

## CORPORATE SELF-GOVERNANCE FOR INCREMENTAL PROGRESS

October 23, 2022 – Extracted with slight revisions from Angie Redecopp, *The Role of Law in Corporate Human Rights Due Diligence*, Ph.D. diss., Manchester, University of Salford, 2021. A copy of the PhD dissertation can be requested from [info@impactbusinesslaw.com](mailto:info@impactbusinesslaw.com).

This is part of a series of articles that include an outline of the PhD dissertation, conclusions on why corporate self-governance, ESG mainstreaming, and industry associations are not enough to carry out the new narrative, and finally, conclusions on the essential role of Canadian lawmakers and specific recommendations for Canadian lawmakers in advancing this narrative.

**Our new narrative requires us to start from the perspective of the entire global value chain and work backwards from that.** Learn more about the series [here](#). Section references in this article refer to content in the dissertation.

Throughout our findings, we highlighted the voluntariness of the decisions being made by the Case Subjects on human rights due diligence (HRDD). This was in the context of multinational companies (MNCs) addressing their entire global value chains, which is our focus. However, we also need to recognize the incremental progress that our Case Subjects and their broader industries are making with HRDD. The Case Subjects are actively doing what they can in response to the influences that currently exist, and ultimately, they achieve this incremental progress through corporate self-governance. Even if we were to see more legislation as will be discussed in the next sections, the complexities of each industry and each business are simply too great to have comprehensive regulations that address all possibilities. For binding commitments to HRDD to be furthered within companies, good internalization of the initial binding commitments is needed, such that it can be replicated, and we see this with the Case Subjects. In this section we first come back to the complexity in global value chains, focusing on literature and findings that demonstrate very specific roles for the MNCs – things that only they can do. Then we summarize what the Case Subjects are doing to further their HRDD, specifically coming back to 6.2 Organizational Integration. Then we further discuss the incremental progress we see with our Case Subjects. We conclude by coming back to what corporate self-governance cannot achieve.

As we saw in the Findings, the complexities of each industry and each business are simply too great to have either comprehensive regulations that address all possibilities or even industry-specific regulations that can get to the level of prescription and subsequent inspection of those regulations to ensure that HRDD is carried out for all products and operations and up the actual supply chain. A typology was offered in 2.1.1 International Instruments and Global Standards to classify soft law: principle-based standards, certification standards, reporting standards, and process standards.<sup>1</sup> Other than certification standards, which are typically industry-driven, none

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<sup>1</sup> Dirk Ulrich Gilbert, Andreas Rasche and Sandra Waddock, 'Accountability In A Global Economy: The Emergence of International Accountability Standards to Advance Corporate Social Responsibility' (2015) 18 Business Ethics Quarterly 148.

of these types of instruments gets us to the point of directly inspecting and ensuring that HRDD is being carried out. The domestic legislation that currently exists, discussed in Subsection 2.1.5, does not get to this level of detail and direct oversight either. As a result, and as we touched on in 3.3 Corporate Self-Governance, though criticized, corporate self-governance is here to stay. MNCs are increasingly adopting private regulation as new tools are needed to respond to new requirements that continue to evolve with the spread of globalization.<sup>2</sup> This was evident for our Case Subjects throughout both the document reviews and the interviews. What follows are examples from our findings to demonstrate that only MNCs can get to the level of detail needed to understand and carry out HRDD across the global value chains. We start by looking at the overall structure of supply chains and recall the various ways that our Case Subjects are addressing the complexities. From 6.1.2 Supply Chain Structure, two of our mining companies have chosen to be in lower risk areas (in comparison), with MiningCo2 carrying out operations in higher risk Africa and responding to the risks and challenges that come with that. FoodCo has identified its farmers as their highest risk tier with food products and are carrying out activities to address these risks. ApparelCo is strategically reducing its supplier base and seeking to get as close to the suppliers as possible. Similarly, TechCo is looking to find a balance between the need for some duplication and like ApparelCo, a reduction in the number of suppliers overall. From 6.1.4 Decision-Making we see various decision points from MiningCo3, during exploration and when approving projects. Each of these decisions and efforts described by the Case Subjects is both industry and company specific.

Continuing with examples demonstrating how only the MNCs themselves can get to the level of detail needed, we look at strategies used by the Case Subjects for different types of suppliers and suppliers and in different industries. For our mining companies, an industry with a significant history of BHR issues, using industry standards is important, both respect to BHR generally and for security. Also from 5.2.2 Industry Associations and Standards, we see our retail companies working with third party auditors, often working together with other MNCs. FoodCo is focused on certifications for specific raw materials. From 6.1.4 Decision Making, both ApparelCo and TechCo also give more attention to specific components. Throughout 6.2 Organizational Integration, we see a host of tools being used for key suppliers, ranging from supplier agreements to supplier training to incentives and awards. We also see the Case Subjects seeking to learn more about their BHR risks and implementing new strategies in response. Of interest on FoodCo and their certifications, is their likeliness to go further where there are certifications available, in a sense letting market availability of ‘certification products’ influence their priorities. Finally, though we criticized materiality assessments for ‘voting’ on whether BHR was important enough in 6.1.4 Decision-Making, we also learned there how well the Case Subjects know their own risk environments. Graetz and Franks acknowledge that a broad risk lens can trend towards cost-benefit analysis, but also highlight the benefits of

