

Global Arbitration Review

# The Guide to Mining Arbitrations

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Editors

Jason Fry and Louis-Alexis Bret

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## Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Mining Arbitrations*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service. But we also provide more in-depth content: books and reviews; conferences; and handy workflow tools, to name just a few. Visit us at [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com) to find out more.

Being at the centre of the international arbitration community, we regularly become aware of fertile ground for new books. Recently mining – and the disputes it throws up – emerged as one such topic.

One could assume mining is little different from energy – which is already covered by a GAR guide (*The Guide to Energy Arbitrations*). But as Jason Fry and Louis-Alexis Bret explain in their excellent Introduction, miners face other risks. More than energy companies, their projects depend on the blessing of the local population because they are visible and on people's doorsteps in a way that oil and gas projects are not. And there are other differences. It is easier to value an early-stage oil and gas asset than a mine, which has implications for damages. And different substantive principles apply. The *lex mineralia* is less influenced by decisions out of Texas and more by rulings in Australia and Canada.

The era of hydrocarbons is waning, while that of minerals and metals is heading the other way. Copper, cobalt, lithium, silicon, zinc and other precious resources are required for batteries, circuitry and solar panels – they are powering the growth of technology and clean energy.

For all these reasons, it seemed right to add mining disputes to the topics covered by the GAR Guides series.

*The Guide to Mining Arbitrations* is the result. It is a practical know-how text in three parts. Part I identifies the most salient issues in mining arbitration, which are identified by reference to the key business risks facing the mining and metals sector. Part II introduces select substantive principles applicable to mining arbitrations, while Part III introduces some regional perspectives on mining arbitration. The Guide ends with a brief conclusion.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Mining Arbitrations*. If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A, and challenge and enforcement of awards in the same practical way. We also have books on advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration*).

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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# Part II

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## Applicable Substantive Principles



# 8

## Human Rights and International Mining Disputes

**Rae Lindsay and Anna Kirkpatrick<sup>1</sup>**

### Introduction

The mining industry can have positive, long-term beneficial effects generating economic and social benefits for local communities and wider society. Equally, it is necessarily accompanied by a high risk of adverse impacts on human rights. Mining operations are complex, and managing the associated risks is challenging, but failing to do so effectively increases the potential for disputes.

In this chapter we discuss the ways in which human rights issues typically arise in mining projects, assess recent efforts by the mining industry to address those issues – spurred by stakeholder pressures and legislative developments – and consider the variety of dispute resolution methods that are utilised to seek remedy against businesses for alleged human rights harms associated with mining operations. Throughout the chapter, we consider the key role played by the UN Guiding Principles on Business and Human Rights (UNGPR), the global authoritative standard on business and human rights, in framing the way in which disputes arise in the sector.

### Human rights and mining

The responsible and sustainable development of mines can bring economic empowerment to communities local to the mine, and can contribute to inclusive social development, transparency and the good governance of public revenues from the exploitation of a country's natural resources. Conversely, the negative impacts of mines can be severe and far-reaching. The recent collapse of a tailings dam at the Córrego do Feijão iron ore mine

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<sup>1</sup> Rae Lindsay is a partner and Anna Kirkpatrick is a senior associate at Clifford Chance LLP. The authors would like to thank Deepaloke Chatterjee and Olivia Johnson for their assistance in the preparation of this chapter.

in Brazil is illustrative. The incident killed over 200 people and polluted nearby rivers.<sup>2</sup> The dam is owned by Samarco Mineracao SA (Samarco), a joint venture between Vale SA (Vale), a Brazilian corporation, and BHP Billiton Brasil, whose parent company is BHP, a dual-listed entity in the United Kingdom and Australia. This is the second time in four years that an operation in which Samarco had an interest has collapsed.<sup>3</sup> Since the incident, litigation against the shareholders has ensued (BHP faced a £5 billion lawsuit in the United Kingdom)<sup>4</sup> and investor reaction has been swift,<sup>5</sup> including a threatened<sup>6</sup> class action lawsuit by shareholders affected by the drop in share prices.<sup>7</sup> Calls for stronger governance in the mining industry have come to the fore, with one former investor in Vale stating that the incident ‘confirms once again our very cautious ESG view on the mining sector’.<sup>8</sup> These tragic incidents have, however, served as an impetus behind collective industry action to improve the safety of tailings infrastructure.<sup>9</sup>

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- 2 Amanda Jasi, ‘Employees removed following Brazil dam collapse’ (*The Chemical Engineer*, 12 March 2019) [www.thechemicalengineer.com/news/employees-removed-following-brazil-dam-collapse/](http://www.thechemicalengineer.com/news/employees-removed-following-brazil-dam-collapse/), accessed 27 April 2019.
  - 3 An iron ore tailings dam in Mariana collapsed on 5 November 2015, killing 19 people and polluting nearby rivers. Samarco also owned the tailings dam. It was described at the time as ‘Brazil’s worst environmental disaster’. Dom Phillips, ‘Samarco dam collapse: one year on from Brazil’s worst environmental disaster’ (*The Guardian*, 15 October 2016), [www.theguardian.com/sustainable-business/2016/oct/15/samarco-dam-collapse-brazil-worst-environmental-disaster-bhp-billiton-vale-mining](http://www.theguardian.com/sustainable-business/2016/oct/15/samarco-dam-collapse-brazil-worst-environmental-disaster-bhp-billiton-vale-mining), accessed 27 April 2019.
  - 4 Jonathan Watts, ‘BHP Billiton facing £5bn lawsuit from Brazilian victims of dam disaster’ (*The Guardian*, 6 November 2018), [www.theguardian.com/environment/2018/nov/06/bhp-billiton-facing-5bn-lawsuit-from-brazilian-victims-of-dam-disaster](http://www.theguardian.com/environment/2018/nov/06/bhp-billiton-facing-5bn-lawsuit-from-brazilian-victims-of-dam-disaster), accessed 27 April 2019.
  - 5 Examples include the move by the head of sustainable finance at Swedish bank Nordea to block the bank’s investment managers from buying shares in Vale SA (Barbara Lewis, Simon Jessop and Clara Denina, ‘Trust in tailings? Vale dam disaster spurs investors into action’ (Reuters, 15 February 2019) [www.reuters.com/article/us-vale-sa-disaster-investors/trust-in-tailings-vale-dam-disaster-spurs-investors-into-action-idUSKCN1Q41PE](http://www.reuters.com/article/us-vale-sa-disaster-investors/trust-in-tailings-vale-dam-disaster-spurs-investors-into-action-idUSKCN1Q41PE), accessed 1 April 2019); the sale by the Church of England of its shares in Vale SA (August Graham, ‘Church of England sells shares in miner Vale after dam disaster kills hundreds’ (City AM, 31 January 2019), [www.cityam.com/272558/church-england-sells-shares-miner-vale-after-dam-disaster](http://www.cityam.com/272558/church-england-sells-shares-miner-vale-after-dam-disaster). Accessed 1 April 2019); and the reduction of Vale’s credit rating from credit rating agencies Moody’s, S&P Global Ratings and Fitch (Jonathan Wheatley, ‘Vale’s credit rating cut to junk by Moody’s’ (FT, 27 February 2019), [www.ft.com/content/964a924c-3aca-11e9-b856-5404d3811663](http://www.ft.com/content/964a924c-3aca-11e9-b856-5404d3811663), accessed 27 April 2019).
  - 6 Zhang Investor Law PC, ‘VALE ALERT: Zhang Investor Law Announces the Filing of a Securities Class Action Lawsuit Against Vale S.A. –VALE’ (Globe News Wire, 22 February 2019), [www.globenewswire.com/news-release/2019/02/22/1740924/0/en/VALE-ALERT-Zhang-Investor-Law-Announces-the-Filing-of-a-Securities-Class-Action-Lawsuit-Against-Vale-S-A-VALE.html](http://www.globenewswire.com/news-release/2019/02/22/1740924/0/en/VALE-ALERT-Zhang-Investor-Law-Announces-the-Filing-of-a-Securities-Class-Action-Lawsuit-Against-Vale-S-A-VALE.html), accessed 27 April 2019.
  - 7 On 28 January 2019, almost US\$18 billion was wiped off the market capitalisation of Vale. Vale’s shares on Brazil’s stock exchange fell by as much as 24 per cent to 42.67 reais: Neil Hume, ‘Vale sheds quarter of its value after Brazil dam disaster’ (*Financial Times*, 28 January 2019), [www.ft.com/content/0c3ba452-22e1-11e9-b329-c7e6ceb5ffdf](http://www.ft.com/content/0c3ba452-22e1-11e9-b329-c7e6ceb5ffdf), accessed 27 April 2019.
  - 8 Susana Penarrubia, the head of ESG integration at DWS asset managers in Barbara Lewis, Simon Jessop and Clara Denina, ‘Trust in tailings Vale Dam disaster spurs investors into action’ (Reuters, 15 February 2019), [www.reuters.com/article/us-vale-sa-disaster-investors/trust-in-tailings-vale-dam-disaster-spurs-investors-into-action-idUSKCN1Q41PE](http://www.reuters.com/article/us-vale-sa-disaster-investors/trust-in-tailings-vale-dam-disaster-spurs-investors-into-action-idUSKCN1Q41PE), accessed 27 April 2019.
  - 9 ‘ICMM commits to create an international standard for tailings dams’ (ICMM, 26 February 2019), [www.icmm.com/en-gb/news/2019/international-standard-for-tailings-dams](http://www.icmm.com/en-gb/news/2019/international-standard-for-tailings-dams), accessed 27 April 2019.

