.americanbar.org/groups/business\\_law/publications/blt/2015/01/02\\_johnson](https://www.americanbar.org/groups/business_law/publications/blt/2015/01/02_johnson); E. Christopher Johnson, Jr., *The Corporate Lawyer, Human Trafficking and Child Labor: Who's in Your Supply Chain?*, 30 THOMAS M. COOLEY L. REV. SYMP. 27 (2013) [hereinafter Johnson, *The Corporate Lawyer*].

23. See *infra* Section II.B (explaining the reality of forced labor and the methods aimed at remedying these issues).

(TVPPRA),<sup>24</sup> Foreign Corrupt Practices Act (FCPA),<sup>25</sup> Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>26</sup> the Trade Facilitation and Trade Enforcement Act,<sup>27</sup> the Federal Acquisition Regulation (FAR),<sup>28</sup> the UK Modern Slavery Act,<sup>29</sup> the French Law of the Duty of Vigilance,<sup>30</sup> and many others. Given the proliferation of laws, enforcement is not where one might expect, but is increasing in some areas, such as with the FAR. This Article reminds the reader that lack of enforcement is not a safe harbor. Quite the contrary, it is a trap for the unwary and could certainly sink a business when storms arise. One of those storms of course is litigation, especially since the TVPPRA includes a private right of action. This leads us to the next legal trend which is the increasing and uncertain litigation trend. This trend, driven in part by a strategic litigation initiative consisting of human rights lawyers, civil litigators, NGOs and others, is designed to fight human trafficking. The Article then summarizes the work of fellow Working Group member, Professor Ramona Lampley, and chronicles a number of cases in the consumer and employment areas. While most cases have been unsuccessful, a recent settlement and some promising rulings on some key points under the TVPPRA suggest this trend may have some viability.<sup>31</sup>

Finally, this Article discusses economic expectations by pointing out the fact that supply chains are critical to a business. Just like the natural disaster that caused significant losses in the Japanese auto industry because the industry did not understand the vulnerability of its supply chain, the same could happen with a disruption caused by not understanding the fact that a key supplier had labor trafficking or child labor in its supply chain. The Article then discusses some

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24. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of the U.S.C.).

25. Pub. L. No. 95-213m 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.).

26. Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. § 78m note (2012)) (creating disclosure requirements for the use of “conflict minerals”).

27. Pub. L. No. 114-125, 130 Stat. 122 (2016) (codified at 19 U.S.C. §§ 4301–4454 (Supp. IV 2016)).

28. See FAR ch. 1 (2018).

29. Modern Slavery Act 2015, c. 30, § 54 (UK).

30. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés des mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 on the corporate duty of vigilance for parent and instructing companies].

31. See *infra* Section II.C.2 (analyzing the litigation trend regarding anti-trafficking practices).

potential problems linked to labor trafficking and child labor in man-made events such as the Rana Plaza tragedy that claimed the lives of over 1100 workers. Any company that had a key supplier in that building had a loss of business and revenue. Similarly, man-made events, such as worker unrest, are always a concern especially with an exploited labor force. Here, the Article discusses the Coalition of Immokalee Workers and the Fair Food program that addressed some inequities in the tomato industry.

Another economic factor is growing consumer and investor interest in this area, as demonstrated by a number of events, such as the litigation discussed below on the consumer side,<sup>32</sup> and the Larry Fink letter on the investor side.<sup>33</sup> These events could lead to a loss of sales from consumers and an adverse impact on a corporation's stock price, both of which would have preventable negative financial consequences to a corporation.

## I. BACKGROUND

### A. *Defining Human Trafficking and Child Labor*

#### 1. *Human trafficking*

The International Labor Organization (ILO) estimates that 24.9 million men, women, and children are subjected to human trafficking around the world.<sup>34</sup> Of these victims, 4.8 million are in sex trafficking and are forced into commercial sex industry activities ranging from pornography to prostitution.<sup>35</sup> Another sixteen million are trafficked in private economic activities including agriculture, construction, domestic work, and manufacturing.<sup>36</sup> Human trafficking is a major criminal enterprise,<sup>37</sup> second only to drug trafficking in terms of criminal enterprises,<sup>38</sup> and a \$150 billion industry.<sup>39</sup> According to U.S. government

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32. See *infra* Section II.C.2.a. (outlining the consumer claims brought by plaintiffs in *Rahaman v. J.C. Penney Corp*, *Doe I v. Wal-Mart Stores, Inc.*, *Tomasella v. Nestle USA, Inc.*, and *National Consumer League v. Wal-Mart Stores, Inc.*).

33. *Infra* note 397 and accompanying text.

34. See GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 1, at 7.

35. *Id.* at 8.

36. *Id.*

37. See LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 2, 83–111 (2010) (exploring the financial side of human trafficking and its insidious benefits).

38. See Michelle Lillie, *When Drug Trafficking Becomes Human Trafficking*, HUMAN TRAFFICKING SEARCH (2014), <http://humantraffickingsearch.org/when-drug-trafficking-becomes-human-trafficking>.

reports, cases of human trafficking have been reported in all fifty states and the District of Columbia.<sup>40</sup> While different governmental and non-governmental entities have defined human trafficking in different ways in an attempt to comprehend the vast scope of the crime,<sup>41</sup> there remains three basic elements: the act, the means, and the purpose.

First, the act refers to the “recruitment, harboring, transportation, provision, or obtaining” of human beings.<sup>42</sup> These terms are used to describe the wide range of potential participants in a trafficking situation, which can include a labor recruiter who recruits a victim, a driver that transports the victim, an enforcer who obtains the victim and breaks them down, or an employer or pimp who harbors the victim.<sup>43</sup> Despite the name “trafficking” and the fact that transportation is one of the acts that can constitute the crime, a person does not need to be moved to be trafficked. Therefore, people can literally be trafficked from within their own homes or communities into prostitution or performing labor or services.<sup>44</sup>

Second, the means element includes any behaviors intended to achieve control over another person, by force, fraud, or coercion,<sup>45</sup> which often involves psychological manipulation.<sup>46</sup> Consequently, the force element can be satisfied by not only traditional physical force or causing serious harm, but also inducing drug addictions, denial of food/water, brands/tattoos, sexual assault, confinement, compelling prostitution, working long hours, and compensation denial.<sup>47</sup> Fraud can

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39. See Press Release, Int'l Labour Org., Economics of Forced Labour: ILO Says Forced Labour Generates Annual Profits of US\$ 150 Billion (May 20, 2014), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_243201/lang-en](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang-en).

40. *Human Trafficking of Children in the United States: A Fact Sheet for Schools*, U.S. DEP'T OF EDUC. OFF. SAFE & HEALTHY STUDENTS (Dec. 3, 2013), <http://www.ed.gov/about/offices/list/oese/osh/factsheet.html>.

41. Compare 22 U.S.C. §§ 7102(2)(A)–(C) (2012) (defining trafficking under the TVPRA through the lens of coercion), with *What is Human Trafficking?*, UN OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited June 1, 2019) (reasoning that human trafficking requires a means not limited to coercion), and U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT JUNE 2012* 9, 33 (2012), <https://2009-2017.state.gov/j/tip/rls/tiprpt/2012> [hereinafter 2012 TIP REPORT] (focusing on the exploitation of individuals rather than the method of exploitation).

42. 22 U.S.C. § 7102(8)(B) (2012).

43. BRIDGETTE CARR ET AL., *HUMAN TRAFFICKING LAW AND POLICY* 132 (2014).

44. See 2012 TIP REPORT, *supra* note 41, at 8.

45. *Id.*

46. *Id.* at 33, 38.

47. See GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 1, at 36.

include false offers of job (or lying about aspects of the job) or offering a better life.<sup>48</sup> Coercion is defined very broadly as “(A) threats of serious harm to, or physical restraint against, any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to, or physical restraint against, any person; or (C) the abuse or threatened abuse of the legal process.”<sup>49</sup> Therefore, it can include not only threats or intimidation to the victim or family members, but also abuse of the law, confiscating identification documents, or any scheme to trick someone.<sup>50</sup>

Finally, the purpose must be for “sexual exploitation, forced [labor], slavery or similar practices, and the removal of organs.”<sup>51</sup> The question that many people ask is whether human trafficking is the same as slavery? This question is premised on the notion that the term “slavery” is harsher than the term “human trafficking,” which will help to engage the public in the fight against it. However strong these feelings may be, the problem with the comparison between slavery and human trafficking is that the legal definition of slavery as it existed in the United States and elsewhere is embodied in the UN definition of that term, which connotes ownership of the slave by the master to wit: “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>52</sup>

As explained in the first human trafficking casebook, *Human Trafficking Law and Policy*,<sup>53</sup> the definitions of human trafficking or trafficking in persons in the Trafficking Victims Protection Reauthorization Act (TVPRA) were designed to create a definitional umbrella that included not only the older forms of slavery, such as involuntary servitude and peonage, but also the newer practices that were outside of those definitions.<sup>54</sup> In other words,

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48. *Id.* at 45.

49. 22 U.S.C. § 7102(2) (2012). Note also that “fraud” and “deception” are also in the definition of trafficking—and most dramatically broaden the definition. In contrast, “force” and “coercion” are most associated with trafficking but not always most prevalent in its definition. *See, e.g.*, Modern Slavery Act, 2015, c. 30, § 3(5) (U.K.) (“The person is subjected to force, threats, or deception designed to induce him or her to provide services of any kind, to provide another person with benefits of any kind, or to enable another person to acquire benefits of any kind.”).

50. GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 1, at 36.

51. *See What is Human Trafficking?*, *supra* note 41.

52. Slavery Convention Art. 1(1), Sept. 25, 1926, 212 U.N.T.S. 17.

53. *See generally* CARR ET AL., *supra* note 43.

54. *Id.* at 136.

all of the ways that people could be enslaved without legal ownership, physical force, absolute physical control, complete control of movement, kidnapping, abduction, domination or other indicia of total physical control, etc. Human trafficking or trafficking in persons would recognize the full spectrum of enslavement and severe exploitation based on non-physical coercion and control.<sup>55</sup>

The U.S. Department of State explains that the words “trafficking and persons” or human trafficking are umbrella terms describing where one person obtains or holds another person in compelled service, which have been defined by terms such as involuntary servitude, slavery, debt bondage, and forced labor.<sup>56</sup> Conversely, the ILO uses forced labor as an umbrella term, much like trafficking in persons and human trafficking are used in the United States.<sup>57</sup> Given this similarity between the elements comprising labor trafficking on the one hand and forced labor on the other, this Article will use the terms synonymously unless the context dictates otherwise.

## 2. *Labor trafficking*

With respect to supply chains, labor trafficking is our focus in this Article. The ABA Model Policies on Labor Trafficking and Child Labor notes that labor trafficking includes:

forced labor in underground markets and sweatshops, as well as in legitimate businesses, including those in the manufacturing, travel, entertainment, hospitality, agricultural, service, and extractive industries. Movement of persons is not required for [l]abor [t]rafficking to exist; i.e., [l]abor [t]rafficking can occur without the victim leaving his or her hometown. People may be considered victims of [l]abor [t]rafficking regardless of whether they were born into a state of servitude, were transported to the exploitative situation, previously consented to work for . . . the individual controlling them, or participated in a crime as a direct result of being trafficked, including the use of illegal substances. These facts become irrelevant once a person is compelled to work by force, fraud, or coercion, which can occur at any point within the employment cycle.<sup>58</sup>

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55. *Id.*

56. PRESIDENT’S INTERAGENCY TASK FORCE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, PROGRESS IN COMBATING TRAFFICKING IN PERSONS: THE U.S. GOVERNMENT RESPONSE TO MODERN SLAVERY 1 (2013), <https://2009-2017.state.gov/documents/organization/207421.pdf>. Note also that forced labor is a term that is not often included in the United States’ definitions of human trafficking and trafficking in persons.

57. See, e.g., *The Meanings of Forced Labour*, INT’L LABOUR ORG. (Mar. 10, 2014), [http://www.ilo.org/global/topics/forced-labour/news/WCMS\\_237569/lang-en](http://www.ilo.org/global/topics/forced-labour/news/WCMS_237569/lang-en).

58. See ABA MODEL BUSINESS AND SUPPLIER POLICIES ON LABOR TRAFFICKING AND CHILD LABOR 15 (AM. BAR. ASS’N. 2014) [hereinafter ABA MODEL POLICIES],

As pointed out by the U.S. State Department, in many cases, labor trafficking occurs in the recruitment process that precedes employment.<sup>59</sup> The recruitment process facilitates labor trafficking when corrupt labor brokers, recruiters, employment agencies, or other intermediaries prey on vulnerable workers and engage in ruthless practices such as charging recruitment fees, deceiving workers about the actual terms of the job, and confiscating passports or other identity documents.<sup>60</sup> Labor trafficking can happen in any sector,<sup>61</sup> and it is more common in jobs that are in the low skilled area and filled by socially marginalized people such as minorities, the disabled, or migrants.<sup>62</sup> Again, these are populations that are vulnerable, and hence more susceptible, to being trafficked.<sup>63</sup>

### 3. *Child labor*

Generally, the ILO has many definitions for child labor, with subcategories such as children in employment, children in child labor, children in hazardous work, and children in light work. In general, child labor is defined as work that is harmful to a child's physical and mental development, is socially or morally dangerous, and interferes with a child's schooling.<sup>64</sup> This last point is particularly troubling because, without adequate education, children from poor families are less likely to break the cycle of poverty that has them working in the first place, thereby perpetuating this vicious cycle.

The global number of children in child labor stands at 152 million children, which is almost ten percent of the world's child population.<sup>65</sup> Almost half of these children, seventy-three million, are in hazardous work.<sup>66</sup> Similarly almost half are between the ages of five and eleven.<sup>67</sup>

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[https://www.americanbar.org/content/dam/aba/administrative/business\\_law/aba\\_model\\_policies.pdf](https://www.americanbar.org/content/dam/aba/administrative/business_law/aba_model_policies.pdf).

59. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT JULY 2015, 15 (2015) [hereinafter 2015 TIP REPORT], (focusing on labor recruitment in global markets). <https://2009-2017.state.gov/documents/organization/243557.pdf>.

60. *Id.*; see also *infra* Section I.D.

61. See, e.g., GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 1, at 8.

62. See 2015 TIP REPORT, *supra* note 59, at 14.

63. *Id.*; see also KNOWTHECHAIN, *infra* note 111, at 10; Shah, *infra* note 84.

64. *What is Child Labour?*, Int'l Labour Org., <https://www.ilo.org/ipec/facts/lang-en> (last visited June 1, 2019).

65. INT'L LABOUR ORG., GLOBAL ESTIMATES OF CHILD LABOUR: RESULTS AND TRENDS, 2012-2016 11 (2017) [hereinafter GLOBAL ESTIMATES OF CHILD LABOUR], [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_575499.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575499.pdf).

66. *Id.*

67. *Id.*

And, while the overall number children in child labor has declined since the turn of the century, the UN Office of Drugs and Crime indicates that child trafficking is on the rise.<sup>68</sup>

Africa has the largest number of children in child labor at almost 72.1 million and also the highest prevalence of children in child labor at one in five.<sup>69</sup> Asia and the Pacific have the second largest child labor population at 62.1 million and also the second highest prevalence at one in fourteen.<sup>70</sup> 108 million children are child laborers in the agriculture sector, followed by the 26 million in the services sector, followed by 18 million in the industry sector.<sup>71</sup>

Whether or not a particular form of “work” can be called “child labor” depends on the age of the child, the nature and hours of work performed, and the conditions under which it is performed. The answer varies from country to country, as well as among sectors within countries.<sup>72</sup> With respect to age, the ILO Minimum Age Convention, sets the youngest age at which children can work at [fifteen].<sup>73</sup> However in some developing countries, twelve- to fourteen-year-olds can perform light work.<sup>74</sup> Hazardous work can only be performed by eighteen-year-olds, but children between sixteen- and seventeen-year-old may perform hazardous work under strictly defined conditions.<sup>75</sup>

The priority in the area of child labor is to eliminate the worst forms of child labor.<sup>76</sup> Generally, this is work which by its nature is likely to harm the health, safety, or morals of the child. This includes hazardous work and all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage, or recruitment as child soldiers, any involvement with prostitution or pornography, or other illicit activities including drug trafficking.<sup>77</sup>

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68. UN OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2018 27 (2018) [hereinafter GLOBAL REPORT ON TRAFFICKING IN PERSONS], [https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP\\_2018\\_BOOK\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf).

69. GLOBAL ESTIMATES OF CHILD LABOUR, *supra* note 65, at 28.

70. *Id.* at 12.

