

IBA Sustainable Law in Action Podcast: ESG Conference – February 2024

Transcript

Introductory soundbite

Leecia Eve: Every single company is dealing with it, both for profit and non-profit as well as law firms. But I think if you know what your North Star is, you've got your plan. You have your alignment. It necessarily doesn't make the job easier to do in a polarised environment, but it does enable you to stay the course and move forward.

Podcast

Sara Carnegie (SC): Hello and welcome to the IBA's Sustainable Law in Action podcast. I'm Sara Carnegie, Director of the IBA Legal Policy and Research Unit. One of our key areas of work focuses on the role of lawyers in addressing climate change and business and human rights challenges.

We live in a world where businesses face increasing expectations from shareholders, investors and consumers to deliver positive outcomes for the environment and for society, and to operate in a manner that is transparent and accountable. Environment, social and governance, or 'ESG', is an umbrella term to describe the collection of factors that are taken into account when assessing an organisation's ability to manage its environmental and social impacts, and the robustness of its governance structures.

Given the growing importance of ESG for businesses, and their lawyers alike, this February in New York, the IBA North American Regional Forum and Energy, Environment, Natural Resources and Infrastructure Law Section, otherwise known as SEERIL, convened the IBA's second annual conference on ESG. I was on the ground in New York to have conversations with conference panellists about the role of lawyers in the ESG space and key challenges and opportunities. I was joined by Melissa Murphy KC, who has over 20 years of experience as a barrister at Landmark Chambers in London, with particular expertise in ESG and a focus on corporate and Third Sector compliance.

Today's podcast features highlights from those conversations. We were joined first by John Sherman, who is a leading authority on the UN Guiding Principles on Business and Human Rights, or the UNGPs. He acted as senior legal counsel to Professor John Ruggie, who authored the UNGPs during his UN mandate. John [Sherman] is currently Chair of the Advisory Committee of the Hoffman Center for Business Ethics at Bentley University.

As someone who was deeply involved in crafting the UN Guiding Principles on Business and Human Rights, how do you perceive the role of law firms in advancing the principles of ESG, and what steps do you think they should take to align with sustainability goals, both internally and with client engagements?

John Sherman (JS): John Ruggie wrote that lawyers were the most consequential new players that he invited into the business and human rights debate because of their influence on the corporate C-suite. And I think that has proven to be true, because when I got involved in this area 15, 20 years ago, the only lawyers who were involved were litigators defending against human rights claims. Now you have M&A lawyers, you have transactional lawyers, you have ESG lawyers, you have procurement lawyers – they're all involved. And you've got laws – you've got a multiplicity of laws all around the world.

So, what does that mean? It means opportunities for lawyers in terms of new compliance practice areas. It means being aware of all the ways in which their advice can implicate potential human rights harms. Those are opportunities for law firms. The challenges are developing the competencies and skills to do this work, and also looking inwards to understanding the extent to

which a lawyer's advice services can facilitate or enable or encourage a client to engage in activity to harm human rights. And I think lawyers do not fully appreciate that impact yet.

Melissa Murphy KC (MM): What specific challenges do you envisage for law firms in effectively integrating ESG considerations into their operations and client services?

JS: It really involves a mindset change among lawyers to, first of all, get down to basic principles of 'what is the key standard out there for determining the impact on, on people, of business activities'? And figuring that out requires an understanding of the UN Guiding Principles on Business and Human Rights – that is the universally accepted standard. It has inspired legislation, it has given rise to litigation, it affects companies – it applies to all business enterprises. There's no exception for law firms: they are big businesses and they have their own responsibility to respect human rights, subject to their professional responsibilities as lawyers. A lot of it boils down to a balancing effort between the client's desires – which the lawyer wants to further – and to the concept of public interest, which is virtually universal in all bar associations. And, lawyers have to make that balancing.

SC: We spoke with Professor Irma Russell at the University of Missouri Law School. Professor Russell has written extensively on corporate social responsibility and sustainability in legal practice, including a recent book titled *Sustainability Essentials: A Leadership Guide for Lawyers*, which she co-authored with John Dernbach and Matthew Bogoshian. We asked Irma for her thoughts on the role of lawyers in the ESG context.