Unfortunately, these types of incidents in the mining sector are not rare, nor are the significant environmental and human rights impacts that accompany them.<sup>10</sup> In addition to these catastrophic impacts, there is a wide range of human rights risks associated with the mining sector that arise on a daily basis. The supply chain related to any mining project is likely to involve potential impacts on employment and diversity rights, child rights, and risks of modern slavery. The right to a safe and healthy working environment is often at risk in the inherently hazardous work conditions associated with mining. Indigenous peoples and local communities can be affected in multiple ways by mine operations (for example, when they are exposed to the environmental effects of operations and associated infrastructure construction, or resettlement). Security and conflict risks are inherent in many mining projects that are located in areas affected by unrest, conflict or severe economic deprivation, or in weak governance zones. Systemic issues within many of the countries in which mines are located may exacerbate human rights risks for businesses. In these contexts, business ethics and corruption will also be a concern. Most recently, the mining industry has become an obvious target for calls to address the negative human rights consequences of climate change.<sup>11</sup>

The particular human rights challenges facing a mining project will vary in intensity and nature, depending on the stage of the mine's life cycle; but the responsibility is acute, given that projects can span decades. Thus, from exploration through design and development, construction, extraction and production and then upon closure and reclamation, significant potential human rights impacts arise and have the potential for dispute, unless managed sensitively and effectively.

## **The UNGP**

The international standards and expectations for states and businesses in respect of business-related human rights harms are articulated in the UNGP. The UNGP is a non-binding instrument endorsed unanimously in 2011 by the UN Human Rights Council.<sup>12</sup> The UNGP operate within a three-pillar framework endorsed by the UN Human Rights Council in 2008 (the Three Pillar Framework).<sup>13</sup> First, states have existing legal obligations to respect, protect and fulfil human rights. Second, business enterprises are required to comply with applicable laws and respect human rights. Third, effective remedies need to be available when rights and obligations in respect of human rights are infringed.<sup>14</sup>

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10 Rio Tinto provides an illustrative overview of the types of human rights-related dispute that can arise in connection with mining projects. See 'Why Human Rights Matter' (Rio Tinto, January 2013) 14, [www.riotinto.com/documents/ReportsPublications/Rio\\_Tinto\\_human\\_rights\\_guide\\_-\\_English\\_version.pdf](http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf), accessed 27 April 2019.

11 '10 Human Rights Priorities for the Extractives Sector' (BSR, n.d.) [www.bsr.org/en/our-insights/primers/10-human-rights-priorities-for-the-extractives-sector](http://www.bsr.org/en/our-insights/primers/10-human-rights-priorities-for-the-extractives-sector), accessed 27 April 2019; 'Climate and Human Rights: The Business Case for Action' (BSR, November 2018), [www.bsr.org/en/our-insights/report-view/climate-human-rights-the-business-case-for-action](http://www.bsr.org/en/our-insights/report-view/climate-human-rights-the-business-case-for-action), accessed 27 April 2019.

12 UNHRC Res 17/4 (2011) UN Doc A/HRC/RES/17/4.

13 John Ruggie, 'Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,' (7 April 2008) A/HRC/8/5 (Third Pillar Report).

14 UNHRC, 'Guiding Principles on Business and Human Rights' (2011) HR/PUB/11/04 (UNGP).

According to the UNGP, the corporate responsibility to respect means that business enterprises should avoid infringing on the human rights of others and address adverse human rights impacts that they are involved with.<sup>15</sup> Accordingly all business enterprises should avoid causing or contributing to adverse human rights impacts through their own activities, and address those impacts when they occur (by ceasing the activity or mitigating the impact, and providing or contributing to remedy); and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.<sup>16</sup>

The responsibility to respect human rights applies to all business enterprises regardless of their size, sector, operational context, ownership and structure, although these factors, may, along with the severity of the enterprise's human rights impacts, be relevant to the appropriate scale and complexity of the measure adopted to implement the UNGP.

To meet the responsibility to respect human rights, all businesses should have in place policies appropriate to their size and circumstances, human rights due diligence (HRDD) processes to identify, prevent, mitigate and account for how they address their impacts on human rights, and processes to enable the remediation of any adverse human rights they cause or to which they contribute.<sup>17</sup> HRDD is key to the fulfilment of the responsibility to respect human rights. As Professor Ruggie, the architect of the UNGP, noted, 'without conducting human rights due diligence, companies can neither know nor show that they respect human rights and, therefore, cannot credibly claim that they do.'<sup>18</sup>

The responsibility to respect human rights is rooted in a transnational social norm. It exists over and above applicable legal requirements, and so cannot be defined or adhered to simply by reference to applicable laws with which enterprises must comply. Nevertheless, increasingly the responsibility to respect human rights is encouraged or required through evolving systems of regulation, and it also may be reflected in contractual arrangements that may be enforced if breached. Failures to respect rights by carrying out HRDD or providing remedy in appropriate cases can have legal consequences, and will attract scrutiny from 'the court of public opinion', which comprises stakeholders including employees, local communities, consumers, civil society and investors.<sup>19</sup> Given its nature and breadth, the responsibility to respect human rights serves to meet a company's 'social licence to operate'.<sup>20</sup>

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15 UNGP, *supra* n.13, Principle 11.

16 UNGP, *supra* n.13, Principle 13.

17 UNGP, *supra* n.13, Principle 15.

18 John Ruggie and John Sherman, III, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 24(3) *EJIL*, <https://academic.oup.com/ejil/article/28/3/921/4616676>, accessed 27 April 2019.

19 OHCHR, 'Q7: If the Guiding Principles are not a legal instrument, are they just voluntary?' in Frequently Asked Questions about the Guiding Principles on Business and Human Rights (2014) HR/PUB/14/3, 9, [www.ohchr.org/documents/publications/faq\\_principlesbusinesshr.pdf](http://www.ohchr.org/documents/publications/faq_principlesbusinesshr.pdf).

20 Third Pillar Report, *supra*, n.12, 54; John Ruggie, 'Remarks' (International Institute for Conflict Prevention & Resolution: Corporate Leadership Award Dinner, New York, 2 October 2008), [www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-speech-to-CPR-2-Oct-2008.pdf](http://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-speech-to-CPR-2-Oct-2008.pdf), accessed 27 April 2019.

## **Managing business-related human rights impacts in the mining industry**

The term ‘social licence to operate’ (referred to in the UN report setting out the Three Pillar Framework) was initially coined to describe the acceptance required from local communities to support the successful operation of mining operations hosted by them.<sup>21</sup> The concept reflects the importance of establishing trust between local communities and mining companies; where there is reciprocity and enduring regard for the other’s interests, a company should be able to demonstrate that it has a social licence to operate.<sup>22</sup> If it fails to do so, the company can expect to face community protests, security problems, and even the revocation of government licences, each of which carries legal, reputational and financial implications. One study reported that where community–company conflict gives rise to temporary shutdowns and delay, ‘a mining project with a capital expenditure of US\$3–5 billion will suffer costs of roughly US\$20 million per week of delayed production in Net Present Value (NPV) terms, largely due to lost sales.’<sup>23</sup>

The imperative to establish a social licence to operate has encouraged businesses in the mining sector to adopt voluntary standards and implement processes for the management of social and environmental issues, even in the absence of regulation requiring such measures.

Social impact assessments have been used since the 1990s by companies operating in the mining sector to understand, prevent and mitigate the social impacts of their projects.<sup>24</sup> More recently, industry-wide initiatives seek to promote the management of common challenges facing the sector. A prominent example is the International Council on Mining and Minerals (ICMM), established by extractive industry operators in 2001 to strengthen the management of environmental and social performance.

