BUSINESS AND HUMAN RIGHTS: SRSG CONSULTATION

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**IMPROVING THE HUMAN RIGHTS PERFORMANCE OF BUSINESS
THROUGH MULTI-STAKEHOLDER INITIATIVES:
SUMMARY REPORT**

1. INTRODUCTION

"Improving the Human Rights Performance of Business through Multi-Stakeholder Initiatives" was one of a series of expert consultations convened on behalf of Professor John Ruggie in his capacity as Special Representative of the Secretary-General of the United Nations (SRSG) on the subject of business and human rights. The consultation began with the premise that it is the duty of states under international law to protect against human rights abuses. Yet, irrespective of the duties of states, there are strong arguments for companies to take responsibility as well. In his 2007 report to the Human Rights Council, the SRSG identified multi-stakeholder initiatives (MSIs) as an important complement to the traditional state-based treaty-making and soft law standard-setting processes. But relatively little is known systematically about how – or indeed whether – particular features of these initiatives influence their effectiveness.

The consultation, convened by the Clean Clothes Campaign and hosted by the Ministry of Foreign Affairs of the Netherlands in The Hague, brought some of the leading MSIs together with representatives from business, government, and civil society to address two interrelated objectives:

- first, to identify "good," if not necessarily "best," practices in the governance of multi-stakeholder initiatives, and

- second, to identify criteria for credible and effective implementation of supply chain codes of conduct.

While exhibiting great diversity, MSIs generally are characterized by multi-stakeholder governance structures and activities, and by mechanisms for enforcement through mutual accountability, market leverage, and/or non-market pressures (both regulatory and non-regulatory). MSIs have emerged in response to governance gaps in which regulatory, judicial, and broader economic and political systems have failed – whether by intent or lack of capacity – adequately to protect human rights. If governance systems all worked the way they are supposed to, many participants felt, MSIs would be a much less important feature of the human rights landscape.

In some areas, MSIs may become new modes of governance, changing the traditional roles and relationships of the state and other actors. But even if MSIs are only

transitional phenomena on a historical timescale, it is important to determine how to make best use of them in building a sustainable system for the protection and realization of human rights.

The consultation was structured around four primary topics:

- MSI Governance
- The Role of Governments in MSIs
- Monitoring and Auditing
- Remediation

Throughout the discussion, participants highlighted successes and failures MSIs have had to date, as well as the opportunities and challenges they face going forward. For the purposes of this summary report, those successes, opportunities, and challenges are drawn out and summarized at the end of the document.

2. MSI GOVERNANCE

There was broad agreement that credible MSIs shared at least the following six features:

2.1 Clarity of Purpose

Participants felt it essential for MSIs to define clearly the scope of their mission, based on an accurate problem definition. The MSI's value proposition in relation to the problem it is intended to redress should be easy to identify and articulate.

Some participants felt that a narrow focus was a success factor. For example, the Voluntary Principles on Security and Human Rights (VPs) are not addressed to the full range of human rights challenges, but to the policies and practices of security forces guarding company assets. Similarly, the Ethical Industries Transparency Initiative (EITI) alone will not solve the resource curse. A narrow focus helps manage expectations and prevents unsustainable mission-creep.

Others noted that an MSI's problem definition must also be framed to attract relevant stakeholders, and communicated so as to generate a shared understanding among them. For instance, one MSI faced the misperception by a local government that its objective was in effect to create a monopoly amongst the companies involved. Another was accused of threatening the reputation of the host country. In a slightly different example, Chinese firms may be reluctant to join MSIs that frame their goals explicitly in terms of "human rights" – and yet they are not necessarily averse to components of human rights, disaggregated and framed in ways that are not considered threatening to the country's political system.

2.2 Involvement of Relevant Stakeholders

"Relevant stakeholders" include, first and foremost, those with the power to address the problem defined. There is usually a challenge of getting the right mix of stakeholders, as the problem is often systemic, involving a wide range of actors across sectors and geographies. If the problem is defined broadly, a very high number of stakeholders will be implicated; if it is defined more narrowly, fewer will be. Collective power to fix the problem is also a function of sufficient seniority among the individuals involved, helping to ensure that organizational commitments and resources are available to follow through. There are also questions about who represents the victims or potential victims, and how to be sure that they are represented effectively.

