

Industry-Specific Multi-Stakeholder Initiatives That Govern Corporate Human Rights Standards: Legitimacy assessments of the Fair Labor Association and the Global Network Initiative

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Received: 31 July 2014 / Accepted: 1 February 2016
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Abstract Multi-stakeholder initiatives (MSIs) are increasingly used as a default mechanism to address human rights challenges in a variety of industries. MSI is a designation that covers a broad range of initiatives from best-practice sharing learning platforms (e.g., the UN Global Compact) to certification bodies (e.g., the Forest Stewardship Council) and those targeted at addressing governance gaps (e.g., the Fair Labor Association). Critics contest the legitimacy of the private governance model offered by MSIs. The objective of this paper is (1) to theoretically develop a typology of MSIs, and (2) to empirically analyze the legitimacy of one specific type of MSI, namely industry-specific MSIs. We argue that industry-specific MSIs that set out to govern corporate behavior have great potential to develop legitimacy. We

analyze two industry-specific MSIs—the Fair Labor Association and the Global Network Initiative—to get a better understanding of how these MSIs formed, how they define and enforce standards, and how they seek to ensure accountability. Based on these empirical illustrations, we discuss the value of this specific MSI model and draw implications for the democratic legitimacy of private governance mechanisms.

Keywords Legitimacy · Multi-stakeholder initiatives · Business and human rights · Private governance mechanisms · Voluntary corporate social responsibility initiatives

Introduction: The Emergence of MSIs as a Global Governance Phenomenon

In a global economy, multinational companies often operate in jurisdictions where governments are either unable or unwilling to uphold even the basic human rights of their own citizens (Scherer et al. 2006; Scherer and Palazzo 2007). The absence of state regulation presents major business challenges for corporations (Braithwaite and Drahos 2000). Clothing retailers like Walmart and H&M face unsafe factory conditions in Bangladesh in the wake of the Rana Plaza tragedy. Internet service providers like Facebook and Google wrestle with their users' expectations to guarantee freedom of expression in China and other nondemocratic regimes. Oil and mining companies like Shell and Newmont operating in conflict zones from the Congo to Iraq struggle to provide security for their people and facilities in these inherently dangerous places. In these contexts, multi-stakeholder initiatives (MSIs) have

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become the default response for addressing so-called “governance gaps.”¹

The case for MSIs is compelling. Van Tulder (2012) notes “Most of the issues we face today are neither owned nor solved by individual stakeholders anymore. With growing interdependence comes a growing need to search for collaborative approaches” (Van Tulder 2012). MSIs as collaborations among different stakeholders therefore increasingly serve a global governance function in regulating what governments leave effectively unregulated (Nolan and van Heerden 2013). We understand “multi-stakeholder initiative” or “MSI” to mean an entity that works with multiple stakeholders (usually business and civil society, along with others, including governments, universities, and/or investors) to solve a business and human rights problem that no actor can solve alone (van Huijstee 2012).

The quantity of MSIs has rapidly increased over the past two decades. A number of academic observers therefore argue that MSIs represent an important new mechanism of global governance (e.g., Reinicke and Deng 2000; Hemmati 2002; Benner et al. 2003). To fill governance gaps, MSIs need to establish or reinforce standards of expected conduct that, while not legally binding, may have normative value in prescribing corporate behavior that ‘socially binds’ corporations to respect human rights (Baccaro and Mele 2011). Whether MSIs achieve this objective depends on their ability to develop input legitimacy (rule credibility, or the extent to which the regulations are perceived as justified) and output legitimacy (rule effectiveness, or the extent to which the rules effectively solve the issues) (Mena and Palazzo 2012). With the proliferation of MSIs, questions about their legitimacy (their accountability and effectiveness to provide and enforce rules) have become louder, and exploring the legitimacy of such “private governance schemes” is currently at the top of the research agenda of many scholars in law, political science and management (Koechlin and Fenner Zinkernagel 2009; Mena and Palazzo 2012; Papadopoulos 2012).

In this paper, we assess one specific type of MSI, namely industry-specific MSIs. We argue that this type of MSI is most likely to be successful in legitimately filling governance gaps. In academic research as well as in practice, the different types of MSIs are rarely taken into account when assessing MSI accountability and effectiveness (for an exception, see Fransen and Kolk 2007; van Huijstee 2012). As a result, the MSI model is underexplored in theory and often criticized and dismissed in

practice (see e.g., Gordon 2014²). To better understand the MSI model, we explore two industry-specific MSIs and assess whether they have potential for addressing business and human rights challenges in a way that is considered legitimate by the public.

For our assessment of industry-specific MSIs, we apply a legitimacy concept from political science (Scharpf 1999). Scharpf has argued that democratic legitimacy focuses on two principal questions: To what extent is the regulation perceived as justified or credible (input legitimacy)? To what extent does the regulation effectively solve the issues that it targets (output legitimacy) (Risse 2004; Scharpf 1999)? These questions also apply to MSIs that fulfill a political role in global governance by defining and enforcing the respect for human rights. We therefore consider a political legitimacy concept most fitting for assessing the legitimacy of MSIs for addressing governance gaps. The concept has been operationalized by Mena and Palazzo (2012) and is thus readily applicable for our assessment of MSIs.

In the first section, we argue that the traditional dichotomy between voluntary and mandatory approaches to regulating the human rights behavior of companies is too limited to capture the range of responses to governance gaps in the human rights context and propose that MSIs as a governance model fall between these two approaches. In section two, we examine the emergence of MSIs and develop a typology for analyzing MSIs. We focus in particular on a subset of MSIs that define and enforce standards to address human rights issues in specific industry settings. In the third section, we empirically assess the legitimacy of the industry-specific model through case studies of two MSIs, the Fair Labor Association (FLA) and the Global Network Initiative (GNI). Section four outlines the limitations of our empirical assessment and the MSI model more generally. Based on these empirical illustrations, we discuss the advantages and limitations of the industry-specific approach. We highlight the potential economic benefits and legitimacy gains for corporations that participate in an industry-specific MSI and discuss implications of industry-specific MSIs as forms of “private governance” that go beyond the human rights context. Finally, section five notes the theoretical and practical implications of our findings.

Business and Human Rights: Moving Beyond the Voluntary–Mandatory Dichotomy

As the language of human rights has started to permeate business operations (Ruggie 2011; Deva and Bilchitz 2013; Wettstein 2012), two dominant approaches to addressing

¹ Writing in 2008, then United Nations Special Representative for Business and Human Rights, John Ruggie noted that “the root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences” (Ruggie 2008).

² See <http://www.opensocietyfoundations.org/events/problem-multi-stakeholder-initiatives>.

Business and Human Rights (BHR) challenges have emerged; one relying on broadly framed voluntary principles and the other focusing on state-based legal accountability mechanisms. The emergence and reliance on MSIs has paved a middle path between these two diverse approaches to regulating the conduct of corporations with respect to human rights.

Voluntary Initiatives that are not Industry Specific

Voluntary initiatives typically promote broad principles of responsible business conduct. Fueled by the growing popularity of the CSR concept, they cover a large variety of topics, including human rights. The initiatives often focus on dialogue and shared learning through the so-called “best-practice” examples. Through these learning processes, implementation guidelines are developed over time. The guidelines remain voluntary, and sometimes weak assessments or monitoring mechanisms of implementation levels are introduced. Businesses have favored such voluntary initiatives since companies can typically determine the sequence and pace of the implementation process.

