



Towards Operationalizing Human Rights and Environmental Protection in Supply Chains: Worker-Enforceable Codes of Conduct

Introduction

Despite efforts to uphold human rights and environmental standards in international supply chains, abuses occur across all sectors and regions. Workers and impacted communities subject to abuses face many barriers to justice when they are harmed. In this publication, Corporate Accountability Lab (CAL) presents model clauses that companies can include in supply chain contracts to give those affected access to remedy.¹ By adopting these clauses, companies can make their codes of conduct worker-enforceable.²

This idea was born from CAL's observation of three parallel phenomena: (1) systemic abuse of workers rights, human rights, and the environment across global supply chains; (2) a lack of access to justice for impacted workers;³ and (3) the proliferation of supplier and buyer codes of conduct that prohibit contracting parties from engaging in practices that abuse workers,

¹ While worker-enforceable codes of conduct are likely feasible in other jurisdictions, this document assumes U.S. state law governs buyer-supplier contracts.

² Companies should also give impacted community members third-party enforcement rights to supplier codes of conduct. Impacted community members are not necessarily supply chain workers but could be defined as those individuals who work, live, or recreate in proximity to where a supplier or sub-supplier is operating and who are negatively impacted by a supplier's activities that violate the supplier code.

³ See Bettina Braun, Avery Kelly, Charity Ryerson, *Worker-enforceable Supplier Codes of Conduct as a Tool for Access to Justice in Global Supply Chains*, 1 ILAW Network Global Labour Rights Reporter 7-10 (2021), <https://www.ilawnetwork.com/wp-content/uploads/2021/01/GLRR-English-FINAL.pdf>.

communities, and the environment.⁴ The idea was further inspired by a general trend of contractualizing human rights protections in business agreements to address adverse consequences of business relationships and activities on workers and the environment.⁵

Although codes of conduct⁶ have become more frequent in buyer-supplier contracting models, our research and experience indicate that little has changed on the ground because codes of conduct are rarely enforced.⁷ While buyers may expect their suppliers to uphold supplier codes of conduct, several factors disincentivize enforcement. For example, verifying supplier compliance almost always requires increased supply chain transparency; additional buyer resources for monitoring purposes; and possible changes in buyers' practices, including adequate lead times and payment to facilitate suppliers' ability to uphold code terms. Buyer codes, in contrast, tend to reflect more aspirational commitments than concretely enforceable terms, and suppliers are often not in a bargaining position to enforce those terms.

But what if other stakeholders -- those whom the human rights and environmental promises are meant to benefit-- could enforce codes of conduct? What if buyers and suppliers named workers as third-party beneficiaries to their contracts or purchase orders containing supplier and/or buyer codes of conduct so that those stakeholders had legal rights to enforce the codes? Human rights and environmental protection in international supply chains might begin to look drastically different.⁸

⁴ As a result of criticism and public pressure, many companies that source goods internationally now use supplier codes of conduct and/or sustainability clauses in their supply chain contracts. Niklas Egels-Zandén, *Revisiting Supplier Compliance with MNC Codes of Conduct: Recoupling Policy and Practice at Chinese Toy Suppliers*, 119 *Journal of Business Ethics* 58, 59–75 (2014). Recently, the adoption of buyer codes of conduct addressing purchasing practices of buying companies or using Buyer-Supplier Mutual Codes of Conduct has gained traction. See, e.g. Katharine Early, *Guide to Buying Responsibly*, 30-31 (2017), https://www.ethicaltrade.org/sites/default/files/shared_resources/guide_to_buying_responsibly.pdf.

⁵ Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 *Business and Human Rights Journal* 195–224 (2017).

⁶ Buyers sometimes include sustainability clauses directly in their contracts or purchase orders with suppliers (instead of a supplier code of conduct addendum). Sustainability clauses often cover similar social and environmental provisions directly in supplier contracts. These clauses could be made enforceable by workers and/or impacted/affected communities by adding third-party beneficiary rights to the sustainability clause(s) of the contract or purchase order.