71. *Id.*

72. See ABA MODEL POLICIES, *supra* note 58, at 14–15.

73. This standard has been separately endorsed by the ABA. *Id.* at 15.

74. See GLOBAL ESTIMATES OF CHILD LABOUR, *supra* note 65, at 21.

75. Convention Concerning Minimum Age for Admission to Employment, art. 3, June 26, 2017, 1015 U.N.T.S. 297.

76. See generally Worst Forms of Child Labour Convention, June 1, 1999, 2133 U.N.T.S. 163.

77. See *id.* at art. 3.

B. *Labor Exploitation in Supply Chains*

1. *What is a supply chain?*

The Business Dictionary defines a supply chain as an

[e]ntire network of entities, directly or indirectly interlinked and interdependent in serving the same consumer or customer. It comprises of vendors that supply raw material, producers who convert the material into products, warehouses that store, distribution centers that deliver to the retailers, and retailers who bring the product to the ultimate user.<sup>78</sup>

Today, a business's purchasing and supply chains are critical for success for a number of reasons. Primarily, these supply chains must operate effectively so that a product that starts as a raw material can make it through many steps without any difficulties so it can reach the consumer in a timely manner. This becomes extremely challenging especially in cases of complex supply chains such as automobiles where the supply chain consists of thousands of suppliers stretching around the world, at multiple tiers that provide materials from raw materials such as steel and plastics, to complex assemblies such as entertainment systems, powertrains, instrument panels and brakes, which may consist of many subassemblies.<sup>79</sup>

2. *How labor exploitation taints supply chains*

Add to this complexity the current competitive environment where consumers have many choices and compare the prices of almost anything on the internet.<sup>80</sup> The resulting consumer demand for lower prices causes businesses to optimize business efficiencies in supply chain management, not only to keep the supplies moving through the system, but also to create a number of positive business results such as driving innovation, improving quality and reputation, reducing time to market, and lowering prices.<sup>81</sup> Regrettably, this increases pressure downstream on the supply chain, and despite these economic benefits, the extended nature of many supply chains permits corrupt labor brokers to exploit a ready supply of vulnerable

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78. *Supply Chain*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/supply-chain> (last visited June 1, 2019).

79. ROBERT M. MONCZKA ET AL., PURCHASING & SUPPLY CHAIN MANAGEMENT 17 (6th ed. 2015).

80. *Id.*

81. *Id.* at 7–10.

men, women, and children.<sup>82</sup> These unethical practices include brokers misleading workers, confiscating their IDs, making it difficult to leave a job, and charging exorbitant fees for recruitment and living expenses.<sup>83</sup> These corrupt labor-sourcing practices make corporate supply chains susceptible to the taint of labor trafficking, child labor, and other labor related exploitation.<sup>84</sup>

3. *Evidence of the existence of labor trafficking and child labor in supply chains*

The U.S. Department of Labor List of Goods Produced by Child Labor or Forced Labor (the “List”) is probably one of the most significant indicators of the existence of labor trafficking, forced labor, and child labor in supply chains.<sup>85</sup> As of September 20, 2018, the List shows there are 148 goods from seventy-six countries, for a total of 418 line items, that fit into this category with the largest group of seventy-four line items in the agricultural area, forty-two in manufacturing, thirty-one in mining/quarrying, and one in pornography.<sup>86</sup>

In addition, the U.S. State Department published a fact sheet called “A Day in Your Life: Touched by Modern Slavery.”<sup>87</sup> It demonstrated that slave-made goods are with most Americans every day, including your cotton sheets, clothes, jewelry, morning coffee, and food throughout the day, even the tires on your car and all your electronic devices.<sup>88</sup>

4. *Examples of ruthless practices accompanying labor exploitation*

The numbers of goods on the List, like the number of people caught in labor trafficking and child labor, are startling in some

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82. This vulnerability springs from worldwide poverty, where a third of the world’s population lives on one dollar a day. See Anup Shah, *Poverty Facts and Stats*, GLOBALISSUES (Jan. 7, 2013), <http://www.globalissues.org/article/26/poverty-facts-and-stats>.

83. See *infra* Section I.B.4 (discussing examples of ruthless practices accompanying human trafficking).

84. See Johnson, *Business Lawyers Are in a Unique Position*, *supra* note 22, at 1091–92 (discussing how workers are commonly exploited).

85. See generally U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2018), <https://www.dol.gov/sites/default/files/documents/ilab/ListofGoods.pdf>.

86. See *id.*; see also *Sweat & Toil: Global Child Labor, Forced Labor, and Human Trafficking Around the World*, U.S. DEP’T OF LABOR, <https://www.dol.gov/general/apps/ilab> (last visited June 1, 2019).

87. See generally U.S. DEP’T OF STATE, OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSONS, A DAY IN YOUR LIFE: TOUCHED BY MODERN SLAVERY (June 2014), <https://2009-2017.state.gov/documents/organization/233950.pdf>.

88. *Id.*

respects. However, behind the numbers, there are examples of ruthless practices that accompany the exploitation that break down into two main categories. First, are abusive working conditions, such as physical and mental abuse, meager or no earnings, long hours, and dangerous workplaces. The second group are unjust recruitment practices—practices which use the legal system or financial vulnerability of victims to place restraints on the ability of trafficked workers to leave just as chains were traditionally used to keep slaves from escaping. These practices include recruitment fees and confiscation of identification documents.

*a. Abusive working conditions*

Many reports indicate that workers in the global supply chains face mental and physical abuse. Workers reported incidents of verbal abuse where they were shouted at or scolded by their supervisor for making a mistake or working too slowly.<sup>89</sup> In extreme cases, workers across various industries were publicly executed, shot dead, strangled, and drowned.<sup>90</sup> Child abuses included beatings similar to the ones young boys in the Ivory Coast have faced.<sup>91</sup> The ILO and International Program on the Elimination of Child Labor (IPEC) report indicates that more than one fifth of working children had cuts and bruises that were likely due to intentional violence.<sup>92</sup> Another report, the GSS Child Labor Survey 2014, found that at least 87.3% of children engaged in child labor suffered from abuse.<sup>93</sup> These abuses included starving, denying sleep, slaps, caning, and beatings with paddles and ropes.<sup>94</sup>

Many workers also worked long hours with one Burmese migrant in Phang Nga, Thailand typically working up to nineteen hours per

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89. VERITÉ, STRENGTHENING PROTECTIONS AGAINST TRAFFICKING IN PERSONS IN FEDERAL AND CORPORATE SUPPLY CHAINS 78, 91, 98, 108, 199, 230, 232 (2015), <https://www.verite.org/wp-content/uploads/2017/04/EO-and-Commodity-Reports-Combined-FINAL-2017.pdf>.

90. Daniel Murphy, *Hidden Chains: Rights Abuses and Forced Labor in Thailand's Fishing Industry*, HUMAN RIGHTS WATCH (Jan. 23, 2018), <https://www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry>.

91. Brian O'Keefe, *Bitter Sweets: Inside Big Chocolate's Child Labor Problem*, FORTUNE (Mar. 1, 2016), <http://fortune.com/big-chocolate-child-labor>.

92. INT'L JUSTICE MISSION, CHILD TRAFFICKING INTO FORCED LABOR ON LAKE VOLTA, GHANA: A MIXED-METHODS ASSESSMENT 14 (2016), <https://www.ijm.org/documents/studies/ijm-ghana-report.pdf>.

93. *Id.*

94. *Id.* at 52.

day.<sup>95</sup> Children who worked in Ghana's fishing industry clocked nine to thirteen hours.<sup>96</sup> In addition, a Human Rights Watch report showed that children in Zimbabwe's tobacco industry worked past their designated working hours without additional pay.<sup>97</sup>

In Thailand's fishing industry, many of the fishermen/women faced dangerous work conditions in bad weather or sea conditions, slippery boats, and hazardous machinery, electrical wiring, or scalding exhaust pipes.<sup>98</sup> The fishers were also at risk of accident, injury, and death because of inadequate training, poorly maintained vessels, language barriers, and lack of safety equipment.<sup>99</sup> As a result of their labor, fishers have been cut, have suffered broken bones, mangled fingers, lost hands and limbs, head injuries, partial paralysis, and have been electrocuted.<sup>100</sup> Children in Ghana's fishing industry also faced hazards such as drowning, serious burns, inhalation of smoke, and cuts.<sup>101</sup> According to the International Justice Mission report, children were injured by fish that pricked or shocked them.<sup>102</sup> Children also had open wounds that become infected when they were not treated immediately.<sup>103</sup>

The mining industry also has child labor with children exposed to extreme danger, suffering pain, and back injury from lifting heavy rocks. Furthermore they were exposed to toxic mercury, which can cause lifelong brain damage.<sup>104</sup> Workers also suffer from health conditions such as heat exhaustion, unexplained illnesses and fever, intestinal problems and diarrhea, and chronic seasickness in the fishing industry.<sup>105</sup> In the tobacco industry, workers cited suffering nausea, vomiting, headaches, or dizziness, which are symptoms of acute nicotine

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95. See Murphy, *supra* note 90.

96. See INT'L JUSTICE MISSION, *supra* note 92, at 47.

97. Margaret Wurth & Jane Buchanan, *A Bitter Harvest: Child Labor and Human Rights Abuses on Tobacco Farms in Zimbabwe*, HUMAN RIGHTS WATCH (Apr. 5, 2018), <https://www.hrw.org/report/2018/04/05/bitter-harvest/child-labor-and-human-rights-abuses-tobacco-farms-zimbabwe>.

98. See Murphy, *supra* note 90.

99. *Id.*

100. *Id.*

101. See INT'L JUSTICE MISSION, *supra* note 92, at 14.

102. *Id.* at 49.

103. *Id.*

104. Jo Becker & Juliane Kippenberg, *The Hidden Cost of Jewelry: Human Rights in Supply Chains and the Responsibility of Jewelry Companies*, HUMAN RIGHTS WATCH (Feb. 8, 2018), <https://www.hrw.org/report/2018/02/08/hidden-cost-jewelry/human-rights-supply-chains-and-responsibility-jewelry>.

105. See Murphy, *supra* note 90.

poisoning.<sup>106</sup> Furthermore, children and adult tobacco workers were exposed to nicotine and toxic pesticides, which can cause long-term and chronic health effects such as respiratory problems, cancer, depression, neurologic deficits, and reproductive health problems.<sup>107</sup>

In the cocoa industry, according to a survey by the Payson Center for International Development at Tulane University, thirty-seven percent of kids farming cocoa in the Ivory Coast suffered “wounds” or cuts.<sup>108</sup> This industry is also an example of the fact that many workers in exploitative supply chains like cocoa<sup>109</sup> receive little to no pay for their work. For example, the 2015 edition of the Cocoa Barometer reported that in the 2013–2014 growing season, the average farmer in Ghana made eighty-four cents per day and farmers in Ivory Coast made fifty cents per day.<sup>110</sup>

*b. Unjust recruitment practices*

In many countries, the migrant community is vulnerable to unjust recruitment practices. An audit report from an apparel company “found that recruitment agents in Taiwan charged migrant workers up to \$7,000 USD for jobs in fabric mills.”<sup>111</sup> In other industries such as the Malaysian electronics industry, migrants also paid recruitment fees.<sup>112</sup> According to a Verité study of the electronics industry, ninety-two percent of all foreign workers surveyed paid fees, and over three fourths of job-seekers became indebted in order to pay these fees.<sup>113</sup>

In addition to recruitment fees, reports also indicate that passports were confiscated to limit the mobility of migrants. When employers or brokers confiscate identity and travel documents, they can control the

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106. See Wurth & Buchanan, *supra* note 97.

107. *Id.*

108. See O’Keefe, *supra* note 91.

109. See *infra* notes 341–45 (discussing the cocoa litigation); see also Lampley, *supra* note 8, at 1721–27.

110. See O’Keefe, *supra* note 91.

111. KNOWTHECHAIN, 2018 APPAREL & FOOTWEAR BENCHMARK FINDINGS REPORT 10 (2018), [https://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark\\_reports/KTC\\_AF\\_2018.pdf](https://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark_reports/KTC_AF_2018.pdf).

112. KNOWTHECHAIN, 2018 INFORMATION AND COMMUNICATION TECHNOLOGY BENCHMARK FINDINGS REPORT 5 (2018), [https://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark\\_reports/KTC-ICT-May2018-Final.pdf](https://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark_reports/KTC-ICT-May2018-Final.pdf).

113. VERITÉ, FORCED LABOR IN THE PRODUCTION OF ELECTRONIC GOODS IN MALAYSIA: A COMPREHENSIVE STUDY OF SCOPE AND CHARACTERISTICS 100 (2014), <https://verite.org/wp-content/uploads/2016/11/VeriteForcedLaborMalaysianElectronics2014.pdf>.

movements of workers and prevent them from changing employers.<sup>114</sup> According to the Verité report, almost half of the foreign workers were “subject to constraints on their freedom of movement and communication that rendered them potential victims of forced labor.”<sup>115</sup>

A company from the Know the Chain 2018 Apparel and Footwear Benchmark Findings Report audited lower-tier suppliers and found that eighty-two percent withheld passports.<sup>116</sup> For example, migrant workers on rubber plantations in Myanmar, Liberia, and Côte d’Ivoire had their passports held by their employers.<sup>117</sup> The Verité report on the electronics industry in Malaysia says that ninety-four percent of foreign workers in the sample had their passports held by the facility or their broker.<sup>118</sup> Furthermore, seventy-one percent of foreign workers interviewed often had little or no ability to get their passports back when they wanted or needed them.<sup>119</sup> The respondents often paid a deposit in order to “borrow” their passports from their employers while in Malaysia, and this deposit ranged from between 500 Malaysian Ringgits (approximately \$155) and Malaysian Ringgits 3500 (approximately \$1082).<sup>120</sup>

## II. THE BUSINESS CASE AND CORPORATE SOCIAL RESPONSIBILITY

### A. *Corporate Social Responsibility*

The troubling reality that slavery still exists today may seem enough to move business leaders to take a role in eliminating these atrocities. However, to the extent that some leaders have taken those actions, the problem remains. Therefore, it is best to present a business case and the best way to look at that business case is through a CSR construct.

The well-known Carroll model defines CSR as “the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time.”<sup>121</sup> It depicts CSR as a pyramid with the economic expectations to generate a profit at the base and with legal expectations to obey the law, ethical expectations

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114. See Murphy, *supra* note 90.

115. VERITÉ, *supra* note 113, at 118.

116. KNOWTHECHAIN, *supra* note 112, at 10–11.

117. *Id.* at 13.

118. VERITÉ, *supra* note 113, at 119.

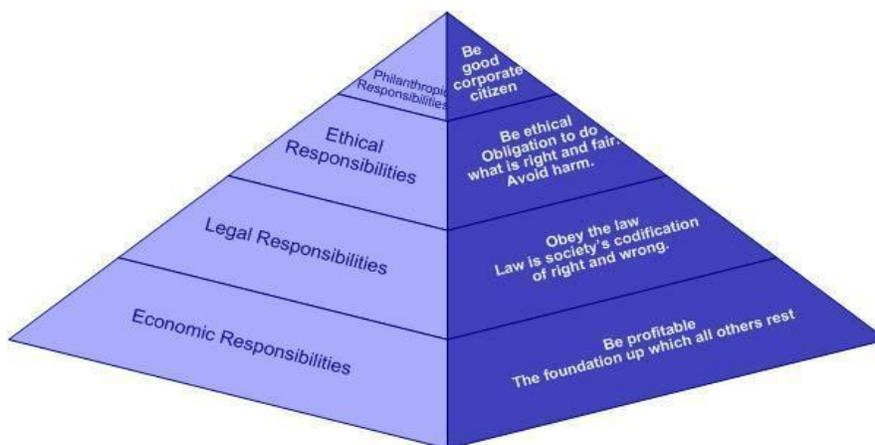
119. *Id.*

120. *Id.* at 121.

121. See ANN BUCHHOLTZ & ARCHIE CARROLL, BUSINESS AND SOCIETY: ETHICS, SUSTAINABILITY, AND STAKEHOLDER MANAGEMENT 32 (9th ed. 2015).

to do what is right and fair, and philanthropic expectations to be a good corporate citizen above, as shown in Figure 1.<sup>122</sup>

Figure 1: Carroll's CSR Pyramid



Carroll's CSR Pyramid

Rather than relying heavily on the legal and economic cases,<sup>123</sup> which are reviewed below and remain very strong, the Authors have decided to lead with the ethical case primarily due to a new tool developed by the Working Group.

### B. Ethical Business Case

#### 1. Model Contract Clauses

This Article has shown that labor trafficking, forced labor, and child labor are realities.<sup>124</sup> While some companies have tried to address this by placing a clause in their purchase orders, without careful contract drafting, perfectly made goods produced by forced or child labor may not fit neatly into a traditional breach of contract cause of action.<sup>125</sup> Nor is it clear what remedies are appropriate when supply chains include forced or child labor, or when suppliers'

122. *Id.* at 36.

123. *See infra* Sections II.C, II.D.

124. *See supra* Section I.A.