Despite the systemic nature of most of the problems MSIs have been created to solve, there may be credibility reasons NOT to include certain stakeholders – for example, a corrupt government. Often this decision is far from clear-cut. For most MSIs, the challenge is in deciding how wide to spread their wings. Is it more effective to be inclusive or like-minded? Is it better to let currently underperforming companies and other actors into the tent and then encourage them to improve from within? Or is it better to set barriers to entry and encourage them to improve in order to join? Similarly, is it credible for a group of companies to take an initiative on their own, while simply communicating externally with non-governmental organizations (NGOs) and other parties? Some say that it isn't, while others say there is no need for companies acting collectively to dress up as an MSI, depending on the group's objectives and their performance in achieving them. Finally, the issue was raised about the legitimacy of stakeholders participating in MSIs when they are on record as opposing voluntary initiatives as a viable solution to human rights challenges, thereby possibly being in a position to create the self-fulfilling prophecy that voluntarism cannot work. Many of these questions remain unresolved.

2.3 Appropriate Balance of Power and Responsibility

In addition to involving all relevant stakeholders, it is important to engage them in meaningful ways. This is a function of timing as well as their role in the governance and day-to-day operations of the MSI. On timing, many participants felt that all stakeholders should be involved as early as possible – i.e. at the "creation" stage of the MSI. On governance, many participants felt it was important to distribute decision-making power widely, though others said this should be considered on a case-by-case basis rather than being considered a foundational principle, cautioning that broadly-shared decision-making power could actually be counterproductive in some cases, depending on the MSI's objectives On day-to-day operations, many participants felt that the role of local stakeholders in particular should be clarified, strengthened, and made more integral to the MSI's work – that local stakeholders' roles should go "beyond consultation."

2.4 Accountability

Most MSIs require a clear commitment from members, at least those in the corporate sector. Participants in the consultation emphasized that the decision to make such commitment by joining an MSI was voluntary, but that once made, compliance was mandatory. To be credible, an MSI must have effective sanctions for noncompliance, based on a robust system for monitoring and measuring performance. Some initiatives require a probationary period (as in the International Council of Toy Industries' CARE program, for example, which also requires members to hire social compliance officers during that period). Sanctions may include suspension or even expulsion. Participants had mixed views on the effectiveness of these sanctions.

2.5 A Grievance Mechanism

Participants felt that grievance mechanisms were important. They stressed that access by victims was critical not only to the effectiveness of any grievance mechanism, but also to the credibility of the MSI – whether it hosts the mechanism itself or mandates participating companies to host their own. Participants noted that MSIs that encourage complaints must be prepared to support those who incur legal or other forms of retaliation for making them.

2.6 Transparency

Participants had mixed views as to the optimal level of transparency for an MSI. However, there seemed to be consensus on *process* transparency as a minimum. It was felt that whether or not *content* transparency was desirable seemed to be a function of timing, consent of the parties, security risk to the victim, and other factors. One participant defined transparency not as 100% disclosure, but rather as "a systematic way for information to flow."

There was broad agreement on these good governance principles. One participant also suggested that having a secretariat seems to be a success factor – some structure that can act on the MSI's behalf. However, it was unclear whether/to what extent each of these governance principles actually contributes to operational effectiveness on the ground and improvements in people's lives. The SRSG noted that there has been a tendency to define "effectiveness" in terms of institutional inputs, such as the way initiatives are structured, who gets to participate, their level of transparency, and so on. While such features may enhance MSIs' short-term social legitimacy and credibility, they do not necessarily translate into longer term effectiveness in solving the specific problems they are intended to address. Indeed, participants gave several examples of MSIs being increasingly overburdened by top-heavy governance structures that actually impede their ability to fulfill their core mission.

3. THE ROLE OF GOVERNMENTS IN MSIs

Participants had mixed views as to whether governments should have roles in MSI governance. The consensus answer seemed to be "it depends" on the tasks at hand.

It would make little sense to have a Kimberley Process or an EITI without government participation; the same may be true of the Voluntary Principles. But government participation can pose risks if it means other stakeholders will not speak freely, or if it compromises the perception of objectivity, neutrality, and independence of action which is so important to many MSIs. Lack of government participation can also pose risks, for example to the financial or political sustainability of the effort or its ability to get to the heart of the problem, particularly where it is clear that lack of strong state governance led to the initiative's creation in the first place.

The consultation identified a number of ways governments can support MSIs, in addition to or instead of becoming actively involved in MSI governance through Board membership or other means. Beyond funding, which was agreed NOT to be the most important contribution governments could make, these include:

- Convening and facilitating
- Endorsing
- Home government diplomacy with host governments
- Promoting and mainstreaming the learning from MSIs across industry sectors
- Educating consumers to help generate demand for responsible goods and services
- Aligning their roles in MSIs with other levers of corporate social responsibility (CSR)

Participants spent a considerable amount of time on this last form of support. Consultation participants agreed that the distinction between "voluntary" and "mandatory" was somewhat artificial; there is in fact a broad spectrum of ways governments can incentivize participation in MSIs. Governments already, to some extent, use levers like export credit agencies, export promotion instruments, public procurement requirements, domestic credit facilities, trade and investment agreements, and government pension funds to promote socially responsible behavior by companies. Governments could use these levers more explicitly – and more systematically, and on a larger scale – to ensure corporate respect for human rights, e.g. through participation in MSIs. This would require inter-departmental coordination among agencies directly responsible for MSI participation or relations (if any), and agencies responsible for these various levers, such as ministries of development, foreign affairs, treasury, and trade, as well as embassies and diplomatic academies.