⁷ "Code and monitoring" systems have largely failed to improve compliance, and at their worst, are mere extensions of corporate public relations. The failures of social auditing have been extensively documented, resulting in condemnation of the industry from academics, unions, and NGOs. See, e.g. Genevieve LeBaron, Jane Lister, *Ethical Audits and the Supply Chains of Global Corporations*. Sheffield Political Economy Research Institute (2018), <http://speri.dept.shef.ac.uk/wp-content/uploads/2018/11/Global-Brief-1-Ethical-Audits-and-the-Supply-Chains-of-Global-Corporations.pdf>; Brian Finnegan, *Responsibility Outsourced*, AFL-CIO (Apr. 2013), <https://aflcio.org/reports/responsibility-outsourced>; Ilona M. Kelly, et. al., *Fig Leaf for Fashion: How social auditing protects brands and fails workers*, Clean Clothes Campaign (2019), <https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf/view>.

⁸ Third-party beneficiary enforcement rights with regard to supplier codes could improve workers' access to justice by providing access to courts in the U.S. jurisdiction that governs the contract. This is particularly relevant for workers in countries where courts are especially slow or dysfunctional. Supplier codes and sustainability clauses often also mandate higher levels of protection than local law on issues like maximum working hours per week and minimum age requirements. This means that the ability to enforce rights under contract often gives workers a higher level of protection than that which local courts would recognize. *Supra*, n.3.

FOR EXAMPLE, despite the fact that many electronics brands have supplier codes that prohibit the use of child labor, much of the cobalt used in electronics manufacturing is mined by children working in dangerous conditions in the Democratic Republic of the Congo. Under a supplier code that is enforceable by workers and impacted communities, families of child laborers working for sub-contractors could enforce human rights conditions against cobalt suppliers producing for electronics brands.

FOR EXAMPLE, if, in violation of a worker-enforceable supplier code of conduct, a supplier or sub-supplier fails to pay workers a living wage, workers who are owed additional pay may enforce these terms against the supplier or sub-supplier.

Sample language and Implementation Steps⁹

Buying companies seeking to minimize the negative impacts that their supply chains have on human rights and the environment¹⁰ can add clauses designating workers as third-party beneficiaries in codes of conduct governing their suppliers and/or buyers' purchasing practices. Worker enforceability, in addition to supplemental steps to ensure that intended third-party enforcement is possible, are concrete steps companies can take to make human rights and environmental abuses in their supply chains less likely.

*Sample third-party beneficiary clauses to be added to a buyer-supplier agreements:*¹¹

1.1. The Parties to this [Purchase Order/Agreement] acknowledge and agree that the terms of [Buyer Code/Supplier Code] are intended to benefit and protect not only the Parties but also persons directly impacted by (1) Supplier's activities performed under this [Purchase Order/Agreement] and (2) activities by sub-suppliers that the Supplier contracts with to perform under this [Purchase Order/Agreement]. Such persons include, but are not limited to, workers, land

⁹ Please note that this sample language and the implementation steps do not constitute legal advice. Consult a lawyer before taking these measures, which may increase buyer and/or supplier liability.

¹⁰ This may include, but is not limited to Benefit Corporations, L3Cs, and other companies working toward clean and sustainable supply chains.

¹¹ Sample contract clauses can be used to make a supplier code and/or a buyer code enforceable by workers and impacted persons, who would be intended third-party beneficiaries of the code(s). Companies can add third-party beneficiary enforceability to a supplier code, buyer code, or both. Third-party beneficiary rights can be limited to workers or can include persons directly impacted (individuals who are not workers but who are harmed as a result of a supplier or sub-supplier's activities), as this model language does.

owners, property owners, those residing, working, and/or recreating in proximity to supply chain activities who are injured or suffer damages due to breach of [Buyer Code/Supplier Code], including survivors of those killed or disabled. Such persons are intended third-party beneficiaries to [Buyer Code/Supplier Code].¹²

1.2. All intended third-party beneficiaries of [Buyer Code/Supplier Code] have the right to enforce [Buyer Code/Supplier Code] against Parties in any court or tribunal that has jurisdiction over the [Buyer/Supplier or Purchase Order/Agreement].¹³

1.3. Third-party beneficiaries may assign their rights to a labor union, non-governmental organization or other organizations providing legal assistance they select.

