

## INDUSTRY ASSOCIATIONS: COMPANY GUIDES AND NETWORK INTERMEDIARIES

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.

We have discussed polycentric or synergistic governance throughout this project, focusing specifically on investor influence and ESG reporting, corporate self-governance, and domestic lawmakers. There will be many different interactions and intermediaries between and among our various polycentric governance members, but it seems that industry associations can and do play a key role here. From both the literature and findings, we see that industry associations play a role both in setting standards and influencing their corporate constituents and the broader network of lawmakers and influencers in the BHR network. Here we reconsider the roles that industry associations play, ranging from company facing education and networking to standard making and enforcement roles, and then to the myriad of intermediary roles within the broader BHR network. We find that there are multiple roles that industry associates can and should play, but that each industry association needs to be very clear on the role or roles that they have cast themselves in, and that most roles require industry-specific expertise.

Various gaps have been identified to this point in Chapter 7. In 7.2 Corporate Self-Governance for Incremental Progress, we recognize that the standards and domestic laws that exist, with the possible exception of certification standards, cannot get us to the level of detail or direct oversight needed to ensure that HRDD is being appropriately carried out. We observe the tendency for our Case Subjects to focus efforts where there are certifications or industry partners making strides in a specific area or with a specific product or raw material. We recognize that companies know their risks best, but we continue to observe choices being made on which risks to prioritize. We see a gap at top levels of our Case Subjects, with BHR being one of many CSR priorities, and typically no direct accountability for BHR specifically. Relationships are key as MNCs seek to self-govern, and this can be a challenge for individual MNCs, and priority will naturally focus on key suppliers or functions. In 7.3 ESG Mainstreaming is not Enough, we see a need for some type of standardization as there are so many global standards, but also a need for both BHR and industry specificity. We see a need for standards to be more consistent in terms of both qualitative and quantitative data required, and for MNCs to be more consistent in their reporting against standards. The difficulty in comparing or giving assurances

on data when it is not provided consistently against a framework is also recognized. We also have concerns about possibly dulling the aspirational internal drive to do better in BHR compliance and elsewhere if the focus moves to responding to increasing disclosure requirements. In the next section we will see gaps in domestic lawmaking as it currently exists.

In this section we consider company facing roles that industry associations can play in Subsection 7.4.1 and intermediary roles in Subsection 7.4.2, both in the context of the findings of our Case Subjects and in response to the gaps identified. As we found in the Findings and discuss further here, there is significant potential with industry associations, but as with the other actors, there are limitations.

### ***Company Facing Roles***

This was a long list of gaps, and while we cannot expect industry associations to fill them all, we already see from our Case Subjects that they are working to fill many. See the end of 5.2.2 Industry Associations and Standards for a summation of the benefits of working with industry associations from the perspective of the Case Subjects. We note some of those benefits immediately below and then we look at how industry associations may be able to address some of the gaps identified through company facing roles. Case Subjects assert that the bar is raised and HRDD is increased across the industry and supply chains as companies learn together, establish best practices, and set HRDD priorities. Some of the Case Subjects also affirm the importance of motivating lagging competitors through industry forums and more broadly through industry specific rankings and certifications. We also see industry associations directly regulating company behaviour by requiring certain actions on the part of companies to maintain membership or as a condition to the company asserting that a certain standard has been met. Ruggie describes the learning approach used by UN Global Compact and points to the practical inability to create regulation and monitor global companies at the UN level (and we argue even at the national level to the extent necessary), and instead points to the benefits of using a learning forum to shape and reshape corporate practice.<sup>1</sup> Industry associations and standards have the potential to create this learning forum according to some of our Case Subjects. In the analysis that follows, we focus on company facing roles, ranging from education and networks to standards making and standards enforcement, and we consider whether the activities of our Case Subjects address gaps identified in the previous subsection through these roles.

We start with education and networks. In 5.2.2 Industry Associations and Standards, MiningCo1 emphasized the value in working with WGC and MAC, noting the learning opportunities and the need for a unified industry. MiningCo3 advised that they engage with industry associations to advance research, share best practices, and contribute to industry standards. FoodCo identified their need to collaborate with others across the industry to further HRDD on other products. FoodCo is also part of a global industry initiative on inequality and human rights that brings

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<sup>1</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.

companies together to make a statement. Moving to on-the-ground networks or coalitions, we learned of significant activity. MiningCo2 is involved with several industry associations in specific regions, FoodCo works with other organizations to further improve livelihoods and farming practices for its producers, and all the retail companies recognized the need to work with each other at the factory level, with ApparelCo specifically identifying the need to recognize each other's certifications. In 6.2.3 Supplier Monitoring and 6.2.5 Supplier Collaboration, we see further evidence of on-the ground coalitions with more detail on coalitions for factory audits and follow up work. We also learned more about FoodCo's certifications, finding that cost and specifications are both relevant and that much work goes into choosing appropriate certifications. In these examples we see industry associations providing or enabling learning opportunities as well as networks that come together either for solidarity or to accomplish a specific purpose.