4. MONITORING AND AUDITING

Participants felt that the social auditing model has been effective in identifying health and safety-type problems, but generally ineffective in identifying more fundamental, rights-based issues such as freedom of association, discrimination, harassment, and physical abuse. Social auditing models that do go beyond how to fix a blocked fire exit to these more fundamental issues – e.g. through collaboration with civil society groups –

are difficult to scale for a variety of reasons. Participants seemed to agree that to address fundamental human rights issues at scale, social auditing and follow-up need to change dramatically. Among the challenges identified were quality and credibility; cost; and effectiveness.

4.1 Quality and Credibility

Suggestions for improvement included hiring auditors through a multi- stakeholder committee; requiring auditors to go through an apprenticeship phase; continuous human rights learning and training for auditors; and periodic review of compliance criteria, drawing on international standards, local law, and auditors' experience.

4.2 Cost

Participants suggested that some redistribution of the cost of compliance and certification among suppliers and buyers up and/or down the value chain might be feasible in cases where certification actually adds value in the marketplace. Currently, costs are largely borne by suppliers without significant cost-sharing by buyers, even in the form of higher prices.

4.3 Effectiveness

Among the many possible indicators of effectiveness one could use to evaluate social monitoring and auditing, the most important was effectiveness in catalyzing sustainable, systemic change in the context of the problem an MSI has been developed to address.

Participants suggested that social monitoring and auditing were limited in their ability to catalyze such change for a number of reasons, notably:

- *They often fail to uncover the root causes of human rights violations.* To remedy a problem, we need to know why it is occurring. Participants suggested that needs and risk assessments could be useful supplements – or even substitutes – for social audits, providing the information MSIs need to identify not only problems but also potential solutions.

- *They do not, in and of themselves, build the capacity required for change.* Several participants' experience indicates that explicitly linking capacity-building to monitoring and auditing greatly enhanced impact. With capacity-building, might monitoring and auditing be things we have to do only in the short term? Will workers eventually be able to identify and escalate issues on their own, and will managers eventually respond out of their own initiative? The importance of capacity-building is explored further below.

5. REMEDIATION

Participants felt that to date, MSIs have had different degrees of success remediating abuses in different categories of rights. MSIs have had good success remediating problems of occupational health and safety, such as poor cleanliness and lighting. In contrast, they have had little success remediating abuse of employer-employee relationship-related rights, such as violations related to wages, overtime, and social security. With respect to freedom of association and collective bargaining participants seemed to agree that MSIs have had even less success.

Freedom of association and collective bargaining were described as enabling rights, needed to sustain any changes MSIs are able to make in the realization of other rights. MSIs' lack of success in this enabling category raised a key question: can remediation fix systemic problems or is it best suited for dealing with isolated incidents? Participants were unanimous that change has to be systemic, not piecemeal or one-off. They suggested that a "long fix" – as opposed to a "quick fix" – was required. Elements of a "long fix" would include:

- *Empowering workers,* for example through education and awareness-raising, formation and capacity-building of workers' committees.

- *Building the capacity of suppliers,* for example through awareness and training for supervisors and managers. Some participants suggested that basic business process improvements – e.g. in scheduling, production planning, costing, and human resources management – could also help prevent violations of rights, either directly (by eliminating inefficiencies that lead to, for example, forced overtime) or indirectly (by providing MSIs with a "hook" on which to build relationships of trust). Other participants suggested that many suppliers were efficient and sophisticated enough already that such improvements were unlikely to be effective channels for further protection of rights.

- *Changing buyer's policies and practices,* such as late confirmation of orders.

- *Building the capacity of states,* e.g. labor inspectorates.

As discussed above, remediation is a response to noncompliance with a human or labor rights code or standard by a company. The objective is to achieve compliance with that code or standard. The term "remediation" or "remedy" can also be used to refer to efforts to redress past wrongs to victims through compensation, apology, or other means, which may or may not include compliance with a particular code or standard. Participants in the consultation agreed that these two types of remediation – remediation to come into compliance and remediation to redress past wrongs to victims – required different mechanisms, though changing corporate behavior to prevent future wrongs could and possibly should be part of both types.