The UN Global Compact (UNGC) is currently the largest global CSR initiative and rests upon ten principles in the areas of human rights, labor rights, environment, and anti-corruption. By signing the UNGC, corporations are asked to embrace these principles as evidenced by their business conduct and to share their learning and best practices.³ The organizational design of the UNGC acknowledges that its primary purpose is to be a learning platform not an accountability mechanism. The realization that private actors can actively contribute to solutions to address pressing global issues like poverty and climate change provided the background for conceptualizing the UNGC. Today, however, over a decade after the launch of the UNGC, our understanding of the political role of corporations in global governance processes has evolved, and it is no longer a question of whether, but how, corporations can integrate principles of responsible business conduct in their core business processes (Baumann-Pauly 2013). Initiatives that are based on broad principles point to a general direction which interested companies might follow in pursuing the ideal of CSR, but often these initiatives fail to provide concrete guidance on what is practically expected from corporations. Implementation of policies and practices based on broad principles is often selective, and accompanying accountability mechanisms are generally weak (Nolan 2005; Deva 2006).

³ UNGC expectations of business participants: http://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html.

Legal Approaches that Focus on Strengthening the Regulatory Capacity of Nation States

Many civil society groups have grown weary of voluntary initiatives to regulate corporate performance with human rights (Human Rights Watch 2013). Allegations of greenwashing, (or: blue-washing in the context of the UN) and selective implementation are pervasive and call into question the credibility of some of these initiatives (e.g., Sethi and Schepers 2014; Rasche 2009). Various corporate scandals among participants in voluntary CSR initiatives have raised further doubts about these initiatives’ effectiveness (e.g., BP’s oil spill in the Gulf of Mexico). These instances give rise to the question of whether “private regulation” can or should replace government regulation when governments are weak, undemocratic, or fail to regulate.⁴ Human rights groups like Amnesty International and Human Rights Watch generally support the view that governments are the only legitimate guarantors of human rights. They support legal approaches that strengthen the national capacity to make corporate respect for human rights legally binding nationally and internationally.⁵ At this point, however, it is unclear how an intergovernmental agreement for legally binding human rights standards might be obtained and in what timeframe. Nevertheless, as the frustrations over the limited change from corporate engagement in voluntary initiatives grow, the support for legal interventions is becoming stronger. Some civil society groups also highlight practical obstacles for their long-term engagement in voluntary initiatives.⁶

The adoption by the UN Human Rights Council in Geneva in June 2013 of a resolution “to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights” is the latest in an ongoing

⁴ See: <http://sustainability.thomsonreuters.com/2014/03/01/executive-perspective-can-private-politics-replace-government-regulation/>.

⁵ See Amnesty International’s latest publication entitled: “Injustice incorporated: Corporate abuses and the human right to remedy” (2014). Available at: <http://www.amnesty.org/en/library/info/POL30/001/2014/en> and Human Rights Watch World Report 2013 USA, 2013 at 29. Also Peter Frankental, “A Business and Human Rights Treaty? We shouldn’t be afraid to frighten the horses” 10 June 2014: <http://www.ihrb.org/commentary/guest/business-and-human-rights-treaty-we-shouldnt-be-afraid.html>.

⁶ Daniele Gosteli, Amnesty International’s business and human rights expert in Switzerland, for example points out in an interview with us that voluntary initiatives are resource consuming for NGOs and “often result in a compromise around the lowest common denominator” that her organization could not support. Gosteli also argues that the power inequalities among participating stakeholders in these initiatives are significant, and the decision-making processes are often dominated by the most powerful participants, typically corporations (sometimes together with governments).

debate around how best to ensure accountability in international law, business, and human rights for corporate rights violations.⁷ While not denying the potential value of targeted and specific government regulations in this field, we point to an alternative and complementary model through which business and human rights challenges can be addressed, and which may, under certain circumstances, involve government participants. A treaty may well be part of the solution but will not resolve implementation challenges on the ground in either the short or longer term. The regulation of corporate activity with respect to human rights requires a multiplicity of stakeholders, and at times, a nuanced mix of public and private regulations that may be difficult to replicate easily across different sectors, states, and cultural boundaries. Industry-specific human rights standards that are defined and enforced through MSIs present a viable option for addressing human rights challenges created and faced by corporations.

Beyond the Voluntary–Mandatory Dichotomy: The Emergence of Multi-Stakeholder Initiatives

As the limits of inward focused corporate self-regulation were debated, alternative approaches emphasizing collaboration and the inclusion of multiple stakeholders in standard setting and verification of corporate performance began to emerge in the late 1990s as a default to counter complex regulatory imbalances in global marketplaces. MSIs began to emerge *en masse*. The first MSIs focused initially on influencing environmental policy (in the wake of the UN Conference on Environment and Development held in Rio de Janeiro in 1992⁸), but quickly broadened to encompass other sectors and issues.⁹ The growth in MSIs

in recent decades can be attributed to a range of factors including increasingly vocal dissatisfaction of civil society with corporate reliance on self-regulation in order to improve their social and environmental performance (Utting 2002). The 1990s was a period when globalization gathered force (including a growth in the number and influence of civil society actors) and media interest focused on headline grabbing issues, such as the use of sweatshops by well-known brands like Nike, Disney and Levi Strauss (Herbert 1995; Bernstein 1997; Egan 1998). Corporate self-regulation was the key buzz phrase in this context (Haufler 2001). The establishment and development of corporate codes of conduct from 1991 (when Levi Strauss first introduced its code) to the end of the decade was remarkable. It was accompanied by an impressive body of research literature focused on exploring this new phenomenon (Jørgensen et al. 2003; Gordon and Miyake 1999; Sabel et al. 2000; Diller 1999). Writing in 2007, the UN Special Representative for business and human rights commented on this phenomenon by noting that MSIs are:

Driven by social pressure, [and]... seek to close regulatory gaps that contribute to human rights abuses. But they do so in specific operational contexts, not in any overarching manner. Moreover, recognizing that some business and human rights challenges require multi-stakeholder responses, they allocate shared responsibilities and establish mutual accountability mechanisms within complex collaborative networks. These can include any combination of host and home States, corporations, civil society actors, industry associations, international institutions and investors groups (Ruggie 2007).

The development and reliance on MSIs in recent decades implicitly acknowledges the limitations of traditional ‘command and control’ regulation, a technique that relies primarily on the state to regulate corporate performance (Sinclair 1997). MSIs instead embody a form of ‘networked governance’ (Baccaro and Mele 2011) that places corporate behavior under the scrutiny of a multiplicity of stakeholders including not only states, but also NGOs, unions, industry bodies, and international organizations. However, the establishment of an MSI is no panacea for ending all corporate rights violations as the initiatives vary widely in their focus and processes for regulating corporate social performance and their effectiveness. The extent to which MSIs offer such ‘solutions’ requires differentiating between various types of MSIs and an in-depth analysis of

⁷ UN Human Rights Council Resolution, 24 June 2014, A/HRC/26/L.22/Rev.1

⁸ The substantive outcome from the Rio conference was Agenda 21 which acknowledged the important role of non-state actors in developing environmental policy. United Nations Sustainable Development ‘United Nations Conference on Environment and Development, *Agenda 21*’ Rio de Janeiro, Brazil, 3–14 June 1992, available at: <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>. Another MSI, the Rainforest Alliance, emerged in the late 1980s and predates the 1990s surge of MSIs.

⁹ Between 1993 and 1998 a number of diverse initiatives emerged including: the Forest Stewardship Council (1993), the Marine Stewardship Council (1997), Social Accountability International (1997), the Fair Labor Association (1998) and the Ethical Trading Initiative (1998). Each of these, in its own way, attempted to regulate what each viewed as a (partially) unregulated market. Each had different goals and processes for achieving this, but what they had in common was an approach that brought together a multiplicity of stakeholders to work together to achieve their goals. The establishment of MSIs continued unabated in the following decades which, more recently, have witnessed the launch of the Voluntary Principles on Security and Human Rights (2000), the United Nations Global Compact (2000), the Kimberley Process Certification Scheme (2002),

Footnote 9 continued

the Extractive Industries Transparency Initiative (2003), the Global Network Initiative (2008) and the nascent International Code of Conduct for Private Security Providers (2010).

both the strengths and challenges facing this type of regulatory initiative. In this paper, we therefore set out to (1) develop a typology of MSIs to explain theoretically why one specific type of MSI, namely the industry-specific MSI, has possibly the greatest potential to legitimately address governance gaps, and (2) to empirically assess the current legitimacy status of two industry-specific MSIs and highlight their legitimacy potential and challenges.