Security is one issue that the mining industry has, for some time, sought to manage by reference to human rights. The Voluntary Principles Initiative (VPI) is a multi-stakeholder platform for companies, NGOs and governments to discuss security issues affecting the extractive industry. The VPI developed the Voluntary Principles on Security and Human Rights in 2000 (VPSHR), which provide guidance to companies on measures to support safety and security of mining operations while respecting human rights.<sup>25</sup> Companies that participate in the VPI are encouraged to incorporate the VPSHR into contracts when engaging private security contractors and also into memoranda of understanding with host governments.

Since 2011, businesses in the sector have increasingly focused on the management of human rights risks by reference to the UNGP. This has been facilitated by the alignment

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21 Miguel Schloss, ‘Transparency and Governance in the Management of Mineral Wealth’ (World Mines Ministries Forum 2002, 14 March 2002); Kieren Moffat and others, ‘The social licence to operate: a critical review’ (2016) 89(5) *Forestry*, 477.

22 Robert G Boutilier and Ian Thomson, ‘Modelling and Measuring the Social Licence to Operate: Fruits of a Dialogue between Theory and Practice’ in Peter Darling (ed), *SME Mining Engineering Handbook* (Society for Mining Metallurgy and Exploration 2011) 4.

23 Rachel Davis and Daniel Franks, ‘Costs of Company–Community Conflict in the Extractive Sector’ (Shift 2014), [www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector/](http://www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector/), accessed 27 April 2019.

24 Susan A Joyce and Magnus MacFarlane, ‘Social Impact Assessment in the Mining Industry: Current Situation and Future Directions’ (2001) 46 *MMSD*.

25 ‘Voluntary Principles on Security and Human Rights’ (2001).

with the UNGP of other, existing international standards such as the UN Global Compact,<sup>26</sup> the IFC's Performance Standards<sup>27</sup> and the Equator Principles.<sup>28</sup>

Notably, the Organisation for Economic Cooperation and Development (OECD) has undertaken significant work to create guidance and tools to assist OECD-based mining businesses to implement HRDD practices through their complex supply chains. An example is the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.<sup>29</sup> Countries outside the OECD with important overseas mining interests have also articulated human rights-focused expectations on companies in the mining sector. Notably, the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (with support from the OECD) has adopted voluntary industry guidelines on responsible mineral supply chains in line with the OECD's guidelines.<sup>30</sup> The ICMM has also announced new requirements for members to support and implement the UNGP.<sup>31</sup> These standards are likely to be significant in prompting further alignment and attention on better management of human rights issues across the sector.

Law and regulation will also be drivers. A variety of legal measures recently adopted or proposed by governments encourage or require more effective management of human rights risks, and are designed to support the prevention of human rights abuse. Most have broad application to all industries. These new measures generally support the effective management of human rights risks consistently with the UNGP, even if they do not expressly require it.<sup>32</sup> They differ in their terms as the national objectives in introducing such legislation are not uniform but certain broad trends are discernible.

Most of the requirements involve some form of public reporting of human rights issues, a leading example being the UK Modern Slavery Act, which seeks to promote transparency within supply chains.<sup>33</sup> Other legislation requires reporting a range of non-financial issues including human rights, such as the EU's amendments in 2014 to the directive regarding

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26 The UN Global Compact, Principles 1 and 2. The UN Global Compact promotes tools and resources aligned with the UNGP.

27 IFC Performance Standards on Environmental and Social Sustainability (International Finance Corporation, January 2012), 1.

28 'The Equator Principles' (Equator Principles, June 2013), 2.

29 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (OECD), [www.oecd.org/corporate/mne/mining.htm](http://www.oecd.org/corporate/mne/mining.htm). The OECD has also issued broader guidance for companies implementing due diligence on but going beyond human rights: OECD Due Diligence Guidance for Responsible Business Conduct (OECD 2018), [www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm](http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm), accessed 27 April 2019.

30 OECD, 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains' (2 December 2015), <http://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm>, accessed 27 April 2019.

31 'ICMM first industry body to commit to UN Guiding Principles on Business and Human Rights' (ICMM, 26 November 2018), [www.icmm.com/en-gb/news/2018/un-human-rights-pr](http://www.icmm.com/en-gb/news/2018/un-human-rights-pr), accessed 1 April 2019.

32 For a review of recent and forthcoming reporting and due diligence requirements relating to human rights, see Catie Shavin, Rae Lindsay, Anna Kirkpatrick and Jo En Low, 'Clifford Chance and Global Business Initiative, Navigating a Changing Legal Landscape' (GBI/Clifford Chance, March 2019), [www.cliffordchance.com/briefings/2019/03/business\\_and\\_humanrightsnavigatingachangin.html](http://www.cliffordchance.com/briefings/2019/03/business_and_humanrightsnavigatingachangin.html), accessed 27 April 2019.

33 See also the California Transparency in Supply Chains Act 2010, the Australian Modern Slavery Act 2018 and the forthcoming New South Wales Modern Slavery Act No. 30.

the disclosure of non-financial and diversity information by certain large undertakings and groups (EU NFRD).<sup>34</sup> The EU NFRD requires companies to report on human rights and other matters to the extent necessary to understand their development, performance, position and human rights impacts, and recommends the reporting of due diligence steps that have been taken. Other legislation goes further still, mandating due diligence on human rights-related issues. For example, the US government places strict requirements on certain government contractors and subcontractors to annually confirm (after carrying out due diligence) that neither they nor any of their proposed subcontractors or agents have engaged in prohibited trafficking-related activities (which include forced labour), or if prohibited activities are found, certify annually that appropriate remedial and referral actions have been taken.<sup>35</sup> In France, large French-registered companies are required to include in their annual report an overview of measures taken pursuant to a 'vigilance' plan that concerns the company's steps to address risks to human rights and fundamental freedoms.<sup>36</sup> Penalties for non-compliance are extensive and include allowing third parties to seek injunctive relief against recalcitrant companies as well envisioning the imposition of damages.

The mining industry is particularly impacted by legislation and regulation that seeks to target the effects of illicit extraction of and trade in minerals sourced from regions affected by conflict. For example, in the US, Section 1502 of the Dodd–Frank Act requires all SEC-reporting companies to conduct supply chain due diligence to identify tin, tungsten, tantalum and gold and, where applicable, to conduct additional disclosure and audits on the sourcing of those minerals.<sup>37</sup> From 2021, similar legislation will affect companies importing certain volumes of tin, tungsten, tantalum and gold into the EU. In common with the Dodd–Frank Act, the EU conflict minerals regulation imposes mandatory due diligence requirements on businesses who source minerals from areas affected by conflict, or high-risk areas where there are widespread and systematic violations of international law including human rights abuses.<sup>38</sup> The London Metals Exchange recently announced that it proposes to introduce rules that, from 2022, allow only responsibly sourced minerals to be traded, reflecting consumer and investor pressure to move away from resources mined from conflict zones.<sup>39</sup> Given the mining industry's historic appreciation of its impact on social issues, it is perhaps unsurprising that, shortly after the UNGP's endorsement in 2011, extractives were evaluated by some commentators as having strong policies and processes in place consistent with the UNGP.<sup>40</sup> Nevertheless, the typically complex, systemic and

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34 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1.

35 Amendment to the Federal Acquisition Regulation; Ending Trafficking in Persons (2015).

36 Law 2017-300 related to Duty of Vigilance of Parent Companies and Commissioning Companies.

37 US Dodd–Frank Act Final Rule 12 USC Section 1502 (2010).

38 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

39 Bloomberg, BMW to Source Cobalt Directly From Australia, Morocco Mines, 24 April 2019, [www.bloomberg.com/news/articles/2019-04-24/bmw-to-source-cobalt-directly-from-mines-in-morocco-australia](http://www.bloomberg.com/news/articles/2019-04-24/bmw-to-source-cobalt-directly-from-mines-in-morocco-australia), accessed 27 April 2019.

40 Kendyl Salcito, Chris Wiegla and Burton H Singer, 'Corporate human rights commitments and the psychology of business acceptance of human rights duties: a multi-industry analysis' (2015) 19(6) *IJHR*, 682.

severe human rights challenges that face mining companies make it equally unsurprising that the sector still has a long way to go in achieving widespread and consistently effective management of human rights risks, to the extent of significantly reducing the prospects that disputes may arise. Even eight years on from the adoption of the UNGP, the High Commissioner for Human Rights has recognised that there remain concerns as to the mining sector's ability to meet the responsibility to respect.<sup>41</sup>

Increased regulation of the types described creates an environment of transparency and disclosure that facilitates scrutiny and could enhance accountability for human rights-related harms, including in litigation and other forms of dispute resolution.

## Disputes in the mining sector related to human rights

The prevalence of human rights effects of the mining sector brings with it a high potential for dispute, with a variety of stakeholders seeking to hold companies to account for alleged creation of or involvement in harm, including claims for redress. The UNGP have driven a more sophisticated understanding of what remedies for victims of rights-holders should entail. This will impact the ways in which disputes concerning business-related human rights harms are approached in the future.