Looking at our gaps, networks such as these could keep the aspirational internal drive going as peers work with one another. We see both the level of detail and direct oversight that corporate self-governance can offer, with the additional oversight of third parties and peers. MNCs, industry associations, and third parties also work together to choose and potentially improve certifications and other specific tools use for different products and ingredients. Given the difficulty in building direct relationships for each MNC, particularly for lower priority suppliers and products, these coalitions can also serve an important role where an individual MNC might not go deeper with certain products or suppliers on their own. Networks here in Canada, with MAC, Canadian Business for Social Responsibility (CBSR), and the Retail Council of Canada all as examples, could serve to better connect companies in a certain industry, or with a social responsibility mindset in the case of CBSR, with national initiatives like procurement and economic incentives.

Shifting to standards making and standards enforcement, we will again look at examples from the findings and then come back to the gaps identified. First though, we come back to some of the literature in 2.1.3 Industry Associations. Latorre distinguishes between the legal obligations created in soft law and the way in which they are enforced,<sup>2</sup> which we see through industry associations enforcing standards based on soft law. On legal pluralism, Merry speaks to the broadening conception of law to include various normative orderings alongside domestic law,<sup>3</sup> which we see in industry standards. While not all the industry associations that we have focused on directly regulate behaviour, most go behind just influence whether it be through memberships or recognition. As we look at examples from our findings, we start with an overall observation from the various interviews. Broadly, our interviewees look to their industry associations to make things easier, not lowering standards, but making standards and other HRDD steps easier to do. From 5.2.2 Industry Associations and Standards, MiningCo2

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<sup>2</sup> Andrew Felipe Lopez Latorre, 'In Defence of Direct Obligations for Businesses Under International Human Rights Law' (2020) 5 Business and Human Rights Journal 56.

<sup>3</sup> Sally Merry, 'Legal Pluralism' (1988) 22 Law and Society Review 869.

commented on the excess of frameworks out there and both MiningCo1 and MiningCo2 were enthusiastic about the WGC Gold Responsible Mining Principles as a clear set of standards specific to their industry (in 6.2.6 Reporting as well). As mentioned earlier, MiningCo3 specially looks to contribute to industry standards through the industry associations it is involved with, MAC and ICMM most notably. TechCo also works directly with an industry association, RBA, on uniform standards and audits for the factories they work in. in 6.2.5 Supplier Collaboration, TechCo stated, ‘If you are asking the same questions of your vendors, and you have agreed on what that set of questions is... [you] will reinforce in that vendor’s mind the need to actually do it’. From 6.2.2 BHR Policies, all the Case Subjects reference to international soft law, either directly through their own BHR policies and approaches, or through their use of RBA or BSCI standards. From 6.4B Remaining BHR Disclosure in Standards, we see the level of BHR specificity in standards promulgated by each of MAC, WGC, and ICMM. Finally, all the industry associations referenced in this paragraph require its members to adhere to their standards.

In these examples, we see industry association both setting standards and seeking to enforce them in some way. In our gaps we see the tension between standardization and the need for both industry and BHR specificity, which our industry standards address in several cases. The additional step needed though is for industry associations to be a greater part of the conversation on the current movements to turn variations of SASB into a global standard. Unfortunately, we are not seeing even the industry standards consistently address the need for quantitative as well as qualitative information, so more is needed there. By setting industry-specific standards, there is pressure on MNCs to address risks identified for all, not just the risks most material to the company. Industry associations have a voice in domestic lawmaking which will be discussed further in a later subsection. As a final observation, industry association are driving many of the Net Zero climate change initiatives,<sup>4</sup> perhaps they could initiate an equivalent for MNCs addressing HRDD in the entirety of their global value chains.

### ***Intermediary Roles***

Before we move to the intermediary roles that industry associations can play, we need to identify a tension that all industry associations face as they move from focusing on their member companies to other arenas. At best, industry associations only loosely regulate company behaviour. From 2.1.3 Industry Associations, foregoing high barriers to entry may be necessary if MSIs are to ensure a wide participation of stakeholders,<sup>5</sup> particularly corporate stakeholders. Given this, industry associations need to be careful to clarify their roles to ensure credibility in the broader BHR ecosystem as they are by their nature not objective third parties. In this subsection we will again look at our findings for roles that industry associations play, this time focusing on intermediary roles around being a specialist for those outside the industry,

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<sup>4</sup> See for example Alex Carr, ‘Leading Sustainability Association Launches Canada’s First-ever Net-zero Leaderboard’ (CBSR, 18 June 2021) < <https://www.cbsr.ca/leading-sustainability-association-launches-canadas-first-ever-net-zero-leaderboard>> accessed 9 December 2021.