The Industry-Specific MSI Model

In this section, we develop a typology of MSIs that enables a differentiation of diverse kinds of MSIs. We argue that for addressing governance gaps in the human rights context the industry-specific MSI model has the greatest potential.

Typology of MSIs

Currently, neither a registry of all MSIs operating in the human rights field nor a widely acknowledged typology of MSIs exists. The latter is problematic because it has often resulted in grouping together entirely different types of MSIs. This lack of differentiation has sometimes resulted in a general rejection of the idea that the MSI model could have potential to effectively regulate business and human rights challenges (e.g., Bauer 2011).

Given the large variety of MSIs, we believe that introducing criteria by which MSIs can be distinguished is an important step to better analyze MSI performance. MSIs can be most easily classified by their form (participatory makeup and governance structure), their scope (their reach in terms of product, industry or geography), and their function (the role they are seeking to perform)

- MSIs differ in form: There is no uniform approach to MSI governance structure and participatory makeup. Some MSIs, for example, include governments (e.g., Voluntary Principles on Security and Human Rights) while others explicitly exclude government involvement (Global Network Initiative). In some entities, some stakeholders are not part of the governing body but participate in an advisory role.
- MSIs differ in scope: MSIs may be formed to address social and environmental issues related to (a) the production of specific commodities (e.g., palm oil, cocoa, cotton etc.), (b) the situation in specific countries (e.g., Bangladesh, Myanmar), (c) specific issues (e.g., child labor), or (d) specific industries (textiles, toys etc.).
- MSIs differ on the functions they perform: Some MSIs mainly focus on fostering dialogue among stakeholders

(e.g., the Ethical Trading Initiative), while others create standards and develop mechanisms to enforce them. Some MSIs have certification schemes (e.g., Rainforest Alliance); others accredit the management systems of participants and verify remedial efforts of suppliers (e.g., Fair Labor Association).

In the context of this study, the most relevant characteristic of an MSI is whether the initiative seeks to address governance gaps in the human rights context. By setting and enforcing standards for groups of competitor companies in the same sector, some MSIs aim to govern the conduct of multinational corporations. As such, these types of MSIs differ from best-practice sharing initiatives that focus on dialogue and learning. They also differ from certification bodies that certify standards at supplier facilities but do not hold companies accountable. Bernstein and Cashore (2007) highlight that entities which focus on governance “deserve independent assessment because, unlike the voluntary nature of most other private authority, they are designed to create binding and enforceable rules” (Bernstein and Cashore 2007, p. 348). We therefore distinguish between three main types of MSIs: (1) Best-Practice Sharing MSIs, (2) Certification MSIs, and (3) Governance MSIs in specific industries. Examples for each type see Table 1.

Level of Analysis: Industry

In this paper, we argue that the industry level is the most promising unit of analysis for defining, implementing, and enforcing human rights standards:

- *Defining human rights standards* For corporations, the industry level is the *primary reference point*. Competition with peers on an industry level is more relevant than on a particular issue or regional level. The motivation for corporations to engage in BHR themes often comes from industry leaders that have put such topics on the agenda. Imitating “best in class” approaches are therefore particularly typical in the industry setting. In the Information Communication Technology (ICT) industry, for example, it was Google which first published a so-called “transparency report” in 2010.¹⁰ The move to publishing the number of requests for data from law enforcement agencies was considered progressive at the time. Within only four years, many others followed, continuously raising the bar of reporting standards.¹¹ The practice of one

¹⁰ For more information on Google’s transparency report see <http://www.google.com/transparencyreport/>.

¹¹ See, for example, the comment of the Institute for Human Rights and Business on the latest transparency report from Vodafone: <http://ihrb.org/commentary/staff/vodafone-transparency-report.html>.

Table 1 MSI typology

Best-practice sharing MSI	Certification MSI	Governance MSI
UN Global Compact	Forest Stewardship Council	Fair Labor Association
Global Reporting Initiative	Social Accountability International	Fair Wear Association
	Roundtable on Sustainable Palm Oil	Global Network Initiative

industry leader thus initiated isomorphic corporate behavior and created a de facto industry standard for reporting. It also started an industry wide discourse over transparency standards on practices that affect the human rights of privacy and free expression.¹² This example illustrates how business and human rights challenges can be industry specific. The most pertinent human rights issues facing ICT companies are different from those faced by companies in the manufacturing or extractives sector. Prioritizing and defining what is expected of corporations in a specific industry context thus allows for the greatest level of specificity in the application of that standard. That this specificity is highly relevant is supported by the fact that major human rights organizations that involve businesses (Global Reporting Initiative, OECD, UN Global Compact) have started to complement their general guidelines with industry-specific guidelines.¹³

- *Implementing human rights standards* The industry level is also the most likely *appropriate forum for committing to joint standards because it creates a level playing field that compensates for additional cost*. To respect human rights, corporations cannot isolate issues. In fact, they may need to reflect on their business model that puts human rights at risk systematically. For example, studies in the textile sector show how current sourcing practices negatively affect working conditions upstream (Labowitz and Baumann-Pauly 2014). Fundamentally revising business models may, however, come at a cost. For individual companies, such additional costs can be a threat to their competitiveness and even survival in the short-term. Industry-wide human rights standards, in contrast, create a level playing field that has the potential to neutralize or at least significantly reduce cost disadvantages.

- *Enforcing human rights standards* In the absence of enforceable governmental regulation, *peer control also creates a strong incentive for corporations to comply with rules, even if these rules are “voluntary”*. What is legally sanctioned is distinguishable from activities that are not, but reputational sanctions can be crucial to business, and the voluntary/mandatory distinction can be blurry (Oka 2007). If a critical mass of players in one industry define and adopt rules, they can jointly create a new level playing field. Industry-specific MSIs present an institutional platform for bringing all relevant actors together and defining standards and enforcement mechanisms. Rules that are created in an industry context are then no longer truly voluntary but de facto binding as they present the industry standard that is expected from all industry participants.

Our understanding of what constitutes an industry is broad and linked to studies that argue that industries are “cultural artefacts” (Beschorner and Hajduk 2013, p. 29). In this conception, industrial sectors—similar to national cultures—can be seen as “frames that structure the perceptions of industry participants about a wide range of things, including products and services, competitors and peers, customers, and regulators. These perceptions also include the meaning of corporate responsibility within industries by determining, for example, the materiality of issues or the legitimacy of stakeholder demands.” (Beschorner and Hajduk 2013, p. 287). For assessing the legitimacy of industry-specific MSIs, this cultural business ethics definition is particularly useful. It includes not only corporate actors but any actor that shapes the perceptions of the industry. Therefore, critical stakeholders from civil society that also participate in MSIs are within the frame of an industry.

Assessing the Legitimacy of the Industry-Specific MSIs Model: Fair Labor Association (FLA) and Global Network Initiative (GNI)

Case Selection

Against the background of our research objective to assess the legitimacy of industry-specific governance MSIs and based on the previous typology, we selected two human rights focused MSIs for our study that are

¹² See, for example, the commentary of Lucy Purdon from the Institute of Human Rights and Business: <http://www.ihrb.org/commentary/ict-sector-transparency-reports.html>.

