

Conference Report: Industry Associations and Transnational Regulation

For a full day, on June 10, 2016, more than 25 experts on industry associations, corporate governance, self-regulation, international law, sustainable development, and transnational governance came together to discuss the role of industry associations and transnational governance at Rutgers Law School. The event was co-sponsored by the Center for Corporate Law and Governance, the American Society for International Law's International Organizations Interest Group, and the Rutgers Institute for Professional Education.

Participants came from industry associations (the American Society for Association Executives, the Commercial Finance Association, the GSM Association, Pennsylvania Bio, the U.S. Council for International Business), standard setting organizations (American National Standards Institute), government (SEC and Treasury), international organizations (the United Nations Global Compact and UNIDROIT), and academia (from the fields of law, sociology, political science, and business administration).

A full list of speaker bios, video recordings of the panel discussions, and presented papers, can be found on our website, <http://cclg.rutgers.edu/event/industry-associations-and-transnational-governance/>.

Summary of Proceedings:

N.B. While comments made by academics have been attributed, those made by practitioners and government officials have not. A full list of participants (and bios), as well as the agenda can be found on the Center for Corporate Law and Governance Website.

The day's discussions focused on three main themes, including the role of industry associations in transnational rule-making, their effectiveness as governors, and their potential for advancing the achievement of social and environmental objectives. Douglas Eakeley (Rutgers Law School) presented these themes during the introductory panel.

In framing the discussion, Sarah Dadush (Rutgers Law School) offered a definition of industry associations as voluntary membership organizations whose function is to aggregate, represent, and promote business interests, meaning the interests of their members. She provided an overview of associations' role as industry governors and set out two characteristics of associations that affect their effectiveness as governors. The first pertains to association membership, which is both voluntary and non-exclusive, features that relegate the normative power wielded by associations to the realm of the soft. The second pertains to the members themselves, who are independent, self-governing (dues-paying) firms with discretion to decide how much rule-making and industry coordination authority to confer to associations. Members also tend to be economic rivals, with different

resources and interests, which can impede collaboration. These two characteristics combine to produce unique challenges for associational governance that unsettle common accounts of associations' autonomy, power, and influence. Julian Arato (Brooklyn Law School) explained how the products of associational governance are "soft law" and contextualized the governance work of associations within the broader context of (hard) public international law.

Moderated by Peter Lyons (World Economic Forum), the speakers on Panel 1, Donna Chung (UN Global Compact), Scott Cooper (American National Standards Institute), Christopher Molineaux (Pennsylvania Bio), Robert Skelton (American Society for Association Executives), and Robert Trojan (Commercial Finance Association), discussed the day-to-day work of associations and provided insight into the myriad ways that industry associations engage in governance activities—beyond lobbying. Indeed, while lobbying is typically what comes to mind when we think about industry associations and governance, associations in fact do much more to meet their members' needs. As examples, they provide networking opportunities and educational programming for members, develop public relations initiatives to promote their industry(ies), participate in the drafting of model laws at the international organization level, and create codes of conduct and certification schemes that are particularly impactful for industries that are concerned about their environmental and social footprint.

This panel discussed some of the challenges that associations face in carrying out their missions, including organizational challenges, like having a clearly defined mission that reflects members' interests; prioritizing and staying abreast of the needs of members; having too large a board or too much diversity among the members in terms of size and market share; pursuing activities that matter to all, rather than only a subset of members—e.g. small businesses (especially in developing countries) that do not have a large market share and may not be equipped to meet certain industry standards; keeping members engaged, especially when member firms are represented by a changing cast of individuals rather than a single person, and attracting a membership that is large (and high caliber) enough to matter for the industry, but not so large as to create collaboration problems among members.

Speakers discussed substantive challenges, as well, like identifying ways to stay relevant for members over time, adjusting to technological changes that might usher an industry into an entirely new era of opportunity or render an industry (or a part of an industry) obsolete, keeping up with developments in research, deciding and when and how to intervene if it appears that one or more members are misbehaving by not complying with the association's by laws (or national laws, for that matter), and effectively translating member interests for policy-makers, and conversely, government interests for members.

Panel 2, moderated by Henry Gabriel (Elon Law School, UNIDROIT, Uniform Law Commission), focused on the dynamics of associational engagement at the

international level. Ayelet Berman, (Graduate Institute of International Development Studies), M.J. Durkee (University of Washington Law School), Helen Medina (US Council for International Business), and Kish Parella (Washington and Lee University Law School) discussed how industry associations engage in policy making and law making by engaging with international organizations (IOs), such as the International Labor Organization and the World Health Organization. Industry associations are often viewed as welcome and needed participants in IO discussions because they bring industry expertise to bear on new policy issues and also act as trusted spokespersons for their business members. On the other hand, Durkee's exploration of the accreditation system for admitting non-state actors into law-making proceedings at the U.N. raised questions about the terms on which associations participate in policy discussions at the international level. Her research reveals that while accredited industry associations participate in policy discussions in order to advance the interests of their (profit-seeking) members, they do so as NGOs, a category that denotes a strong commitment to the public interest. She proposes amending the accreditation system to be more transparent about whose interests U.N. consultants are actually promoting.