125. *See Model Contract Clauses, supra* note 5, at 1095.

workers are killed in factory fires or building collapses.<sup>126</sup> At the same time, companies' duties to control supply chains are mounting steadily.<sup>127</sup> The Working Group drafted the MCCs to address these and other complex legal issues. The MCCs aim to help companies control their suppliers and supply chains and meet growing compliance obligations,<sup>128</sup> protect workers in international supply chains,<sup>129</sup> and minimize companies' litigation and other liability risks.<sup>130</sup>

The goal is to make supply chain control and worker protection both legally effective and operationally likely.<sup>131</sup> Frequently, companies have no shortage of policies; they often appear on the company website, and they may be incorporated by reference into supply contracts (frequently as a Code of Conduct).<sup>132</sup> The issues are more complicated than can be handled easily by a simple incorporation clause, however, and the MCCs attempt to address those complexities.<sup>133</sup>

The MCCs fully recognize that companies have different policies and practices with respect to supply chain management; the Working Group is keenly aware that there is no broad consensus on the standards to be applied or the operational methods to implement them.<sup>134</sup> The MCCs are agnostic as to particular standards and operational methods; each company can use its own standards or one of the other models. These standards may relate to anti-trafficking, worker safety, conflict minerals, antidiscrimination, sustainability, or other issues.<sup>135</sup> Companies that do not already have such policies can use the ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor, or the work of the UN, the OECD, or other projects.<sup>136</sup>

The MCCs move the commitments that companies require of their suppliers from corporate policy statements to the actual contract documents where those policies may have legal implications. The contractual documents are what govern, and often guide, the behavior of the parties. Contractual terms have great potential to

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126. See *infra* notes 139–43 and accompanying text.

127. See *Model Contract Clauses*, *supra* note 5, at 1095.

128. See *infra* text accompanying notes 147–48.

129. *Model Contract Clauses*, *supra* note 5, at 1094–95.

130. *Id.* at 1105, n.46, n.49.

131. See *infra* text accompanying note 330 (discussing the potential success of strategic litigation).

132. See *Model Contract Clauses*, *supra* note 5, at 1096.

133. See *id.* at 1094.

134. *Id.* at 1096.

135. *Id.* at 1094.

136. See *id.* at 1093 n.1; *The Principles*, *supra* note 9.

make a difference when combined with effective remedies. The MCCs also seek to minimize litigation risk associated with companies' public statements about their role as buyers in the global supply chain.<sup>137</sup> Although no risk can be eliminated entirely, the disclaimers in the MCCs address these concerns directly.<sup>138</sup>

One of the areas of significant concern to buyers and human rights advocates is access to remedies. The MCCs provide an expanded suite of remedies explained in the Report of the Working Group<sup>139</sup> and explained further by Professor Martin, who was a member of the Working Group, authored an article for this Symposium Issue<sup>140</sup> and spoke at the *American University Law Review's* Symposium, "New Perspectives: A Discussion on Modern Global Supply Chains." Professor Martin explained in her Article that there are challenges to asserting the default remedies under the UCC and the CISG against a supplier who used forced or child labor so the remedies and the MCCs seek to provide a slate of non-compensatory and compensatory remedies for this situation.<sup>141</sup>

Non-compensatory remedies are cumulative and include: (1) validating demands for adequate assurances; (2) obtaining injunctive relief; (3) requiring the seller to remove employees; (4) requiring the seller to terminate subcontracts; and (5) suspending payments during investigation and until remediation of the violation of the Corporate Human Rights Policies (CHRP).<sup>142</sup>

Compensatory remedies include general and consequential damages such as procurement of replacement goods, non-delivery, and diminished sales and loss of reputation. When a CHRP breach causes reputational damage, liquidated damages can effectively address the complaints of conscious consumers. Such damages should be allocated to compensate third parties affected by the CHRP breach, perhaps in the form of remediation to affected communities.<sup>143</sup>

There are many more issues to consider such as, what should the buyer do with these goods? Should they be stored, returned, destroyed, or donated? And rather than terminate the contract,

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137. See *Model Contract Clauses*, *supra* note 5, at 1094.

138. See *id.* at 1105 n.46, n.49 (discussing the potential disclosure obligations assumed by the use of Section 5.7); see also *infra* note 340 and accompanying text.

139. *Model Contract Clauses*, *supra* note 5, at 1101–03.

140. See generally Martin, *supra* note 7.

141. See *id.* at 1793–01.

142. See *id.* at 1802.

143. See *id.* at 1809–10.

should the buyer attempt to work with the supplier to remediate claims and fix the process which would provide better employment for the local workers, some of whom may have been victimized, and also improve conditions in the communities where the workers reside?<sup>144</sup>

## 2. *Rule of law*

Human trafficking and child labor are illegal virtually everywhere, yet it remains so prevalent because the laws are not enforced, especially overseas but also to some extent in the United States.<sup>145</sup>

Labor exploitation involves a

failure of or gap in the [r]ule of [l]aw. We often associate rule-of-law projects with nation building in the third world. Trafficking is a rule-of-law problem at the micro-level. In trafficking, law fails to protect one individual from the coercion, domination, and enslavement by another.<sup>146</sup>

However, businesses must still put in place effective compliance programs to guard against either selective enforcement or a change in enforcement priorities. Relying on non-enforcement is not an effective compliance program.<sup>147</sup> Moreover, as guardians of the rule of law, lawyers should lead the implementation of such programs not only on a rule of law basis, but also under our ethical obligations under the MR.

The ultimate goals of a corporation should be the fusion of high performance and high integrity:

High integrity means robust adherence to the letter and spirit of the formal rules, both legal and financial; voluntary adoption of global binding ethical standards that go beyond existing rules . . . ; and employee commitment to core values of honesty, candor fairness, trustworthiness, and reliability . . . . For lawyers, these integrity issues go for beyond the strictures of mandatory legal professionalism.<sup>148</sup>

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144. *See id.* at 1801–12.

145. *See infra* notes 181–84 and accompanying text.

146. E. Christopher Johnson, Jr., *Responsible Corporate Counsel and the Bottom Line*, in NELSON P. MILLER ET AL., *LAWYERS AS ECONOMIC DRIVERS: THE BUSINESS CASE FOR LEGAL SERVICES* 98 (2012).

147. *See* Johnson, *Business Lawyers are in a Unique Position*, *supra* note 22, at 1104, 1111 (noting that changing laws and policies could lead to renewed civil and criminal liabilities for companies relying on non-enforcement).

148. David Wilkens et al., *Lawyers and Professionals as Citizens: Key Roles and Responsibilities in the 21<sup>st</sup> Century*, HARV. L. SCH. CTR. ON THE LEGAL PROF. 22 (Nov. 20, 2014), [https://clp.law.harvard.edu/assets/Professionalism-Project-Essay\\_11.20.14.pdf](https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf).

Consequently it is clear that lawyers do bear more responsibility as guardians of the rule of law to counsel their clients to obey the letter and spirit of the law including establishing the proper compliance programs.

### 3. *Legal ethics*

As stated above, lawyers should consider their ethical obligations and opportunities under the MR. This Article mentions opportunities, because these rules give counsel the option to “push back” on immoral, illegal and unethical management decisions, and in some cases, take appropriate action.<sup>149</sup> For example, the discussions of labor trafficking, child labor, and other exploitative labor practices can certainly give rise to numerous arguments that have been advanced for centuries about the immorality and societal disdain of these slave-like practices and the brutality accompanying them as were discussed earlier.<sup>150</sup> With respect to such moral and societal arguments, Model Rule 2.1 points out that “In rendering advice, a lawyer may refer to the not only to the law, but to other considerations such as *moral*, economic, *social* and political factors that may be relevant to a client’s situation.”<sup>151</sup>

Similarly, Model Rule 1.6(b)(1) permits, but does not require, a lawyer to disclose client confidential information “to prevent reasonably certain death or substantial bodily harm”<sup>152</sup> such as may occur in factories, mines, fishing boats and other sites around the world where forced, trafficked laborers and children toil in corporate supply chains.<sup>153</sup> For those representing corporate clients, Model Rule 1.13(c) allows, but does not require a lawyer representing a corporation to reveal confidences if the corporation’s highest authority insists on violating the laws such as the TVPRA by “knowingly benefiting financially or by receiving anything of value, from a venture which the [corporation] knew or should have known that the other party used [prohibited e.g. trafficked] labor.”<sup>154</sup>

Finally Model Rule 1.16(b)(4) permits, but does not require, a lawyer to withdraw from representation if the client insists on taking

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149. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 278 (5th. Ed. 2009).

150. See, e.g., *Ethics and Slavery*, BBC: ETHICS GUIDE, [http://www.bbc.co.uk/ethics/slavery/ethics/intro\\_1.shtml](http://www.bbc.co.uk/ethics/slavery/ethics/intro_1.shtml) (last visited June 1, 2019).

151. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR. ASS'N 1983) (emphasis added).

152. See *id.* at r. 1.6(b)(1).

153. Cf. *id.* (allowing lawyers to break the confidence of their clients in order to prevent bodily harm).

154. See Pub. L. No.106-386, § 1591, 114 Stat. 1464, 1487 (2000).

an action that the lawyer finds “repugnant.”<sup>155</sup> As pointed out by Working Group Vice Chair Susan Maslow, corporate counsel could not only find refusing to address an issue of discovered trafficking “repugnant” but also conclude the very failure to set up a meaningful compliance program to detect and prevent it unacceptable.<sup>156</sup>

Withdrawal is always an issue-fraught proposition. Will withdrawal accomplish the goal of forcing positive and swift change or help individuals who are not otherwise culpable avoid civil and even criminal liability? Does the proper course of action differ if such a move by counsel occurs in the midst of a U.S. Customs and Border Protection (CBP) investigation or seizure of merchandise under the amended Trade Facilitation and Trade Enforcement Act of 2015, a U.S. Immigration and Customs Enforcement investigation, a civil False Claims Act inquiry or any other similar governmental action? Will the threat of withdrawal be enough to guide a client to authorize self-reporting in light of any mandatory disclosure rule? With increasing legislative requirements and stakeholder interest in enhanced human rights audits and remediation plan transparency, the likelihood of more investigations and resulting internal discovery of goods tainted by forced labor seems inevitable.<sup>157</sup> With that inevitability comes the growing responsibility of counsel to insist upon effective human rights compliance programs and swift corrective action and perhaps, in some instances, disclosure by counsel in spite of the attorney-client privilege.<sup>158</sup>

#### 4. *Moral case*

Given the many moral difficulties with the enormity and brutality of trafficking and child labor, as outlined above,<sup>159</sup> it would not be surprising if many were morally outraged. In addition to those feelings, there are some foundational documents or principles that should give some pause. For example, all major religions and atheists

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155. MODEL RULES OF PROF'L CONDUCT r. 1.6 (b)(4).

156. See Susan Maslow, *Tattletale: Supply-Chain Investigations and the Attorney-Client Privilege*, AM. BAR ASS'N: BUS. L. TODAY (Apr. 19, 2018), <https://businesslawtoday.org/2018/04/tattletale-supply-chain-investigations-attorney-client-privilege> (discussing further the role of attorney-client privilege).

157. Cf. *infra* Section II.C.1 (addressing the legislations trends regarding human trafficking and forced labor).

158. See Maslow, *supra* note 156.

159. See *infra* Section I.B.4 (discussing the implications of ruthless practices accompanying of trafficking).

recognize the concept of human dignity, which is also a foundational element in important human rights documents. The Universal Declaration of Human Rights, states that “[a]ll human beings are born free and equal in dignity and rights . . . . Everyone has the right to life, liberty and security of person . . . . No one shall be held in slavery or servitude.”<sup>160</sup> Similarly the Declaration of Independence, states, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>161</sup>

##### 5. *Voluntary norms and guidelines*

Another set of ethical initiatives in this area are the norms and guidelines discussed in a forthcoming chapter of the ABA CSR Practitioners Guide.<sup>162</sup> Similarly, the UN Guiding Principles on Business and Human Rights, the ABA Model Principles on Labor Trafficking and Child Labor, OECD Guidelines for Multinational Enterprises, and Ethical Trading Initiative, all seek to guide corporate conduct to do what is right, just, and fair by addressing issues such as labor trafficking and child labor.<sup>163</sup> These initiatives are certainly in line with the types of values promoted by the MCC.<sup>164</sup>

##### 6. *Diversity initiatives*

Diversity initiatives in general have been very successful in fostering strong relationships among employees of different races, ethnicity, gender, national origin, sexual preference and identity and other classes, such that as a group they contribute to the success of the company.<sup>165</sup> These strong relationships help bolster the ethical and moral foundation necessary to support the corrective actions discussed throughout this Article.

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160. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 1, 3, 4 (Dec. 10, 1948).

161. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

162. Fernanda Beraldi et al., Labor Practices ABA CSR PRACTITIONERS GUIDE (forthcoming 2019).

163. See UN Guiding Principles, *supra* note 10; OECD, *supra* note 11; ETHICAL TRADING INITIATIVE, *supra* note 12; *The Principles*, *supra* note 9.

164. Fernanda Beraldi et al., *supra* note 162.

165. See, e.g., Brief of Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents at 14–15, *Fischer v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981) [hereinafter Fortune-100 Brief], 2015 WL 6735839; see also Beraldi et al., *supra* note 162.

A range of corporations have clearly gone on the record in support of diversity initiatives both on their websites and in briefs filed with the Supreme Court of the United States. For example, MTV Network argued that “a well-trained workforce with a diverse background is essential to the innovation of eclectic programming” and that “a diverse workforce is essential to eclectic programming that feeds the marketplace of ideas.”<sup>166</sup> General Motors argued that

[t]he capacities to work easily with persons of other races and to view problems from multiple perspectives are essential skills in the business world of the twenty-first century. Indeed, the cross-cultural competence of a business’ work force directly affects its bottom line. Academic institutions with diverse student bodies offer the best—and for many students, the only—opportunity to acquire these crucial skills.<sup>167</sup>

Fortune 100 and other leading American businesses, including American Express, CBS Corporation, Deloitte LLP, eBay, Johnson & Johnson, Marriott International, Inc., Microsoft, PepsiCo Inc., Shell Oil, Sprint, Starbucks, and United Airlines, have all stood for the proposition that “Fortune 100 and Other Leading American Businesses all stand for the proposition that the pursuit of meaningful diversity is consistent with the University’s educational mission.”<sup>168</sup>

One type of diversity initiative that could have a particular impact on curtailing exploitative practices in supply chains are minority and women supplier development programs (MSDPs). In the United States, the development of minority supplier development programs was spurred in part by civil unrest and riots as a result of high unemployment rates in African American urban centers, such as Watts (Los Angeles) in 1965, Detroit in 1967, and a host of other cities following nonviolent civil rights leader Martin Luther King Jr.’s assassination in 1968.<sup>169</sup> Detroit-based General Motors developed the

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166. Motion for Leave to File Brief Amicus Curiae out of Time and Brief of MTV Networks in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 1785765, at \*5.

167. Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399096, at \*12.

168. See Fortune-100 Brief, *supra* note 168, at 16; see also Beraldi et al., *supra* note 162.

169. See, e.g., DeNeen L. Brown, *In Detroit, ‘The Rage of Oppression.’ for Five Days in 1967, Riots Consumed a City*, WASH. POST (July 23, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/07/23/in-detroit-the-rage-of-oppression-for-five-days-in-1967-riots-consumed-a-city/>; Alan Taylor, *The Riots that Followed the Assassination of Martin Luther King Jr.*, ATLANTIC (Apr. 3, 2018), <https://www.theatlantic.com/photo/2018/04/the-riots-that-followed-the-assassination-of-martin-luther-king-jr/557>

first MSDP just a year after the 1967 riots there, which left 43 people dead and hundreds more injured.<sup>170</sup> Xerox reports that their Chairman and President called for increased hiring of African American businesses while mired in the 1968 race riots in Rochester, New York.<sup>171</sup> General Motors' MSDP was one of many business and government initiatives supporting minority entrepreneurship and combating economic inequality under the leadership of President Nixon. Nixon signed Executive Order 11458 on March 5, 1969, founding the Office of Minority Business Enterprise and expanded its powers in 1971's Executive Order 11625.<sup>172</sup> In addition, companies such as Allstate, Coca-Cola, and other corporate giants have MSDPs that integrate both training suppliers to compete in the marketplace and opportunities to network with their top executives.<sup>173</sup> With the addition of robust MSDPs, companies like these have dramatically increased the amount of money they spend with diverse suppliers. This has led to an increase in the number of members of the Billion Dollar Roundtable.<sup>174</sup>

Furthermore, MSDPs utilized on an international scale could play an integral role in eliminating labor exploitative practices in international supply chains. As leading trainers of minority- and women-owned businesses, MSDPs have both ideal access to, and a vested interest in, ensuring the integrity of their international supply chains. It would be directly in line with the foundational principles of MSDPs to extensively train businesses on how to proactively combat labor exploitative practices in international supply chains.

MSDPs requiring or otherwise supporting ethical baselines, such as a Fair Trade Certification, in international supply chains could

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159; *Watts Riots*, CIVIL RIGHTS DIG. LIBRARY, [crdl.usg.edu/events/watts\\_riots/?Welcome](http://crdl.usg.edu/events/watts_riots/?Welcome) (last visited June 1, 2019).

170. Jonathan Katz, *The Business Case for Supply Chain Diversity*, INDUSTRYWEEK (Nov. 12, 2011), <https://www.industryweek.com/leadership/business-case-supply-chain-diversity>.

171. XEROX, NEWS FROM XEROX: DIVERSITY AT XEROX [https://www.xerox.com/downloads/usa/en/n/nr\\_Xerox\\_Diversity\\_Timeline\\_2008.pdf](https://www.xerox.com/downloads/usa/en/n/nr_Xerox_Diversity_Timeline_2008.pdf) (last visited June 1, 2019).