¹³ See, for example, the UN Global (UNGP) attempt to clarify their principles in the investment context. The UNGP and the UNEP Finance Initiative launched in April 2006 at the New York Stock Exchange, the Principles for Responsible Investment (PRI). PRI invites large institutional investors—both asset owners (e.g., pension funds, endowments) and asset managers—to commit to a set of six principles designed to put ESG issues into the core of investment decision-making. While PRI addresses a specific sector, the principles remain broad and are not fully operationalized.

- (1) truly multi-stakeholder in their form, meaning all participating stakeholders are represented in the governing body and are granted equal decision-making power,
- (2) industry-specific in scope (for reasons outlined above), and
- (3) set up to ‘fully regulate’ governance gaps, that is, these ‘Governance MSIs’ have developed mechanisms to define and enforce human rights standards.

To select data-rich cases for assessing the legitimacy of industry-specific MSIs, we further specified the criteria of industry-specificity and selected MSIs that are well-known in their industry and represent a “critical mass” of industry players. Critical mass in this context is not defined by the actual number of participants but by its collective leadership potential to redefine the ‘rules of the game.’ If the largest players with the most prominent brand names support an MSI, they may then develop transformative power that impacts how the industry operates.

Two organizations that meet the selection criteria are the Fair Labor Association (FLA) and the GNI. They are both industry-specific as they focus on two specific sectors. The FLA concentrates on targeted sectors in the manufacturing industry (textiles, footwear, agriculture, university branded-goods, and electronics); the GNI operates in the information and communications technology (ICT) industry. The FLA and the GNI grant representatives of all stakeholders equal voting rights in their governing body and both MSIs define specific standards that are closely monitored. Noncompliance with standards is required to be remedied, and remediation is verified by independent third parties.

The FLA and the GNI are also well-known organizations in their respective industries. Both organizations have a critical mass in subsections of their sectors. The FLA encompasses most of the major sportswear brands¹⁴; and the GNI comprises some of the biggest Internet service providers in the ICT industry¹⁵. The FLA is older and more established than the GNI and is often considered a best-practice example of MSIs.¹⁶ Both initiatives are regularly subject to intense public criticism; an indication that these organizations matter in their respective industries.¹⁷

¹⁴ The FLA does not consider itself an industry-specific initiative. In fact, it operates in multiple industries in the manufacturing sector and even in agriculture. Its profile in the sportswear industry, however, is the strongest. All major sportswear brands participate, and hence, it meets our case selection criteria in the context of this study.

¹⁵ See <http://globalnetworkinitiative.org/participants/index.php>.

¹⁶ John Ruggie, the former UN Special Representative for Business and Human Rights, for example, declared the FLA as the “gold standard” within MSIs and the leader in its field (Ruggie 2009).

¹⁷ See for example the criticism of American student organizations on the more recent work of the FLA with Apple (<http://flawatch.usas.org>).

Theoretical Framework

From a legitimacy perspective, the evolution of MSIs can be regarded as emblematic for the “remarkable period of institutional innovation in transnational governance” (Hale and Held 2010). In the context of BHR, the political role of corporations is explicit, and therefore, the question of how to legitimize private governance in the human rights context is even more pronounced. The political role of private actors has raised concerns over the legitimacy of private actors’ rule-making activities. Political scientists refer to this development as “private governance” and discuss whether and how such constructs can be legitimized in the absence of democratically elected governments (Büthe 2010; Papadopoulos 2012). There are also several legitimacy concepts in political science literature that define criteria to assess the legitimacy of private actors’ rule-making in global governance. For example, Koppel (2008) suggests four legitimacy criteria: representation, neutrality, participation and procedural regularity. Alternatively, Dingwerth (2005) suggests three legitimacy criteria: transparency, inclusiveness, and accountability. These concepts, however, are not fully operationalized and hence are not readily applicable.

Mena and Palazzo (2012), in contrast, define criteria for the legitimate transfer of regulatory power from traditional democratic nation-state processes to private regulatory schemes, such as MSIs. They refer to political science literature in which democratic legitimacy is typically concerned with input legitimacy (rule credibility, the extent to which regulations are perceived as justified) and output legitimacy (rule effectiveness, the extent to which the rules effectively solve issues) (Mena and Palazzo 2012; Scharpf 1997, 1999). Mena and Palazzo (2012) define four criteria for input legitimacy (inclusion, procedural fairness, consensual orientation, and transparency) and three criteria for output legitimacy (coverage, efficacy, and enforcement) and they also operationalize these legitimacy criteria (Mena and Palazzo 2012, p. 539). We adopt their operationalization for our study (see Table 2) and apply it to FLA and GNI.

The conceptualization of legitimacy borrowed from political science literature is rather positivistic. Alternative legitimacy conceptions from sociology would focus specifically on the perceptions of different constituents and ask whether the activities of the MSI under review are perceived as socially acceptable (Suchman 1995). However, measuring perceptions across a variety of global stakeholders, over time, and without a benchmark, is too challenging given the scope of our research. We therefore use the existing operationalization of democratic legitimacy from Mena and Palazzo (2012) as a starting point for assessing the

Table 2 Criteria of MSI democratic legitimacy

Dimension	Criterion	Definition and key questions
Input	Inclusion	Involvement of stakeholder affected by the issue <i>Are the involved stakeholders representative of the issues at stake? Are important stakeholders excluded from the process?</i>
	Procedural fairness	Neutralization of power differences in decision-making structures <i>Does each of these stakeholders have a valid voice in decision-making processes?</i>
	Consensual orientation	Culture of cooperation and reasonable disagreement <i>To what extent does the MSI promote mutual agreement among participants?</i>
	Transparency	Transparency of structures, processes, results <i>To what extent are decision-making and standard-setting processes transparent? To what extent are the performance of the participating corporations and the evaluation of that performance transparent?</i>
Output	Coverage	Number of rule-targets following the rules <i>How many firms per industry/region comply with the rules?</i>
	Efficacy	Fit of the rules to the issue <i>To what extent do the rules address the issue at hand?</i>
	Enforcement	Practical implementation of the rules and their verification procedures <i>Is compliance verified and non-compliance sanctioned?</i>

Source adapted from Mena and Palazzo (2012), p. 539

potential and limits of MSIs legitimately filling governance gaps.

The operationalized framework includes indicators for ‘inclusion,’ ‘transparency,’ and ‘procedural fairness’ that are also able to capture aspects of what has been termed ‘procedural legitimacy.’ Procedural legitimacy is the connection of input and output legitimacies through emphasis on the procedural quality of the process. John Ruggie, the former UN Special Representative for Business and Human Rights considered process legitimacy as critical for buy-in and consensus-building (Ruggie 2013, p. 142; Buhmann 2012). The suggested operationalization also highlights that input and output dimensions of legitimacy are inextricably linked. Output legitimacy hinges upon input legitimacy and depending on the perceived procedural fairness, trust forms or erodes and either supports or undermines the functioning of an MSI.

Data Collection

The data for the following empirical assessment of the FLA and the GNI is based on insider information. All authors of this paper have first-hand experience working for the two MSIs selected for this study and two of the co-authors were instrumental in creating and managing those MSIs.¹⁸ For the legitimacy assessment of these MSIs according to the theoretical framework, such an insider perspective was

indispensable. The assessment would not have been possible but for the two co-authors who have an institutional memory about how the selected MSIs formed, evolved, and operated. Their insights enabled us to use unique and otherwise undocumented information for our assessment.