In her research on the International Conference on Harmonization (ICH), a network of drug regulatory authorities and pharmaceutical industry associations that deals with harmonizing the standards for the production of pharmaceuticals, Berman raised further questions about why associations engage in international policy making initiatives. She suggests that as products evolve scientifically and technologically, becoming more complex, resource-strapped regulators become increasingly dependent on industry associations for technical expertise in order to develop effective regulations and standards. She identifies a few concerns about involving industry associations in standard setting. One concern is that their inclusion might lead to regulatory capture, and to the development of standards that promote industry interests but undermine those of the broader public—or of competing sectors. A related concern is that the standards could generate problematic distributional consequences by benefiting industry—at the expense of other interests. In the context of international standard setting, such distributional concerns also extend to developing countries, which risk seeing their interests sidelined by those of powerful Western industry associations. Parella's research suggests that formal, hard law, can sometimes be used most effectively not as a regulatory tool but rather as a catalyst for stimulating voluntary change by industry actors. She explains that the process of creating hard law instruments, such as treaties, creates a variety of effects on the institutional environment in which industry associations operate, encouraging these associations and their members to voluntarily improve their behavior.

The keynote speaker, Mike Posner (NYU Stern School of Business), who established the first Business and Human Rights Center to be located *inside* a business school, spoke about the potential for associations to advance social and environmental objectives. In GDP terms, he explained, half of the largest economies in the world are companies, not states. It is therefore vital to bring business onto 'the side' of

human rights and the planet. He described the governance gap that exists when it comes to businesses and human rights and environmental protection. Specifically, public initiatives such as the Global Compact and the UN Guiding Principles that have helped to set the normative stage provide inadequate guidance when it comes to actually advancing these norms.

He called for associations to get “in the middle” of multi-stakeholder initiatives to improve the social/environmental performance of their member companies and their respective industries. Associations should pro-actively engage in industry-wide reform efforts, rather react defensively to the prospect of additional regulation and litigation. Such engagement is particularly necessary when it comes to addressing the challenges posted by increasingly complex global supply chains. Ideally, then, associations would work with government and NGOs and individual pioneer firms to address human rights compliance and environmental degradation issues and to develop standards and metrics for evaluating the non-financial performance of firms.

In this regard, one stumbling block concerns the standards for assessing businesses’ social and human rights performance, as distinct from environmental performance. Though there is more interest in social performance than ever before, we lack workable metrics for measuring it. The focus tends to be on the *processes* in place for dealing with social problems (having a committee, observing reporting requirements, etc) rather than on actual *outcomes*. It is the outcomes measurement and standardization that requires attention. Indeed, to the extent that associations have engaged in initiatives designed to advance more than the single bottom line of profitability, Posner observed that these have typically been focused on environmental objectives.

The question was raised, why would associations be motivated to take up and diffuse non-financial objectives, given that it is difficult to make a “business case” for sustainability? In answering, Posner acknowledged that it is difficult to make out a business case based on (especially short-term) profit and loss, alone. The case is made by looking at long-term business objectives, like being a corporate or industry leader and generally striving for excellence. He expressed support for the idea of “shared responsibility” whereby government would do its part to protect human rights and the environment (including by making key public goods available) and provide guidance to businesses about how to get on board—without offloading its public responsibilities onto the private sector—and, conversely, business would not walk away from its social and environmental responsibilities but rather pro-actively work in collaboration with stakeholders to identify ways to improve non-financial performance. He explained that it isn’t enough to recognize the importance of including businesses in achieving social and environmental objectives; their precise role must be more clearly articulated in order for real progress to occur *and* industry must be at the table when this role is being carved out to overcome the trust issues that prohibit business from “giving up control” when it comes to rule-setting.

Moderated by David Zaring (Wharton School of Business – Law Dept), the Panel 3 speakers, Jonathan Balcom (Securities and Exchange Commission), Peter Lyons, Jared Roscoe (Department of Treasury), and Christina Skinner (Brooklyn Law School) focused on the interactions between associations and public organizations. We heard about how differently associations interact with governmental organizations domestically as compared with the international sphere. In the case of financial regulation, for example, the domestic sphere appears to be more aggressive in terms of structuring the participation of associations' in law-making / standard-setting (detailed notice and comment procedures, Sunshine Act, FOIA). As a result, the domestic sphere is perhaps more shielded from associations' influence than is the case in the international sphere (e.g. within bodies like IOSCO and the FSB) where associations have a seat at law-making table and it is not uncommon to see IOs with separate committees headed up by associations. This again raised the issue of how capture can look different at the domestic and international levels.