Firstly, the UNGP emphasise that rights-holders have a right to an effective remedy where business-related harm is suffered. States have the duty to ensure, within the scope of their jurisdiction, that this internationally recognised human right to an effective remedy may be realised.<sup>42</sup> An effective remedy is one that is appropriate and sufficient to restore the rights-holder as far as possible to the position he or she would have been in, had the abuse or impact not occurred.<sup>43</sup> Businesses also have the responsibility to respect the right to an effective remedy where business-related harms are involved. The UNGP clarify that business should not infringe or diminish the ability of victims to gain access to forums to air their grievances and that they should provide or cooperate in good faith in remedial processes, including by supporting their outcomes.<sup>44</sup>

Secondly, the UNGP identify the three categories of mechanism that are available for the resolution of business-related human rights disputes: state-based judicial mechanisms, state-based non-judicial mechanisms and non-state based mechanisms, such as

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The study showed that the oil and gas and mining sector companies, as a sector, displayed one of the strongest commitments to adopting policies and processes to implement the UNGP in 2012–2013.

41 OHCHR, Statement by the UN High Commission for Human Rights Michelle Bachelet, 23 April 2019, [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24507&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24507&LangID=E) accessed on 27 April 2019.

42 For example, see Universal Declaration on Human Rights, Article 8 and European Convention on Human Rights, Article 13.

43 See generally, Sonja Starr, 'The Right to an Effective Remedy: Balancing Realism and Aspiration' in Mashood Baderin and Manisuli Ssenyonjo (eds) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 477–98; UNGA, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises' UNGA 72nd Session No 73(b) UN Doc A/72/162 (2017) ('UN Working Group Report 2017').

44 See also the 2016 HRC Resolution, which calls on business to contribute actively to initiatives that aim to promote a culture of respect for the rule of law, and participate in good faith in domestic judicial processes, as well as establish effective operational-level mechanisms. UNHRC Res 32/10 (2016) UN Doc A/HRC/RES/32/10, para. 9.



operational-level grievance mechanisms. Recent work mapping available mechanisms and identifying barriers to access to remedies has highlighted the distinctions between these various mechanisms and some of the barriers to effective remedy that exist, leading to policy initiatives aimed at tackling those barriers.<sup>45</sup> In the next four sections we consider examples of human rights-related disputes involving the mining sector that have arisen in these forums.

### **Operational-level grievance mechanisms**

The UNGP clarify the unique function that company-led operational level grievance mechanisms (OLGMs) can play in both helping prevent the escalation of human rights-related disputes (often mitigating or putting an end to harm at an early stage, and providing an information loop into HRDD) and in providing access to remedy for harms that companies identify they have caused or to which they have contributed.<sup>46</sup> If OLGMs meet the effectiveness criteria stipulated by the UNGP (the ‘effectiveness criteria’),<sup>47</sup> they may resolve grievances before they escalate into human rights abuses, avoiding the need for recourse by rights-holders to more formal dispute resolution processes.

Most mining companies already have in place OLGMs and some have made efforts to develop mechanisms that are consistent with the UNGP. For example, in an effort to be transparent about its efforts to facilitate remedy, Rio Tinto has published guidance, which was primarily intended for its own personnel, that details examples of OLGMs designed with the effectiveness criteria in mind.<sup>48</sup>

Barrick Gold Corporation (Barrick) has also sought to be transparent about efforts to formulate a remedial mechanism meeting the effectiveness criteria in the context of operations at a gold mine in Papua Guinea. Barrick implemented the Olgeta Meri Remedy Framework (the Porgera Framework) in 2011 to consider and resolve claims of egregious human rights abuses involving sexual violence by security forces employed at the mine.<sup>49</sup> The mechanism provided 119 women with cash compensation and other forms of remedy

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45 The Council of Europe issued recommendations lowering barriers to accessing remedy in 2016, Recommendation CM/Rec/(2016)3; ‘Appendix 4: Recommendation CM/Rev(2016) 3 of the Committee of Ministers to Member States on human rights and business’ (COE 2016); the EU Agency on Fundamental Rights issued an opinion in 2017, FRA (2017) Improving access to remedy in the area of business and human rights at the EU level, Vienna, 10 April 2017; and the European Parliament published a comprehensive report with recommendations in 2019, Directorate-General for External Policies, ‘Access to legal remedies for victims of corporate human rights abuses in third countries’ (European Union, February 2019). The OHCHR’s initiative on improving accountability and access to remedy in cases of business involvement in human rights abuses has been ongoing since 2014 (‘OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses’), [www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx), accessed 27 April 2019).

46 UNGP *supra* n.13, Principle 22.

47 UNGP *supra* n.13, Principle 31.

48 ‘Why Human Rights Matter’ (Rio Tinto, January 2013) 79, [www.riotinto.com/documents/ReportsPublications/Rio\\_Tinto\\_human\\_rights\\_guide\\_-\\_English\\_version.pdf](http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf), accessed 1 April 2019. One example included a community feedback system at its bauxite mine in Weipa, Australia developed in line with the UNGP.

49 ‘Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework’ (Enodo Rights 2016) 2.

including medical care, counselling, school fees and business training, in return for a waiver of future claims against Barrick.<sup>50</sup>

While the mechanism has been praised for its ‘ambition’ and commitment to the UNGP<sup>51</sup> it was also recognised, in retrospect, that this particular OLGGM suffered significant flaws in its design, did not live up to some of the effectiveness criteria of the UNGP (including in the ways remedy was evaluated and provided), and failed to address broader issues faced by alleged victims and other women working at the mine, many of which were deep-rooted. Despite implementing the Porgera Framework, Barrick has faced litigation (which later settled) in the US by women who chose not to use the scheme.<sup>52</sup> This demonstrates that corporate initiatives to provide remedy via an OLGGM, even within a well-funded and sophisticated framework, may not dissuade rights-holders from pursuing recourse by more conventional litigation routes. Barrick has continued its efforts to learn from the shortcomings of the Porgera Framework and has stated its commitment to improve its OLGGMs in line with the UNGP.<sup>53</sup> The highly publicised example of the Porgera Framework demonstrates the complexities involved in seeking to provide access to remedy through an OLGGM, especially where particularly serious human rights abuses are involved. It also highlights the fact that companies should be realistic in their expectations whether an OLGGM will or should provide a complete solution for the remedy of negative human rights impacts; an OLGGM should not preclude rights-holders from pursuing legitimate efforts to access remedy by other available routes.<sup>54</sup> This area promises significant future developments in efforts to design mechanisms and dispute resolution outcomes that ensure rights are respected and harms remedied appropriately, while carefully balancing legitimate interests of companies to achieve finality and certainty of outcomes once their remedial responsibilities have been met.

## Domestic litigation

National courts remain the primary legal mechanism through which rights-holders seek to hold corporates to account for human rights-related harms. However, various intractable factors mean that the barriers to mounting claims in an effective forum, establishing a legal liability and accessing a remedy against a corporate entity for human rights-related harms remain high.<sup>55</sup>

In the criminal sphere, it is possible to hold corporate executives to account for aiding and abetting the commission of gross human rights abuses by states and other actors,

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50 Margaret Jungk, Onida Chichester, Chris Fletcher, ‘In Search of Justice: Pathways to Remedy at the Porgera Gold Mine’ (BSR 2018) 5, [www.bsr.org/reports/BSR\\_In\\_Search\\_of\\_Justice\\_Porgera\\_Gold\\_Mine.pdf](http://www.bsr.org/reports/BSR_In_Search_of_Justice_Porgera_Gold_Mine.pdf), accessed 27 April 2019.

51 ‘Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework’ (Enodo Rights 2016) 1, [www.enodorights.com/assets/pdf/pillar-III-on-the-ground-assessment.pdf](http://www.enodorights.com/assets/pdf/pillar-III-on-the-ground-assessment.pdf), accessed 27 April 2019.

52 ‘In Search of Justice: Pathways to Remedy at the Porgera Gold Mine’ (BSR 2018) 68, [www.bsr.org/reports/BSR\\_In\\_Search\\_of\\_Justice\\_Porgera\\_Gold\\_Mine.pdf](http://www.bsr.org/reports/BSR_In_Search_of_Justice_Porgera_Gold_Mine.pdf), accessed 1 April 2019.

53 *ibid.* 36.