We are aware that such an insider perspective is particularly susceptible to biases, and we will address this issue in the limitations section of this article. Currently, none of the authors has an operational role in these MSIs and hence any conflict of interest can be excluded. We also complement and balance our perspective with publicly available sources about these MSIs and additional interviews with relevant stakeholders.¹⁹

To further objectify our data gathering, we asked the two co-authors that were most involved in the selected MSIs to independently address the following questions in writing prior to sharing the operationalized legitimacy framework with them: (1) how did the MSI come into existence, (2) how did the MSI define common human rights standards, (3) how does the MSI enforce these standards, and (4) what kind of public accountability mechanisms were put in place. The resulting case studies served as our main data source for the legitimacy

¹⁸ Names omitted for the review process.

¹⁹ The NYU Center for Business and Human Rights and the Institute for Human Rights and Business has co-hosted a series of meetings among several MSI secretariats in 2014 and 2015 to better understand the current challenges of MSIs. The meeting minutes of these meetings and conversations with participants complemented our perspectives.

assessment. Direct quotes in the text stem from these currently unpublished case studies.²⁰

Assessment of the Input Dimension of Legitimacy

According to the theoretical framework, the chance for industry-specific MSIs to achieve high input legitimacy is strong if relevant stakeholders of the industry are participating in the MSI formation process (inclusion). Governance mechanisms and standards can be defined jointly as all participating stakeholders are considered equal partners in the decision-making process (procedural fairness). Both the FLA and the GNI give all stakeholder groups equal voting rights. Issues that arise are in principle, discussed openly and with a consensus orientation (consensual orientation). Transparency over procedures ensures accountability of decision-making (transparency).

In terms of the *inclusion* of relevant stakeholders, the FLA had a favorable start. After a series of labor rights scandals that involved US brands, President Clinton used his convening power to bring together relevant industry stakeholders. In August 1996, the White House convened industry, labor, consumer, NGO, and government leaders and challenged them to develop a system to prevent such abuses. These disparate stakeholders formed the apparel industry partnership (AIP) and negotiated a workplace code of conduct that companies agreed to attach to all their contracts or purchase orders.

Initially, a broad array of stakeholders participated in the process of defining a common standard for the apparel industry. But soon, this process turned into a battle. While stakeholders shared the common objective to improve working conditions in the global apparel supply chain, they often clashed over the strategies to achieve this objective. The disagreements escalated and the union representatives ultimately disengaged from the process, though only following a very intense internal debate within the trade union ranks. This was not the only time the organization reached a breaking point:

Because the AIP took decisions by consensus, progress was often slow and agreement could not be reached on all issues. After 6 months of sometimes fierce debate, the AIP had missed its initial deadline and seemed to be in danger of collapsing.²¹

This early, often volatile, history of the FLA points to the limits of the *consensual orientation* of the participants and

the difficulties of establishing processes that all parties consider fair and reflects the criticisms and frustrations of some civil society actors today with MSIs. What helped the FLA push through some of these conflicts were the ongoing revelations of further labor rights scandals in the global supply chain of participating brands -

A new scandal broke concerning a Nike supplier in Vietnam and the resulting public controversy appeared to galvanize the company caucus and the AIP announced a month later that they had agreed on a code of conduct and principles of monitoring.

Also at the GNI, a series of events prior to the creation of the MSI had raised questions about the role of ICT companies in protecting the right to free expression in repressive regimes and the privacy rights of their users

A number of incidents in China involving American corporations brought to the public's attention by press and advocacy groups helped galvanize global public opinion on issues of online censorship and surveillance and possible corporate complicity in the actions of governments against their own citizens."²²

The tipping point for public concern over the Internet and risks of corporate complicity in certain parts of the world was the case of Chinese journalist Shi Tao. In 2004, Yahoo!'s subsidiary in Beijing complied with a Chinese law enforcement demand for user-account data, which ultimately led the Chinese police to Mr. Shi, who was accused of transferring state secrets by sending to a U.S.-run website his notes summarizing the official Chinese press coverage rules distributed by the Chinese government on the fifteenth anniversary of the tragic events in Tiananmen Square. Mr. Shi was eventually convicted and sentenced to ten years in prison. When these trial documents were discovered, translated, and released in the Fall of 2005, Shi Tao's case attached a name, face, and personal tragedy to the argument that the U.S. technology companies were complicit in the failure of certain governments to protect the rights of their own citizens.

Each of these American high-tech companies felt pressure from users, employees, the public, civil society, socially responsible investors, and from legislators in the United States and Europe. Like in the case of the FLA, the US government got involved and threatened to legislate. The U.S. House of Representatives held a hearing in February 2006 in which executives from Cisco, Google, Microsoft, and Yahoo! were excoriated for being complicit in the Chinese government's unjust online censorship and surveillance. Congressman Chris Smith (R-NJ) and others proposed legislation to regulate American companies doing

²⁰ Refined case studies of the FLA and the GNI from the same authors will also be integrated in the forthcoming textbook entitled "Business and Human Rights—From Principles to Practice" (Routledge 2016).

²¹ FLA case study prepared by co-author.

²² GNI case study prepared by co-author.

business in the Internet-restricting countries.²³ The U.S. Department of State, Under Secretary, Condoleezza Rice, created the Global Internet Freedom Taskforce in 2006 to address challenges around the globe to freedom of expression and the free flow of information on the Internet. It became increasingly clear to stakeholders across civil society, investors, academics, and government that there was a growing governance gap between corporate practices and human rights that national and international laws did not guarantee.

In 2006, a group of stakeholders organized to develop an industry code of conduct and further mechanisms to address the issue of corporate complicity in violations of the rights to freedom of expression and privacy. These stakeholders then agreed to work together in a multi-stakeholder dialogue, with the various constituencies on equal footing. Unlike in certain other multi-stakeholder dialogues, all parties agreed early in the process that governments should not participate in the dialogue. This was principally because governments were perceived as central in creating an environment that led to violations of rights to freedom of expression and privacy and put companies at risk of complicity in those human rights violations.

As in the case of the FLA, the years that eventually led to the creation of the GNI were tension filled:

Not only did the newly formed group have to overcome the traditional distrust between human rights groups and companies, but the group had to contend with deep distrust between companies themselves in a fiercely competitive and often-secretive industry.²⁴

The newly formed initiative faced difficult decisions as to the specific sectors that should be covered within the industry. In addition to the initial companies, Google, Microsoft, and Yahoo!, four European telecommunication companies joined the dialogue and remained involved for nearly two years before concluding that the multi-stakeholder dialogue was not in their companies' best interests, resulting in leaving the discussions. Despite repeated requests to join the preliminary discussions and pressure from civil society and the U.S. lawmakers, hardware manufacturers like Cisco did not participate in the dialogue and did not join the GNI for reasons that never became public. Therefore, similar to the case of the FLA, critical stakeholder groups left the discussions early in the process. The GNI participants continued to negotiate until an agreement was finally reached on a set of principles, implementation guidelines, and a governance, accountability, and

shared learning framework. The GNI was launched publicly in October 2008.

While these formative discussions in the FLA and the GNI were not easy, they were essential for building trust among participants. Today, the FLA and the GNI have both established strong working relationships among their participants but given the differing perspectives of the stakeholders involved in the separate initiatives achieving consensus remains challenging. The trust established among the various parties in each MSI means that the discussions can be robust, but are driven by the ultimate goal of achieving consensus. Both MSIs will likely continue to face challenges on this front. The GNI, for example, is currently going through a strategic review process that has resurfaced some fundamental debates over the mechanisms and standards of the initiative.

In situations in which the interests of industry leaders and civil society organizations are closely aligned, achieving consensus is not contentious, and the collaboration is particularly beneficial for the participants. The revelations by Edward Snowden about the NSA and other intelligence services, for example, placed technology companies in the public spotlight in an unprecedented way. GNI participants decided to use their collective power to jointly lobby the US Senate to lead surveillance reforms.²⁵

The formation process of the FLA and the GNI also illustrates that the criteria for input legitimacy are closely interconnected and subject to compromise. For example, the strength of certain participants' commitment to transparency and procedural fairness may override consensus orientation and inclusion. Consensus is not often achieved easily, and this is most apparent in the start-up phase of an MSI. In both of these cases, critical stakeholders left the negotiations and the remaining participants had to accept that not all stakeholders were fully represented in the process.