The speakers shared the view that in the financial regulation realm, the relationship between government and associations is generally very collaborative, with industry supplementing government regulatory capacity where it is lacking, resulting in a more efficient allocation of resources between government regulators, private regulators, and industry. Skinner observed that one important way that associations supplement official regulatory efforts in the financial industry is to foster cultural change among bankers and their ilk to be more ethical. Indeed, certain aspects of industry behavior, like ethics, are very difficult to regulate through official means. However, as Skinner suggests, associations can drive conduct change/norm creation/norm restoration in three different ways: (1) by creating conduct certification regimes, (2) developing codes of conduct, or (3) by “deter[ing] market-damaging activities.”

One panelist observed that financial regulation is likely a special case where association participation is more structured as a result of the exponential increase in official regulation since the Great Recession. In other areas, however, associations may have much more influence, especially in industries where government expertise or monitoring capacity is outdone by industry expertise. And associations and government do sometimes compete, and in some circumstances, perhaps to mitigate the competition issue, association participation in official regulatory processes is required by statute (e.g. statutory SIFMA sub-committee).

This panel also raised the issue of the distributive effects of under-regulated participation of associations in governance. Specifically, well-resourced associations tend to have a big advantage over smaller associations in terms of paying to travel to international meetings or representing market interests that are sizeable enough to get the ear of official policy-makers; similarly, developed country associations will have an advantage over developing country associations. The speakers also discussed the challenge for an association whose mandate requires it to interact with national regulators to dedicate the same attention to all

governments and regulators. Often, associations have to prioritize which interlocutors to engage, which again entails a focus on the big (government) players, sometimes to the detriment of the small.

Moderated by Julian Arato, the closing remarks panel participants, Sarah Dadush, Henry Gabriel, Lyn Spillman (University of Notre Dame, Sociology and author of the book *Solidarity in Strategy: Making Business Meaningful in American Trade Associations*), Shana Starobin (University of Pennsylvania Law School), and David Zaring offered their thoughts on the day's discussions by revisiting the three themes set out at the beginning of the day. What follows is a brief recap of some of the main takeaways from that discussion.

In addressing the question about how autonomous associations are / should be as law-makers, Gabriel drew on his experience at UNIDROIT and the Uniform Law Commission. He explained that associations can have a loud norm-setting voice when it comes to setting standards and rules for their specific industry, rules that are designed to apply primarily to them and for their benefit (he gave the example of model laws drafted at UNCITRAL, the focus of which is private international law). On the other hand, when it comes to setting rules for areas that matter for broader policy reasons, a broader set of stakeholders, or if there is a clash between the interests of associations and those of other stakeholders, then associations are only one voice among many (including, for example, consumer groups, regulatory agencies, associations from other industries).

Starobin expressed the view that there should be limitations on how involved associations become in law-making, in particular when it comes to setting norms for the production / administration of public goods (e.g. clean water, breathable air, human rights protections). She cautioned that it is necessary to police the line between public and self-interested norm-setting, adding that this was especially important when association interests clash with those of other stakeholders. Depending on the industry, the likelihood of a clash will be more or less great. Thus techniques need to be deployed to bring the interests of industry and other stakeholders in line, and these techniques will be deployed differently depending on the industry. Her view is that associations have a role to play in norm-setting but that they should be only one voice at a—more inclusive than is currently the case—table. In short, they should be participants not leaders of the conversation.

Spillman's view is that associations will continue to expand their governance / coordination role, both at the domestic and the international level. As to the question of whether associational governance should expand autonomously from formal institutions, her view, like Starobin, is that it will depend on a number of factors, including, the industry, and the context in which governance activities unfold, which could be in a time of crisis. She described the expansion of associational governance as "intermittent." She generally cautioned against adopting a universalist normative framework for enabling / restricting associations' governance role. Echoing this view, Dadush added that associations will be called upon to take rule-making action at different times in an industry's life (when industry is emerging, when it faces a crisis that government may or may not be able

to address, or there is a major technological shift. Should they fail to answer the get-involved call of their members, associations risk become redundant.

With regard to the question, how important is it for associations to remain tethered to their members, Spillman explained that for smaller “dinner club” associations—which comprise a large share of associations in the US—autonomy was not really an option, as their survival depends on being very much tethered to their members. For bigger “policy associations,” on the other hand, a certain amount of autonomy might actually be a requisite for being efficacious, as these associations need to avoid being “captured” by their more powerful members to credibly engage with policy-makers.