172. *MBDA History*, MINORITY BUS. DEV. AGENCY, <https://www.mbda.gov/about/history> (last visited June 1, 2019).

173. See, e.g., *We Are the Good Hands: Sustainable Procurement*, ALLSTATE, <https://www.allstatesustainability.com/more-that-matters/sustainable-procurement> (last visited June 1, 2019); *Supplier Diversity*, COCO-COLA, <https://www.coca-colacompany.com/stories/programs-supplier-development#ath> (last visited June 1, 2019).

174. *About Us*, BILLION DOLLAR ROUNDTABLE, <https://www.billiondollarroundtable.org> (last visited June 1, 2019).

significantly curtail labor exploitation. From its inception, the concept of fair trade included an ethical sourcing and fair business practices.<sup>175</sup> “Fair Trade is about ensuring that workers in a company’s supply chain are being treated and paid fairly.”<sup>176</sup> The “certification process is complex and rigorous, generally taking anywhere between six to nine months for a producer to achieve Fair Trade Certified status.”<sup>177</sup>

Similar to the role of MSDPs, in East Africa and Asia, it is often the Fair Trade intermediary organizations, one step up the supply chain, that provide women with capacity building support in the form of seminars and training on governance issues and financial management.<sup>178</sup> “[T]hese intermediaries have successfully given women producers access to Fair Trade and other export markets,” which makes their products more marketable and provides access to a typically exploited population—women—into the supply chain in a way that they can eradicate it themselves<sup>179</sup>

Similarly in Europe, where supplier development initiatives have developed to increase the incidence of micro, small, and medium-sized enterprises (SMEs) in the supply chain, “[t]he initiative is a key part of its Sustainable Procurement Plan, which aims to improve the firm’s environmental, social and ethical performance by responsibly purchasing goods and services.”<sup>180</sup>

Consequently, it is clear from the foregoing that MSDPs and their counterparts around the world are uniquely suited in the corporate diversity context to identify, train and eradicate exploitative practices in international supply chains.

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175. Amy Shoenthal, *What Exactly is Fair Trade, and Why Should We Care?*, FORBES (Dec. 14, 2018, 2:04 PM), <https://www.forbes.com/sites/amyschoenberger/2018/12/14/what-exactly-is-fair-trade-and-why-should-we-care>.

176. *Id.*

177. *Id.*

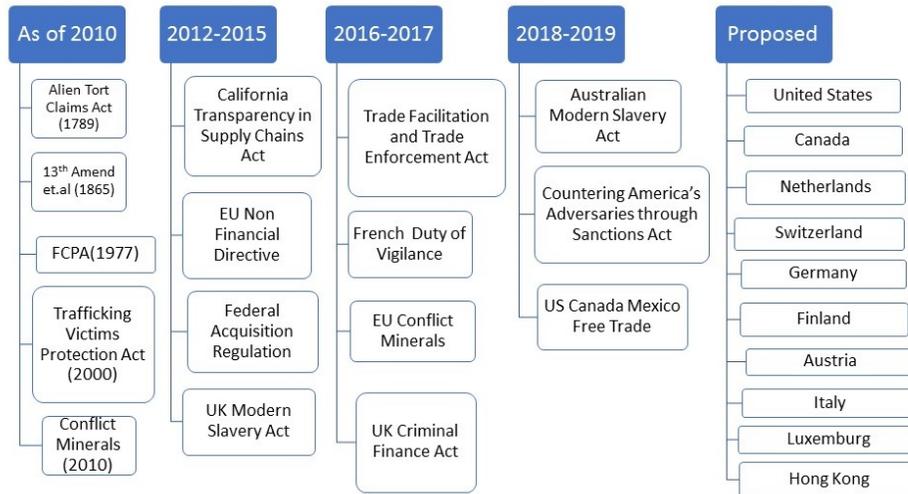
178. *Id.*

179. *Id.*

180. Lorna Thorpe, *Arup: Supporting Developing SMEs*, GUARDIAN (May 20, 2012, 7:01 AM), <https://www.theguardian.com/sustainable-business/best-practice-exchange/arup-supporting-developing-smes>.

### C. CSR Legal Expectations

Figure 2: Supply Chain Human Trafficking Legislative Progression



Human trafficking and child labor are illegal in virtually every country. In the case of human trafficking, 169 countries are parties to the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol).<sup>181</sup> More than 100 countries have passed anti-trafficking laws, and many have established specialized law enforcement units.<sup>182</sup> In the case of child labor, 171 countries have ratified the ILO Minimum Age Convention (No. 138).<sup>183</sup>

However, violations of these laws are commonplace—particularly overseas—due to the demand for cheap labor and services and the lack of meaningful law enforcement, as well as various other

181. See G.A. Res. 55/25, Annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) (committing to targeting human trafficking through a comprehensive international approach between both countries of origin and destinations of trafficked persons).

182. GLOBAL REPORT ON TRAFFICKING IN PERSONS, *supra* note 68, at 7, 45.

183. C138—Minimum Age Convention, 1973 (No. 138), INT'L LABOUR ORG. (June 19, 1976), <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300>.

contributing factors.<sup>184</sup> Businesses that rely on lack of enforcement as a strategy for avoiding prosecution are taking a risk that enforcement policy will not change, thereby exposing their operations and management to potential civil and criminal liability.

1. *Increasing and uncertain legislation trend*

The lack of enforcement of existing laws in this area coupled with increased awareness of the problem has led to an increase in legislation relating to exploitative labor practices and working conditions in supply chains over the last decade which is depicted in Figure 2 and further explained in the discussion below.

a. *Legislation as of 2010*

As of 2010, the primary human trafficking legislation was the TVPRA and its numerous reauthorizations.<sup>185</sup> Also in existence at that time were FCPA,<sup>186</sup> Dodd-Frank conflict minerals,<sup>187</sup> EU (European Union) Non-Financial Directive,<sup>188</sup> Alien Tort Claims Act,<sup>189</sup> and the Thirteenth Amendment and other laws addressing slavery prior to the enactment of the TVPRA.<sup>190</sup>

i. *Trafficking Victims Protection Reauthorization Act*

The TVPRA was the first comprehensive federal human trafficking legislation that was intended to combat human trafficking, protect

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184. See LIANA SUN WYLER, CONG. RESEARCH SERV., R4297, *TRAFFICKING IN PERSONS: INTERNATIONAL DIMENSIONS AND FOREIGN POLICY ISSUES FOR CONGRESS 1* (2013).

185. Pub. L. No. 106-386, § 1591, 114 Stat. 1464, 1487 (2000).

186. 15 U.S.C. § 78dd-1 (2012).

187. Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010).

188. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330).

189. 28 U.S.C. § 1350 (2012). Though enacted in 1789, this law was not used until 2004 when it became the primary tool for international human rights abuses. See, e.g., CARR ET AL., *supra* note 43, at 301. Its use was limited following the Supreme Court ruling in *Kiobel*. See *infra* notes 370–75 and accompanying text.

190. U.S. CONST. amend. XIII; see also Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82); White-Slave Traffic Act (the Mann Act), ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2, 28, and 42 U.S.C.). For a detailed discussion of this evolution, see CARR ET AL., *supra* note 43, at 1–128.

victims, and guarantee the punishment of perpetrators.<sup>191</sup> It is a criminal statute with penalties up to life imprisonment and has been reauthorized and amended four times in 2003, 2005, 2008, and 2013.<sup>192</sup>

The 2008 Reauthorization, in particular, relates to the types of situations that can occur in a supply chain:

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by [human trafficking or other exploitative labor], knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means . . . .<sup>193</sup>

The law further provides a civil private right of action for any victim “against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of *value* from participation in a venture which that *person* knew or should have known has engaged in an act in violation of this chapter).”<sup>194</sup> This private right of action has extraterritorial reach if the offender is a “national of the United States or an alien lawfully admitted for permanent residence . . . or . . . is present in the United States.”<sup>195</sup> The applicability of this provision to a supply chain case and its extraterritorial reach have been recently litigated and affirmed in *Ratha v. Phatthana Seafood Co.*,<sup>196</sup> discussed below.<sup>197</sup>

#### *ii. Foreign Corrupt Practices Act*

While not an anti-trafficking law per se, the resource guide to the FCPA published by the U.S. Department of Justice and the Securities and Exchange Commission (SEC) includes human trafficking is a potential component of corruption.<sup>198</sup> The resource guide pointedly notes that corruption is a global problem that, among other things, “threatens

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191. See CARR ET AL., *supra* note 43, at 109 n.1.

192. *Id.*

193. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5068 (codified as amended at 18 U.S.C. § 1589(b) (2012)).

194. 122 Stat. at 5067 (emphasis added).

195. 122 Stat. at 5071.

196. No. CV 16-4271-JFW (ASx), 2017 WL 8292391, at \*8 (C.D. Cal. Dec. 21, 2017).

197. See *infra* notes 368–69 and accompanying text.

198. U.S. DEP’T OF JUSTICE, ENF’T DIV. OF THE U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2–3 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

stability and security by facilitating criminal activity within and across borders, *such as the illegal trafficking of people, weapons, and drugs.*<sup>199</sup>

*iii. Dodd-Frank Conflict Minerals*

Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act requires certain corporations subject to the Securities Act of 1933 or the Securities Exchange Act of 1934 to disclose their use of conflict minerals (tantalum, tin, gold, or tungsten) if those minerals are “necessary to the functionality or production of a product” manufactured by those companies.<sup>200</sup>

Dodd-Frank is a reflection of Congress’s concerns that the trade of conflict minerals ultimately led to the facilitation of the deadly conflict and humanitarian crisis in the Democratic Republic of the Congo (DRC) region.<sup>201</sup> Compliance with conflict minerals rules involves several measures. First, the company must determine whether it manufactures or contracts to manufacture products whose functionality or production is dependent on the use of conflict minerals. Second, it must prepare a reasonable country of origin inquiry, documenting the origin of conflict minerals used, and file an accompanying Specialized Disclosure Report (Form SD). Third, it must exercise due diligence to determine the chain of custody of the conflict mineral use and file a conflict minerals report that details the company’s due diligence process used as well as information on the facilities, country of origin, and products of the conflict minerals.<sup>202</sup>

The conflict minerals disclosures have been very controversial and widely criticized for the onerous reporting obligations and investigation costs. The most significant challenge came in a lawsuit, *National Ass’n of Manufacturers v. Securities and Exchange Commission*,<sup>203</sup> the result of which was to find that the disclosure portion of the rule

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199. *Id.* (emphasis added); see also Johnson, *Business Lawyers Are in a Unique Position*, *supra* note 22, at 1113–14 (providing a detailed discussion of the applicability of the FCPA to human trafficking and liability for foreign subsidiaries of U.S. based corporations).

200. Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C. § 78m note (2012)); see also *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SEC. & EXCH. COMM’N (Mar. 14, 2017), <https://www.sec.gov/opa/Article/2012-2012-163htm-related-materials.html>.

201. *Fact Sheet: Disclosing the Use of Conflict Minerals*, *supra* note 200.

202. Fatima Alai & Sophia I-Ling Wang, *Conflict Minerals Disclosure Requirements and Corporate Social Responsibility*, CPA J. (July 2018), <https://www.cpajournal.com/2018/07/18/conflict-minerals-disclosure-requirements-and-corporate-social-responsibility>.

203. No. 1:13-cv-00635-KBJ, 2017 WL 3503370 (D.D.C. Apr. 3, 2017).

violates the First Amendment.<sup>204</sup> In light of that decision, the SEC essentially indicated that it will not enforce the disclosure portion of the rules, but the law is still in effect, which obviously creates a conundrum for companies.<sup>205</sup> This is among the reasons that most corporations that have filed reports in the past have continued to do so.<sup>206</sup> Another reason may be driven by a powerful alliance of investors still interested in the viability of the rule.<sup>207</sup> In addition, states such as California and Maryland have enacted legislation prohibiting companies that fail to comply with the conflicts minerals law from contracting with their states.<sup>208</sup>

*b. Legislative developments between 2012 and 2015*

Between 2012 and 2015, governments started enacting broad based supply chain specific legislation with the California Transparency in Supply Chains Act<sup>209</sup> and the Executive Order Strengthening Protections Against Trafficking in Federal Contracts (Federal Contracts Executive Order).<sup>210</sup> That same year, during the ABA Presidential administration of Laurel Bellows, the ABA Business Law Section formed a Working Group to develop the ABA Model Principles and their related Policies on Labor Trafficking and Child Labor.<sup>211</sup> The introduction to those Policies, published in 2014 upon the Principles being adopted by the ABA House of Delegates, stated that “Labor Trafficking and Child Labor increasingly have become—or are becoming—the subject of laws criminalizing such conduct, imposing civil liability based upon that

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204. Michael R. Littenberg, *The Conflict Minerals Rule—Litigation Is Over, but the Drama Continues*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 14, 2017), <https://corpgov.law.harvard.edu/2017/04/14/the-conflict-minerals-rule-litigation-is-over-but-the-drama-continues>; see also Colin Diamond & Irina Yevmenenko, *Conflict Minerals Update—SEC Releases Guidance Following District Court Decision*, WHITE & CASE (Apr. 17, 2017), <https://www.whitecase.com/publications/alert/conflict-minerals-update-sec-releases-guidance-following-district-court-decision>.

205. Littenberg, *supra* note 204; see also Marc Butler, *Why the Conflict Minerals Rule Refuses to Die*, INTELLIGIZE (June 21, 2018), <https://www.intelligize.com/why-the-conflict-minerals-rule-refuses-to-die>.

206. Littenberg, *supra* note 204.

207. *Id.*

208. CAL. PUB. CONT. CODE § 10490 (West 2018); MD. CODE ANN., STATE FIN. & PROC. § 14-413 (West 2018).

209. Cal. Civ. Code § 1714.43 (West 2012).

210. Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Sept. 25, 2012).

211. See *ABA Model Business and Supplier Polices on Labor Trafficking and Child Labor*, Am. Bar Ass’n (Jan. 9, 2019), [https://www.americanbar.org/groups/business\\_law/initiatives\\_awards/child\\_labor](https://www.americanbar.org/groups/business_law/initiatives_awards/child_labor); see also *The Principles*, *supra* note 9.

conduct, and requiring public disclosure of efforts taken to address Labor Trafficking and Child Labor.”<sup>212</sup>

In 2014, the EU Non-Financial Disclosure Directive was passed. By 2015, the Federal Contracts Executive Order was codified into law as the revised FAR<sup>213</sup> and, in the United Kingdom, there was passage of the Modern Slavery Act.<sup>214</sup>

*i. California Transparency Act*

In addition to public companies, certain companies that do business in California have disclosure obligations relating to human rights violations in their supply chain. The California Transparency in Supply Chains Act (“California Transparency Act”) requires manufacturers and retailers with global revenue in excess of \$100 million to disclose the extent to which they monitor their supply chains for potential human rights abuses.<sup>215</sup> Specifically, companies must prominently disclose on their website the extent which they: (1) evaluate and address the risks of human trafficking and slavery; (2) perform audits on their suppliers; (3) mandate that their direct suppliers operate in compliance with laws on slavery and human trafficking; (4) maintain accountability policies and procedures for employee and contractor compliance; and (5) provide employees and management with training opportunities on slavery and human trafficking—with a particular focus on mitigating risks within products’ supply chains aimed at eliminating slavery and human trafficking.<sup>216</sup>

Critics argue the California Transparency Act is ineffective because it does not require a business subject to the act to take any action related to the disclosures or steps to eliminate slavery or forced labor in its supply chain.<sup>217</sup> Nevertheless, as described below, several plaintiffs have attempted to use the California Transparency Act to hold retailers responsible for forced labor in their supply chains, claiming that retailers that misrepresent disclosures made also violate California’s consumer protection statutes: the Unfair Competition Law, the False Advertising Law, and the Consumer Legal Remedies Act.<sup>218</sup>

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212. *Id.*

213. *See* FAR ch. 1 (2018).

214. *See* Modern Slavery Act 2015 c. 30, § 1.

215. CAL. CIV. CODE § 1714.43 (West 2018).

216. §§ 1743.43(c)(1)–(5).

217. *See, e.g.,* Julie A. Gutierrez, *Less than Transparent: How California’s Efforts to Shine Light on Modern Slavery May Ultimately Keep Consumers in the Dark*, 19 LOY. J. PUB. INT. L. 57, 58–59 (2017).

218. For an analysis of these cases, see *infra* Section II.C.2.

*ii. EU Directive on Non-Financial Disclosure*

The EU Directive on Non-Financial Disclosure (“Directive”) and relevant legislation implementing the Directive into national law across the EU require large companies with more than 500 employees to report in their annual reports on the impact of their business activities on certain non-financial matters.<sup>219</sup> The Directive reflected “a view to identifying sustainability risks and increasing investor and consumer trust.”<sup>220</sup> Specifically, the companies are required

to disclose in their management report relevant and material information on policies, outcomes and risks, including due diligence that they implement, and relevant non-financial key performance indicators concerning environmental aspects, social and employee-related matters, respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors.<sup>221</sup>

Similar to the United Kingdom (UK) Modern Slavery Act of 2015, discussed below, and the California Transparency Act, the Directive does not require companies to pursue additional measures to address reported impacts. But failure to make the reports can result in sanctions, which are specific to EU member states.<sup>222</sup>

CSR Europe and the Global Reporting Initiative have published a guidance regarding the status of implementation within each of the individual member states.<sup>223</sup> Each EU member state will be responsible for establishing the reporting obligations for covered entities. There is uncertainty as to whether the United Kingdom will continue to push for non-financial disclosures pertaining to CSR as the United Kingdom is in the processing of leaving the EU.