Thus, while the general consensus orientation was strong for both organizations in the formation phase, it was not absolute as it would have blocked progress. The level of representativeness of MSI participants represents an issue that requires critical attention. Both organizations under review have been criticized for their lack of inclusion of relevant industry stakeholders although no stakeholder group has been explicitly excluded from the deliberation processes. According to some campaign groups, the FLA's governance structure is lacking appropriate representation of workers' rights organizations, though major unions have refused to join.²⁶ Critical stakeholder groups also chose to

²³ The Global Online Freedom Act was introduced in 2013: <https://beta.congress.gov/bill/113th-congress/house-bill/491>.

²⁴ GNI case study prepared by co-author.

²⁵ See <https://www.globalnetworkinitiative.org/news/gni-urges-us-senate-lead-surveillance-reform>.

²⁶ See <http://usas.org/campaigns-0ld/sweat-free-campus/dont-pay-the-fla/about-the-fla/>.

exit the GNI (*e.g.*, Amnesty International) and critics of the GNI argue that the initiative's participant base has not yet reached a critical mass in the industry.²⁷ Therefore, whether FLA and GNI have reached appropriate levels of "inclusion" is contested.

Conflict in those early negotiations arose particularly over the level of *transparency* that the initiatives would require. The objective of both initiatives was to increase corporate accountability, and this required the review of corporate conduct against a substantive standard and reasonable levels of disclosure. Making independent assessments public, however, was not an easy sell for the companies involved.

The FLA, for example, increased transparency requirements incrementally over time. With strengthened levels of trust in the organization, the participating stakeholders realized that greater transparency could lend their efforts greater credibility. In addition, the FLA deliberately created accountability mechanisms at multiple levels. Participating companies commit to meeting the Obligations of Companies over a period of time (normally 2–3 years). Their progress is monitored in a variety of ways, including independent external audits and assessments and an accreditation review that involves headquarter and field reviews. The results of all these processes are fully transparent and published on the FLA website but often there are practical challenges to keeping information up-to-date:

The specific time frames for submitting monitoring reports, corrective action plans, and updates, and publishing tracking charts have proven hard to maintain and all parties (independent auditors, supplier and brand representatives, and FLA staff) often run well behind schedule.²⁸

A second level of accountability is exercised by the tripartite Board of Directors and its Monitoring Committee who receive staff reports on the audit-and-review processes and who vote on the accreditation of companies. A third level of accountability is to be found in the FLA complaint system that allows any third party to lodge a complaint if they believe that an FLA-affiliated company does not adhere to its code of obligations.

At the GNI, it was clear that establishing greater transparency over corporate conduct to regain consumer trust was a main driver also of the corporate participants of the initiative:

All participants of the GNI agreed on the importance of assuring the public that the company assessments were independent, credible and focused on a

meaningful look at company policy, practice and the outcomes of company decisions.²⁹

Hence, the inclusion of transparency and accountability mechanisms from the outset was in both MSIs crucial for establishing their legitimacy. Transparency requirements have a history of reluctant acceptance by corporations, but when corporations assume a role of both regulator and 'regulatee,' the transparency of standards, monitoring results and governance structure are key in helping to boost the legitimacy quota of the regulatory initiative. Yet transparency, like the MSIs themselves, is most effective when targeted. The FLA and the GNI both have transparent standards, and information is released publicly about company performance. Critics may debate the adequacy of the standards but this is distinct from the transparency around both the standard itself and its implementation. Broad CSR initiatives with amorphous standards, in contrast, do not produce targeted information, and thus these initiatives lack the accountability mechanisms that are critical for their legitimacy.

Could both the volume and the specificity of the information be increased in both the FLA and the GNI? Yes, but the content and quality of the information released should be the ongoing focus rather than simply quantity of information. Increased transparency or 'regulation by information' (Slaughter 2003) is also a key component of recent US regulatory initiatives to increase the flow of information about corporate performance in countries rife with human rights violations³⁰, but whether deployed in MSIs or laws, transparency is most effective when it serves a targeted purpose and is in a form that is useful for encouraging improved corporate performance whether used by the corporation itself, corporate peers, the government or advocacy constituents.

The input dimension of broad-based initiatives, in contrast, is difficult to assess due to the low entry barrier to participation. In broad MSIs, such as the UN Global Compact, tight industry collaboration does not exist. The pressure to solve human rights issues is different for different participating companies, and hence, the general

²⁹ GNI case study prepared by co-author.

³⁰ For example, The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §5301 note), addresses financial transparency. Section 1504 requires all listed oil and mining companies to disclose the revenues that they pay to governments worldwide. The European Parliament has recently approved a Directive on the disclosure of non-financial information by European Union (EU) companies. The Directive will require EU public interest entities with more than 500 employees to provide an annual written report on human rights, environmental, and social issues to give an understanding of their impact in each of these areas See Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013, Article 2(1)).

²⁷ See <http://www.forbes.com/sites/larrydownes/2011/03/30/why-no-one-will-join-the-global-network-initiative/>.

²⁸ FLA case study prepared by co-author

principles to which participants have committed are not easily implementable or assessable. Broad initiatives typically lack rigor in translating principles into standards and enforcement mechanisms. Legal approaches, in contrast, primarily allow for limited deliberation prior to the formulation of hard law. While legal approaches have great accountability due to the rigid procedures upon which they are built, inclusion and consensus orientation are less pronounced.

The case illustrations of the FLA and the GNI show, however, that the ideal of input legitimacy is not easily achieved. MSIs that come close to the ideal can typically already look back to a multi-year engagement process. To date, both organizations do not fully meet all input legitimacy criteria. Table 3 summarizes the empirical findings on input legitimacy.

Assessment of the Output Dimension of Legitimacy

For industry-specific MSIs that set out to address governance gaps, output legitimacy can be concretely assessed. The FLA and the GNI standards apply to companies that commit to participate in the MSI (*coverage*). Their rights-based and industry-specific standards define in concrete terms what is expected of companies in the human rights context (*efficacy*). Their standards are monitored by independent third parties, and remediation is verified. If a participant violates the standards or procedures, peer pressure and the threat of exclusion from the MSI can correct noncompliance (*enforcement*).

In terms of *coverage*, the rules defined by the FLA and the GNI only apply to the initiatives' participating companies. Yet given the large representation of, for example, sportswear brands in the FLA, the FLA's Workplace Code of Conduct has, according to some observers, turned into a de facto standard for the entire industry. The content of the standards and the monitoring and reporting of corporate compliance with the MSI's benchmark have a direct correlation with the number of participants who choose to be part of a specific MSI. The broader and more general the approach, the lower the barrier to entry thus resulting in a higher number of participants. With over 8000 corporate participants in the UN Global Compact, it stands in stark contrast to the less than 60 brands and suppliers participating in the FLA (although there are a significant number of the US universities and colleges and their licensees participating) and the 6 ICT companies in the GNI. Disparity in numbers can be partly explained by the narrow focus of these two MSIs, but the more stringent accountability mechanisms in the FLA and the GNI also serve as a barrier to entry.

Legal approaches, in contrast, would by definition have greater coverage than MSI rules. Yet, the extraterritorial

application of legislation is difficult to design, apply, and monitor on a large scale (Hathaway 2011). Extraterritorial legislation also rarely exists, and if it exists, it is likely not adopted. Companies in such situations need practical alternatives to legislation and hence MSIs prevail.