Irma Russell (IR): Lawyers' main function is to serve clients, but it's not an unbounded task or calling. It's to serve the client's legitimate interests: any service of an illegitimate interest is also illegitimate. And the other qualifier that sometimes we forget about is that lawyers can only use lawful means in serving those legitimate interests. So, I think if we keep those two adjectives about the interests and the methods, that we will stay on the right side of the line.

SC: You work within legal education, and it's interesting to me to think how legal educational institutions can better prepare future lawyers to navigate these complexities so that they are providing effective counsel to clients. Do you have any observations on that?

IR: We have now, as a matter of legal education in this country, required ethics and professional responsibility as a class, and that wasn't always the case. So, I think that in the changing world, we need to scrutinise again what we require in that area of professional responsibility. In recent years, the American Bar Association [ABA] has moved toward requiring diversity, equity and inclusion [DEI] part of the professional responsibility canon that students need to learn. And the accreditation standards for law schools make that a reality. And just now the ABA is working on a resolution on climate change and sustainable development. We need to have the same seriousness about it that we appropriately have for DEI. We need to have a programme where we know that all students get the basics of climate change, the basics of sustainability.

SC: The term 'climate-competent lawyering' is becoming increasingly well known as terminology that's mainstream. What does it mean to you, and how do you see that playing out in the future, both in terms of the lawyer's practice, but also what the bars and the regulators might need to do to facilitate that transition?

IR: Everything we do affects the climate and sustainability. And so, recognising that means that lawyers need to be prepared to talk with clients, advise them first on the law, and then second, they should be, talking about advising on opportunities that now exist and risks that now exist. One point that we often overlook is that lawyers are not dropped down into a functioning system that's static. The system is always changing because it has to change in response to needs, and lawyers are part of that role of changing. The bar associations recognise that lawyers have a duty to help change the law when needed. And so, when we recognise that, we see that it's not enough for lawyers to simply say 'I can't do anything more than tell the client where the line is'. So, lawyers

are not simply inside the system: they are also a corrective in the system. And some lawyers will, inevitably, I believe, step up to that challenge.

SC: We were delighted to be able to speak with Doug Jones, an American attorney and former US Senator for Alabama. In addition to being counsel at law firm ArentFox Schiff, he is Senior Fellow at the Center for American Progress Policy Institute, where he focuses on issues of racial justice and equality, voting rights and law enforcement reform. We asked Doug for his thoughts on how lawyers and businesses should respond to the recent politicisation of ESG, which we're seeing is particularly problematic in the US and the European Union.

We're hearing from Senator Doug Jones, who's been speaking about the political aspects and how ESG has been politicised, as we've seen in the US and perhaps more recently within the European Union, in the debate that's happening. How can we avoid those extreme perspectives and the politicisation, if you like, of ESG, and how can we avoid the impact of that on lawyers? Are effectively lawyers now stepping into a policymaking role? And could you give us your thoughts on that, Doug, and how we could perhaps avoid that?

Doug Jones: I think for lawyers and for businesses, they have to be aware. They have to really understand the dynamics that are in play right now, [and] where people are coming from. If we use your mission, if you use what is in the best interest of the client, the company or whatever. If you use the data – and the data is something that I think is really important. If you move away from labels – I'm not talking about the label of a political party, I'm talking about political labels, like ESG has become a political label. The moment you start using those political labels, people take sides and they get entrenched. And so, I think lawyers ought to be good at that. You know, lawyers tell everybody every day that, 'put aside your biases', 'put aside your prejudices', 'judge things on the facts, and here are the facts'. We do that every day, whether it's in front of judges, whether it is with clients, whether it's in front of juries. I think we have to continue to do that in a bigger context – even if it is in social circles, when we're having a cocktail with somebody. You can be amazed how [much of] an effect that can have, a positive effect.

SC: Moving on to the importance of ESG for business, we spoke with Sarah Fitts, who is a Council Member of the IBA Energy, Environment, Natural Resources and Infrastructure Law Section. Sarah is also a partner at ArentFox Schiff in New York, where her practice has a particular focus on the energy and infrastructure industry.

MM: Is there an argument, do you think, for saying that embedding ESG within your business is simply prudent management?

Sarah Fitts (SF): A lot of ESG improvements go straight to the bottom line. If you can reduce turnover on employees because they feel more included, that's real money. And if you don't understand what their concerns are on procurement, you're not going to be able to help them when they're doing their big construction project. So, it's really a matter of understanding business.

