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Seeking a ‘Smart Mix’: Multi-Stakeholder Initiatives and Mandatory Human Rights Due Diligence

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I. Background

In today's increasingly globalized economy, in which multinational companies outsource manufacturing, agricultural production, and the extraction of natural resources, human and labor rights abuses are commonplace. As a result of widespread news and social media coverage, consumers, investors, and governments increasingly expect multinational corporations to play a far more vigorous role in overseeing their global supply chains. In the last several decades, these large companies have come under growing pressure to act as responsible global citizens and to use their economic muscle to support a variety of social goals, from preserving clean air and water and reducing carbon emissions, to ensuring workplace safety and eliminating forced and child labor.

In 2011, the United Nations established an overarching framework called the Guiding Principles on Business & Human Rights, which articulate general responsibilities for governments and companies.¹ Many multinational corporations have also developed their own unilateral codes of conduct and voluntary reporting systems related to their environmental and social efforts. But a decade after the adoption of the Guiding Principles, it is clear that this combination of UN and individual-company commitments is inadequate to accomplish meaningful rights protection and enforcement. Instead, it is now necessary to establish more concrete, industry-specific human rights standards and metrics that will mandate the necessary supply chain oversight to ensure rights violations no longer occur with impunity.

Recognizing this need, a number of mostly Western governments are beginning to adopt mandatory due diligence and reporting standards that address the global operations of multinational companies. Initially, these measures focused on child or forced labor and simply required companies to report on their efforts to address these challenges.² But the EU and several of its member states are now going further, crafting mandatory human rights due diligence ("mHRDD") requirements for all companies that do business within the EU.³

The effectiveness of these measures will depend on how human rights due diligence is defined, interpreted, and applied. In developing criteria for what constitutes adequate due diligence under the law, regulators should look to the work of multi-stakeholder initiatives ("MSIs") – organizations that involve companies, civil society organizations, and sometimes governments, in the establishment and application of industry-specific standards. Though MSIs vary greatly in their approaches and effectiveness, their work offers promising lessons to governments, in the EU and elsewhere, as they begin to adopt and apply mHRDD laws.

II. The Problem

Over the last decade, the UN Guiding Principles have provided a useful framework for governments and companies that seek to address human rights challenges. The principles place primary responsibility on governments to protect human rights, but also establish that private companies have a corollary duty to respect human rights. The Guiding Principles also describe human rights due diligence as a broad risk-management process which requires companies to assess actual and potential human rights impacts (GP 18), integrate and act upon the findings (GP 19), track responses (GP 20), and communicate how impacts are addressed (GP 21).⁴ But the principles alone have not led to sufficient progress.

Recognizing that many companies fail to embrace their responsibilities under the Guiding Principles, a number of governments are beginning to assert greater regulatory control over the global operations of multinationals. In March 2021, the European Parliament approved an outline proposal for the EU Directive on Mandatory Human Rights, Environmental and Good Governance Due Diligence.⁵ According to the outline proposal, companies subject to the due diligence requirement must “identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate potential and/or actual adverse impacts on human rights, the environment and good governance in their value chain”.⁶ The European Parliament is expected to approve the legislation in 2022, after which each EU member state will implement the directive into its national legislation.⁷ In parallel, France, Germany, and Norway have established national legislation mandating human rights due diligence, and other European countries are in the process of enshrining of similar legislation.⁸

While this is an important step forward, the EU regulation and national laws on mHRDD leave regulators and courts with the daunting challenge of determining what constitutes compliance. Put differently, because the provisions do not define substantive, industry-specific standards, government regulators and courts will need to determine what actions constitute compliance and non-compliance for a given industry. This determination promises to be especially challenging given the fundamental complexity inherent in human rights standards themselves.

The vague nature of due diligence in a human rights context stands in sharp contrast to the framework for addressing the legal requirements companies face with respect to corruption and environmental standards. Under the 40-year-old U.S. Foreign Corrupt Practices Act, the U.K. Anti-Bribery Act and other similar laws in Europe and elsewhere, there are clear substantive standards for the courts and regulators to apply.⁹ Similarly, governmental and international regulations relating to the environment set clear substantive standards on air and water quality and carbon emissions. In the human rights arena, similarly clear substantive standards are essential as well.

