OPEN ACCESS
Scholars International Journal of Law, Crime and Justice
Abbreviated Key Title: Sch Int J Law Crime Justice
ISSN 2616-7956 (Print) |ISSN 2617-3484 (Online)
Scholars Middle East Publishers, Dubai, United Arab Emirates
Journal homepage: https://saudijournals.com

Review Article

Human Rights and International Mining Disputes: A Legal Appraisal within the Current Trend of Massive Human Rights Violations in the Extractive Sector in Cameroon

Nkumbe Ebong Mekede[1*]

[1]Ph.D in Mining, Oil and Gas Law, Lecturer of Law, University of Douala, Faculty of Laws and Political Science, Department of English law, Cameroon

DOI: 10.36348/sijlcj.2022.v05i12.007 | **Received:** 22.10.2022 | **Accepted:** 01.12.2022 | **Published:** 30.12.2022

***Corresponding author:** Nkumbe Ebong Mekede
Ph.D in Mining, Oil and Gas Law, Lecturer of Law, University of Douala, Faculty of Laws and Political Science, Department of English law, Cameroon

Abstract

This article explores in an explicit manner the interface between human rights and international mining disputes in Cameroon’s extractive law in order to spotlight or identify the causes, stakes, challenges and possible ways forward in curbing human right violations in the extractive sector. This article focuses on the various pieces of extractive legislation in Cameroon and makes a comprehensive legal appraisal on how such extractive texts protect human rights either directlt or tacitly, arguing that the present extractive texts in force falls short of guaranteeing the rights of individuals engaged in the extractive industry. In consequence to this half-bake protection accorded by the mining, oil and gas laws with respect to human rights exigencies, it is a settled fact that human righs are increasingly violated in the extractive sector and this does not showcase a good image of the country at the international arena. This is because mining disputes are becoming rife and rampant. A fundamental recommendation to this legislative pitfall in the extractive sector is that, there is urgent need to revise some provisons of the extractive sector laws so that, it should integrate human rights issues in a holistic manner thereby significantly curbing mining disputes.

Keywords: Cameroon; Disputes, Human Rights; Human Rights Violations, International Mining Disputes; Extractive Sector.

Copyright © 2022 The Author(s): This is an open-access article distributed under the terms of the Creative Commons Attribution **4.0 International License (CC BY-NC 4.0)** which permits unrestricted use, distribution, and reproduction in any medium for non-commercial use provided the original author and source are credited.

1. 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 increase the potential for disputes.

In this article, we discussed 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 this article, we considered the key role played by the UN Guiding Principles on Business and Human Rights (UNGP), the global authoritative standard on business and human rights, in framing the way in which disputes arise in the sector.

1.2. 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 country 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 in Brazil is illustrative. The incident killed over 200 people and polluted nearby rivers (Cain M, 2022).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 (Drummond M, 1999). Since the incident, litigation against the shareholders has ensued (BHP faced a £5 billion lawsuit in the United Kingdom) and investor reaction has been swift, including a threatened class action lawsuit by shareholders affected by the drop in share prices (Eggert R, 2006). 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’. These tragic incidents have, however, served as an impetus behind collective industry action to improve the safety of tailings infrastructure.

Unfortunately, these types of incidents in the mining sector are not rare, nor are the significant environmental and human rights impacts that accompany them (Revesz S.S, 2000). 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. More so, the 2016 Mining Code of the Republic of Cameroon in it Article 133(1) provides that “any natural or legal person carrying out exploration and mining works pursuant to this law shall be bound to do so according to standard practice and in accordance with the laws and regulations in force, in such manner as to safeguard the health and safety of persons, workers of the mine and property”.

Additionally, 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.

In another development, 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.

1.3. 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 (Dowdeswell E *et al.*, 1995). The UNGP operate within a three-pillar framework endorsed by the UN Human Rights Council in 2008 (Ruggie J, 2008). 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.

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. 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 and this is visible under UNGP in Principle 13. 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 and this is perceived under UNGP in Principle 15. According to 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” (John J *et al.*, 2017).

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 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. Given its nature and breadth, the responsibility to respect human rights serves to meet a company's 'social licence to operate'.

2. 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 (Kieren F *et al.*, 2016). 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 (Robert G.B *et al.*, 2011). 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.