54 UN Working Group Report, *supra* n.40, para. 71.

55 UNHRC, ‘Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse’ UNGA 32nd session Nos. 2 and 3 UN Doc A/HRC/32/19 (2016).

but successful prosecutions are extremely rare.<sup>56</sup> Typically, liability for complicity in a third party's gross human rights abuse may arise where: (1) a company assisted in the perpetration of a gross human rights abuse or crime; (2) the assistance had a substantial effect on the perpetration of the crime; and (3) the company knew that its acts would assist the perpetration of the crime even if it did not intend for the crime to be committed.<sup>57</sup> Prosecutions of corporations are most likely in states that have created domestic law offences for the commission of international crimes, and whose laws permit the corporate prosecutions (not all legal systems do), meaning that prosecutions of executives of the company are generally more likely.<sup>58</sup> The indictment of a French company for alleged complicity in crimes against humanity is reportedly the first example of such a prosecution involving a corporate defendant.<sup>59</sup>

The circumstances in which a corporation may be considered legally complicit in abuses by another actor under domestic civil laws varies across jurisdictions and remains uncertain in many.<sup>60</sup> Claims against corporations in relation to directly caused human rights harms as well as for complicity in the wrongful acts of a third party are most commonly advanced in proceedings under general laws of tort (common law jurisdictions) or the law of remedies for breach of non-contractual obligations (civil law jurisdictions). As such, the claims are often not framed in terms of human rights, but rather are founded on an appropriate formulation of domestically defined wrongs that do not expressly refer to

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56 Doug Cassell, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6(2) *NJIHR*.

57 *Prosecutor v. Anto Furundzija* (Trial Judgement) IT-95-17/1-T (ICTY) [249]. See generally, ICJ, *Corporate Complicity & Legal Accountability*, Volume 1: Facing the Facts and Charting a Legal Path (2008), [www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf](http://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf), accessed 1 April 2019; ICJ, 'Corporate Complicity & Legal Accountability, Volume 2: Criminal Law and International Crimes' (2008), [www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf](http://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf), accessed 27 April 2019; and ICJ, 'Corporate Complicity & Legal Accountability, Volume 3: Civil Remedies' (2008), [www.icj.org/wp-content/uploads/2012/06/Vol.3-Corporate-legal-accountability-thematic-report-2008.pdf](http://www.icj.org/wp-content/uploads/2012/06/Vol.3-Corporate-legal-accountability-thematic-report-2008.pdf), accessed 27 April 2019.

58 See, for example, the recent convictions of two former executives of Ford Motor Argentina in Buenos Aires (Uki Goñi, 'Argentina: two ex-Ford executives convicted in torture case' (*The Guardian*, 11 December 2018), [www.theguardian.com/world/2018/dec/11/pedro-muller-hedo-sibilla-ford-executives-argentina-torture-case?CMP=Share\\_AndroidApp\\_Tweet](http://www.theguardian.com/world/2018/dec/11/pedro-muller-hedo-sibilla-ford-executives-argentina-torture-case?CMP=Share_AndroidApp_Tweet), accessed 27 April 2019) and pending convictions against Lundin executives (Richard Milne, 'Swedish oil bosses set to be charged over South Sudan deaths' (*Financial Times*, 18 October 2018), [www.ft.com/content/c7295ae6-d2cf-11e8-a9f2-7574db66bcd5](http://www.ft.com/content/c7295ae6-d2cf-11e8-a9f2-7574db66bcd5), accessed 27 April 2019).

59 In June 2018, the French cement company, Lafarge, was charged with complicity in crimes against humanity and financing terrorists, for allegedly paying significant sums (approximately 13 million euros) to jihadists, including the Islamic State group, to keep a factory open in Syria during the conflict there. A formal investigation by prosecutors is underway: Agence France-Presse, 'Lafarge charged with complicity in Syria crimes against humanity' (*The Guardian*, 28 June 2018), [www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity](http://www.theguardian.com/world/2018/jun/28/lafarge-charged-with-complicity-in-syria-crimes-against-humanity), accessed 27 April 2019.

60 For example, in the United States, until recently, the Alien Tort Statute (ATS) provided particularly fertile ground for claims by non-US nationals against corporations based both in and outside the United States, based on alleged involvement in 'violations of the law of nations' (international law). The scope of risk under the ATS has been significantly curtailed for non-US companies and operations by the US Supreme Court's decision that the ATS should not be interpreted to extend to activity taking place entirely outside the United States, on the basis of a 'presumption against extraterritoriality'. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); *Jesner v. Arab Bank, PLC* 138 S. Ct. 1386 (No. 16-499) (2018).

human rights. Increasingly, however, it may be possible to find examples of causes of action that are codified or recognised as a matter of principle as founding liability for human rights abuses.

Because it is common for multinational corporations to operate transnationally through separately incorporated subsidiaries, claims are often brought against both a locally incorporated subsidiary operating where the harm occurred, and its ultimate parent company. A subset of such claims that is on the rise seeks to identify direct duties owed by ultimate parent corporations toward alleged victims, or some other form of liability for harms directly caused by others.

In England, a recent line of cases seeks to establish a parent company duty of care to third parties (whether employees of subsidiaries or local communities affected by subsidiaries' operations). The existence of the duty turns on whether the parent company has voluntarily assumed a direct responsibility over certain areas (such as health and safety or security), such that the parent may be held liable for damage suffered by individuals because of alleged failures (acts or omissions) in such areas.<sup>61</sup>

A mining dispute arising from environmental damage and associated human rights impacts is at the forefront of shaping the law in this area. In *Lungowe v. Vedanta Resources Plc and Konkola Copper Mines Plc*<sup>62</sup> an English court held that the circumstances evidenced an arguable claim that the parent company assumed a duty of care to 1,826 Zambian farmers who allegedly suffered personal injury, damage to property and loss of income, amenity and enjoyment of land owing to alleged pollution and environmental damage caused by discharges from a copper mine owned and operated by its Zambian incorporated subsidiary.<sup>63</sup> The Court of Appeal upheld the decision, noting that while no prior case has imposed a duty of care between a parent company and an unrelated party affected by the operations of its subsidiary, this lack of precedent does not 'render such a claim inarguable'.<sup>64</sup> The Supreme Court has recently confirmed that neither the judge instance nor the Court of Appeal had erred in finding that there was an arguable claim against Vedanta. The Supreme Court confirmed that there is nothing 'special or conclusive about the parent/subsidiary relationship' that gives rise to a novel duty of care and that well-established general principles apply to assessing whether a duty of care arises.<sup>65</sup>

Other litigants with claims on similar bases have failed to demonstrate an arguable case of a duty of care.<sup>66</sup> The legal landscape is unpredictable, with each case to be determined

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61 These cases are based on attempts to apply and expand principles first enunciated in relation to an asserted parent company duty of care for damage suffered by an employee of a subsidiary on the basis that the parent company had assumed responsibility for such employee's health and safety (*Chandler v. Cape plc* [2012] EWCA Civ 525).

62 *Lungowe and others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975.

63 *Lungowe and others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528.

64 *Lungowe and others v. Vedanta Resources Plc, Konkola Copper Mines Plc* [2017] EWCA Civ 1528 [88].

65 *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and others* [2019] UKSC 20, [56]–[60].

66 In *AAA and Others v. Unilever PLC and Another* [2018] EWCA Civ 1532, it was unsuccessfully argued that a parent company was liable for failures to protect third parties (local communities) from personal injury and associated damage arising from post-election violence in Kenya. *Okpabi and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191 involved a claim against the UK-incorporated parent holding company, Royal Dutch Shell, in relation to environmental damage from oil spills allegedly emanating from the pipelines and associated infrastructure owned and operated by its Nigerian incorporated subsidiary. The claims were

on the basis of its own particular facts and context. One judge observed that separate courts examining identical facts might conceivably reach differing conclusions on whether the relevant tests are made out.<sup>67</sup> However, a notable feature of these cases is the attempt made to argue that the relevant assumption of responsibility by the parent and consequent duty of care is evidenced by corporate statements about policy or governance that concern the multinational's approach to matters such as corporate social responsibility, human rights or security (including, for example, adherence to the VPSHR). To date, the English courts have concluded that such policy documents do not, in themselves, suffice to evidence such an assumption of responsibility. That said, the Supreme Court held that if a parent company not only states that it has policies in place, but takes steps to actively implement those policies at its subsidiaries, a duty of care may arise to those affected by the subsidiaries' activities.<sup>68</sup> Similarly, the Supreme Court noted that if a parent company holds itself out as exercising control over its subsidiaries in published material, it may have assumed a responsibility to such third parties, 'even if it does not in fact do so'.<sup>69</sup>

*Kalma v. AML*<sup>70</sup> also concerned a mining-related dispute that arose from multiple human rights violations by police responding to a protest at a mining site at Tonkolili in Sierra Leone. Having considered the complex facts and context – including through the highly unusual step of hearing evidence in Sierra Leone – the judge dismissed the claims that the parent company was liable for the police action, which relied on various causes of action including negligence, employee and non-employee vicarious liability and accessory liability. The judge did, however, find that standards voluntarily subscribed to by the company, namely the VPSHR had not been met, representing a failure to meet the applicable standard of care, had a duty existed (which he held it did not).<sup>71</sup> This is not the first time that an English court has made clear that where companies state commitments to abide by voluntary standards, more than 'lip service' to them is required.<sup>72</sup>

Claimants and their lawyers continue to refine and adapt their liability theories to take advantage of situations where corporate behaviour might not match the socially responsible image that companies are at pains to portray. Publicity around recent proceedings mounted on behalf of more than 100 claimants against Gemfields Limited, a UK company, referred to the company's active involvement in the running of a mine in Mozambique

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dismissed on the basis that no arguable case was made out. These cases have applications for leave to appeal to the UK Supreme Court pending.