Unlike environmental standards, however, human rights goals are hard to quantify. And unlike indicators of corruption, which can be applied consistently across industries, human rights challenges vary substantially across sectors. For companies that outsource manufacturing across the globe, for example, the substantive human rights standards need to address workplace safety, child and forced labor, and other workers' rights priorities. For social media companies, the standards will need to address privacy, free expression, and the adequacy of their response to harmful content, such as hate speech and incitements to violence. For mining and extractive companies, the standards need to protect the personal security and other concerns of local populations where the companies operate, especially in conflict zones. This breadth and nuance will create a daunting test for regulators or judges deciding what constitutes adequate due diligence in each of these industries.

Without clear standards, courts or regulators are likely to afford companies wide deference as long as they show that they have an internal assessment process in place and seem to be acting in good faith. In a potentially parallel situation, U.S. courts are highly deferential to company decision-making under the "business judgment rule." According to this precedent, courts will not interrogate corporate decision-making as long as a justification can be provided that suggests the decision was made in good faith, with reasonable care, and a reasonable belief that the decision was made in the best interest of the corporation.¹⁰ Unfortunately, a similar degree of deference to a company's human rights due diligence processes will not be sufficient to advance a remedy for the many serious global human rights challenges in which businesses are implicated and bear some responsibility.

Indeed, clear standards and metrics are needed to drive multinationals to address their human rights impacts in a comprehensive way. Without such standards, it is unlikely companies will address the fundamental problems they face because the risks to their reputations are too significant and the costs of making substantive progress too high.¹¹ Many companies describe the difficulty even in taking the preliminary step of mapping their supply chains.¹² For example, to map the complex garment supply chain in Bangladesh, the "Mapped in Bangladesh" project was created to support companies' mapping efforts.¹³ Once the hurdle of mapping is overcome, companies face significant reputational risk in publicizing their practices. Indeed, companies are not even in agreement about what transparency means or requires. An MIT study found that definitions of supply chain transparency related to labor practices in the apparel industry vary substantially across organizations.¹⁴ Even with an intention to be transparent, companies face significant costs in any effort to implement and enforce human rights standards across their supply chains.

Marks & Spencer, a British supermarket chain, provides a good example of a well-meaning and market-leading practice that does not go far enough. M&S maintains an interactive map of its sourcing locations with information on the product manufactured, the address, the male to female worker ratio, the number of workers, and the existence of trade unions or workers committees.¹⁵ This constitutes a market-leading practice in supply chain mapping and the distribution of information to the public.¹⁶ However, the map only includes suppliers with which the company has a direct relationship, and therefore excludes a presumably large number of subcontractor facilities where rights violations are arguably more likely to occur.¹⁷ The M&S map also provides no information from independent

third parties on the compliance status of the production sites with the M&S code of conduct. This failure to connect geographic data with independent compliance data is emblematic of the way many companies publish their supplier lists today.¹⁸ But without such connection, it is essentially impossible to assess the adequacy of a company's human rights due diligence activities.

Given these challenges, it is unlikely that companies will implement systematic improvements without industry-specific expectations. To develop these standards and metrics, companies and other key stakeholders from civil society, academia, and governments, should work to reach consensus on expectations, which can then be enacted and enforced by governments. Governments can facilitate this process by supporting the exchange of ideas and the development of solutions for corporate human rights challenges through their support of MSIs.

III. A Way Forward

Shaping Mandatory
Human Rights Due Diligence through
Multi-Stakeholder Initiative Standards

Regulators and courts should look to leading MSIs to help them determine what constitutes “adequate” human rights due diligence in various sectors.¹⁹ Though the effectiveness of MSIs varies greatly, the best of these initiatives have made important progress in defining industry-specific standards and metrics.