Efficacy of rules, namely how well the rules fit the problems at hand, is greater if rules are designed in industry-specific MSI settings than through generalized legal processes. MSI processes allow for greater flexibility to adapt rules to changing expectations and new challenges (e.g., emerging markets). The FLA, for example, adapts its rules and procedures regularly. The most recent code revision of the FLA was just completed in 2013. Rules designed in industry-specific MSI settings can also be more specific than legislation. Industry insiders (both corporate and noncorporate MSI participants) know the risk points for potential human rights violations best. They are therefore often in a better position than legislators to design appropriate processes to prevent and remediate human rights violations. The ICT industry representatives in the GNI, for example, are arguably more likely to have greater (technological) insights into risks that could compromise privacy than any public actor.

Legislation commonly has to be general and abstract to capture a large number of cases. Like the principles of voluntary CSR initiatives, they provide general guidance. Rule-addressees need to interpret and apply these general rules in their specific context. However, if each company interprets general rules on their own instead of collectively, companies in the same industry may end up with entirely different priorities. Such a situation limits the potential leverage of corporate actions, hampers comparability, and disables accountability. The specificity and flexibility of industry-specific MSI rules can better ensure a consistent fit between the rules and the issues at hand but such inherent flexibility also contains risks where internally generated rules allow too much leeway for companies in complying with human rights. The natural 'check and balance' to this in a legitimized MSI is the inclusion and equal participation of a multiplicity of stakeholders in the design and implementation process of the MSI. Equal participation of all stakeholders is not easily achieved, and the power balance may naturally veer toward corporate and government participants who are primarily responsible for implementing the standards at ground level.

The involvement of companies in industry-specific MSIs like the FLA and the GNI helps clarify and refine the application of international human rights standards to specific business operations and provides them with input that includes voices beyond their own company and peers to noncorporate participants. Broad industry participation in turn, assists in the development of accepted norms that will guide corporate performance. The challenge in all such

Table 3 Overview of empirical findings: input dimension of legitimacy

Input legitimacy	FLA	GNI
Inclusion	Governance structures: most of the relevant stakeholders but limited civil society participation and no unions	Governance structures: most of the relevant stakeholders but telecommunication companies
procedural fairness	Jointly defined procedures; clear decision-making structures that apply even in challenging cases; good representation of NGOs a challenge	Jointly defined procedures; clear decision-making structures
Consensual orientation	In principle; grew stronger over time as trust was built	In principle, grew stronger over time as the industry faced collective challenges (Snowden, NSA)
Transparency	Full disclosure of verified remediations; levels of transparency increased in stages	Transparency was from the very beginning a condition for companies to stay engaged

initiatives is to raise the bar beyond the minimum of what the law requires and attain compliance with international standards. The MSIs provide a valuable and targeted platform for the practical application and monitoring of international standards to specific business settings.

In terms of *enforcement*, MSIs like the FLA and the GNI are not without ‘teeth.’ Participating in these MSIs requires companies to respect the requisite standards and ensure remediation if a deviation from the standard is detected in independent assessments. In the case of the FLA, for example, a participating company (Russell Corp.) was put on special review status due to Code violations in a supplier factory in Honduras.³¹ According to observers of the process, it was the other participating companies that were most upset about the case. They viewed this incident as putting the credibility of the FLA at stake and demanded a root-cause analysis and exhaustive remediation measures. This illustrates how peer pressure within an industry can be an effective mechanism to remedy human rights violations and reinforce human rights standards.

In the earlier discussion on input and output legitimacies with respect to the two dominant BHR approaches, we presented them as if they exist in opposition to each other. These approaches, however, often exist in parallel and are potentially complementary. The reliance on voluntary initiatives is viewed by some as impeding or supplanting legal regulatory efforts to improve corporate compliance with human rights (Human Rights Watch 2013). However, the breadth of voluntary initiatives is diverse and as is evident from the above discussion such conclusions cannot be drawn so broadly without assessing the particulars of a specific initiative. Both the FLA and the GNI deliberately excluded government participation from the MSI, but each was convened in a moment of crisis partly at the behest, or at least with the encouragement, of a particular government. In some of their countries of operation, the private regulatory efforts of the FLA and the GNI occasionally act as substitutes for the absence of enforced government

regulation and/or supplementing national legal standards. The sustainability of such tactics as a rights protection mechanism seems more assured with an industry-specific approach with committed participants and a relatively narrow issue focus. Table 4 summarized the empirical findings on output legitimacy.

Limitations of the Empirical Assessment and the MSI Model

From our empirical assessment of the FLA and the GNI, we conclude that in principle, the industry-specific MSI model has great potential for addressing governance gaps. Yet, as noted in our data collection section, our analysis is largely based on the perspectives of MSI insiders. While this approach gave us unique access to otherwise non-existent data, the data sources are likely biased toward an overly positive perspective on these initiatives.

In terms of the MSI model, many authors have highlighted the general limitations of voluntary initiatives that were set up to counter corporate human rights abuses (Utting 2005; Peters et al. 2009; Simons 2004). Questions about the sustainability and legitimacy of MSIs prevail and, as we have noted, the many and varied shortcomings of such mechanisms have contributed to the ongoing call for broader legal regulation of corporate compliance with human rights (Human Rights Watch 2013). In the academic literature, it has been pointed out that a multiplicity of human rights standards within and across sectors may in fact be beneficial due to their complementarity (Turcotte et al. 2013). Our paper does not fully assess the linkages of human rights legislation, voluntary CSR initiatives and competing MSI standards in manufacturing/ICT. Its objective was not to reject either approach but to highlight that a legitimacy analysis of transnational human rights governance needs to include MSI standards as potentially legitimate governance schemes and differentiate between types of MSIs.

Reliance on MSIs has emerged in part because of the lack of better alternatives, but dependence on this

³¹ See <http://www.fairlabor.org/report/jerzees-de-honduras-honduras>.

Table 4 Overview of empirical findings: output dimension of legitimacy

Output legitimacy	FLA	GNI
Coverage	Participating Companies (39), participating suppliers (19), university licensees (613), licensees (1473), universities and colleges (172), and civil society organizations (4)	ICT companies (6), civil society (13), academia (10) and investors (9)
Efficacy	Mission and rules are aligned: FLA Workplace Code of Conduct	Mission and rules are aligned: GNI Principles
Enforcement	Compliance is verified, and noncompliance is sanctioned	Compliance is verified, and noncompliance is sanctioned

regulatory mechanism has also at times been a deliberate choice as a means of attracting a broad array of relevant participants in a nonlegally binding manner. The binding/nonbinding nature of MSIs is contentious. Characterizing participation as nonbinding is accurate only in the strict legal sense but participation in a MSI can trigger socially induced compliance, which, while not legally binding, may have regulatory force by virtue of the scale of consent of the participants (such as governments, companies, and other civil society actors).