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<sup>2</sup> Corinne Gendron Silvester Ivanaj, and John McIntyre, ‘Introduction. Corporate Social Responsibility and Attitudes Towards Regulation of Multinational Companies’ (2013) 8 Responsible Organization Review 3.

including BHR with the familiar methodology for broader social and business risks.<sup>3</sup> In 5.2.1 International Instruments and Global Standards, MiningCo1 provided that companies are figuring out their own risks and investors are developing their own tools. Similarly in 5.2.3 Domestic Laws and Litigation, ApparelCo stated, ‘The law does not really understand these things as well as the people that are practicing it’. We see the deep knowledge that the Case Subjects have of their risks through both their materiality assessments, the additional data gathering some partake in, and their overall knowledge of their suppliers and operations.

We recognize that there are things that only MNCs can do given their intimate knowledge of their own global value chains. Now we come back to 6.2 Organizational Integration to see how our Case Subjects are using this knowledge. We provided summative comments and conclusions at the end of each subsection in Section 6.2 and found that good internalization leads to HRDD for more suppliers, locations, products, and tiers in the chain. Here we look again at how HRDD is being furthered through its organizational integration and we relate this to BHR specificity in the context of the integration with CSR policy and then within ERM and supplier management systems. This comes back to our tensions around the voluntariness associated with CSR and corporate self-governance generally.

Starting at the top, we find in 6.2.1 Governance and Accountability that both CSR and BHR compliance are found at the top policy and governance levels, but that human rights compliance is one of multiple priorities. There is accountability and training for CSR throughout the organizations, but BHR specificity is often missing. All the Case Subjects significantly advanced their CSR efforts, typically framing this more specifically in the context of ESG, throughout the study. We also recall the aspirational comments made by various interviewees in 6.1.1 CSR and BHR, such as this is the ‘way we do business’, references to visionary leaders, sustainability as being core throughout corporate history, ‘doing the right thing’, and hiring people who ‘want to make a difference. This aspiration, specific to BHR compliance or not, together with the policies and processes that are in place, is advancing HRDD in the Case Subjects.

When we get to 6.2.2 BHR Policies, we do see specificity both in the stand-alone BHR policies or approaches of most of the Case Subjects, and in the codes used with suppliers. Moving to monitoring suppliers in 6.2.3 Supplier Monitoring, we see significant integration of BHR compliance both with ERM and supplier management systems. There is BHR specificity, but it is included with other sustainability criterion and overall quality imperatives. Similarly, the supplier training and other forms of collaboration typically include BHR as part of CSR and other supplier development initiatives. We see benefits with the integration of BHR compliance. We note an interesting parallel with the investment industry, where investment firms used to be separate (much like corporate CSR groups), and now ESG analysis is integrated into the

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<sup>3</sup> Geordan Graetz and Daniel M Franks, ‘Incorporating Human Rights into the Corporate Domain: Due Diligence, Impact Assessment and Integrated Risk Management’ (2013) 31 Impact Assessment and Project Appraisal 97.

fundamental financial activities being carried out.<sup>4</sup> To repeat an observation we have made a few times, when we look at the overall framework for HRDD that is integrated into the systems of the Case Subjects, we consistently see the HRDD framework set out in the UNGPs. BHR compliance is one of many parts of the CSR ‘system’, but the consistent use of this HRDD framework gives us some important BHR specificity.

In reviewing the organizational integration of HRDD in our Case Subjects, we will find that the starting point may be aspirational and perhaps found in the company’s broader CSR values, but that specific frameworks and processes within the Case Subjects are also present. A study set out previously finds that firms select their level of compliance based on customer expectations and firm capabilities.<sup>5</sup> Going back to Kun in 3.2.2 Using Soft Law, he proposes that effective operationalization of soft laws may be dependent on the clarity and strength of the moral aim of the norm, the effectiveness of the legal infrastructure supporting the norm, and the fit of the norm into the natural self-regulatory processes of the employers.<sup>6</sup> This points to both aspirational and moral imperatives that may be more readily found in CSR, as well as frameworks and processes within the organization that commitments to HRDD can fit into, all of which we see in our Case Subjects. While we continue to question the lack of BHR specificity at top policy and governance levels, the integration of BHR criteria with other criteria for both supplier screening and supplier monitoring seems to be effective. Ultimately, as our Case Subjects become proficient at carrying out their binding commitments to HRDD in one area, they can more easily apply this to other areas. Industry can contribute to the frameworks and processes, but the MNCs themselves need to strategically develop these specific processes.