The History of MSIs and Why they Can Be so Important

MSIs emerged roughly three decades ago as an ad hoc response to human rights and environmental governance gaps in an increasingly globalized economy. As global supply chains proliferated, large multinationals began to source their products in countries offering inexpensive labor, where local governments were unable or unwilling to provide the oversight necessary to ensure compliance with fundamental norms. Companies and civil society organizations created MSIs to help fill this void, deploying an innovative private governance mechanism to bring representatives of business, civil society, academia, and sometimes governments together.²⁰ Many of these MSIs were formed in the wake of a crisis, which laid bare problems too large and complex for any one actor to address. The Accord on Fire and Building Safety in Bangladesh, for example, was formed after the tragic collapse of the Rana Plaza factory complex, and brought unions and brands together in a binding agreement to improve factory safety.²¹ Wide public attention to these problems made clear the urgent need for a collective response in which companies could collaborate with each other and other stakeholders.

In this way, MSIs meet the practical needs of companies and other key stakeholders. They provide a neutral forum in which companies, civil society organizations, and other experts can share knowledge and develop best practices, while at the same time serving as an external oversight mechanism on company practices. Increasingly, the most effective MSIs provide a credible framework for consumers and investors who wish to assess whether individual companies are developing and implementing strong rights-based practices.

There are at least five important features of MSIs:

FIRST, they offer a **venue to share expertise and resources**. They do so by bringing together different stakeholder perspectives and pooling their knowledge and experience. Some MSIs jointly sponsor the development of training modules and implementation guides that are relevant to an entire industry. The Better Cotton Initiative, for example, provides training on more sustainable farming practices to more than 2.3 million cotton farms in 23 countries.²² In this way, MSIs are also a resource to individual companies, helping them to enhance their internal expertise and technical capacities.

SECOND, they offer a venue in which proposed **solutions can be tested**. An individual company can only test solutions across its own supply chain, which is costly and often does not offer a sufficiently representative sample from which to draw broad lessons or make future reforms. Working through an MSI

enables companies to assess potential solutions more broadly. This approach also increases the leverage any one brand or retailer has over individual production sites in global supply chains, yielding larger-scale, systemic reform. Under the auspices of the Accord on Fire and Building Safety in Bangladesh, unions and brands have come together to encourage factory owners and managers to implement important safety improvements.²³ Such improvements would be more difficult for a single actor to drive.

THIRD, MSIs are able to **develop ambitious but practical standards** reflecting the diverse constituencies at the table. The participants in these negotiations, with practical and industry-specific expertise, but divergent interests and perspectives, are jointly able to produce standards that are both realistic and ambitious. For example, the Fair Labor Association (FLA) has created the Principles of Fair Labor and Responsible Sourcing, applicable to the manufacturing and agricultural sectors, which validate the performance of a company around corporate governance and human rights due diligence systems.²⁴ Similarly, the FLA's Workplace Code of Conduct applies the International Labor Organization's Core Conventions to the working conditions in factories and farms.²⁵ The FLA standards and principles are revised regularly with the participation of all stakeholders.

FOURTH, because this negotiation process includes both industry representatives and civil society actors, **the standards they develop enjoy legitimacy within industry and across the broader international community.** Created with the participation of civil society, and sometimes governments, these standards generally conform to internationally-recognized global norms, such as the ILO's core obligations. Furthermore, because companies have typically been involved in the creation of the standards, they have a greater stake in the successful implementation of the standards themselves.

FIFTH, MSIs offer **tangible incentives for implementing solutions.** Many leading MSIs offer incentives for successful implementation in the form of company accreditation. The FLA, for example, assesses companies and their suppliers throughout and at the end of a two- or three-year implementation schedule during which the entities take steps to bring their supply chains into compliance with the FLA's Workplace Code of Conduct. They are accredited or not based on this assessment.²⁶ Such accreditation can incentivize consumption and investment by individuals who favor companies making meaningful rights-based commitments. Likewise, public condemnation, on the basis of failure to meet standards, poses a threat to a company's revenue.

