

UN Forum on Business and Human Rights 2014

Summary of side event: “Principles in Practice – recent developments in law and legal practice in the field of business and human rights”

Organisers: Herbert Smith Freehills LLP and Faculty of Law, Western University

Date and Time: 1 December 2014, 10am-11:30am, Room XI

Participants:

Moderator: Sara Seck, Associate Professor, Faculty of Law, Western University

Panelists:

Sarah Altschuller, Counsel, Foley Hoag LLP

Stéphane Brabant, Partner, Herbert Smith Freehills LLP

Jeff Collins, Senior Counsel of International Policy, Chevron

Rachel Davis, Managing Director, Shift

Anthony Ewing, Lecturer in Law, Columbia Law School

Roger Leese, Partner, Clifford Chance LLP

Mahdev Mohan, Assistant Professor of Law, Singapore Management University

Overview:

The past year has seen evidence of increasing efforts to implement the UN Guiding Principles on Business and Human Rights (UNGPs) by States and businesses. This session provided an update on recent legal developments and discussed current legal issues associated with the implementation by businesses of the UNGPs. Reference was made to the challenges faced by business lawyers advising on human rights and the implications of these challenges for current legal educational initiatives.

Summary of Substance:

The side event took the format of a facilitated panel discussion with an opportunity for questions from the floor. The discussion sought to address five questions:

1. What legal developments have there been at the international and national level that you think will lead to more companies implementing the corporate responsibility to respect human rights?

Panelists provided insights into recent legal developments in the ASEAN, the United Kingdom, France, the European Union and the United States. These developments included new or revised laws relating to transparency and supply chains, reporting, access to justice and provisions in investment agreements.

2. What trends are you seeing in terms of litigation against companies for allegations of human rights-related impacts? What trends are you seeing in terms of companies attempting to facilitate access to remedy through non-judicial grievance or remedy mechanisms?

The panelists briefly referred to the decrease in ATS litigation in the US and examples of tort-based litigation in Canada and the UK, as well as future possibilities due to new

legislation. However, it was highlighted that while litigation used to be the primary motivator for businesses to approach legal counsel, the increase in other human rights laws means that litigation is no longer the only or even primary driver. The conversation then turned to non-judicial grievance mechanisms, including efforts to integrate NJGM requirements into loan agreements. Results of a pilot project by IPEICA on best practices on NJGMs will be released soon. The importance of NJGMs not becoming a box-ticking exercise was stressed, with reference to the UNGPs' effectiveness criteria, especially legitimacy.

3. What do you see are the key legal issues facing companies when implementing the corporate responsibility to respect?

Panelists noted the challenges associated with integrating human rights due diligence (HRDD) within existing policies and procedures as required by other laws, and related cultural issues within an enterprise. The need to be creative in identifying how to exercise influence and use leverage was discussed. Challenges were identified in reconciling legal duties of data protection, confidentiality and price sensitive information, with disclosure and transparency required in HRDD.

4. What do you think are the main challenges facing business lawyers in advising on human rights?

The panelists identified structural, cultural and educational challenges facing lawyers advising business enterprises on human rights. Structurally, there is often a lack of understanding of human rights issues by internal counsel who may be unfamiliar with the UNGPs as well as related CSR commitments of the business. There is also a tendency to treat human rights as a box checking exercise. It was noted that the perimeter of the lawyer has extended as negative human rights impact on others are now a legal concern, but understanding this requires a critical shift in mindset for business and their lawyers. This requires CSR consultants to work with legal counsel both internally and externally. The importance of education was identified, from guidance tools such as the OECD stakeholder engagement tool for extractive companies (not yet released) to online internal law firm education on HRDD. Reference was also made to Columbia University's Teaching Business and Human Rights Forum.

5. What developments have there been within the legal profession and law teaching that you think will help business lawyers to overcome these challenges? What more do you think could be done, or done differently?

The panel concluded by reflecting upon the role of legal education in implementation of the UNGPs. Within law schools, the need to integrate business and human rights (BHR) into existing curricula was identified, as well as the development of new courses including especially in the geographies of the world where human rights impacts are most felt. The role of professional legal education was highlighted, and related reports from the IBA, ABA and Law Society of England and Wales were noted. These reports consider the relationship between professional responsibility and ethical codes for lawyers and the UNGPs, and the role of bar associations and law societies in educating for implementation. The recently released draft IBA Guidance for Bar Associations and Business Lawyers was specifically discussed.