To close this recap on organizational integration, relationships are key for our Case Subjects, and this comes through self-governance, not direct regulation. In 6.1.4 Decision Making, we see that most of the steps that Case Subjects are looking at to get further up the supply chain come back to their direct suppliers, showing the importance of those critical business relationships. Elsewhere we see relationships with competitors that use the same suppliers, through MSIs to support farmers, with coalitions that include third party service providers. These are business relationships that are built over time and take significant effort. None of the steps involved in carrying out HRDD are easy, and as the Case Subjects become good in certain areas of HRDD, they can more easily apply this in other areas. From FoodCo in Section 6.3, ‘Once we achieve these 2020 targets on [product A], we are going to want to set new targets... We have done that with [product A], and we hope to replicate that’.

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<sup>4</sup> Robert G Eccles and Svetlana Klimenko, ‘The Investor Revolution’ (2019) 97 Harvard Business Review 106.

<sup>5</sup> Petra Christmann and Glen Taylor, ‘Firm Self-Regulation Through International Certifiable Standards: Determinants of Symbolic Versus Substantive Implementation’ (2006) 37(6) Journal of International Business Studies 863.

<sup>6</sup> Attila Kun, ‘How to Operationalize Open Norms in Hard and Soft Laws: Reflections Based on Two Distinct Regulatory Examples’ (2018) 34(1) International Journal of Comparative Labour Law and Industrial Relations 23.

Finally, we come back to the incremental progress that we see the Case Subjects making. To further analyze this, we visit our model of making ‘company law’ set out in Table 3.3. We found in 6.3 Are the Case Subjects Making Company Law that the Case Subjects were not fully successful in applying their company laws on HRDD, based on voluntariness as Case Subjects make decisions on what part of their global value chains to address. However, if we revisit this from the perspective of applying their company laws within the bounds of what they have internally committed to, they would all pass. This has us again recognizing the incremental progress of our Case Subjects. The learning potential that comes out of this company law and incremental progress can be significant. From 3.3.1 Making Company Law, we have organizational culture as socially constructed<sup>7</sup> and organizations constructing the meaning of both compliance and law through the flow of ideas across business and legal fields.<sup>8</sup> Backer looks to interactions between businesses and those to whom they account to see how business shape their understanding of what compliance is.<sup>9</sup> Ruggie points to the benefits of using a learning forum to shape and reshape corporate practice<sup>10</sup> in 3.3.2 Can MNCs Regulate Themselves. We see these interactions and the learning taking place with our Case Subjects, with the furtherance of their HRDD as a result. In 5.2.2 Industry Associations and Standards, ApparelCo discussed learning and leverage through associations and TechCo talked about using partnerships and collaborations to try and move markets to catch up with what they are trying to do. From relationships on the ground to industry groups and other collaborations, our Case Subjects are learning and reshaping their corporate practices in response. We see the learning and resulting behaviours evidenced beyond just operational integration. We see the Case Subjects engaging more deeply with the communities they are in and addressing vulnerabilities beyond their direct impacts, with examples set out in 6.1.3 Addressing Vulnerabilities. This is not something that could be prescribed by regulators, rather it is a part of corporate self-governance.

From our findings and this further analysis, we see that only MNCs can address certain of the complexities of their global value chains and that only MNCs can develop the relationships necessary to effectively carry out HRDD. We also see the importance of BHR specificity for HRDD progress, while recognizing the benefits of the integration of BHR compliance with other policies and systems within the MNCs. However, while corporate self-governance puts us in good stead with significant portions of HRDD for our Case Subjects and we see increases on an incremental basis, this does not address the entire global value chain, nor does it address all

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<sup>7</sup> Lisa Interligi, ‘Compliance Culture: A Conceptual Framework’ (2010) 16 *Journal of Management and Organization* 235.

<sup>8</sup> Lauren B Edelman and Shaubin A Talesh, ‘To Comply or Not to Comply - That Isn’t the Question: How Organizations Construct the Meaning of Compliance’ in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar 2011) 103.

<sup>9</sup> Larry Cata Backer, ‘Unpacking Accountability in Business and Human Rights’ (2018) SSRN 8 < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3163242](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3163242)> accessed 23 December 2021.

<sup>10</sup> John Gerard Ruggie, ‘The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact’ (2002) 5 *Journal of Corporate Citizenship* 27.

Canadian MNCs. On the EU Sustainability Directive calling for greater state involvement, 'Policy-makers should attempt to retain a degree of much-needed flexibility by providing discretion to corporations and their boards on how to succeed in integrating sustainability within their risk management processes and corporate governance agendas, rather than resort to overly rigid legal imperatives'.<sup>11</sup> Yes, we want to leave it to the MNCs to figure out how to carry out HRDD, but we cannot leave the ultimate agenda to them and we need to ensure that all MNCs are accountable.

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<sup>11</sup> Sofia Karagianni, 'The EU Wants Business to be Sustainable. But it Must Empower Companies to do That' (World Economic Forum, 26 October 2021) <<https://www.weforum.org/agenda/2021/10/european-union-sustainable-corporate-governance/>> accessed 7 December 2021.