Industry-specific MSIs such as the FLA and GNI have developed standards that, while reflective of broader international human rights norms, are specifically targeted to those rights issues most pertinent to their industry. The standards developed aim to reflect international standards and societal expectations, and while not legally binding can have ‘force’ by the degree of consensus and acceptance linked to their particular monitoring and enforcement instruments. However, the standards imposed by a MSI are naturally self-selective. There is a danger of resorting to the lowest common denominator in order to achieve consensus and maintain the participation of key stakeholders. What is key here is the makeup of the ‘multi-stakeholder’ aspect of the initiative and the bargaining powers that each group wields over the other. Within the FLA, board seats are equally divided (six each) between corporate, NGO, and university and collegiate participants with an independent Chair. The sustainable and meaningful participation of NGO stakeholders in the FLA presents a challenge. Most of the NGOs active in the business and human rights sphere have limited staff resources trying to cover a multitude of MSIs and find it difficult to commit to join boards and working groups. An MSI like the FLA may be only one of a number of initiatives one specific NGO engages with in the business and human rights space and that may not even be the main focus of that NGO. Unlike FLA company affiliates, which generally have a “CSR” or “compliance” department working on these issues, NGO staff participating in FLA governance structures generally cover a

number of different issues and organizations and cannot devote the same amount of time as their corporate counterparts. This does not call into question the FLA structure or charter but does point to a reality of multi-stakeholder initiatives. The structure of stakeholder representation most commonly adopted by MSIs, including the FLA and the GNI, means that direct decision-making power is wielded by the stakeholders on the board. In the case of the FLA, this means that workers primarily rely on the indirect representation of their needs via NGO board participants. The civil society representation on the FLA Board has always been North American and the Board has discussed the need to ensure engagement with NGOs in the supply chain, especially from major sourcing countries such as China. The FLA has suppliers from China sitting on the employer bench but has not managed to secure regular participation from Asian NGOs. A crucial factor which may balance the bargaining power of board participants is recognition that ongoing NGO participation is key to MSI credibility. The board makeup of the GNI is also designed to allow all stakeholder input into the governance of the MSI. The GNI board composed of an independent chair: five corporate participants, three from civil society and two each from academia and the investment communities.

The private voluntary nature of MSIs also lends them a certain degree of agility in adapting and responding to new issues as they arise. That agility engenders flexibility, which can be both a benefit and limitation of MSIs in advocating compliance with human rights (Nolan 2013; Baccaro and Mele 2011). The absence of legally binding regulation can also be beneficial to MSIs in attracting participants but much depends again on the particular structure and function of the individual MSI. Participation in a MSI is self-selective and the participation numbers in MSIs reflect the stringency of their approach to standard setting and compliance. The UN Global Compact has proved successful in attracting a large number of stakeholders, but it has also attracted significant criticism relating to the very soft commitments required of its

participants (the very factor which may have induced participants to join) (Deva 2006; Nolan 2005). The scaling up of the FLA and GNI has been confronted with serious limits precisely because of what some might perceive as the arduous nature of the commitment required (including adherence to MSI standards and the level of monitoring and transparency required from participation in the initiatives). Limited membership can affect the ability of the MSI to level the playing field in improving compliance with human rights standards. However, if a MSI is able to attract significant key players from a particular industry, such peer pressure and leadership may then be effective in shaping broader corporate approaches to human rights. The GNI for example includes the leading companies operating in the consumer-facing Internet sector, but to broaden its impact it needs to address the future participation in adjacent industries such as hardware and telecommunications. The FLA has attracted significant participation from key sportswear brands and the university and collegiate sector but lacks a real presence in the retail sector.

Finally, as MSIs such as the FLA have now been in operation for more than a decade, the limitation of a ‘monitoring only’ approach is becoming more apparent. The FLA has analyzed audit results every year since it started external auditing in 2002 and concluded that while audits are reasonably effective in identifying violations they are less so in effecting lasting change. The number of violations has remained stubbornly high, despite thousands of audits and remedial programs. As reliance on MSIs in a variety of industries has increased so too has an industry focused on developing processes to manipulate the audit process.

“The result is that code of conduct audits have provoked a veritable industry of falsified wage and hour records as suppliers attempt to “comply” with code standards. Newspapers in south China, for example, carry advertisements by consultants offering to game audits and by software providers offering programs that fake wage and hour records. Social auditors have become adept at exposing fake records but this cat-and-mouse game has become a treadmill” (Nolan and van Heerden 2013, p. 14).

Audits can be effective in righting specific wrongs, but they are less effective in changing the culture of noncompliance that prevails in many exporting countries. The FLA’s investment in a ‘sustainable compliance’ approach that invites suppliers to be part of the solution is indicative of its evolution and acknowledgement of the weakness of relying purely on a ‘policing’ approach (Locke 2013). Sustainable compliance is now pursued through needs assessment followed by capacity building rather than coercion. In order to be effective, capacity building must involve not only

management and supervisory staff but also workers who are empowered to understand their rights and who are provided with channels and guarantees that allow them to exercise those rights.

Discussion of Case Studies: Theoretical and Practical Implications

The legitimacy of MSIs in general and industry-specific MSIs in particular is an under-explored area of research, and our two case studies of FLA and GNI highlight several aspects that can improve our understanding of these private governance mechanisms (Siggelkow 2007).

First, on the input dimension of legitimacy, we have seen across both cases that neither inclusion, nor consensus orientation, and transparency are absolute criteria that need to be in place for an MSI to start operating. In fact, those criteria can develop over time. As trust among heterogeneous participants in these organizations develops, consensus building becomes easier, and so does the commitment to disclose and share sensitive information. While wide representation of all stakeholders is certainly desirable, it cannot come at the expense of stalling the process (like in the case of the unions in the FLA) or creating conflict of interest (like in the case of governments in the GNI). We therefore contest that with the increasing levels of trust, input legitimacy increases in industry-specific MSIs.

Second, the assessment of the output dimension of legitimacy shows that the number of rule-targets is an insufficient criterion for assessing coverage. High standards and rigor in enforcing standards may limit the number of participants in some MSIs, yet these aspects also alter the quality of the coverage. We suggest that output legitimacy tends to be higher in organizations with high standards and rigorous enforcement mechanisms. The case data also provide novel insights on the efficacy of rules and show that for creating a “fit” between the rules and the issue, the rules need to be subjected to regular review. The discussion of the experience with monitoring mechanisms in the FLA has shown that, as issues evolve, organizations need to learn from past experience and adjust mechanisms to improve efficacy. We therefore suggest that the output legitimacy of an industry-specific MSI increases with the organization’s ability and willingness to learn and adjust.

Finally, the case studies have shown that the input and output of legitimacies are inextricably linked. Both of these dimensions of legitimacy mutually enforce each other and cannot be analyzed separately. The form of industry-specific MSIs enables delivering on its purpose. In other words, input legitimacy is a precondition for output legitimacy. Output legitimacy, in turn, reinforces trust within the organization and hence is critical for further developing the criteria of the

input dimension of legitimacy (inclusion, consensus-orientation, and transparency). We therefore suggest that industry-specific MSIs that develop input and output legitimacies in parallel will have higher legitimacy long term than the MSIs that neglect either of these dimensions.

Conclusion: Industry-Specific MSIs as a Model to Define and Enforce Human Rights Standards

The focus on the dichotomy of voluntary and mandatory approaches in the human rights field does not capture how business and human rights challenges are de facto addressed today. New and hybrid forms of regulation have emerged, and they are often institutionalized through MSIs (Nolan 2014). In this paper, we have analyzed one specific type of MSI, namely industry-specific MSIs that were set up to prevent and address corporate human rights abuses and contrasted them with the dominant approaches to date. Our case illustrations of the FLA and the GNI show that current industry-specific MSIs are far from perfect, but they offer valuable insights into the conditions of success for private governance initiatives.

The assessment of the legitimacies of industry-specific MSIs on the input and output dimensions highlights both the potential and challenges of this model of private governance. The results of our analysis demonstrate that industry-specific MSIs can, at least in principle, be a legitimate and effective approach to protect human rights. However, devising an effective and legitimate MSI is easier to do in theory than practice. More research is needed on which particular aspects targeted MSI processes are the most effective in providing greater protection for human rights and how (or if) such mechanisms should collaborate with government actors. Can the lessons learned from the FLA and the GNI be replicated in other industries and what levers can be applied to reduce the entry barriers so that these industry-specific MSIs can attain broader coverage? MSIs are viewed by some as a stop-gap measure for improving corporate respect for human rights, but increasingly it appears that MSIs are more of a long-term mechanism to fill governance gaps, and as such, it is critical to establish how and in what situations such private regulation can be most effective.

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