*iii. Federal Acquisition Regulation*

Before it was updated in 2015, the FAR had already “prohibited contractors, subcontractors and their employees from engaging in severe

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219. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330).

220. *Id.* at L 330/1.

221. European Commission Press Release Memo/14/301, Disclosure of Non-Financial and Diversity Information by Large Companies and Groups—Frequently Asked Questions (Apr. 15, 2014), [http://europa.eu/rapid/press-release\\_MEMO-14-301\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-301_en.htm).

222. *See, e.g.,* GRI ET AL., MEMBER STATE IMPLEMENTATION OF DIRECTIVE 2014/95/EU 16–31 (2017), [https://www.globalreporting.org/resource/library/NFR\\_publication%20online\\_version.pdf](https://www.globalreporting.org/resource/library/NFR_publication%20online_version.pdf).

223. *Id.* at 5.

forms of trafficking, procuring commercial sex acts and using forced labor in the performance of a U.S. government contract or subcontract.”<sup>224</sup> This is a major driver for CSR because the U.S. government is the single largest buyer of goods and services in the world. In fact, it procures more than \$500 billion of goods and services every year.<sup>225</sup>

As revised, the FAR forbids contractors, subcontractors, and any of their employees or agents from engaging in a host of prohibited practices including denying access to the employee’s identity or immigration documents,<sup>226</sup> using misleading or fraudulent recruitment practices, or making material misrepresentations during the recruitment of employees.<sup>227</sup> This prohibition also applies to using recruiters who do not comply with local labor laws,<sup>228</sup> charging employees recruitment fees, or failing to provide an employment agreement or similar work documents in writing, in a language the employee understands.<sup>229</sup>

One of the most significant requirements of the updated FAR relates to obligations for companies with government contracts valued over \$500,000 for supplies (other than commercially available off-the-shelf items) or services to be acquired or performed outside the United States<sup>230</sup> These companies must satisfy certain additional requirements, including obligations to: have a compliance plan for prevention, monitoring, and detection of trafficking in persons;<sup>231</sup> perform due diligence to determine potential violations contractor’s supply chain;<sup>232</sup> certify that there are no violations in the supply chain;<sup>233</sup> maintain an awareness program to inform contractor employees about the government’s policies prohibiting trafficking-related activities;<sup>234</sup> maintain a process for employees to report,

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224. Michael Navarre & Michael Mutek, *Final Trafficking in Persons Rule Creates New Compliance Component for U.S. Government Contractors*, 57 GOV’T CONTRACTOR ¶ 74 (2015) (considering the new burdens imposed by the FAR’s requirements).

225. *Government Contracts and Procurement*, K&L GATES PUB. POL’Y & L. PRAC., [http://www.klgates.com/files/upload/Public\\_Policy\\_Govt\\_Contracts.pdf](http://www.klgates.com/files/upload/Public_Policy_Govt_Contracts.pdf) (last visited June 1, 2019).

226. FAR 52.222-50(b)(4)(2018).

227. 52.222-50(b)(5)(i).

228. 52.222-50(b)(5)(ii).

229. 52.222-50(b)(9).

230. 52.222-50(h); *see also* Navarre & Mutek, *supra* note 224.

231. 52.222-50(h).

232. 52.222-50(h)(3)(v).

233. 52.222-50(h)(5).

234. 52.222-50(h)(3)(i).

without fear of retaliation, activity inconsistent with the policy.<sup>235</sup> In addition, these FAR suppliers must pay wages that meet applicable host country legal requirements or explain any variance from those requirements,<sup>236</sup> must include a housing plan, that meets the host country's housing and safety standards,<sup>237</sup> and must monitor, detect, and terminate any agents, subcontractors, or subcontractor employees who have engaged in trafficking in persons.<sup>238</sup>

The penalties for non-compliance include loss of award fee, suspension of contract payments, removal of offending employee or employees from the project, termination of the contract, and suspension or debarment.<sup>239</sup> As reported in the 2018 Trafficking in Persons Report, the Department of Defense took action against employers or contractors who were not compliant with these provisions resulting in twenty-two suspensions, six debarments, one job termination, and one compliance agreement.<sup>240</sup>

In addition, there is a risk of False Claims Act violations and liability for false statements if an employee's certification is false or the employee recklessly disregarded or consciously avoided learning the truth.<sup>241</sup> Therefore, an employee that certifies that a supply chain is free of coerced labor without conducting an appropriate due diligence review could be imprisoned if a violation is later found to exist.<sup>242</sup>

*iv. UK Modern Slavery Act 2015*

In 2015, the United Kingdom passed the Modern Slavery Act ("UK Act").<sup>243</sup> The UK Act prohibits slavery, forced or coerced labor and human trafficking within the United Kingdom. In addition, a portion of the UK Act applies directly to certain company's supply chains. Similar to the California Transparency Act, § 54 of the UK

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235. 52.222-50(h)(3)(ii).

236. 52.222-50(h)(3)(iii).

237. 52.222-50(h)(3)(iv).

238. 52.222-50(h)(3)(v).

239. 52.222-50(e).

240. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2018 448 (2018), <https://www.state.gov/trafficking-in-persons-report-2018>.

241. See 18 U.S.C. § 1001 (2012).

242. Gerald T. Hathaway & Matthew A. Fontana, *Business and Human Rights: Threading the Needle of Multiple Jurisdictions in Supply Chain Integrity, including Human Trafficking Compliance*, AM. BAR ASS'N 10 (Apr. 23, 2018), [https://www.americanbar.org/content/dam/aba/events/labor\\_law/2018/papers/Industry%20Deep%20Dives%20Fashion.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/Industry%20Deep%20Dives%20Fashion.pdf).

243. Modern Slavery Act, 2015, c.30 (U.K.).

Act requires public disclosure of what companies are doing to prevent the occurrence of human trafficking within their supply chains.<sup>244</sup> The UK Act applies to all companies (not just retailers and manufacturers) that have a combined turnover (revenue) of £36 million.<sup>245</sup> The UK Act requires an annual disclosure, which must be published on a company's website with a link to the disclosure in a prominent place on that website's homepage.<sup>246</sup> The law requires that each annual statement<sup>247</sup> describe the steps the company has taken during the financial year to "ensure that slavery and human trafficking is not taking place in any of its supply chains, [or] in any of its own business."<sup>248</sup> If the company has taken no steps regarding slavery or human trafficking, it must so state.<sup>249</sup> The statement must be signed by a high level person (a corporation must have the statement approved by its board of directors, and signed by a director, an LLC equivalent must have a member sign it, and a partnership must have a partner sign it).<sup>250</sup> The UK Home Secretary has published guidance about the law.<sup>251</sup>

*c. Legislative developments between 2016 and 2017*

Between 2016 and 2017, the Trade Facilitation and Trade Enforcement Act of 2015, the French Duty of Vigilance, EU Conflict

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244. § 54.

245. §§ 54(2)(a)–(b); *see also* ERNST & YOUNG, THE UK MODERN SLAVERY ACT OF 2015: WHAT ARE THE REQUIREMENTS AND HOW SHOULD BUSINESSES RESPOND? 2 (2017), [https://www.ey.com/Publication/vwLUAssets/ey-the-uk-modern-slavery-act-2015/\\$FILE/ey-the-uk-modern-slavery-act-2015.pdf](https://www.ey.com/Publication/vwLUAssets/ey-the-uk-modern-slavery-act-2015/$FILE/ey-the-uk-modern-slavery-act-2015.pdf).

246. §§ 54(7)(a)–(b).

247. The topics of the statement may include information about:

- (a) the organisation's structure, its business and its supply chains;
- (b) its policies in relation to slavery and human trafficking;
- (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
- and (f) the training about slavery and human trafficking available to its staff.

§ 54(5).

248. §§ 54(4)(a)(i)–(ii).

249. §§ 54(4)(b).

250. §§ 54(6)(a)–(d).

251. AMBER RUDD, TRANSPARENCY IN SUPPLY CHAINS ETC. A PRACTICAL GUIDE (2017) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/649906/Transparency\\_in\\_Supply\\_Chains\\_A\\_Practical\\_Guide\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf).

Minerals Regulation, and UK Criminal Finances Act were enacted by the United States, France, the European Union, and United Kingdom, demonstrating the clear global nature of labor exploitation and the worldwide efforts on behalf of governments to fight it.

*i. Trade Facilitation and Trade Enforcement Act of 2015*

Until 2016, Section 307 of the Tariff Act of 1930 “prohibit[ed] the importation of merchandise that has been mined, produced, or manufactured, wholly or in part, in any foreign country by forced labor—including prison labor and forced or indentured child labor.”<sup>252</sup> However, the Tariff Act also included an exception to this section called the Consumptive Demand Clause.<sup>253</sup> This clause allowed for the importation of goods made with forced labor if the consumptive demand for the good was higher than the ability for the company to produce the good in the United States to meet this demand.<sup>254</sup>

The Trade Facilitation and Trade Enforcement Act of 2015 repealed the Consumptive Demand Clause.<sup>255</sup> Therefore if a U.S. CBP officer suspects a good has been made with forced labor, he or she may issue a Withhold Release Order, which has the effect of detaining the goods at the border.<sup>256</sup> The order is then published in the Federal Register.<sup>257</sup>

When CBP officers detain goods, it has an economic impact on a company’s profits and market share. For example, in 2016, CBP detained a shipment of stevia from a company called PureCircle.<sup>258</sup>

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252. Pub. L. No. 71-361, § 307, 46 Stat. 590, 689 (1930).

253. 46 Stat. at 690 (allowing the importation of some goods produced by forced labor if the goods were not produced “in such quantities in the United States as to meet the consumptive demands of the United States”).

254. *Id.*

255. Pub. L. No. 114-125, § 910, 130 Stat. 121, 239 (2016); *see also Trade Facilitation and Trade Enforcement Act of 2015: Repeal of the Consumptive Demand Clause*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/Fact%20Sheet%20-%20Repeal%20of%20the%20Consumptive%20Demand%20Clause.pdf> (last visited June 1, 2019).

256. *See, e.g., Forced Labor*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 20, 2018), <https://www.cbp.gov/trade/programs-administration/forced-labor>.

257. *Detention Orders (Withhold Release Orders)*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations/detention-orders> (last visited June 1, 2019).

258. Sam Dean, *Shares in Stevia Maker PureCircle Plummet as ‘Slave Labour’ Allegation Takes Its Toll*, TELEGRAPH (Jan. 5, 2017, 9:52 AM), <http://www.telegraph.co.uk/business/2017/01/05/shares-stevia-maker-purecircle-plummet-slave-labour-allegation>.

As a result, PureCircle shares dropped more than ten percent, and sales were expected to fall fourteen percent.<sup>259</sup>

*ii. French Duty of Vigilance (Law No. 2017-399)*

In 2017, the French parliament adopted a *duty of vigilance*<sup>260</sup> for large corporations (“*la loi sur le devoir de vigilance*”).<sup>261</sup> It came in response to concerns about violations of basic labor and worker safety standards in global supply chains. After the Rana Plaza tragedy, Socialist and Green Party members of parliament pushed for the adoption of a law to increase the legal accountability of multinational corporations. Draft legislation was designed to impose a “duty of vigilance” on multinational enterprises.<sup>262</sup> It was framed to cover both parent companies in France and major French purchasers of goods manufactured in global supply chains.<sup>263</sup>

The law imposes the obligation to establish and effectively implement a vigilance plan on

any company that, at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its

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259. *Id.*

260. A new article to the Trade and Industry Code, article L. 225-102-4 was added. Article 1 of the new section provides that the law applies to

any company that, at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and its direct or indirect subsidiaries whose head office is located on French territory or abroad.

EUR. COAL. FOR CORP. JUST., *French Duty of Vigilance Law—English Translation*, BUS. & HUM. RTS. RESOURCE CTR. (Dec. 14, 2016), <https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation>.

261. The Authors thank Ms. Elise Groulx Diggs, Esq., Ad.E.,LL.M. Avocate à la Cour, Barrister & Solicitor (Paris, Québec) Associate Tenant Doughty Street Chambers (London, UK), Professor Béatrice Parance, Ph.D, Law School Université Paris, Vincennes, St-Denis, and Ms. Aure Demoulin Bouchier, J.D. Georgetown Law (Washington, DC) for their assistance in writing this description. Ms. Diggs has an upcoming article in Volume 50 of the Georgetown Journal of International Law entitled *Business and Human Rights as a Galaxy of Norms* which situates the new French duty of vigilance within a broader set of norms that can be characterized as the Business and Human Rights Galaxy.

262. See, e.g., Vivian Grosswald Curran, *Harmonizing Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17 CHI. J. INT’L L. 403, 415–16 (2017).

263. *Id.*

service and its direct or indirect subsidiaries whose head office is located on French territory or abroad.<sup>264</sup>

The vigilance plan must be specifically designed to prevent gross violations of basic standards that protect human rights, fundamental freedoms, the environment, public health and the safety of persons.<sup>265</sup> The plan, which is preventative in nature,<sup>266</sup> must identify key risks to stakeholders (through “risk mapping”) and specify how the corporation adopts measures to manage these risks effectively.<sup>267</sup>

The vigilance plan must focus on risks to stakeholders, which are distinct from risks to the enterprise, that stem from the operations of subsidiaries, which the parent company directly or indirectly controls, and from the operations of suppliers and subcontractors with which the contracting company deals on a regular basis (“established commercial relationship”).<sup>268</sup> The law also establishes the civil liability of parent companies and principal contracting companies in specific cases where there is a “*faute de vigilance*” (fault of vigilance).<sup>269</sup> This principle would arise in cases where the company failed to prepare an effective vigilance plan to prevent relevant violations and where a causal link existed between the damage that occurred and the lack of an effective plan.

An issue of interpretation concerns the scope of a vigilance plan. The law refers first to subsidiaries controlled by the company, as defined in Article L. 233-16(II) of the Commercial Code,<sup>270</sup> directly or indirectly. The applicable test here is that of accounting consolidation, which mostly extends to companies controlled by the exercise of voting rights or by the appointment of governing bodies.

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264. EUR. COALITION FOR CORP. JUST., *supra* note 260. These thresholds of compliance are based only on the number of employees and do not take into account the revenue of the company.

265. See, e.g., Sarah A. Altschuller & Amy K. Lehr, *The French Duty of Vigilance Law: What You Need to Know*, CORP. SOC. RESPONSIBILITY & L. (Aug. 3, 2017), <http://www.csrandthelaw.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know>.

266. See, e.g., Penelope Bergkamp, *Supply Chain Liability: The French Model*, CORP. FIN. LAB (Mar. 11, 2017), <https://corporatefinancelab.org/2017/03/11/supply-chain-liability-the-french-model> (explaining the proactive measures companies must implement in order to achieve compliance).

267. *Id.*

268. Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUS. & HUM. RTS. J. 317, 320 (2017).

269. *Id.* at 318–19.

270. CODE DE COMMERCE [C. COM.] [Commercial Code] art. L233-16(II) (Fr.).

The scope of a vigilance plan can also be extended generally to cover the operations of subcontractors or suppliers with whom the principal contactor (or purchaser) has “established commercial relationships.”<sup>271</sup> The law defines the duty of vigilance as designed to manage the risks that business operations might violate standards of: (1) human rights; (2) fundamental freedoms; (3) public health and safety and (iv) environmental protection.<sup>272</sup>

Finally, the plan needs to provide for the protection of whistleblowers.<sup>273</sup> The law also strongly encourages corporations to engage with trade unions and other stakeholders, and to include them in the preparation and implementation of their vigilance plans.

*iii. EU Conflict Minerals*

In 2017, the EU Parliament and EU Council adopted new import regulation on “conflict minerals” under Regulation 2017/821 (“EU Conflict Minerals Regulation”).<sup>274</sup> The EU Regulation applies to the same four minerals as the U.S. law (tin, tantalum, tungsten, and their ores, as well as gold).<sup>275</sup> One significant difference is that it applies to all minerals that originate from conflict-affected and high-risk areas—not just in the DRC and surrounding countries.<sup>276</sup> The EU Conflict Minerals Regulation, which will come into effect on January 1, 2021,

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271. Some believe that a narrow interpretation of “established commercial relationships” would not meet the requirements of the legislation. For example, when there is evidence that a supplier is quietly outsourcing production to sweatshop operators, the principal purchaser would be ill advised to ignore such evidence and avoid inquiring further about the business practices of the supplier.

272. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 on the Duty of Care of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017; *see also* Cossart et al., *supra* note 268, at 320–21.