67 *Lungowe and others v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [53].

68 Briggs J, noted that he regarded that 'the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial . . . ' *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and others* [2019] UKSC 20, [61].

69 *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and others* [2019] UKSC 20, [53]–[54].

70 *Kadie Kalma & Ors v. African Minerals Ltd & Ors* [2018] EWHC 3506 (QB).

71 *ibid.*, [367].

72 *Vilca and 21 others v. Xstrata Limited and another* [2016] EWHC 389 (QB), [25].

owned by one of its subsidiaries, where serious human rights abuses were said to have occurred.<sup>73</sup> The claimants' lawyers referred to Gemfields' claims to be a supplier of responsibly sourced gemstones, promoting transparency, trust and responsible mining practices. Gemfields issued an immediate statement<sup>74</sup> reaffirming its commitment to investigating and acting on any abuses connected with the group's operations, and the case settled within a year without any admission of liability.<sup>75</sup> Of interest are the publicly announced terms that included not only a cash settlement, but also a commitment from the company to work with the claimants' lawyers to develop an OIGM to deal with the going matters at the mine that would be consistent with the UNGP. The company also committed to funding training on agricultural planning for the life of the project.

In other jurisdictions, mining-related litigation involving allegations of human rights abuses also seeks to hold parent companies to account for the operations of their overseas subsidiaries. Of note are two Canadian cases where claimants have overcome jurisdictional hurdles and their claims against parent companies and their subsidiaries may be destined for trial. In *Araya v. Nevsum*,<sup>76</sup> three Eritrean refugees claim, on behalf of themselves and more than 1,000 Eritrean workers, that Nevsum Resources Ltd (Nevsun) is liable in negligence and for breaches of customary international law (CIL), including forced labour, torture, slavery and crimes against humanity. The claims relate to Nevsum's alleged complicity in the use of forced labour at the Bisha mine in Eritrea by Nevsum's local sub-contractors employed by Nevsum's subsidiary in Eritrea. The claim has been allowed to proceed on the basis that it is arguable that CIL forms part of Canadian law. The Supreme Court will rule on whether this is correct. If so, this may be a stepping stone for corporate liability in Canada in the future.

In *Choc v. Hudbay and others*,<sup>77</sup> three claims against Hudbay Mineral Inc (Hudbay), a Canadian mining company, concern alleged serious human rights abuses including killings and rape by security personnel working at its subsidiary's nickel mining operations in Guatemala. Courts have so far refused to dismiss the claims on the basis that it was not 'plain and obvious' that Hudbay did not owe a duty of care to the plaintiff or (in relation to one of the claims) that the corporate veil should not be lifted to establish Hudbay's liability for the actions of its subsidiaries.

## OECD national contact points

Aside from courts and other judicial tribunals, states may set up non-judicial mechanisms to deal with business and human rights-related disputes. National contact points

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73 Thomas Harding, 'Gem miner reveals alleged human rights abuses in Africa' (*The Guardian*, 10 February 2018), [www.telegraph.co.uk/business/2018/02/10/gem-miner-reveals-alleged-human-rights-abuses-africa/](http://www.telegraph.co.uk/business/2018/02/10/gem-miner-reveals-alleged-human-rights-abuses-africa/), accessed 27 April 2019.

74 'Gemfields Press Statement' (Gemfields, 11 February 2018), <https://gemfields.com/gemfields-press-statement/>, accessed 27 April 2019.

75 'Gemfields Press Statement' (Gemfields, 29 January 2019), <https://gemfields.s3.amazonaws.com/News%20and%20Announcements/2019/January/20190117-%20GGL%20SENS%20announcement%20-%20Gemfields%20Press%20Statement%20in%20relation%20to%20Settlement%20Agreement.pdf>, accessed 27 April 2019.

76 *Araya v. Nevsum Resources Ltd* [2017] BCCA 401.

77 *Choc v. Hudbay Minerals Inc, HMI Nickel Inc and Compañia Guatemalteca de Níquel SA*, 2013 ONSC 1414.

(NCPs) established under the OECD Guidelines for Multinational Enterprises (OECD Guidelines) are one example that has received increased attention in recent years. The OECD Guidelines stem from an international agreement binding OECD members and adhering states to set standards for OECD-based enterprises operating across borders to conduct their businesses responsibly.<sup>78</sup> NCPs offer a mediation and conciliation platform that can be used as a route for rights-holders and civil society organisations with a relevant interest to bring complaints against businesses where the expectations in the guidelines have not been met.

A large proportion of cases initiated before NCPs relate to the extractives sector.<sup>79</sup> Since the inclusion of a human rights chapter in 2011 that incorporates HRDD in line with the UNGP, many complaints now include assertions of non-compliance with the human rights due diligence standards in the OECD Guidelines.<sup>80</sup> Recent examples include alleged failures in environmental and human rights diligence in oil and gas or mining operations in locations such as Western Sahara,<sup>81</sup> Cameroon<sup>82</sup> and Canada.<sup>83</sup> It is notable that NCP complaints are also focused on investors as the OECD NCP mechanism is increasingly used as a means to put indirect pressure on companies and projects via complaints aimed at parties on whom they depend for financial support.<sup>84</sup>

The effectiveness of NCPs across OECD member states is mixed and the overarching perception is that more could be done to improve consistency, increase effectiveness and enhance the process more broadly.<sup>85</sup> NCPs cannot impose or enforce remedy, nor compel

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78 OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing.

79 Between 2001–2015, one study noted that 57 specific instances related to the mining sector and a further 33 were related to the oil and gas sector, OECD Watch, 'Remedy Remains Rare' (June 2015), [www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf](http://www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf), accessed 27 April 2019; 'Case statistics (June 2015) – Cases by sector' (OECD Watch), <https://complaints.oecdwatch.org/cases/statistics>, accessed 27 April 2019.

80 John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' (2015) Corporate Social Responsibility Initiative, Harvard Kennedy School Research Paper 6, 14, [www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper.66.oecd.pdf](http://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper.66.oecd.pdf), accessed 27 April 2019.

81 'GLAN vs. San Leon Energy' (OECD Watch, 24 October 2018), [https://complaints.oecdwatch.org/cases/Case\\_518](https://complaints.oecdwatch.org/cases/Case_518), accessed 27 April 2019.

82 'Victoria Oil & Gas plc (VOG) and Association des Habitants de Ndogpassi I, II et III (AHN), and Cercle de Bon Voisinage de Logmayangui (CBVL)' (OECD, 13 February 2018), <http://mneguidelines.oecd.org/database/instances/uk0051.htm>, accessed 27 April 2019.

83 'Seabridge Gold and the Southeast Alaska Conservation Council' (OECD, 23 December 2016), <http://mneguidelines.oecd.org/database/instances/ca0019.htm>, accessed 27 April 2019.

84 Norges Bank Investment Management was found by the Norwegian NCP to have failed to implement human rights due diligence in respect of the human rights impacts of a proposed steel plant to be developed in India by POSCO, one of its investee companies. 'Final Statement: Complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Developments vs. POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway)' (The Norwegian NCP for the OECD Guidelines, 27 May 2013).