Implementing third-party beneficiary enforceability:

In order to be successful, third-party beneficiary language must be accompanied by frameworks that facilitate enforceability. This includes but is not limited to:

- **Providing notice and worker education** to ensure that workers are aware of their rights under the supplier code and/or buyer code, understand they can enforce those rights, and know how to do so.
- **Informing parties** of their contractual responsibilities and communicating that workers (and impacted community members, where applicable) have the ability to enforce legal rights for non-compliance with the codes of conduct.
- **Suppliers' regular disclosure** of accurate, complete information regarding production facilities by analyzing disclosures carefully. Buyers should require frequent disclosures of sub-suppliers and their locations.
- **Buyers' compliance with transparency best practices** by publicly disclosing all production facilities in their supply chains.
- **Buyer monitoring of supplier compliance** with the code. Many buyers already have a system in place for monitoring compliance with the supplier code. If this is the case, the buyer should update the monitoring process to reflect modifications to the supplier code, and ensure that existing monitoring activities are meaningful and legitimate, including by

¹² It is essential that the parties ensure that no person who takes or considers taking action to enforce the code of conduct is retaliated against.

¹³ If the parties have an arbitration agreement in their contract or purchase order, they should include language clarifying that third-party-beneficiaries can choose court proceedings over arbitration.

consistently conducting off-site worker interviews and ensuring that suppliers have given notice to workers of third-party beneficiary rights.¹⁴

- **Making public that supply chain agreements on human rights and the environment are enforceable by impacted community members and/or workers.** In addition to publishing codes of conduct on company websites and CSR reports, companies should publish whether language in the supply agreements provides third-party beneficiary enforcement.
- **Ensuring a fair pricing structure¹⁵** to make compliance possible. Downward price pressure often leaves suppliers with few options except to cut corners on human rights and environmental compliance. Buyers have a responsibility to ensure that the prices paid to suppliers are fair and reflect additional costs that the supplier may incur to comply with the supplier code.
- **Ensuring that no person** who takes or considers taking steps to investigate or report code violations of or who considers to or takes legal actions on violations of code provisions **faces retaliation.** Robust anti-retaliation policies are essential to make third-party beneficiary enforcement possible.

Commercial viability

An initial test of this strategy indicates that third-party-enforceable codes of conduct, at least for suppliers, are commercially viable. CAL worked with an international buyer based in the United States to make its supplier codes of conduct worker-enforceable. In 2018, the buyer's 14 suppliers, sourcing from more than 100 factories worldwide, entered into agreements with the buyer that included worker-enforceable supplier codes.¹⁶ While each of the 14 supplying companies was aware of the new language that made their codes of conduct worker-enforceable, none of them resisted it.¹⁷ This test case suggests that worker-enforceable supplier codes are commercially viable.

We encourage companies that source goods transnationally and are interested in minimizing negative impacts on human rights and the environment in their supply chains to adopt buyer and supplier codes of conduct and to make them enforceable by workers and impacted communities. This is a concrete step that companies can take to operationalize commitments to minimize adverse impacts of their business on human rights and the environment.

¹⁴ Some independent NGOs with labor-rights expertise and worker-driven social responsibility organizations offer factory inspections that typically comply with higher monitoring standards.

¹⁵ Components of a fair pricing structure may or may not be outlined in a buyer code of conduct.

¹⁶ Charity Ryerson, *CAL Victory: Test Case Offers Solution for Global Worker Exploitation*, Corporate Accountability Lab, (Dec. 19, 2018), <https://corpaccountabilitylab.org/calblog/victory-test-case-offers-solution?rq=victory>.

¹⁷ *Supra*, n.3.