273. Loi 2017-399 du 27 mars 2017 (Fr.); *see also* Noëlle Lenoir et al., *Compliance in France and the United States: A Combination of Corporate and Social Responsibility*, KRAMER LEVIN (Nov. 5, 2018), <https://www.kramerlevin.com/en/perspectives-search/compliance-in-france-and-the-united-states-a-combination-of-corporate-and-social-responsibility.html>.

274. Council Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum, and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1, 5.

275. *Id.* at art. 1, at 5.

276. *Id.*

applies to EU-established importers of the targeted minerals.<sup>277</sup> Companies from outside the EU will also be impacted as EU companies will need to make sure they source from responsible smelters and refiners.<sup>278</sup> The EU Commission will publish white-lists of companies that fulfill requirements set out by Regulation 2017/821.<sup>279</sup> Importers that do not reach the volume-thresholds set out in Annex I of the Regulation will be exempt from due-diligence obligations.<sup>280</sup> In August 2018, the EU Commission published guidance to help enterprises identify these “high risk areas.”<sup>281</sup> Part of the guidance incorporates the OECD Five Step Due Diligence Guidance.<sup>282</sup> The guidance also establishes certain “red flags” importers should be aware of.<sup>283</sup>

*iv. UK Criminal Finances Act*

The UK Criminal Finances Act (“CFA”) went into effect on September 30, 2017, enhancing the ability of law enforcement officers to freeze and seize assets alleged to be connected to, among other violations, gross human rights abuses.<sup>284</sup> All companies that have a presence in the United Kingdom (even if headquartered abroad) must comply with the legislation. This CFA therefore has significant implications for companies and individuals doing business both inside and outside the United Kingdom, especially in industries and sectors in which human rights violations occur more frequently.

To date, much of the UK government’s ability to address human rights abuses in supply chains has revolved around the UK Modern Slavery Act. The CFA goes much further than modern slavery to include “gross human rights abuses or violations,” which, under the CFA, are defined as (1) prohibited conduct against a protected person (including whistleblowers and human rights defenders, for example), (2) for prohibited motivations and (3) involving public officials performing official duties. Prohibited conduct includes the

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277. *Id.*

278. *Id.*; *id.* at art. 2, at 6; *id.* at art. 5., at 9.

279. *Id.* art. 9, at 12.

280. *Id.* art. 1, at 5.

281. Commission Recommendation 2018/1149 of 10 August 2018 on Non-Binding Guidelines for the Identification of Conflict-Affected and High-Risk Areas and Other Supply Chain Risks Under Regulation 2017/821 of the European Parliament and of the Council, 2018 O.J. (L 208) 94, 94.

282. *Id.* at 97.

283. *Id.* at 102–06.

284. Criminal Finances Act 2017, c.22, § 13 (U.K.).

use of cruel, degrading or inhuman acts such as forced labor and human trafficking, among other practices.<sup>285</sup>

While, at first, the wording in the CFA seems to provide a safe haven for public officials and other protected persons (i.e., human rights journalists and whistleblowers), it also encompasses activities that are connected to gross human rights abuses. This means conduct seen to be “directing or sponsoring, profiting from, materially assisting, or acting as an agent in connection with, the commission of gross human rights abuses.”<sup>286</sup> For example, companies in the United Kingdom selling clothing items made with the use of child labor may be seen as obtaining revenue and benefiting from gross human rights abuses through the sale of the goods.

Therefore, companies doing business in areas of the world where human rights abuses may be prevalent, should be cautious, as this law would permit UK authorities to pursue companies that benefited or inadvertently assisted third parties gross human rights violations.<sup>287</sup> No intent to benefit or assist is required under the law which has a twenty year statute of limitations that can be applied retroactively.<sup>288</sup>

Given this strict liability type of law with retroactive enforcement, it is different than the UK Bribery Act or other instances of the old CFA, where the “reasonable preventative measures” taken by the company are not a form of defense against enforcement. Therefore, compliance with the CFA is a significant concern for companies that are subject to it, and who do business in areas where gross human rights abuses are prevalent, which places a premium on compliance and due diligence.<sup>289</sup> Even if a company under enforcement manages to escape definitive seizure, their assets may still have been frozen during the proceedings, which leads to operational, financial, legal, and reputational setbacks.

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285. §§ 13(3)(1)–(4).

286. Richard J. Rogers & Sasho Todorov, *New UK Law: Liability for ‘Profiting From’ Gross Human Rights Abuses*, FCPA BLOG (Sept. 4, 2017, 7:18 AM), <http://www.fcpablog.com/blog/2017/9/4/new-uk-law-liability-for-profiting-from-gross-human-rights-a.html>.

287. Fabio Leonardi et al., *Retroactive Corporate Liability for Human Rights Abuses*, PILLSBURY ALERT (Dec. 7, 2017), <https://www.pillsburylaw.com/en/news-and-insights/retroactive-corporate-liability-for-human-rights-abuses.html>.

288. *Id.*

289. *Id.*

*d. Legislative developments between 2018 and 2019*

The trend of proliferating supply chain laws continued into the 2018–2019 period with the enactments of the Australia Modern Slavery Act, Department of Treasury’s Office of Foreign Asset Control’s (OFAC) Countering America’s Adversaries Through Sanctions Act (CAATSA), and the United States-Mexico-Canada Agreement.

*i. Australia Modern Slavery Act 2018*

Similar to the UK Modern Slavery Act discussed above, Australia also joined the list of countries that are pushing the boundaries and requiring business to look into their supply chains. As of January 1, 2019, the Modern Slavery Act 2018 (“Act”) established a modern slavery reporting requirement. This requires certain large businesses and other entities in Australia to make annual public reports (“Modern Slavery Statements”) on their actions to address modern slavery risks in their operations and supply chains.<sup>290</sup>

The Modern Slavery Statements support the Act’s primary objective to assist the business community in Australia to take proactive and effective actions to address modern slavery. This will help mitigate the risk of modern slavery practices occurring in the supply chains of goods and services in the Australian market. Australia requires businesses and other organizations that carry on business in Australia above a certain size (consolidated revenue of \$100 million Australian dollars—approximately \$73 million U.S. dollars in a reporting year) to report annually on the risks of modern slavery in their operations and supply chains, and the action they have taken to assess and address those risks, and the effectiveness of their response.<sup>291</sup>

To ensure high-level engagement, the board of directors (or equivalent) must approve the statement, and a director (or equivalent) must sign it.<sup>292</sup> The statements will be publicly available on a central register maintained by the Australian government.<sup>293</sup> The Australian government itself, and those of its entities that satisfy the reporting revenue threshold, will also have to prepare a statement.<sup>294</sup>

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290. Modern Slavery Act of 2018, pt 2 (Austl.).

291. See *id.* at pt 1, s 5 (defining “reporting entity”); *id.* at pt 2, s 16 (outlining the mandatory criteria for the Modern Slavery Statements).

292. *Id.* at pt 2, ss 13(2)(d), 14(2)(e).

293. *Id.* at pt 2, s 18.

294. *Id.* at pt 2, s 15.

While the Act, similar to the UK Modern Slavery Act, does not contain penalties or independent oversight, non-governmental organizations may publicly shame noncompliant companies through use of the requirement and public register. This “naming and shaming” creates consumer pressure, which has been proven to be a very important form of punishment in this space.

*ii. Countering America’s Adversaries Through Sanctions Act*

In 2017, OFAC issued a final rule under CAATSA<sup>295</sup>—directed at Russia, Iran, and North Korea.<sup>296</sup> Specifically, as it relates to North Korea, CAATSA seeks to sanction businesses with supply chain links with North Korea.<sup>297</sup> In July 2018, the U.S. Department of State released an advisory on North Korean forced labor, detailing the tactics the country deploys to evade related sanctions.<sup>298</sup> The release outlines the lengths that North Korea is going to in order to avoid the U.S. sanction.<sup>299</sup> It contains red flags and other information, including a frequently asked questions and a fact sheet, which companies are expected to leverage in their due diligence programs as they work to meet requirements of CAATSA.<sup>300</sup> The two key sanctions risks for any company are the “inadvertent sourcing of goods, services, or technology from North Korea” and the “presence of North Korean citizens or nationals in companies’ supply chains, whose labor generates revenue for the North Korean government.”<sup>301</sup> The sanctions apply to any goods imported into the United States, whether in whole or in part.<sup>302</sup> This means that the risk of sanctions violations apply to any part, material or process associated with North Korean labor, either within the country or abroad, and at any stage in the sourcing, production or manufacturing of goods.

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295. Pub. L. No. 115-44, 131 Stat. 886 (2017).

296. *Id.*

297. § 311, 131 Stat. at 942 (expanding “persons” covered by the law to include those who “knowingly, directly or indirectly” purchase from or sell to North Korea specific items listed in the statute).

298. Press release, U.S. Dep’t of State, Risks for Businesses with Supply Chain Links to North Korea (July 23, 2018), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/dprk\\_supplychain\\_advisory\\_07232018.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/dprk_supplychain_advisory_07232018.pdf).

299. *Id.* at 2–5.

300. *Id.* at 2–5, 9–15.

301. *Id.* at 1.

302. *Id.*

*iii. United States-Mexico-Canada Agreement of 2018*

On November 30, 2018 the U.S. government signed a new trade agreement with Mexico and Canada.<sup>303</sup> This trade agreement includes an entire chapter dedicated to outlining fair labor practices and the prohibition of goods made with forced labor.<sup>304</sup> Article 23.6 prohibits the importation of goods made with forced or child labor into its territory from other sources and emphasizes cooperation between the parties for the identification and movement of goods produced with forced labor.<sup>305</sup> Each party of the agreement is to determine how to enforce the measures of Article 23.6.<sup>306</sup> This new trade agreement signals a move in the U.S. government to utilize trade agreements as a mechanism for combatting forced labor and ensuring trading partners are also realizing the obligations to eradicate forced labor and uphold ILO conventions.

*e. Current legislative proposals*

The future trend creates what we have seen over the last decade, that is an increased proliferation of new laws. At the time of publication there are a number of countries considering legislation, some of which are advanced to the stage where they can be discussed and others which have not advanced to that level.

*i. Canada*

The Subcommittee on International Human Rights of Canada's House of Commons Standing Committee on Foreign Affairs and International Development recently released its report "A Call to Action: Ending the Use of All Forms of Child Labour in Supply Chains" following a study undertaken by the Subcommittee and testimony and written briefs received in late 2017.<sup>307</sup> The report offers the following seven recommendations to the Government of Canada:

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303. Agreement between the United States of American, the United Mexican States, and Canada, U.S.-Mex.-Can., Nov. 30, 2018; *see also Agreement Between the United States of America, the United Mexican States, and Canada Text*, OFF. U.S. TRADE REPRESENTATIVE (Nov. 30, 2018) [hereinafter *U.S.-Mexico-Canada Agreement Text*], <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (providing the full text of the treaty).

304. *U.S.-Mexico-Canada Agreement Text*, *supra* note 303, art. 23.6.

305. *Id.*

306. *Id.*

307. HOUSE OF COMMONS, REP. OF THE STANDING COMM. ON FOREIGN AFFAIRS & INT'L DEV., SUBCOMM. ON INT'L HUMAN RIGHTS, A CALL TO ACTION: ENDING THE USE OF ALL FORMS OF CHILD LABOUR IN SUPPLY CHAINS 1-3 (Oct. 2018), <http://www>.

Recommendation 1—Prioritizing the Elimination of Child Labour and Forced Labour in Canada’s International Assistance. That the Government of Canada make the elimination of all forms of child labour and forced labour a specific goal in its international assistance spending, and a metric through which to evaluate its international assistance policy . . . .

Recommendation 2—Improving Access to Quality Education for Children and Adults. That the Government of Canada continue to work with its international partners to increase the quality and accessibility of education for children and adults affected by child and forced labour, with a specific emphasis on vocational training and entrepreneurship.

Recommendation 3—Supporting Law Enforcement and Judicial Systems—That the Government of Canada invest in the provision of training and resources for law enforcement, as well as the capacity of judicial systems to bring those responsible for the proliferation of child labour to justice, where states are open to such assistance.

Recommendation 4—Including Discussion of Child Labour and Forced Labour in all Free Trade Negotiations. That the Government of Canada include discussion of child labour and forced labour in its free trade negotiations, including an assessment of progress made in eliminating the use of child labour in the supply chains of the country in question.

Recommendation 5—Building Capacity of Canadian Businesses to Monitor their Supply Chains. That the Government of Canada develop a strategy to incent businesses to thoroughly and continually monitor their supply chains for the use of child labour and forced labour, and to share best practices . . . .

Recommendation 6—Advancing Initiatives to Motivate Businesses to Eliminate Child and Forced Labour in their Supply Chains. That the Government of Canada develop legislative and policy initiatives that motivate businesses to eliminate the use of any form of child labour in their global supply chains, and that empower consumers and investors to engage meaningfully on this important issue . . . .

Recommendation 7—Examining Canada’s Import Regime and Procurement Policies as Levers to Eliminate the Use of Child Labour. That the Government of Canada consider how to use Canada’s import regime as well as its public procurement policies to incentivize businesses to eliminate the use of any form of child labour in their supply chains.<sup>308</sup>

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ourcommons.ca/Content/Committee/421/FAAE/Reports/RP10078750/faaerp19/faaerp19-e.pdf.

308. *Id.* at 23, 27, 43.

*ii. Netherlands*

Two developments in the Netherlands show that legislation in the area of business and human rights is gaining momentum. In 2016, the Dutch government expressed its intention to make voluntary international CSR agreements legally binding.<sup>309</sup> These agreements are currently negotiated in various industry sectors. Second, on February 7, 2017, the Dutch Parliament adopted a bill introducing a duty of care to prevent child labor.<sup>310</sup> The bill requires companies selling goods and services to Dutch end-users more than once a year to examine whether there is a reasonable suspicion that the goods or services are being made using child labor.<sup>311</sup> This includes a periodic examination of their production or supply chain.<sup>312</sup> If a discovery is made, the company must set out a plan of action on how to combat such labor practices and issue a due diligence statement on their investigation and plan of action.<sup>313</sup> Companies are required to issue a statement in accordance with the ILO Tool declaring that they have exercised due diligence to prevent their goods and services being made using child labor.<sup>314</sup> In cases of non-compliance, companies risk a fine up to a maximum of EUR 820,000 or, alternatively, ten percent of their annual turnover.<sup>315</sup> Companies that have applied due diligence but have failed to submit the statement with the supervising authority can also be fined, and being fined twice within five years will constitute an economic offence, which may lead to criminal proceedings.<sup>316</sup> If approved, the proposed bill will not come into effect before January 1, 2020.<sup>317</sup>

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309. See Cees van Dam, *Statutory Human Rights Due Diligence Duties in the Netherlands*, ROTTERDAM SCHL. OF MGMT. 1, 1 (July 2016), [https://www.rsm.nl/fileadmin/Images\\_NEW/Sites/Chair\\_IBHR/Publications/Van\\_Dam\\_-\\_Statutory\\_HRDD\\_duties\\_in\\_NL.pdf](https://www.rsm.nl/fileadmin/Images_NEW/Sites/Chair_IBHR/Publications/Van_Dam_-_Statutory_HRDD_duties_in_NL.pdf); see also *Progress on Voluntary Agreements and Legislation*, MVO PLATFORM (Dec. 9, 2016), <https://www.mvoplatform.nl/en/progress-on-voluntary-agreements-and-legislation>.

310. *Corporate Alert: Bill Adopted by Dutch Parliament Introducing a Duty of Care to Prevent Child Labor*, STIBBE (May 22, 2017), <http://stibbe.m17.mailplus.nl/genericservice/code/servlet/React?encId=Sw4ZZe9GRvHkWbW&actId=222732&command=openhtml>.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

*iii. United States*

Recently, the U.S. House of Representatives introduced House Bill 7089, which would require certain companies to disclose whether they have taken measures to identify and address forced labor, slavery, human trafficking, and the worst forms of child labor in their supply chains, and if so, what measures were taken.<sup>318</sup> This law would be known as the “Business Supply Chain Transparency on Trafficking and Slavery Act of 2018” and would amend the Securities Exchange Act of 1934.<sup>319</sup> The amendments would require the SEC to issue regulations imposing disclosure requirements on certain issuers that report to the SEC and that have annual global receipts exceeding \$100,000,000.<sup>320</sup>

While the law, like the California Transparency Act, would not require public companies to implement any policies or engage in any efforts to eliminate forced labor, slavery, human trafficking and the worst form of child labor from their supply chains, it would require them to disclose publicly if they do nothing to identify or address these exploitative forms of labor in their supply chains. Congresswoman Carolyn Maloney (D-NY), along with Congressman Chris Smith (R-NJ), sponsored House Bill 7089.<sup>321</sup> House Bill 7089 is substantively similar to House Bill 3226, introduced in 2015, and its accompanying Senate Bill 1968 also co-sponsored by Congresswoman Maloney and Congressman Smith.<sup>322</sup>

*iv. Other potential legislative proposals*

There are a number of other countries considering legislation, including Switzerland,<sup>323</sup> Germany,<sup>324</sup> Finland,<sup>325</sup> Austria,<sup>326</sup> Italy,<sup>327</sup>

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318. Business Supply Chain Transparent on Trafficking and Slavery Act of 2018, H.R. 7089, 115th Cong. (2018).