To this effect, Section 63 (c) of the Gas Code of 2012 provides that "*local content shall include notably; a programme and conditions for giving priority to local enterprises with the required capacities for the supply of goods, products, materials, tools, equipment and service delivery*". In addition, Section 66(1) of the same Gas Code further states that "*in awarding contracts, gas companies and their subcontractors shall be bound to give preference to companies under Cameroonian Law that meet international standards for constructions, service delivery of materials, equipment and products relating to gas activities*". A reading of the above disposition of the Gas Code relative to the development of local enterprises and industries clearly indicates that there is some of sort of a will to develop the local enterprises and industries but, a profound examination of the said dispositions gives the impression that for those gas companies and their subcontractors to ever give preference to Cameroonian local enterprises and industries, they must indeed accomplish or meet to a greater extent the standards set by the gas companies if not, the so-called preference treatment to be granted to them shall merely be a farfetched requirement on the part of the law in force.

Equally so, 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"(Rachel D *et al.*, 2014). 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. Broadly, the 2016 Mining Code of Cameroon in Article 164 provides that "*the development of mining resources and industrial quarries must include a "Local Content" component which shall specify the spin-offs of the selected mining and quarry projects on Cameroon's economic, social, cultural, industrial and technological development*". More still, the 2016 Mining Code outlines in details the substratum of the contents of local content.

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. 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 with the UNGP of other, existing international standards such as the UN Global Compact, the IFC's Performance Standards and the Equator Principles.

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 human rights 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. 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) have adopted voluntary industry guidelines on responsible mineral supply chains in line with the OECD's guidelines. The ICMM has also announced new requirements for members to support and implement the UNGP. These standards are likely to be significant in prompting further alignment and attention on better management of human rights issues across the sector.

In another development 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. They differ in their terms as the national objectives in introducing such legislation are not uniform but certain broad trends are discernible. Hence, the 2019 Petroleum Code of Cameroon in Article 91 provides that "*holders shall carry out petroleum operations in such a manner as to ensure, under all circumstances, the conservation of natural resources, in particular hydrocarbon deposits, and due protection of essential features of the environment*".

In this respect, holders shall take all the neccssa.ry measures to preserve the safety of persons and property, and protcct the environmenl, natural surroundings and ecosystems. Also, petroleum contract holders shall, at their own expense, carry out an environmental and social impact assessment in accordancc with the environmental protection laws and regulation in force. This is contained in Section 92 of the Petroleum Code of 2019. Also, Article 135 of the 2016 Mining Code provides that "any mining and quarry operation undertaken must comply with the laws and regulated force relating to sustainable environmental protection and management". The Mining operator is therefore compelled to take measures to curb any environmental hazard.

3. 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. Additionally, Article 8 of the Universal Declaration on Human Rights of 1948 and Article 13 of the European Convention on Human Rights of 1950 stipulate that 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. 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. 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.

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 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.

3.1. Domestice Litigation

In terms of Article 231 of the Mining Code of 2016 and Section 123 of the Petroleum Code of 2019, mining operators as well as holders of petroleum authorization and contract are subject to the Cameroonian laws in force. National courts remain the primary legal mechanism through which rights-holders seek to hold corporates to account for human rights-related harms. This is contained in Sections 231 of the Mining Code of 2016 and Section 125 of the Petroleum Code of 2019. 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.

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, but successful prosecutions are extremely rare (Doug C, 2018). 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. 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.

Broadly, 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. 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. The circumstance 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. 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'. 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 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. Since 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. 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* 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 (Calvano L, 2008). 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'(Buckles D *et al.*, 2016).

Also, 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 (Ayling R.O *et al.*, 1997). Other litigants with claims on similar bases have failed to demonstrate an arguable case of a duty of care.The legal landscape is unpredictable, with each case to be determined 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.

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. 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.

Additionally, *Kalma v. AML* 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). 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.

Also, 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 owned by one of its subsidiaries, where serious human rights abuses were said to have occurred (Goldberg L, 1992). 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 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.

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. Nevsun* three Eritrean refugees claim, on behalf of themselves and more than 1,000 Eritrean workers, that Nevsun 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 Nevsun's alleged complicity in the use of forced labour at the Bisha mine in Eritrea by Nevsun's local sub-contractors employed by Nevsun'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*, 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.

3.2. International Arbitration

Besides litigation, the extractive sector laws in the country equally give parties the leeway to have their disputes related to human rights to be settled by employing alternative disputes resolution mechanisms. This is perceived in Article 232 of the 2016 Mining Code and Section 125(2) of the 2019 Petroleum Code. 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. 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). The measures were implemented to control the use of tobacco in order to protect 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 (Mann H, 2008). 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 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 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. Where human rights defences have been raised by states, tribunals have been reluctant to recognise them.