Gabriel added that if associations do not speak for their members, the latter will find a way to “kill it” or at least kill the initiative that the association was trying to advance, for example, a treaty or a model law. He explained that the more successful associational governance efforts, at least at the international level, involved associations who mobilized and spoke for all of the key interested parties, bringing them under a “big umbrella.” While the failures were due to entities who had not been invited under the umbrella fighting back. Thus, Arato summarized, there are challenges of representation and autonomy not only within the association, but in the association’s interactions with formal law-making institutions / international organizations, in particular if associations fail to bring enough interests under their representation umbrella.

With respect to the desirability of associations’ engagement in international rule-making, Zaring explained that there are circumstances in which it will be more or less compelling. It will be more compelling when associations step in to fill a public international law or government capacity gap. Associations can develop standards, informal rules, and model laws more nimbly than public international law (the treaty process is painfully slow and complex). Associations’ engagement is also compelling when government lacks the capacity or resources to regulate a specific area. Their engagement is less compelling if it creates a risk of anti-competitive behavior. Starobin later echoed this concern, saying that associations can be used by their more powerful members to disseminate rules that give those members an edge over their competitors.

For Starobin, this desirability question raised the issue of the effectiveness of associational governance: effectiveness is in the eye of the beholder, and depending on which stakeholder you ask, their views may differ widely. Answers may again vary depending on the industry—where government lacks capacity but stakeholders’ interests are not clearly aligned (e.g. fast fashion in Bangladesh), having more associational engagement may not be desirable.

In addressing the question whether associations are well suited to pursue non-market values, Dadush re-emphasized the challenges faced by associations wishing to act autonomously from their members. Firm members, who have the freedom to association-shop, may have only limited appetite for their associations’ rule-making with respect to non-market / sustainability values. Should the gap between member and association executives become too wide, the association may not survive. Only some (larger) associations can afford to assert their ‘sustainability personality’ and run the risk of losing members.

Spillman underscored that many associations have a heterogeneous membership, rather than firm members that all belong to the same industry, and that this further complicates the issue of divergence between association executives' interests and members' interests when it comes to pursuing non-market values. She expressed the view that it is naïve to understand associations are only profit seeking. In fact, she explained, associations speak in two "vocabularies of motive." One is the vocabulary of collective interest (advancing the profitability of the industry), and one is the vocabulary of public stewardship, which is traditionally assigned to government but has and continues to find its way in the associational space, as well. She gave the example of minority inclusion as an example of an associational priority as a driving interest that can be described as more social-justice-driven than profit-driven (e.g. the National Association of Real Estate Brokers works to draw more business to real estate agents from minority groups to better serve minority communities).

Starobin added that associations are only one among many actors who can advance non-market values and that depending on the industry and the context, associations may or may not be the best "stewards." Gabriel remarked that the more long-term-minded an association (or an individual business) is, the better it will be at advancing non-market values. He gave the example of a family run business being more in touch with its social role in the world as distinct from, for example, an association for canners. Generally, he said, associations are less reliable protectors of consumers than individual companies. Zaring responded that some associations in the financial world are relatively "consumer-facing," and that they are advancing more "ethical banking" values. In spite of the consumer-facing dimension, it is unclear whether these efforts will bear fruit and/or be sustainable.

The panel closed with two suggestions for making the volume on non-market values within associations louder: Spillman's was to promote association prizes programs, which are not economically valuable (they cost more to put together than they pay off) but are valuable from a solidaristic sense because they ratchet up standards and values among industry players. For similar reasons, Starobin supported the idea of schemes that carry a big reputational bang—where the pursuit of enhanced reputational assets compels firms to undertake meaningful behavior changes.

Conference Outputs and Looking ahead:

The conference was a big success in terms of creating a community of thinkers and doers in the space of associations and governance, and in terms of sparking new conversations around this timely issue. It necessarily raised more questions than could be addressed in a single (packed as it was) day, and this was also a mark of success.

As an immediate output, video recordings of the proceedings are available on the Center's website, along with some of the papers presented at the conference.

In the longer term, our hope is to keep the conversation going and to grow this new community. To facilitate this, we are considering a) Launching a Working Paper series on the topic, that would be hosted and curated by the Center; b) Putting together a bibliography comprised of the most relevant literature; c) Organizing future events focused on specific sub-topics, for example, looking at a particular industry, (e.g. finance, food, or oil), or at a particular theme, such as the role of associations in advancing global policy objectives such as the Sustainable Development Goals, or at a particular challenge facing associational governance, such as how industry associations adjust to developments in technology or regulation.

We welcome any ideas and contributions from the conference participants, the Center's Advisory Board, and affiliated faculty members with an interest in this topic.