319. H.R. 7089, §§ 1, 3.

320. § 3.

321. *Investors Welcome Federal Bill Calling for Corporate Disclosures on Trafficking and Slavery Risks*, KNOWTHECHAIN, <https://knowthechain.org/tag/business-supply-chain-transparency-on-trafficking-and-slavery-act> (last visited June 1, 2019).

322. *U.S. Congress Joins the Growing Number of Countries Considering Supply Chain Transparency Legislation*, K&L GATES (Nov. 1, 2018), <http://m.klgates.com/us-congress-joins-the-growing-number-of-countries-considering-supply-chain-transparency-legislation-10-31-2018>.

323. INT’L CORP. ACCOUNTABILITY ROUNDTABLE & FOCUS ON LABOUR EXPLOITATION, FULL DISCLOSURE: TOWARDS BETTER MODERN SLAVERY REPORTING 20–21 (2019), [https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5caf92140852294a37e36bb2/1555010068494/ICAR+Full+Disclosure+Report\\_Apr10-WEB.pdf](https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5caf92140852294a37e36bb2/1555010068494/ICAR+Full+Disclosure+Report_Apr10-WEB.pdf).

324. *Id.*

Luxemburg,<sup>328</sup> and Hong Kong.<sup>329</sup> The sheer number of these and other countries mentioned above considering legislation in this area certainly demonstrates, as this Article has discussed, that such legislation is proliferating. In addition, it also continues to demonstrate the global nature of labor exploitation and the resulting global efforts on behalf of governments, now potentially including in Asia, to fight it.

## 2. *Increasing and uncertain litigation trend*

Similar to the situation with legislation, there is an increasing litigation trend involving labor trafficking matters. Driven partly by a strategic litigation initiative, involving human rights lawyers, civil litigators, and others are committing to use strategic litigation to fight human trafficking and modern-day slavery. This initiative can help to build accountability by states, corporations, and other actors, as well as push defendants into bankruptcy through crippling damage awards.<sup>330</sup> There are many challenges to this litigation, including local partners, costly corporate suits, retaliation against trafficking victim plaintiffs, and extraterritorial jurisdiction matters.<sup>331</sup> Furthermore, trafficking tends to confound juries, as the causes of action in this area are new and unique.<sup>332</sup>

Cases can arise in a number of ways, including a trafficking civil case, tort case for other injuries, breach of contract case, shareholder strike suit to protest bribes paid by a corporate entity to facilitate trafficking, administrative action, such as a labor complaint, lost wages action, or consumer class action. In addition, the plaintiffs may pursue criminal penalties under bribery statutes, criminal trafficking statutes, money-laundering actions, or criminal fraud

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325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. Hannah T. Warren et al., *Eliminating Forced Labor from Your Company's Supply Chains: Lessons Learned from 2018 and Trends Developing for 2019*, K&L GATES (Mar. 4, 2019), <http://m.klgates.com/eliminating-forced-labor-from-your-companys-supply-chains-lessons-learned-from-2018-and-the-trends-developing-for-2019-03-01-20191>.

330. See Martina Vandenberg & Nick Gronko, *Modern Day Slaves are Suing Traffickers*, CNN (Jan. 8, 2016), <http://edition.cnn.com/2016/01/08/opinions/modern-day-slaves-suing-traffickers/index.html>; MARTINA VANDENBERG, HUMAN TRAFFICKING PRO BONO LEGAL CTR. & FREEDOM FUND, ENDING IMPUNITY SECURING JUSTICE 3–4 (2015), [http://www.htprobono.org/wp-content/uploads/2015/12/FF\\_SL\\_AW02\\_WEB.pdf](http://www.htprobono.org/wp-content/uploads/2015/12/FF_SL_AW02_WEB.pdf).

331. See VANDENBERG, *supra* note 330, at 11.

332. *Id.*

claims. In common law countries, plaintiffs might file a mandamus action to try and force the prosecutor to act.<sup>333</sup>

Working Group member Professor Ramona Lampley<sup>334</sup> confirmed the increased trend and more viable and complex legal theories and then placed the suits into two groups: consumer cases and employee cases.

*a. Consumer litigation*

*Rahaman v. J.C. Penney Corp.*<sup>335</sup> is a consumer case emanating from the Rana Plaza disaster in which a building that had been declared unsafe collapsed and killed 1100 mostly women and children garment workers. Defendants J.C. Penney, The Children's Place and Wal-Mart, won on a motion to dismiss due to a statute of limitations issue and that defendants had no duty to the plaintiffs' family members killed or injured because the defendants did not have control over the suppliers operating in the building and had not undertaken to monitor or implement safety measures.<sup>336</sup>

*Rahaman* followed the precedent established by *Doe I v. Wal-Mart Stores, Inc.*,<sup>337</sup> a class action complaint by employees of suppliers alleging Wal-Mart violated the supplier Code of Conduct in failing to monitor and correct unsafe working conditions.<sup>338</sup> In holding for the defendant, Wal-Mart, the court indicated that there was an absence of contractual duty, and absence of control over work conditions. Furthermore, the court also rejected the common law duty of buyer to monitor suppliers to protect supplier's employees and third party beneficiary claims by employees.<sup>339</sup> This demonstrates that even though these cases have not been successful, claims are still being brought against companies, which is one of the reasons for the disclaimers in section 5.7 of the MCCs. These disclaimers would help a company that has been sued under a *Doe* like theory, argue that in attempting to control the method of work a buyer does not assume a duty to monitor or inspect.<sup>340</sup>

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333. *See id.* at 6.

334. Professor Lampley has written an excellent article on this subject, which is one of the pieces included within this Symposium issue. *See generally* Lampley, *supra* note 8.

335. No. N15C-07-174 MMJ, 2016 WL 2616375 (Del. Super. Ct. May 4, 2016).

336. *See id.* at \*1, \*10.

337. 572 F.3d 677 (9th Cir. 2009).

338. *See id.* at 679–80.

339. *See id.* at 682.

340. *See Model Contract Clauses, supra* note 5, at 1105 (discussing how 5.7 of the MCCs addresses when buyers do not have a duty to monitor the activity of suppliers);

The next consumer case is the *Tomasella v. Nestle USA, Inc.*,<sup>341</sup> one of three class action lawsuits filed on behalf of Massachusetts consumers against Hershey Co., Mars, Inc., and Nestlé USA, Inc.<sup>342</sup> In each case, Tomasella alleged the food manufacturers violated the Massachusetts Consumer Protection Act by failing to disclose material information to consumers regarding their use of child labor in sourcing cocoa for their food products.<sup>343</sup> Tomasella further alleged the manufacturers had been unjustly enriched by receiving payment for chocolate products that consumers would not otherwise have paid had they known child labor was used to produce the products.<sup>344</sup> The court granted the food manufacturers' motions to dismiss in favor of all defendants.<sup>345</sup>

The Tomasella cases were preceded by three other unsuccessful consumer class actions in California from 2016 against the same companies.<sup>346</sup> In the 2016 cases, the plaintiffs alleged the food manufacturers violated California's Unfair Competition Law (UCL),<sup>347</sup> Consumer Legal Remedies Act (CLRA),<sup>348</sup> and False Advertising Law (FAL)<sup>349</sup> by failing to disclose the use of child and forced labor in their supply chains.<sup>350</sup>

Other class actions in 2016 and 2017 against other large retailers and manufacturers of seafood were similarly unsuccessful in alleging

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*see also* Lampley, *supra* note 8, at 1747 (“Monitoring, inspecting, and requiring a supplier to comply should be a purchaser right, not a duty, consistent with cases . . . such as *Doe I v. Wal-Mart Stores.*”).

341. Nos. 18-cv-10269-ADB, 18-cv-10359-ADB, 18-cv-10360-ADB. 2019 WL 383884 (D. Mass. Jan. 30, 2019).

342. *See generally* Class Action Complaint, *Tomasella v. Hershey Co.*, No. 1:18-cv-10360 (D. Mass. Feb. 26, 2018), 2018 WL 1051865 [hereinafter *Hershey Co. Class Action Complaint*]; Class Action Complaint, *Tomasella v. Mars, Inc.*, No. 1:18-cv-10359 (D. Mass. Feb. 26, 2018), 2018 WL 1051861 [hereinafter *Mars, Inc. Class Action Complaint*]; Class Action Complaint, *Tomasella v. Nestle USA, Inc.*, No. 1:18-cv-10269 (D. Mass. Feb. 12, 2018), 2018 WL 823151 [hereinafter *Nestle USA, Inc. Class Action Complaint*].

343. *Tomasella*, 2018 WL 1051865, at \*1 (citing MASS. GEN. LAWS ch. 93A, § 2 (2018)).

344. *Id.*

345. *Id.* at \*6–7. The same day, Tomasella appealed the decision for all three defendants. *Appeal filed*, Nos. 19-1130, 19-1161, 19-1132 (1st Cir. Feb. 4, 2019).

346. *See generally* *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1020 (N.D. Cal. 2016), *aff'd*, 891 F.3d 857 (9th Cir. 2018); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 957 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 462 (9th Cir. 2018) (mem.); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 654 (N.D. Cal. 2016), *aff'd*, 730 F. App'x 460 (9th Cir. 2018) (mem.).

347. CAL. BUS. & PROF. CODE §§ 17200–10 (West 2019).

348. CAL. CIV. CODE § 1770 (West 2019).

349. CAL. BUS. & PROF. CODE § 17500 (West 2019).

350. *Hodsdon*, 162 F. Supp. 3d at 1019; *McCoy*, 173 F. Supp. 3d at 956; *Dana*, 180 F. Supp. 3d at 654–55.

the corporations' failure to disclose the use of forced labor in supply chains violated the UCL, CLRA, and FAL.<sup>351</sup> Finally, one class action filed alleging forced labor in production of pet food was unsuccessful similar to the seafood cases.<sup>352</sup>

However, in *National Consumers League v. Wal-Mart Stores, Inc.*,<sup>353</sup> the D.C. Superior Court denied manufacturers' motions to dismiss similar claims.<sup>354</sup> In *National Consumers League*, consumer plaintiffs sued Wal-Mart Stores, Inc., J.C. Penney Corp., and The Children's Place, Inc.<sup>355</sup> alleging the corporations' social responsibility statements posted on their respective websites mislead consumers regarding the use of forced labor or child labor in the corporations' supply chains in violation of the District of Columbia Consumer Protection Procedures Act (CPPA).<sup>356</sup> The court found that Wal-Mart's "Sourcing Standards & Resources" and "Standards for Suppliers" statements on its website specified Wal-Mart's suppliers were contractually obligated to sign the Standards for Suppliers before commencing work for Wal-Mart, and that the suppliers were also obligated to "comply with all applicable laws and regulations" and to provide workers with "a safe and healthy work environment."<sup>357</sup>

The order denying the defendants' motion to dismiss went beyond the allegations in the complaint. The court examined the website of each defendant, found that the corporate statements therein paralleled contracts attached to the complaint, and eventually found that giving consumers a false impression of corporate practices and supply chain procedures was sufficient for a claim under the CPPA, rather than a false statement.<sup>358</sup>

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351. See generally *Wirth v. Mars, Inc.*, No. SA CV 15-1470-DOC (KESx), 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), *aff'd*, 730 F. App'x 468 (9th Cir. 2018) (mem.); *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW, 2016 WL 192569 (N.D. Cal. Jan. 15, 2016), *amended by* 229 F. Supp. 3d 1075 (N.D. Cal. 2017), *aff'd*, 731 F. App'x 719 (9th Cir. 2018) (mem.); *Barber v. Nestle USA, Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015), *aff'd*, 730 F. App'x 464 (9th Cir. 2018) (mem.).

352. *Hughes v. Big Heart Pet Brands*, No. CV 15-08007-CJC (AGRx), 2016 WL 524057, at \*1 (C.D. Cal. Jan. 15, 2016), *aff'd*, 740 F. App'x 876 (9th Cir. 2018).

353. No. 2015 CA 007731 B., 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016).

354. *Id.*

355. *Id.* at \*1.

356. *Id.* (citing D.C. CODE § 28-3901-13 (2015)).

357. *Id.*

358. *Id.* at \*5 ("The key inquiry of misrepresentation under the CPPA is the overall impression that the . . . statements can create on the public, not whether the statements made by the defendants are literally false."); see also *Lampley*, *supra* note 8, at 1720 (providing detailed analysis of *National Consumers League*).

At a panel moderated by Author Johnson at the 2016 ABA Business Law Section Annual Meeting, two prominent judges agreed that once some of these cases survived a motion to dismiss, companies would start taking them more seriously.<sup>359</sup> Given that this case just settled as of the time of this writing, it remains to be seen if it will be a trend one way or another.<sup>360</sup>

*b. Employment litigation*

Moving to employment cases, where plaintiff employees have primarily advanced claims under the Alien Tort Statute (ATS)<sup>361</sup> and TVPRA,<sup>362</sup> *Doe, I v. Nestlé, S.A.*<sup>363</sup> involved claims concerning child labor in the cocoa industry. In *Doe I*, while the Ninth Circuit followed precedent that the ATS did not apply extraterritorially, it found the case may allow a domestic application of the statute because former child slaves who had worked on cocoa plantations in the defendant's supply chain could sue the manufacturer under the ATS for aiding and abetting child slavery and remanded the case for a factual determination.<sup>364</sup> In *Adhikari v. Kellogg Brown & Root, Inc.*,<sup>365</sup> families of Nepali victims allege defendants engaged in forced labor scheme to entice victims to work in Jordan. The victims here were captured by an Iraqi insurgent group and killed.<sup>366</sup> Here, the Fifth Circuit recognized that the ATS may apply in instances of aiding and abetting, but affirmed the district court denial to amend the complaint to include these claims because of insufficient factual

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359. E. Christopher Johnson, Jr. et al., *Increased Litigation and Regulatory Risk Are Present in the Supply Chain (Labor Trafficking and Child Labor Arena)* (2016), [https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/events/business\\_law/2016/09/annual/materials/regulatory-risk-201609.pdf](https://www.americanbar.org/digital-asset-abstract.html/content/dam/aba/events/business_law/2016/09/annual/materials/regulatory-risk-201609.pdf).

360. See *Statement on Resolution of Lawsuit Against Walmart, JC Penney, and the Children's Place*, NAT'L CONSUMERS LEAGUE, [https://www.nclnet.org/resolution\\_walmart](https://www.nclnet.org/resolution_walmart) (last visited June 1, 2019) [hereinafter *Statement on Resolution of Lawsuit*]. The Authors' views are that the strategic litigation coalition mentioned earlier will be emboldened by these cases and will seek opportunities to bring additional actions in this area. See *supra* notes 330–33 and accompanying text.

361. 28 U.S.C. § 1350 (2012).

362. 18 U.S.C. § 1595; see also Lampley, *supra* note 8, at 1729–30 (explaining the significance of *Doe* decision).

363. 906 F.3d 1120 (9th Cir. 2018).

364. *Id.* at 1125–27.

365. 845 F.3d 184 (5th Cir. 2017).

366. *Id.* at 190.

evidence.<sup>367</sup> *Ratha v. Phatthana Seafood Co.* involved a claim by Cambodian seafood workers alleging a forced labor scheme against Thai suppliers and U.S. distributors.<sup>368</sup> While this case survived a motion to dismiss on the TVPRA claims, including the extraterritorial application of the TVPRA, the court entered judgment for defendants on evidentiary grounds.<sup>369</sup>

This ruling on the extraterritorial application is important because the Supreme Court's holding in *Kiobel v. Royal Dutch Holding*<sup>370</sup> precludes claims attempting to apply ATS extraterritorially.<sup>371</sup> In this regard, it also appears that *Jesner v. Arab Bank, PLC*<sup>372</sup> might provide a safe harbor from ATS claims for foreign corporations.<sup>373</sup> However, the 2008 reauthorization of the TVPRA included a grant of extraterritorial application.<sup>374</sup> At first glance, this seems to confer jurisdiction, but litigation over jurisdictional grant is protracted and unclear.<sup>375</sup>

#### D. CSR Economic Expectations

As mentioned above, supply chains are increasingly important and create potential for significant business success but not without some significant risks. The MIT Center on Transportation and Logistics indicated that the types of risks that would impact supply chains in 2018 included natural disasters, man-made crises, and economic upheavals.<sup>376</sup> As shown below, these risks also exist with respect to the presence of labor trafficking and child labor in the supply chain of any given business.

##### 1. Natural disasters

Events such as storms, floods, wildfires, hurricanes, and earthquakes can lead to significant supply chain disruptions. To recognize the potential impact such catastrophes can cause, businesses must understand all of the entities in each tier of their

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367. *Id.* at 199–200.

368. No. CV 16-4271-JFW (ASx), 2017 WL 8292391, at \*1 (C.D. Cal. Dec. 21, 2017).

369. *Id.* at \*8.

370. 569 U.S. 108 (2013); *see also* Lampley, *supra* note 8, at 1730 (discussing *Kiobel*).

371. *Kiobel*, 569 U.S. at 116, 124.

372. 138 S. Ct. 1386 (2018).

373. *Id.* at 1390 (“[I]t would be inappropriate for courts to extend ATS liability to foreign corporations absent further action from Congress.”).