<sup>5</sup> Dorothee Baumann-Pauly and Lilach Trabelsi, ‘Complementing Mandatory Human Rights Due Diligence: Using Multi-Stakeholder Initiatives to Define Human Rights Standards’ (2021) SSRN 3810689.

policymaking, and providing and assessing disclosure information. This time we will provide examples in each area and then look at how gaps are addressed collectively. We then conclude by coming back to the interconnectedness of our industry players and the rest of the polycentric governance universe.

We start with the specialist role that industry associations can play, educating those outside the industry. In 5.2.2 Industry Associations and Standards, in reference to working with WGC and MAC, MiningCo1 stated, 'It is in our interest to continue to work together with like-minded companies and sort of champion why being a Canadian company and working in the mining industry in these locations make us – they set us apart.' Here we see both advocacy for the mining industry and education for the public on what responsible mining entails. We learned about specific specialist type roles too with WGC using their standards to reassure and educate other stakeholders like the Responsible Jewellery Council or the London Bullion Market Association. In 6.3 Company Law we touch on the specialist role of RBA and BSCI as it educates at the factory level, equipping suppliers to meet their standards. Moving to the policymaking role, industry associations like MAC, WGC, ICMM, and Retail Council of Canada have a voice when it comes to domestic lawmaking and initiatives. Industry associations can and should be part of the conversation on such things as a full global value chain orientation and developing a disclosure standard on the scale of the TCFD. We learned in 5.2.2 Industry Associations and Standards that ApparelCo has been a part of industry consultations on Bill S-216. TechCo has been involved at the policymaking level as well. Policymaking can be a challenge for traditional industry associations as there would likely be varying views within their membership on whether legislation should be advocated for. There are other avenues here though, such as with the Shareholder Association for Research & Education, introduced in Subsection 2.1.3. Finally, we look at examples of industry associations in roles around providing and assessing information. From 6.2.6, we see both ICMM and WGC providing assurances related to certain of our Case Subjects following their standards. Throughout the Findings we have references to FoodCo focusing on certifications, and in 5.2.1 International Instruments and Global Standards, we find that they use the ISEAL Codes of Good Practices as a tool to evaluate various certifications. In 2.1.1 International Instruments, we provided examples of industry associations or MSIs in other jurisdictions providing information centres for the public to access BHR related disclosure of MNCs, in some cases specific to modern slavery statements. Both in the literature review and in 5.2.4 Stakeholder Pressure, we found specific examples of rating agencies, some of which could be broadly defined as industry associations or MSIs as well, again having resources to rate the raters. In 6.2.3 Supplier Monitoring, we have both BSCI and RSA in assessment or assurance type roles with respect to factory audits.

In these examples, we have industry associations serving in intermediary roles in the broader BHR landscape. They educate others in specialist roles, they engage in policymaking to a limited extent, and they provide means of obtaining and assessing information. Looking at our gaps, we start with the challenge identified in 7.3 ESG Mainstreaming is not Enough around the difficulty in comparing or giving assurances on data when it is not provided consistently against

recognized frameworks. We see industry associations developing their own BHR frameworks, or broader frameworks that include BHR-specific criteria, and giving ratings or assurances against them. Industry associations could play a greater role in policymaking, tensions notwithstanding. There may also be roles for these associations to address uniformity, assist companies on their internal business cases in response to legislation, and generally apply pressure to others in the industry. Coming back to specific standards for BHR akin to the TCFD, given TCFD's focus on governance, if that were replicated for BHR, it would mean BHR specificity in top level policy and governance. We have many examples from the Case Subjects of on the ground industry coalitions influencing other state lawmakers and non-Canadian MNCs. Elsewhere we see industry associations involved in information gathering, and if Canadian passes supply chain legislation, this could develop here. We see several other examples of industry associations addressing gaps around gathering and comparing BHR information more broadly. Industry associations cannot fill every gap, and they themselves need to be both regulated and supported by national and perhaps international bodies. There is much that industry associations can do though to bring together polycentric governance for BHR and ultimately influence HRDD in Canadian MNCs across their global value chains. As is the case with all the actors though, industry associations are not enough. We see significant potential, but this needs to be further built upon with domestic lawmaking.