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 of 1969, which permits the interpretation of treaties consistently with any relevant rules applicable in the relations between the parties. In *Urbaser v. Argentina*, 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.' The counterclaim subsequently failed on the merits. Other similar attempts have been unsuccessful. The case of *South American Silver Limited v. Bolivia* concerned the alleged expropriation of mining concessions covering an area predominantly inhabited by indigenous peoples. 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, as well as the UNGP and the OECD Guidelines. The tribunal held that the express provisions of the BIT (which made no reference to human rights) prevailed.

The majority took a similar view in *Bear Creek v. Peru.* 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. 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, had caused social unrest and failed to comply with relevant international norms requiring consultation with indigenous peoples, rendering its claims inadmissible.

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 (Golderg S.B, 1992).

There has also been a growing trend towards the introduction of human rights considerations by way of non- party submissions (or amicus curiae briefs).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. For example, in *Bear Creek v. Peru*, 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 (Moore D.E, 2012). 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 (Douglas Y, 1995).

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. 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 rights under the terms of such agreements, while providing the necessary investor protection’. 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).

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. 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) (Ashurst L.P, 2011). 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.

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 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. 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.

4. International Good/Best Practices with Respect to Local Content Requirements

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 (Ackerman R.M, 2012). Ther legislation requires reporting a range of non-financial issues including human rights, such as the EU’s amendments in 2014 to the directive regarding the disclosure of non-financial and diversity information by certain large undertakings and groups (EU NFRD) (Delgado R, 1985). 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.

Additionally, 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. 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.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.

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 whose 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. 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.

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. Nevertheless, the typically complex, systemic and 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. 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.

5. 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 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.

REFERENCES

- Ackerman, R. M. (2012). Disputing Together: Conflict Resolution and the Search for Community. *Ohio State Journal on Dispute Resolution*, 8(4), 10.
- Ashurst, L. P. (2011). Governing Law and Dispute Resolution Clauses in Energy Contracts, Oxford, Oxford University Press.
- Ayling, R. D., & Kelly, K. (1997). Dealing with conflict: natural resources and dispute resolution. *The Commonwealth Forestry Review*, 182-185.
- Ayling, R. O. (1997). Armed Conflict and Natural Resources, Oxford, *Oxford University Press.*
- Cain, M. (2022). Thinking Disputes: an Essay on the Origins of the Dispute Industry. *Law and Society Journal*, 11(2), 82-83.
- Calvano, L. (2008). Conflict and Collaboration in Natural Resource Management, Washington D. C. *Foundation Press.*
- Davis, R., & Franks, D. (2014). Costs of Company-Community Conflict in the Extractive Sector, Brussel, *Cambridge University Press.*
- Delgado, R. (1985). Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution. *Wisconsin Law Journal*, 10(7), 45-48.
- Doug, C. (2018). Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, Cambridge, *Cambridge University Press.*
- Douglas, Y. (1999). The Dictionary of Conflict Resolution, San Francisco, *Jossey-Boss Publishers.*
- Dowdeswell, E. (1995). Sustainable Development: The Contribution of International Law, in Sustainable Development and International Law, London, *MacMillan Press Ltd.*
- Drummond, M. (1999). The Condition of Sustainability, London, *Capstone Publishing Ltd.*
- Eggert, R. (2006). Mining and the Environment: International Perspectives on Public Policy,

Resources for the Future, Washington DC, *Foundation Press.*

- Goldberg, L. (1992). *Dispute Resolution:* Negotiation, Mediation, and other Processes, London, *Cambridge University Press.*
- Golderg, S. B. (1992). Dispute Resolution Processes, Boston, *Federaton Press.*
- John, J. (2017). The Concept of 'Due Diligence in the UN Guiding Principles on Business and Human Rights, New York, *Foundation Press.*
- Kieren, F. (2016). The social licence to operate: A Critical Review, Oxford, *Oxford University Press.*
- Mann, H. (2008). Investment Agreements, Business and Human Rights, New York *Foundation Press.*
- Moore, D. E. (2012). A Structural Model for Arbitrating Disputes under the Oil and Gas Lease. *Natural Resources Journal*, 10(8), 23.
- Revesz, S. S. (2000). Environmental Law, the Economy and Sustainable Development: The United States, the European Union and the International Community, Cambridge, *Cambridge University Press.*
- Robert, G. B. (2011). Modelling and Measuring the Social Licence to Operate, New York, *McMillian Press.*
- Ruggie, J. (2008). Protect, Respect and Remedy: A Framework for Business and Human Rights, New York, *Green Leaf PLC.*

© 2022 |Published by Scholars Middle East Publishers, Dubai, United Arab Emirates