374. 18 U.S.C. 1596 (2018).

375. Lampley, *supra* note 8, at 1718–29.

376. Rob Savitsky, *3 Types of Risk that Will Impact Supply Chains in 2018*, MIT CTR. FOR TRANSP. & LOGISTICS: SUPPLY CHAIN @ MIT (Jan. 4, 2018), <http://supplychainmit.com/2018/01/04/3-types-of-risk-that-will-impact-supply-chains-in-2018>.

supply chains. This in-depth look must include a risk assessment of potential instances of labor trafficking and child labor as set forth in the ABA Model Principles on Labor Trafficking and Child Labor.<sup>377</sup>

An example of such a risk is the Japanese Tsunami in 2011 that crippled the Fukushima nuclear plant and disabled a small number of suppliers that, unknown to the Japanese auto industry, held a significant and disproportionate amount of their business. This unknown risk led to massive losses within the industry including a \$3.2 billion loss for Toyota and almost \$900 million for Honda.<sup>378</sup> Automakers thought they had spread risk across their supply chain by diversifying tier 1 and tier 2 suppliers.<sup>379</sup> What they did not see was that these suppliers sourced from the same sub-suppliers, making their supply chain narrow instead of wide at the bottom.<sup>380</sup> When those sub-suppliers at the bottom of the supply chain were disabled by the tsunami, their efforts to diversify their tier-1 and tier-2 suppliers proved fruitless.<sup>381</sup>

## 2. *Man-made events*

Man-made events also frequently disrupt supply chains, including fires, product defects, cyber-attacks, labor and civil unrest, terrorism, utility failure, and piracy.<sup>382</sup> The prime example is the disastrous collapse of the Rana Plaza building on the outskirts of Dhaka, Bangladesh that killed more than 1100 garment workers.<sup>383</sup> The day before the collapse, an engineer had determined, based on cracks in the wall caused by the addition of new machinery in the building, that the building was unsafe.<sup>384</sup> Nevertheless, the building owners and businesses in the building forced

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377. *The Principles*, *supra* note 9 (“Principle 2—The Business/Supplier will Conduct a Risk Assessment of the Risk of Labor Trafficking and Child Labor and Continually Monitor Implementation of this Policy.”).

378. Hans Greimel, *Tsunami: The Aftermath*, AUTOMOTIVE NEWS (Mar. 12, 2012, 12:01 AM EST), <http://www.autonews.com/article/20120312/OEM01/303129960/tsunami-the-aftermath>.

379. *Id.*

380. *Id.*

381. *Id.*

382. Savitsky, *supra* note 376.

383. See generally Johnson, *Business Lawyers are in a Unique Position*, *supra* note 22, at 1101–02 (providing a description of the Rana Plaza accident and the resulting economic damage).

384. *Bangladesh Factory Collapse Blamed on Swampy Ground and Heavy Machinery*, GUARDIAN (May 23, 2013, 1:52 PM EST), <https://www.theguardian.com/world/2013/may/23/bangladesh-factory-collapse-rana-plaza>.

workers to enter the building or risk losing their jobs.<sup>385</sup> For those acts, they and certain government officials faced capital murder charges.<sup>386</sup>

### 3. *Economic forces*

Economic forces cause product or labor shortages than can have an impact on supply chain stability. MIT cites examples such as financial insolvency, trade or tariff disagreements, loss of patent rights, and sub-suppliers that perform poorly.<sup>387</sup> An example of a labor-related movement arising from worker unrest in the supply chain is the Campaign for Fair Food that is driven by Coalition of Immokalee Workers (CIW), an organization representing tomato pickers in Florida.<sup>388</sup> The CIW started with a boycott against Taco Bell and once it agreed to sign a Fair Food Agreement, fourteen other retailers, including Ahold USA, The Fresh Market, Wal-Mart, Chipotle Mexican Grill, Trader Joe's, Sodexo, Aramark, Compass Group, Bon Appétit Management Company, Subway, Whole Foods Market, Burger King, McDonald's, and Yum Brands, also signed Fair Food Agreements.<sup>389</sup> Only Wendy's declined to sign such an agreement.<sup>390</sup> Those agreements call for better labor standards and wages for farmworkers in the suppliers' operations.<sup>391</sup> The campaign's position is that major corporate buyers overleverage their buying power in a manner that creates downward pressure on wages and working conditions, resulting in human rights abuses from which workers lack legal protection.<sup>392</sup> The CIW's approach is consistent with the UN Guiding Principles on Business and Human Rights and the ABA Model Principles and Policies that call for businesses to use leverage to encourage businesses in their supply chains to address adverse human rights impacts, even in the absence of a legal obligation to address such impacts.<sup>393</sup>

Another economic force is the growing consumer and investor awareness and concern over the issue of labor exploitation which could lead to

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385. *Id.*

386. Johnson, *Business Lawyers are in a Unique Position*, *supra* note 22, at 1102.

387. Savitsky, *supra* note 376.

388. *About*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/about> (last visited June 1, 2019) [hereinafter FAIR FOOD STANDARDS COUNCIL].

389. Susan L. Marquis, *Campaign for Fair Food Makes a Real Difference*, RAND CORP.: RAND BLOG (Aug. 25, 2017), <https://www.rand.org/blog/2017/08/campaign-for-fair-food-makes-a-real-difference>; *see also Participating Buyers*, FAIR FOODS STANDARDS COUNCIL, <http://www.fairfoodstandards.org/resources/participating-buyers> (last visited June 1, 2019).

390. BOYCOTT WENDY'S, <http://www.boycott-wendys.org> (last visited June 1, 2019).

391. FAIR FOOD STANDARDS COUNCIL, *supra* note 388.

392. *Id.*

393. *See The Principles*, *supra* note 9; UN Guiding Principles, *supra* note 10, at 20.

additional boycotts or similar actions.<sup>394</sup> Additionally, consumer surveys, such as one conducted by the Walk Free Foundation showing sixty-six percent of U.S. consumers would stop buying a product if they discovered it was produced using slave labor,<sup>395</sup> demonstrate consumers' desire to influence social problems in supply chains. Furthermore, a study in November 2005 by Harvard economists demonstrated that a ten to twenty percent price premium could be acceptable to consumers in response to a retail brand's identifiable anti-trafficking efforts.<sup>396</sup> On the investor side, among other developments, Blackrock CEO Lawrence Fink's 2018 message to CEOs about the importance of social responsibility raised more than a few eyebrows.<sup>397</sup> All of these efforts demonstrate the importance of social responsibility to consumers and investors, both of which can have a significant impact on a corporation's bottom line.

CONCLUSION: WHY WE NEED LAWYERS TO LEAD  
THE IMPLEMENTATION OF NEW SOCIAL CONTRACTS FOR  
INTERNATIONAL SUPPLY CHAINS

This Article stands for the proposition that corporate lawyers must take the lead in eliminating human rights abuses because, among other reasons, they deal with a failure or gap in the rule of law that is designed to protect men, women, and children far removed from a client's end product. Laborers in the domestic supply chain enjoy protection from rigorously enforced employment and labor laws. However, the rule of law does not protect nearly 200 million vulnerable people. Despite new laws from international governments

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394. See, e.g., BOYCOTT WENDY'S, *supra* note 390; see also *supra* notes 340–60 and accompanying text.

395. See WALK FREE FOUND., SLAVERY ALERT: CONSUMER POLL, UNITED STATES 2, <https://cdn.walkfreefoundation.org/content/uploads/2017/05/14093928/Slavery-Alert-Consumer-Poll-United-States.pdf> (last visited June 1, 2019) (providing data from 2014).

396. Michael J. Hiscox & Nicholas F.B. Smyth, Is There Consumer Demand for Fair Labor Standards? Evidence from a Field Experiment 3, 4 (unpublished manuscript), [https://scholar.harvard.edu/files/hiscox/files/is\\_there\\_consumer\\_demand\\_fair\\_labor.pdf](https://scholar.harvard.edu/files/hiscox/files/is_there_consumer_demand_fair_labor.pdf).

397. Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html> (“[F]or the world's largest investor to . . . declare he plans to hold companies accountable . . . is a bracing example of the evolution of corporate America.”); see also *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> (last visited June 1, 2019).

and lawsuits brought by victims of international human rights violations, human rights advocates, and consumers, a myriad of human rights abuses continue to occur.<sup>398</sup>

The MCCs are a needed addition to these efforts that fall under the umbrella of Corporate Social Responsibility. Lawyers largely control the purchase order and supply agreement arena.<sup>399</sup> The UCC or CISG governs the rights and responsibilities of parties to agreements. Because these agreements control virtually every product a company sells or buys and given corporate attorneys' familiarity with the UCC and CISG, lawyers are in a unique position to affect change across supply chains by leveraging these powerful commercial laws.<sup>400</sup>

A business that really wants to gain control of its supply chain will make sure that it has the best contract possible so that it not only gets the best products from the perspective of quality, service, and price, but also that it helps to ensure those products were made by workers who were adequately paid, protected, and valued, and certainly were not the victims of labor trafficking, forced labor, or child labor.<sup>401</sup>

In addition to these practical reasons for adopting and implementing the MCCs, there is a strong business case for doing so from an ethical perspective. To accomplish this task, a business may modify its purchase order or supply agreement in accordance with the MCCs and then incorporate its company policies and/or its Code of Conduct together with any other documents, such as the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the Ethical Trading Initiative, or the ABA Model Principles on Labor Trafficking and Child Labor.<sup>402</sup>

The result converts the purchase order or supply agreement into a weapon to fight labor trafficking, child labor and any other human rights issue a business wants to attack using its own Code of Conduct

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398. See Beraldi et al., *supra* note 162; see also Part I.

399. See Silvia Hodges, *Power of the Purse: How Corporate Procurement is Influencing Law Firm*, L. PRAC. TODAY (Jan. 2012), [https://www.americanbar.org/content/dam/aba/publications/law\\_practice\\_today/power-of-the-purse-how-corporate-procurement-is-influencing-law-firm.pdf](https://www.americanbar.org/content/dam/aba/publications/law_practice_today/power-of-the-purse-how-corporate-procurement-is-influencing-law-firm.pdf).

400. See generally Aditi Ramesh et al., *CISG v. UCC: Key Distinctions and Applications*, 7 BUS. & MGMT. REV. 459 (2016) (describing the jurisdiction of the UCC and CISG in contract formation and highlighting distinct differences between provisions in each that have important implications for businesses).

401. See, e.g., *Model Contract Clauses*, *supra* note 5; Lampley, *supra* note 8; Martin, *supra* note 7; see also *supra* Section I.B.1.

402. See *supra* Section II.B.5 (describing voluntary guidelines for ethical international corporate conduct).

or other standard.<sup>403</sup> This social contract remedy gives businesses teeth to address problems further down a supply chain in what would otherwise be a toothless request to change operations policy. The MCCs' disclaimers also lessen the risk of litigation. As Author Johnson stated in an earlier article: "Lawyers play a critical role for business clients. Lawyers discern the legal, financial, ethical, and moral risks of noncompliance with the rule of law including local, state, and federal laws and international norms and rules."<sup>404</sup> Lawyers do not, claim to substitute the public good for shareholder return. Rather we "help corporate boards and CEOs recognize both the risks of violating laws and the long-term reward of acting within those laws, even while others blindly pursue short-term rewards in the face of unacceptable risks."<sup>405</sup>

This Article's discussion of the many laws in this area, which are not being enforced both here in the United States and abroad, is an indication that the traditional rule of law is not yielding tangible results in this area, which is among the reasons we require social contracts to fill this void. The rationale for doing so is clear, when either governments begin enforcing these laws or draft more onerous ones, corporations who have implemented social contracts will be ahead of the curve.<sup>406</sup>

This Article also pointed out that lawyers should recognize that not only are we the guardians of the rule of law, but also are governed and guided by the MR. As discussed, the MR allow lawyers to consider moral, economic, social, and political factors relevant to a client's situation when rendering advice.<sup>407</sup> The MR also permit lawyers to disclose confidential client information to prevent "reasonably certain death or bodily harm"<sup>408</sup> or if the client insists on violating the law.<sup>409</sup> Lawyers are also permitted to withdraw from representation if the client insists upon taking actions that the attorney finds "repugnant."<sup>410</sup>

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403. *E.g.*, *Model Contract Clauses*, *supra* note 5.

404. Johnson, *Business Lawyers are in a Unique Position*, *supra* note 22, at 1122.

405. *Id.*

406. *See supra* Section II.C.1.

407. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983); *see also supra* Section II.B.3.

408. *Id.* at r. 1.6(b)(1). For example, if an attorney representing a corporation that subcontracted with the factory involved in the Rana Plaza disaster had known about the building conditions, they might have been permitted to disclose these facts to prevent loss of life. *See supra* notes 383–85 and accompanying text.

409. MODEL RULES OF PROF'L CONDUCT r. 1.13 (c). For example, violating the "knowing benefits" provision of the TVPRA. *See supra* Section II.C.1.a.i.

410. MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(4); *see also* RHODE & LUBAN, *supra* note 149, at 670.

From a moral perspective, this Article makes it clear that labor exploitation runs counter to human dignity, the bedrock principle in the Universal Declaration of Human Rights and the United States Declaration of Independence. Terrible living conditions and outright brutality to men, women, and children make a system involving trafficking or forced labor an affront to morality.<sup>411</sup>

This Article also discussed the role that diversity can play in these efforts given that since the late 1960s, corporations have embraced the concept of diversity.<sup>412</sup> Additionally, corporations in the late 1960s started to embrace the concept of minority and women supplier development programs, which have proven very successful.<sup>413</sup> Given the success of these programs in developing minority and women businesses in the United States, the programs should be easily replicated with overseas suppliers.<sup>414</sup> This Article also chronicles some situations where these types of programs have been successful in helping suppliers in the Fair Trade program, which is a promising development.<sup>415</sup>

While they are not enforced, this Article highlighted many laws that attempt to target human rights abuses in international supply chains.<sup>416</sup> This Article noted that the lack of enforcement is not a safe harbor, so the increased regulation and uneven enforcement is a precarious position for companies that are not prepared for a change in enforcement policy. Therefore, counsel should advocate for supply chains that are free of labor trafficking, forced labor and child labor by ensuring that their clients are doing all they can to obey the law and utilizing social contracts will advance those efforts significantly.

This Article also demonstrated how the litigation environment is likewise expanding and uncertain.<sup>417</sup> On the consumer side, *National Consumers League* survived a motion to dismiss but later settled.<sup>418</sup> On the employee side, *Ratha* survived a motion to dismiss on TVPRA claims, but the court dismissed the case on evidentiary grounds.<sup>419</sup>

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411. See *supra* notes 160–61 and accompanying text; see also *supra* Section I.B.4.

412. This was demonstrated in the many supportive briefs filed in favor of that concept. See *supra* notes 165–75 (noting briefs filed in *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. University of Texas*, 570 U.S. 297 (2013)).

413. See *supra* Section II.B.6.

414. See *supra* notes 169–74 and accompanying text.

415. See *supra* notes 175–80 and accompanying text.

416. See *supra* Section II.C.1.

417. See *supra* Section II.C.1.

418. See *supra* notes 353–58 (discussing the facts of *Nat'l Consumers League v. Wal-Mart Stores, Inc.*).

419. See *supra* note 368–69 (examining the outcome of *Ratha v. Phatthana Seafood Co.*).

Lastly, when considering economic risk from a business perspective, three types of problems could lead to an unstable supply chain: national disasters, man-made issues, and economic issues. Under national disasters, this Article demonstrated that instability in the supply chain can cause a serious financial loss, such as the Japanese auto industry felt in the Fukushima disaster.<sup>420</sup> The key issue for businesses is recognizing the potential that such disruptions can cause, which means understanding all of the entities in each tier of a business's supply chain. Doing so could also lead to identifying any labor exploitation in the supply chain, which could also lead to a disruption in the supply chain. Under man-made events, fire, product defects, cyber-attacks, labor and civil unrest, terrorism, utility failure, and piracy are more frequent disruptors of supply chains such as the collapse at Rana Plaza that claimed over 1100 lives.<sup>421</sup> Under economic risk, worker and consumer boycotts, such as conducted by the Coalition of Immokalee Workers caused a significant economic adjustment to occur in the tomato industry.<sup>422</sup>

Consequently, this Article has demonstrated, why lawyers, armed with a tool like the MCCs can develop social contracts that will make a difference in the lives of almost 200 million people caught in the bondage of labor trafficking, forced labor, and child labor. The MCCs use existing commercial law of the UCC and CISG to put teeth into commitments made by companies in their codes of conduct and other norms and guidelines they may have adopted. This action is consistent with the rule of law, MRs, and from a moral perspective. Additionally, there are potential opportunities for companies to utilize minority supplier development principles to develop downstream suppliers overseas. It is also supported by business case in the legal arena given the increasing and uncertain legislation and litigation environments in this area. In addition, the interest of consumers and investors, the latter as demonstrated by the Larry Fink letter, support an economic business case for action to be taken on this issue now. Finally, this Article has also demonstrated that all of the forgoing fall squarely within a business case supported by CSR principles.

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420. *See supra* Section II.D.1.

421. *See supra* Section II.D.2.

422. *See supra* Section II.D.3.