There's stupid ESG though. I was talking to a friend who works at a company that was on the tipping point of financial insolvency, and they were a food distribution business. So, there were lots and lots of things they could be focusing on, like reducing packaging costs, reducing food waste, reducing the amount of time that food had to stay in refrigerators to increase freshness and reduce electricity. And they had the notion that their ESG solution was onsite day care. There was no way you could really tick the boxes that there was an A to B on a financial justification for this. I would caution against stupid ESG, but things that really tie to the business – making your buildings more efficient, reducing packaging – all of those things, everybody wins.

SC: What else do you think the IBA could do for its members to assist in this space?

SF: You know, we heard a lot in the conference about how the multitude of regulations is a real burden; that doing the same report five times with slightly different metrics doesn't improve the data or the use of it, and it imposes costs. And I think some of the reporting burdens risk pushing

small enterprises out of the supply chain entirely, or forcing them to work through aggregators which will further reduce their profitability. So, I think people who look at things like harmonisation of regulations, might find a really interesting project there. It would be an opportunity for, for model laws, for example.

SC: Leecia Eve is a public policy, legal and compliance expert with more than three decades of experience in government and private industry. Leecia is currently a partner at management consulting firm Ichor Strategies. We asked for her insights on how businesses can sustain their ESG initiatives, including those relating to diversity, equity and inclusion in the face of increasing hostility towards this aspect of ESG, as seen more recently in the US.

Leecia Eve (LE): Yes, this is an incredibly polarised environment, this issue around the world, but particularly in the US. You have to know, what are your goals? What are your priorities? What is the strategic plan to get there? Every single company is dealing with it, both for profit and non-profit as well as law firms. But I think if you know what your North Star is, you've got your plan, you have your alignment. It doesn't necessarily make the job easier to do in a polarised environment, but it does enable you to stay the course and move forward. Also, what enables one to stay the course is recognising that it's important to the bottom line of the business.

But there are going to be legal challenges: law firms are being sued, investment banks are being sued, because they may have, quote unquote, in the eyes of the litigants, too much of a focus on ESG and not enough.

SC: What I was going to ask you actually, in relation to your experience in both public and private sector and now as a consultant, whether you saw different challenges in the two sectors? Because certainly in my background as well, I worked in the public sector for many years, and I saw a much greater emphasis on DEI much earlier in the journey compared with private sector activity – and particularly, you know, dare I say it, within the legal sector itself, within law firms, big business law firms. Just wondered if you'd had any particular thoughts on the difference between the two.

LE: Yes. Well, I believe this is an area where historically, as a general matter, equality, equity, social justice, transparency, those are areas where traditionally government has led. But if you look at literally where we are today in 2024, [the Biden] administration has done extraordinary work in terms of the tens of billions of dollars that are going to states and local governments and to some extent, to private corporations around the country to significantly improve the nation's infrastructure. A key element in those federal laws is an equity component because he – the President of the United States – recognises that federal government has made mistakes in the past in terms of where investments have been made, that they haven't been made equally across communities, that historically disadvantaged communities were never the full beneficiaries of these efforts. So this is a space where, again, government is way out ahead.

MM: Thinking about the S in ESG, do you see any benefit in the public disclosure of what companies are doing in this regard?

LE: Short answer to that question is yes, I do see benefit. As an investor myself, I would like to know lots of data about a particular company: obviously, its return on investment, how its products are doing, what its safety record is for its products, for its employees. And yes, I would like to know where it stands with respect to other aspects of the S and G. But I would say as a follow on, measurement for the sake of measurement obviously doesn't really do anybody good.

SC: To understand how multilateral development banks are responding to the ESG challenge and the role of sustainability disclosure frameworks, we spoke with Christopher Stephens, who is Senior Vice President and General Counsel of the World Bank Group. Christopher is – among others – responsible for overall coordination and support on legal aspects of the operational activities of the World Bank.

MM: We've just had an introductory panel which has provided us with a state of the nations review of ESG in terms of developing regulatory frameworks, and much of what we've heard about has been about disclosure requirements. Are we doing enough, quick enough, towards an outcome as distinct from processes? Because all of that disclosure and evaluation and assessment is process-based.