85 Christine Haigh, 'The global system for holding corporations to account is in need of serious reform' (*The Guardian*, 20 February 2015), [www.theguardian.com/global-development-professionals-network/2015/feb/10/the-global-system-for-holding-corporations-to-account-is-in-need-of-serious-reform](http://www.theguardian.com/global-development-professionals-network/2015/feb/10/the-global-system-for-holding-corporations-to-account-is-in-need-of-serious-reform), accessed 27 April 2019; Shelley Marshall, 'OECD National Contact Points: Better navigating conflict to provide remedy to vulnerable communities' (Corporate Accountability Research 2016), <http://>

co-operation by businesses, meaning their main deterrent strength lies in the reputational risks associated with negative pronouncements by an NCP. In some recent cases, however, the ability to broker mediated or encourage separately negotiated settlements, and to monitor and comment upon progress by businesses, has proven effective in achieving tangible shifts in adherence to the OECD Guidelines and the expectations in them.<sup>86</sup>

## International arbitration

International arbitration is not typically used to holding businesses to account for their impact on human rights. Individual or collective rights-holders seeking remedy for human rights abuses through international arbitration will find that the barriers are high. Unlike the court system, arbitration is consent-based. In commercial transactions, businesses frequently agree to arbitration as an appropriate means to resolve their disputes. However, those impacted by business operations are not usually party to any agreement with the companies responsible for human rights impacts, and the incentive for businesses to invite proceedings by third parties through agreeing in contracts to grant them enforceable rights is less clear. Although international commercial arbitration may be employed by companies to settle disputes that involve human rights issues in connection with their commercial dealings, it is not generally accessible for the settlement of human rights-related disputes between affected rights-holders and businesses. Recent developments may augur a shift towards greater use of arbitration between private parties in human rights-related matters. These are discussed later in this section.

In relation to investment treaty arbitration, human rights are often relevant to examining the facts at the heart of investor-state disputes, not least because the types of regulatory decisions that trigger investors' claims may often be part of steps taken by the state to progress societal goals, which often seek to positively affect citizens' rights.<sup>87</sup> For example, recently, a tobacco company challenged Uruguay's implementation of domestic measures asserting (unsuccessfully) that the measures were expropriatory and in breach of standards of fair and equitable treatment afforded to it under the relevant bilateral investment treaty (BIT).<sup>88</sup> The measures were implemented to control the use of tobacco in order to protect

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corporateaccountabilityresearch.net/njm-report-xvi-oecd-ncp/, accessed 27 April 2019; 'Meeting Report: Update on the role of OECD National Contact Points with regard to the extractive sectors' (OECD National Contact Points and the Extractive Sector, London, 22 March 2013), [www.ihrb.org/pdf/IHRB-NNC-P-OECD-National-Contact-Points-and-the-Extractive-Sector\\_2013-Update.pdf](http://www.ihrb.org/pdf/IHRB-NNC-P-OECD-National-Contact-Points-and-the-Extractive-Sector_2013-Update.pdf), accessed 27 April 2019.

86 Fédération Internationale de Football Association (FIFA) and Building and Wood Workers' International reached a mediated settlement through the Swiss OECD NCP in which the parties undertook to cooperate in ensuring decent work and safety in the workplace for migrant construction workers involved in 2022 FIFA World Cup Qatar including bolstering the effectiveness of grievance mechanisms and strengthening the functionality of FIFA's body tasked with overseeing the implementation of human rights. 'Final Statement FIFA BWI'; 'Follow-Up Statement FIFA BWI' (SECO), [www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik\\_Wirtschaftliche\\_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Statements\\_zu\\_konkreten\\_Faellen.html](http://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Statements_zu_konkreten_Faellen.html), accessed 27 April 2019.

87 In this chapter we do not consider the role that investors' human rights may play in investment treaty arbitration in any detail, but broadly, similar considerations apply.

88 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.



health and reduce high levels of smoking in the country, and were not aimed at depriving the investor of its investment treaty rights.

In spite of this, the role of human rights law in investment treaty arbitrations has been limited. The reasons are well-rehearsed.<sup>89</sup> International investment treaty law and international human rights law are considered to co-exist, separately, in two distinct fields that do not and, arguably, should not overlap. Many consider that international investment law is a self-contained regime that seeks to protect investors and promote investment.

Investment treaties do not usually refer to the human rights obligations of states, nor do they oblige companies to comply with human rights standards.<sup>90</sup> Founding a defence, or indeed a cause of action relating to human rights, on the express wording of the treaty, is usually limited. In practice, rather than citing compliance with human rights obligations in defence of their actions, states tend to defend their actions by asserting that their strategies are necessary for public policy reasons<sup>91</sup> or allege that the investment underpinning the investor's claim has not been made in accordance with the law, as required by the investment treaty.<sup>92</sup> Where human rights defences have been raised by states, tribunals have been reluctant to recognise them.<sup>93</sup>

However, states have begun to introduce human rights arguments by positing in investor–state disputes that tribunals should interpret treaties in line with international human rights law by virtue of Article 31(3)(c) of the Vienna Convention on the Law of Treaties

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- 89 See generally: Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities,' (2008) IISD, [www.iisd.org/pdf/2008/iaa\\_business\\_human\\_rights.pdf](http://www.iisd.org/pdf/2008/iaa_business_human_rights.pdf), accessed 27 April 2019; James D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity,' (2007) 18 *Duke J. of Comp. & Int'l. L.* 77, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1077&context=djcl>, accessed 27 April 2019; OECD Global Forum on International Investment VII: Best Practices in Promoting Investment for Development (2008), [www.oecd.org/investment/globalforum/oecdglobalforumoninternationalinvestmentvii.htm](http://www.oecd.org/investment/globalforum/oecdglobalforumoninternationalinvestmentvii.htm), accessed 27 April 2019; Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment and Human Rights Law', in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2010) 45–62, 46; Susan Karamanian, 'The Place of Human Rights in Investor-State Arbitration' (2013) 17(2) *Lewis & Clark Law Review*, 423; Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11(1) *AJWH*, 67; and Monica Feria-Tinta, 'Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v. Uruguay' (2017) 34(4) *JILA*, 601.
- 90 Marc Jacob, 'International Investment Agreements and Human Rights', INEF Research Paper 3/2010, para. 1.3.1.
- 91 In *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Ecuador unsuccessfully argued that the claimant's case was barred due to its 'unclean hands' in its management of a mining concession alleging flagrant breaches of Ecuadorian and international human rights law and international public policy.
- 92 In *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, the tribunal confirmed that the carrying out of an environmental impact assessment study was one of the requirements of a lawful investment in accordance with Kenyan law.
- 93 In *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, the investor alleged that land acquired for a real estate venture was illegally occupied by third parties, in breach of Burundi's obligations under the Belgium–Burundi investment treaty. Burundi unsuccessfully asserted that expelling the squatters would have been in violation of both Burundian law and Article 17 of the International Covenant on Civil and Political Rights. The tribunal dismissed the argument holding that the relevant inquiry was not whether expulsion would violate human rights law but whether Burundi had taken necessary measures to prevent the squatters' occupation in the first place.

1969, which permits the interpretation of treaties consistently with any relevant rules applicable in the relations between the parties.<sup>94</sup> In *Urbaser v. Argentina*,<sup>95</sup> admitting a counterclaim by the state that the investor had breached individuals' right to water, the tribunal held that 'the BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.'<sup>96</sup> The counterclaim subsequently failed on the merits.

Other similar attempts have been unsuccessful. The case of *South American Silver Limited v. Bolivia*<sup>97</sup> concerned the alleged expropriation of mining concessions covering an area predominantly inhabited by indigenous peoples.<sup>98</sup> Bolivia defended a claim for expropriation in respect of the cancellation of relevant licences on the basis that the claimant had violated the human and collective rights of the indigenous communities. Bolivia further argued that the BIT should be interpreted in accordance with Bolivian law and international law instruments that protect indigenous communities,<sup>99</sup> as well as the UNGP and the OECD Guidelines.<sup>100</sup> The tribunal held that the express provisions of the BIT (which made no reference to human rights) prevailed.<sup>101</sup>

The majority took a similar view in *Bear Creek v. Peru*.<sup>102</sup> The dispute concerned a project to develop a silver mine in Santa Ana, an area populated by indigenous communities. Bear Creek had secured the right to mine by way of a decree that authorised the acquisition and development of the necessary concessions. Following large, violent protests and strikes the decree was revoked by the state and the project halted.<sup>103</sup> Bear Creek sought damages for expropriation and other breaches of the Canada–Peru Free Trade Agreement. Peru argued that the claimant had failed to secure a social licence to operate for the project,

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94 Yannick Radi, 'Realising Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2011) *NCJILCR* 37(4); Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', 60(3) *Int'l and Comp Law Quarterly* (2011); Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009).

95 *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

96 *ibid.*, [1200].

97 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15 (PCA 2013).

98 *ibid.*, [104].

99 These comprised (1) the 1969 American Convention on Human Rights; (2) the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women; (3) the 1989 Indigenous and Tribal Peoples Convention ('ILO Convention No 169'); (4) the 2007 United Nations Declaration on the Rights of Indigenous Peoples; and (5) the 2009 Political Constitution of the Plurinational State of Bolivia.

100 *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (PCA 2013) [195] – [200].

101 *ibid.*, [217]. The tribunal also dismissed Bolivia's contention that the purported non-compliance with the investment treaty could be excused by a state of necessity, namely the necessity to protect 'human and indigenous rights'.

102 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21.