With respect to remediation that seeks some form of redress for the victim, participants felt that dialogue-based alternative dispute resolution (ADR) mechanisms can be effective in some circumstances. At the same time, given that international human rights law requires states to ensure victims' rights to an effective remedy, participants asked how MSIs that sponsor ADR-based access to justice mechanisms should engage the national justice systems of home and host countries. Here again the answer was generally "it depends," but participants agreed on the baseline need to ensure that what is offered is consistent with human rights standards, and to consider how that might strengthen and feed into national justice systems rather than provide only one-off solutions.

6. SUCCESSES

6.1 Issue Validation

In the mid-1990s, human rights issues had little currency within the market system. There was general consensus amongst the participants that in varying degrees, MSIs since then have changed thinking and practice in global supply chains in most industries around the world. In 1992, for instance, it would have been highly unlikely for a company to take responsibility for human rights impacts on any workers it did not employ directly. Today it is commonplace for high-profile brands to take increasing responsibility for such actors.

6.2 Convening and Mobilization

MSIs have succeeded in establishing the space and the precedent for stakeholders across sectors – in business, government, and civil society – to discuss and take action on problems in which they are all implicated. This reflects a notion of shared responsibility more appropriate than unilateral action to the complex nature of human rights issues. Participants stressed that MSIs' multi-stakeholder nature was more than just a process – it was a critical part of their impact on the ground.

6.3 Leadership Quality

Through the process of engagement, MSIs have contributed to developing a class of leadership companies in a wide range of sectors. At the individual level, MSIs have helped to create and give outlet to a generation of boundary spanners working with one foot inside their organizations and one foot outside, translating across stakeholders and working to gain the traction internally to make change.

7. OPPORTUNITIES AND CHALLENGES GOING FORWARD

Despite these achievements, consultation participants felt that the most important measure of success was on-the-ground change in people's daily lives, and that here

MSIs have thus far fallen short. Is it a question of implementation? Or, as one participant suggested, does it reflect "a basic inevitability about our mission"? MSIs have been set up to deliver public goods. Can they ever do that as effectively or as legitimately as the public agencies which exist to perform that role?

One speaker expressed the opinion that today's MSIs are facing a mainstreaming period in their historical development, with two important implications. First, they must develop sustainable revenue models appropriate to their long-term goals. Second, they must move from largely tactical to strategic approaches. Today's MSIs must think about the "end game" and engage in dynamic innovation and continuous self-reinvention to ensure they are fit for purpose.

Two of the most important strategic questions and challenges identified throughout the consultation were critical mass and the relationship of largely voluntary MSIs to the sphere of regulation.

7.1 Critical Mass

Do MSIs really shift markets or only small niche areas within markets? There are very few MSIs that have even approached critical mass. Those that have generally work in industries where production is concentrated in a relatively small number of countries and/or companies, dominated by premium or high-profile brands with valuable reputations to protect. There are three categories of new players most MSIs must urgently seek to include if they are to achieve the kind of scale required to change entire systems or markets:

- Emerging market companies (and countries)
- Value brands
- Small and medium enterprises

Serious questions were voiced as to whether the kinds of levers MSIs traditionally use – such as public campaigns, ethical consumption, and elaborate civic engagement mechanisms – will work for these categories of players. Several participants suggested that the pressure for more "commodified" approaches was likely to increase, and would be reinforced by the introduction of ISO26,000, a "guidance" on social responsibility. One lever that was proposed was making MSI participation a condition of industry association membership, as ICTI has done in the toy industry.

7.2 Relationship to Regulation

Critics often portray MSIs and voluntary standards generally as providing alternatives to or even means of escaping binding regulation. For most MSIs, however, the regulatory interface is much more complex. Some seek eventual public policy integration as a way of achieving scale, bringing in smaller firms, producers of commodities and other unbranded products, and companies and governments from emerging markets who

do not have other incentives to join. For others, the whole point is to get governments to implement regulation they already have on the books.

Participants predicted that MSIs would need to focus more explicitly on their relationships to regulation in the future, for a variety of reasons. First, many leadership companies actually prefer regulatory solutions in some areas, where "level playing fields" are business-critical. Second, MSIs are proving to be interesting platforms for joint policy advocacy. And third, to the extent that MSIs begin to shift entire markets, they are more likely to come under scrutiny from regulators at the national and international levels on competition and trade policy grounds.

While participants agreed that different MSIs would necessarily have different "end games," they also felt that MSIs share an opportunity to use their experience to feed into smart regulation in the areas in which they work.

8. CONCLUSION

There are no easy answers or ready-made solutions to the challenges MSIs face in the current mainstreaming phase of their historical development. Yet participants felt that there were four strategic themes worth exploring further, as MSIs move forward toward systemic impact, sustainability, and scale: *going beyond monitoring, increasing local ownership, exploring strategic and operational integration with one another*, and *paying greater attention to actual drivers of operational effectiveness*.

APPENDIX 1. PARTICIPANTS LIST

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