Christopher Stephens (CS): The disclosure requirements are an important part of the concept of accountability. There's enormous pressure on companies to pronounce good ESG practices. Whether they walk the talk is a different matter. And when you leap from the talk to regulation, you get the lawyers very excited and focussed on risk, which is why I think international best practices short of formal requirements are an effective middle ground to transition people into good behaviour, as it were, so that they can aspire to a standard and pronounce the standard without the threat of risk and liability that the lawyers are terrified of. But that said, there has to be that accountability. And I think transparency and reporting is an essential element of that.

SC: Given the increasing emphasis on ESG and social responsibility, how do you envision the role of lawyers evolving within the World Bank Group to further integrate ESG principles into its operations and decision-making processes?

CS: Like the private sector, our lawyers have to be aware of policy requirements, market practices, stakeholder expectations and risks, including reputational risks. Our lawyers are intimately involved in developing policies, both internally for the Bank and for external application in our operations. But we also support operations' teams and our clients directly in the public sector, where we support policy enhancements in governments, and in the private sector, where we require or engage good practices – in both cases, supporting training and capacity building for better implementation of ESG on the ground.

SC: Thinking about the role of lawyers and the evolving nature of how they advise clients, how do you perceive that that is going to increase in the context of the shaping of corporate behaviour beyond the World Bank Group? And I particularly consider some of the comments that we've been hearing at the conference in relation to this wider concept of public interest. How do you see that fitting with the role of lawyers in this context?

CS: I think lawyers have an enormous opportunity, particularly when working through, trade groups – like the IBA, like the Compact and Forum on SDG 16 – to create and lift the concept of international law and emerging market standards, so that when people are looking for benchmarks of what is best behaviour, best practices, they can look at those standards that have emerged, and were developed by organisations like the World Bank, like the IBA, like the Compact and Forum.

MM: Thinking about the strategies and initiatives which you personally have implemented, what would you tell us about that?

CS: Well, there's a number of different policies. The ESF (Environmental and Social Framework) is the policy that always requires implementation when we make a loan, when we make an investment in a company or in a project. More recently, we've been more actively involved, including through the legal team, in advising governments on policy dialogue to improve national requirements so that these standards are applicable more broadly than just within our projects. And that's an effort both to raise the standards across the board and to raise the standards of international best practice as a model for broader application.

SC: Florencia Heredia is the chair of SEERIL and a senior partner of an Allende and Brea in Argentina, where she heads the Natural Resources and Energy practice. We asked Florencia for her insights on how the different committees in the SEERIL section of the IBA are prioritising ESG in their work.

We would be really keen to hear about the progress and the priorities that SEERIL has placed on ESG as a concept, and whether you've got any insights into what the different committees are doing and how they regard this.

Florencia Heredia (FH): SEERIL is a section that encompasses several committees – Mining, Oil and Gas, [International Construction] Projects, Power, Environment [Health and Safety], and Water Law – so, we have a strong focus on the extractives sector, and the ESG topic has always been in the core of the concerns of our industries. However, the way these issues are approached today – and the different mindset and evolution at the corporate level and investors level – certainly makes a change and drives different forces to change the landscape. We in SEERIL are very conscious of these changes and challenges, and we work towards trying to bring value to our members in showing these trends and how we, as experts in these fields, consider that they have to be best approached.

SC: The position in Argentina, we heard you speak about it, particularly with regard to the extractive industry, the mining companies that you've worked with. Are there particular challenges that you are seeing in that jurisdiction?

FH: Certainly, Argentina is a Latin American country, and Latin America is a region that has the blessing of having a lot of resources, but also is a region of the world – and Argentina is no exception I might say – one of the leading countries in political unrest and economic disturbances, and this has been going on for quite some time. So, I think the challenge there is how to comply and address all these concerns, the most advanced environmental techniques and protection, the social awareness and how projects impact communities, and also the governance of the companies in an environment which is very challenging because of economic issues. So, for companies, and my experience as external counsel with companies, [it's] always very hard to try to balance all these issues.

MM: Environmental considerations, similarly, social and governance considerations and objectives have been around for a long time. What I'm interested in, though, is whether the need to transition in an orderly way to net zero has an impact and if so, what you see that as being for the sort of industries which you are familiar with.

FH: What I do see is that companies are being very careful to commit – and to report on how they commit - on, on their net zero goals, because it's really very hard to achieve it. And certain industries like, let's say, oil and gas, cannot be reconverted from one minute to another or from one year to another. Most of the largest oil and gas companies are opening their mining divisions. They are going into the exploration of critical minerals or transition energy minerals like lithium.