The Challenges of MSIs

MSIs face several practical and interrelated challenges. In a highly heterogeneous group of stakeholders with conflicting priorities, reaching decisions by consensus can take a long time. While civil society organizations and some governments press for more stringent standards and metrics, companies are often reluctant to make these stronger commitments. Particularly in the early phases of an MSI, when foundational principles are discussed and actual standards need to be defined, negotiations can be lengthy and contentious. Even greater differences manifest themselves as MSIs build systems to independently assess company compliance and to hold non-compliant companies accountable. Resolving these differences often involves a lengthy process. For example, the FLA was founded in

1999 and the organization was fully operational three years later, once all stakeholders had agreed on the full set of operational principles, monitoring mechanisms, and transparency requirements.

This process is further complicated by different expectations about how much money new MSIs need to institutionalize their work and who should pay these costs. In 2017, the NYU Stern Center for Business & Human Rights surveyed several of the most well-established MSIs and found that in a majority of cases, their resources were insufficient to support operations which would effectively advance the objectives of the MSI.²⁷

A number of civil society organizations, especially advocacy groups, are reluctant to join MSIs due to the reputational risk inherent in simply sitting at the table with large companies. In part because of this, most MSIs struggle to attract sufficient civil society representation, which contributes to the power imbalances between companies and those advocating for greater rights protection. These power dynamics can be enshrined in the institutional design – some organizations self-describe as MSIs but fail to include all key stakeholders, while others relegate certain stakeholder groups, typically civil society, to advisory bodies without decision-making power. Indeed, few MSIs have established equal representation of all stakeholder groups in the decision-making process. These imbalances are exacerbated by the costs of participation. The money and time required to participate meaningfully can mean that only large organizations can afford to be involved. As a result, some civil society groups have declined to join these efforts and others have joined only to withdraw their support subsequently.

These practical challenges give credence to a more substantive critique. Too often, MSIs provide a safe haven to companies that seek to publicize their commitment to human rights without making meaningful changes to their business practices. One recent study assessed 40 voluntary initiatives, involving 10,000 participating companies from 170 countries, and covering diverse sectors, including agriculture, minerals, seafood, electronics, and toys.²⁸ The study determined that “[w]hile MSIs can be important and necessary venues for learning, dialogue, and trust-building...they should not be relied upon for the protection of human rights.”²⁹ Unfortunately, this overgeneralization fails to distinguish between MSIs that are effective, and those that are not.

Given all of these challenges, critics of MSIs are rightfully concerned that participation in an MSI should not become a check-the-box exemption that would allow companies to meet their mHRDD requirements without making meaningful changes. This is a valid concern if participation in *any* MSI is deemed adequate, in and of itself.

Instead, we propose that the typology detailed below should be used to guide regulators as they assess the strength of a given MSI and thereby determine whether any one of them should contribute to shaping mHRDD requirements.

The MSI Typology

Fundamentally, not all MSIs are created equal. While critics often dismiss MSIs as a homogenous category, there are significant differences across organizations. The criteria below can help distinguish MSIs that are making a meaningful contribution from those that provide public relations benefits and a safe haven for less committed companies. Likewise, these criteria can determine which MSIs regulators should look to when defining adequate mHRDD.

This typology is modeled in part on the operations of the FLA which embraces all five criteria outlined below. The example of the FLA demonstrates that adherence to these criteria is achievable despite the challenges faced in implementation.

Only the MSIs that meet the following five standards should help clarify the requirements of human rights due diligence.

1. Multi-Stakeholder Governance

True multi-stakeholder representation and decision-making is the condition *sine qua non* for any organization that defines and enforces rules that govern the human rights conduct of companies. This should include local stakeholders, such as local manufacturers, who often bear the greatest costs in applying MSI-made standards but are often excluded from decision-making bodies. Any organization that is not fully multi-stakeholder in the composition of its governing body is unable to claim legitimate decision-making.³⁰

2. Standards that Accord with International Laws and are Based on Technical Expertise

MSI standards should be based on relevant international laws and norms. The MSI process should apply these international standards to each industry, developing standards and metrics that are most applicable to each industry and reflective of the most pressing challenges they face. Only standards that are fully aligned with international laws and norms can be accepted as “adequate” in the context of mHRDD. Decision-making must also be guided by scientific facts and technical expertise, not merely by the political interests of individual stakeholders. This requires giving those with industry-specific know how a voice in decision-making, coupled with a commitment from all stakeholders to work towards a common, rights-oriented end.