103 Jean-Michel Marcoux and Andrew Newcombe, 'Bear Creek Mining Corporation v Republic of Peru: Two Sides of a 'Social License' to Operate' (2019) *ICSID Review*, 2, <https://academic.oup.com/icsidreview/advance-article/doi/10.1093/icsidreview/siy020/5366378>, accessed 27 April 2019.

had caused social unrest and failed to comply with relevant international norms requiring consultation with indigenous peoples, rendering its claims inadmissible.<sup>104</sup>

The tribunal upheld Bear Creek's claim on the basis the company had not caused or contributed to the protests and awarded damages based on the company's investment costs. Dissenting on the measure of damages awarded, Philippe Sands QC considered that it was appropriate to deduct the compensation afforded to the claimant by 50 per cent on the basis that the investor had contributed to the loss it had suffered by failing to secure a licence to operate and that while international human rights instruments did not impose obligations on investors, such standards should not be without significance or legal effects for investors.<sup>105</sup>

There has also been a growing trend towards the introduction of human rights considerations by way of non-party submissions (or *amicus curiae* briefs).<sup>106</sup> Though well-established in litigation, *amicus curiae* briefs are now more frequently employed in arbitration since certain arbitral rules have clarified tribunals' powers to admit these briefs in certain circumstances.<sup>107</sup> For example, in *Bear Creek v. Peru*,<sup>108</sup> the tribunal accepted an *amicus curiae* brief from a Peruvian NGO and a Peruvian lawyer who assisted the court with an understanding of the law applicable to the social licence to operate.<sup>109</sup> Phillippe Sands QC described the intervention as 'helpful', but it is unclear the degree to which, in general, such *amicus* briefings assist or influence the decision of a tribunal.<sup>110</sup>

There are indicators that the prevalence of human rights arguments in both investor-state and commercial arbitration may grow in the future.

States are beginning to include express reference in their model investment and trade agreements to human rights and impose obligations on investors in relation to human rights-related issues.<sup>111</sup> This has been invigorated in part by the UNGP, which call on states to ensure that 'they retain adequate policy and regulatory ability to protect human

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104 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award (30 November 2017), [253], [256], [264], [328].

105 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion (30 November 2017), [6], [10].

106 Professor John Ruggie provided a statement of the UNCITRAL Working Group highlighting the importance of transparency in investor-state arbitration and this is evidenced in the new rules which provides that a non-disputing party may apply to make a written submission to the tribunal: UNCITRAL, 'Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session', (2008) UN Doc A/CN.9/646, Article 4.

107 Sophie Lamb, Daniel Harrison and Jonathan Hew, 'Recent Developments in the Law and Practice of Amicus Briefs in Investor-State Arbitration' (2017) *Latham & Watkins* 5(2) 78, 79, 87, [www.lw.com/thoughtLeadership/recent-developments-law-practice-amicus-briefs-investor-state-arbitration-IJAL](http://www.lw.com/thoughtLeadership/recent-developments-law-practice-amicus-briefs-investor-state-arbitration-IJAL), accessed 27 April 2019; Lucas Bastin, 'Amicus Curiae in Investor-State Arbitration: Eight Recent Trends' (2014) *Arbitration International* 30(1) 126, 128, 130, <https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/2-Bastin-Eight-Trends.pdf>, accessed 27 April 2019.

108 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21.

109 *ibid.*, [227].

110 *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion (30 November 2017), [36].

111 See further: Jennifer Zerk, 'Human Rights Impact Assessment of Trade Agreements' (Chatham House International Law Programme, London, 26 February 2019), [www.chathamhouse.org/event/human-rights-impact-assessment-trade-agreements](http://www.chathamhouse.org/event/human-rights-impact-assessment-trade-agreements), accessed 27 April 2019.

rights under the terms of such agreements, while providing the necessary investor protection'.<sup>112</sup> For example, the 2012 South African Development Community model BIT requires investors to meet minimum standards for human rights and act consistently with international human rights and labour standards that are binding in either the state hosting the investment or the state from which the investor comes (whichever sets the higher standard). The BIT also states that any requirement to carry out an environmental social impact assessment before making an investment should be coupled with HRDD.<sup>113</sup>

In a provision reminiscent of the rationale invoked by Professor Sands QC in *Bear Creek v. Peru*, the 2018 Dutch model BIT proposes a provision whereby the compensation that an investor may be awarded in any dispute may take into account where an investor is in 'non-compliance with its commitments' under the UNGP and the OECD Guidelines.<sup>114</sup>

Both these model investment treaties evidence a heightened focus by states on the important role that investors can play in promoting respect for rights through the manner in which their investments are undertaken. This is matched in the model treaties by obligations upon investors to take steps to respect rights, and penalties if they fail to do so. Whether these model terms will crystallise into provisions in binding treaties, and the extent to which this will drive the discussion of human rights in investment treaty arbitration in the future, remains to be seen.

Of potentially broader application is an initiative to develop a set of specialised arbitral rules to deal with human rights-related disputes, the Hague Rules on Business and Human Rights Arbitration (the Hague Rules).<sup>115</sup> These are expected to be released in late 2019 following a period of public consultation on the key elements to be included in the rules. The aim is to provide default procedural rules for parties who wish to facilitate dispute resolution of human rights-related disputes in line with the UNGP. This may mean ensuring that disputes are heard by those with the relevant expertise for both commercial and human rights-related issues, increasing transparency around the process of arbitration, and providing default rules that are sensitive to the fact that victims of human rights-related harms may be vulnerable and require protection during the proceedings. Those promoting the Hague Rules envisage that they will offer a vehicle for the direct enforcement of human rights against companies by rights-holders. The concept is that commercial parties may incorporate the Hague Rules into their arbitration clauses in their contracts and also craft clauses that allow non-party rights-holders to rely on the arbitration clause to pursue rights against companies where abuses occur. It is also envisaged that companies incorporate the rules into arbitration agreements with rights-holders directly, perhaps after a dispute has arisen, in the manner of an *ad hoc* submission to arbitration.

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112 UNGP *supra* n.13.

113 SADC Model Bilateral Investment Treaty Template with Commentary (2012) ISBN 978-1-894784-58-0, Articles 13.1 and 15, [www.iisd.org/itm/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf](http://www.iisd.org/itm/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf), accessed 27 April 2019.

114 Netherlands Model Bilateral Investment Treaty (2019) Article 23, [www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden](http://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden), accessed 27 April 2019.

115 CILC, 'The Hague Rules on Business and Human Rights Arbitration' (2019), [www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/](http://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/), accessed 27 April 2019.

Indeed, it seems that there are circumstances in which companies may be willing to voluntarily agree to arbitration to resolve disputes connected with human rights. The Bangladesh Accord<sup>116</sup> was signed by over 200 companies and trade unions in the aftermath of the collapse of the Rana Plaza complex in Bangladesh, which killed over 1,000 and injured many more. The Accord seeks to ensure that standards are met in factories and that companies assist in the funding of remediation where issues are found. Disputes under the Accord may be referred to arbitration. In 2016, two signatory trade unions sought to enforce terms of the Accord against two signatory companies.<sup>117</sup> The arbitrations settled in 2017. The names of the respondent companies remained confidential throughout the proceedings and the arbitration would never have yielded a direct remedy for victims of the collapse of Rana Plaza. It may be, therefore, that there is scope to improve this type of remedial mechanism so that it conforms with the effectiveness criteria of the UNGP. Nonetheless, the fact that the companies were willing to agree in advance to the resolution of disputes concerning human rights-related issues by way of arbitration is significant, and demonstrates that there are circumstances where arbitration is considered the most appropriate dispute resolution mechanism.

## **Conclusion**

Mining inherently impacts human rights, often negatively. The mining industry itself has committed to respecting rights and taking steps to manage its negative impact on human rights in line with emerging standards, most notably the UNGP. However, resolving human rights issues through meaningful and effective HRDD takes time. Meanwhile, impacts proliferate. Indeed, it would be naïve to think that mining will ever be free of disputes over human rights-related harms associated with its operations.

The trajectory towards increased accountability will be driven more and more by legislation and regulation that mandates the mining industry to approach respect for rights through the responsible management of human rights risks. Moreover, the impacts of mining will increasingly be drawn out in terms of human rights terms and rights-holders will remain alive to any improvements in the avenues for seeking remedy against businesses; more disputes are inevitable.

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116 'Bangladesh Accord: Safe Workplaces' (Bangladesh Accord), <https://bangladeshaccord.org/>, accessed 27 April 2019.

117 *IndustriALL Global Union v. Respondent*, PCA Case No 2016-36 (PCA 2016); *UNI Global Union v. Respondent*, PCA Case No. 2016-37 (PCA 2016).

# Appendix 1

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