SC: John Vellone was one of the co-chairs of the IBA's ESG Conference. He's also a partner and national leader of the Energy Resources and Renewable Sector, at Borden Ladner Gervais in Toronto, and a national leader of the firm's ESG initiative.

John, we'd be really interested to hear your insights into the challenges and opportunities that are faced by legal professionals in addressing ESG issues within the energy, environment and natural resources sector, particularly in Canada.

John Vellone: Frankly, the opportunities and the challenges are all coming almost from the same space. In our sectors, the energy transition – that is a global effort to try to decarbonise and shift away from fossil fuels to other non-emitting energy sources – is triggering, I will say, a wealth of opportunities for some of our clients in the electricity and renewables space as they see business boom globally. [It's] triggering concerns around existential threats for some of our clients in the oil and gas industries that are looking to facilitate a gradual transition to some other type of fuel sources, be they biofuels, hydrogen, etc. [It's] triggering opportunities for competitive advantage for our clients in the mining and natural resources space, as they realise they can distinguish themselves from some of their peers by significantly outperforming on some of these greener types of metrics. They need to get the dollars in to build the mine to begin with, and to do that, they need

to get through the ESG screens. And so they are seeing these screens as barriers to their ability to raise funds and in a high interest rate, high inflation environment, with the supply chain type of challenges that we have seen persist even though we're out of the global pandemic.

Almost everywhere I go in my space – natural resources, writ large – the energy transition is dominating, the topic both as a risk and as an opportunity.

SC: Last but not least, to round out our discussions at the ESG event, we delved into the intersections of ESG and credit risk with Patrick Welch, who is Chief ESG and Ratings Policy Officer at Kroll Bond Rating Agency in New York, where he is responsible for leading the agency's credit ratings policy and overseeing the firm's ESG strategy.

Patrick Welch (PW): We see the world of ESG as having two perspectives. One perspective is those elements of ESG that relate to the financial or credit quality of an issuer of debt. And then the other perspective is, you know, what are the things that the company is doing that has impacts on society. I know that's overly simplistic and there are things that cross over, but we think it's really important as a starting place in thinking about ESG, to separate those two perspectives.

MM: Wouldn't a company's ability to transition in an orderly and rational way to net zero – wouldn't that be material to value?

PW: A company's ability and its wherewithal to transition, and the cost that would be required for it to transition is very much in the domain of what a credit rating agency should be thinking about right now. To show you the complexity of this, carbon emissions up until recently have been treated as exogenous to operating your business, even though on a worldwide basis, it's a cost. So, what the world is doing now is trying to figure out how to take that worldwide cost and allocate it to the people creating the cost, to the companies creating the cost. But you have to figure out for any given company how that cost might impact its ability to pay back its debt. The problem with carbon and the problem with transition is that it's still got things to work out before it becomes a clearly allocatable cost.

SC: That means that you'd be assessing a company's risk of litigation, risk of shareholder, shares falling, stock falling, and all of those things impact the risk of default, etc.

PW: If you do good credit analysis, you're looking for anything that impacts the ability to repay debt obligations. Interestingly, in the early days of ESG, where there was a really big push on ESG, where people wanted everything to be put into a credit rating, that shouldn't have been put into a credit rating. And now we're at the other end of the spectrum where some people who are pushing back on ESG say that there is nothing that matters in ESG to credit risk. And neither of those two views are true. They weren't true then and they're not true now. I think the world is going to, as it moves forward on ESG, it's going to, in a better way, figure out those things that are financially material and then we are going to actually all feel those things in our lives in a way that's not just in the political arena.

SC: What was clear from these discussions is that ESG matters to every type of business, from food and beverage companies to energy and mining firms, and that lawyers play a critical role in helping businesses to understand and respond to material ESG-related risks and opportunities. We heard that the increasing politicisation of ESG poses a real challenge, particularly in the US, but that lawyers can help navigate this environment through focusing on the facts and helping clients stay true to their ESG priorities.

Looking ahead, the IBA is committed to continuing to provide a platform for lawyers to come together to discuss pressing ESG challenges through its conferences, seminars and publications. The issue is not going away, whatever acronym we use.