3. Independently Monitored Compliance

Industry-specific standards must also be translated into metrics that lend themselves to routine monitoring and measurement. MSIs should offer processes for independent monitoring, as well as independent verification of successful remediation. Without independent assessments of company performance, including remediation, companies cannot credibly show compliance with a given standard.

4. Meaningful Enforcement and Penalties

Company compliance with MSI standards and rules needs to be mandatory. MSIs need to have a progressive range of options to address company non-compliance, including in the most egregious cases, suspension or expulsion. While the presumption is that MSIs will work with companies to improve their performance, the existence of strong sanctions will help to ensure that these so-called voluntary initiatives are in fact able to set binding rules for their members. Companies that repeatedly disrespect the rules or refuse to comply should be warned, placed

on probation, and in the most egregious cases expelled from the organization if they repeatedly violate the MSI's core requirements. Such an escalating system of penalties effectively precludes a company from claiming ignorance and instead forces companies to embody their commitments or lack thereof.

5. Public Transparency

Public transparency is an essential attribute of MSIs. It enables public accountability of company actions when they violate human rights. The appropriate type and amount of information to be disclosed will inevitably vary across industries and should therefore be determined by the relevant stakeholders in each MSI. However, to be credible MSIs must demand a meaningful degree of public transparency, especially around compliance and enforcement.

As the criteria suggest, there is substantial variation across organizations that are seen as, or call themselves, MSIs. The five criteria above help distinguish valuable MSIs from those that merely provide cover for companies that violate norms or resist change. Only the MSIs that adhere to these criteria should participate in defining adequate mHRDD.

IV. Conclusion

With the help of MSIs, regulators can better define what companies must do to ensure that their supply chains comply with international human rights norms. MSIs are one venue through which industry-specific human rights standards, metrics, and means of evaluation can be defined and implemented. While not all MSIs are created equal, organizations that meet the criteria outlined above can make a valuable contribution to specifying adequate mHRDD, and to advancing human rights for workers and communities. Indeed, regulators should look to these organizations for help in creating meaningful standards for multinationals.

Governments should also take steps to support the MSIs making a meaningful contribution and should encourage broad engagement from key stakeholders. This support can mean all the difference. In the context of the FLA, for example, President Clinton convened a meeting of multinational companies and non-governmental organizations at the White House in 1996 and challenged them to work together to improve working conditions in the apparel and footwear industries. These meetings under the good offices of President Clinton eventually led to the creation of the FLA.³¹ Government resources also can help MSIs overcome debilitating budgetary constraints. The International Code of Conduct Association (ICoCA) for Private Security Providers, for example, has been supported by the Swiss government from its inception in 2013 and has, thanks to government support, begun to serve as an important standard-setting organization.³²

MSIs should neither be sweepingly dismissed nor uncritically accepted as organizations that can contribute to shaping mHRDD requirements.³³ If MSIs meet the criteria outlined in this paper, they can help define adequate human rights due diligence in specific industries, and thereby help ensure that human rights are advanced through corporate practice. Imposing these criteria for MSIs ensures that the mix of public and private regulation to advance human rights in corporate practice is indeed a "smart mix".³⁴

Notes

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⁷ *Id.*

⁸ For an overview of national initiatives for mandatory human rights due diligence in Europe, see, (<https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/>) (Updated on June 25, 2021).

⁹ Foreign Corrupt Practices act, 15 U.S.C. §§ 78dd-1 *et seq.* (1977, as amended); Bribery Act 2010 (c.23).

¹⁰ See *e.g. Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1982) (the Business Judgment Rule is “a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”) (internal citations omitted).

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