JANUARY 2021
VOL. 21-1

PRATT'S

ENERGY LAW REPORT

LexisNexis

Pratt's Energy Law Report

VOLUME 21 **NUMBER 1** **January 2021**

LexisNexis®

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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number] (LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

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(2021–Pub.1898)

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Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc.

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

ESG Litigation Risks for Mining and Metals Companies

By Oliver Wright, Rebecca Campbell, Michael Kendall, Kevin M. Bolan, Clare Connellan, and Karen Eisenstadt*

The unprecedented level of scrutiny on mining companies' environmental, social, and governance ("ESG") efforts complements a global disputes trend, in which claimants have invoked novel theories and strategies in court to try to impose greater transnational accountability on mining concerns. The authors of this article synthesize significant ESG litigation developments, present a fresh angle on the wide-ranging reputational and litigation risks for mining companies, and offer a potential call to action for constructive, creative, effective solutions that advance ESG principles.

The mining and metals sector faces environmental, social, and governance ("ESG") pressures from multiple sources, including investors seeking to factor ESG risks into their decision-making and regulators imposing greater disclosure requirements.

This unprecedented level of scrutiny on mining companies' ESG efforts complements a global disputes trend, in which claimants have invoked novel theories and strategies in court to try to impose greater transnational accountability on mining concerns. The accompanying breakdown in traditional concepts of jurisdiction, corporate separateness, and tort liability threatens companies' expectations and their existing risk-management approaches.

ESG LITIGATION TRENDS

The past few years have seen significant developments in transnational labor, environmental, and bribery litigation. The trend in each area is toward seeking increased corporate accountability and a breakdown of traditional concepts of jurisdiction, corporate separateness, and tort liability. These developments can inform how mining companies might mitigate ESG-related litigation risks.

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- *Labor Litigation*, which has been waning in the United States, is expanding into new fora and legal theories.
    - Earlier last year, the Canadian Supreme Court endorsed for the first time the litigation of claims based on violations of "customary international law" norms in Canadian courts, including against corporate defendants. The case involves a lawsuit against Canadian miner Nevsun alleging the use of forced labor at a mine in Eritrea by Eritrean-state controlled subcontractors of Nevsun's local subsidiary.
    - In late 2019, a group of parents and children from the Democratic Republic of the Congo ("DRC") filed a class-action lawsuit in the United States under the Trafficking Victims Protection Reauthorization Act against Apple and several other international, hi-tech companies. The plaintiffs allege that the defendants "knowingly benefited" from the use of child labor in cobalt mines in the DRC by their suppliers.
- The threat of parent-company environmental litigation for overseas harms is becoming increasingly substantial, especially in Europe.
    - In a landmark decision in 2019, the U.K. Supreme Court held that a parent company's public human-rights commitments and its lack of due diligence regarding the activities of its local affiliate could be enough to create parent-company negligence liability for toxic discharges from a copper mine in Zambia.
    - France's 2017 Duty of Vigilance Law sets the stage for similar parent-company ESG lawsuits. The law requires regulated companies to implement a due diligence plan that maps and prioritizes business-related human rights and environmental risks for all companies directly or indirectly controlled by the parent. Companies that fail to establish or implement such a plan will be subject to tort liability for the resulting human rights or environmental harms. This theory of liability is yet to be tested in court.
- *Bribery Litigation* took an unexpected turn in 2019 when a U.S. court deemed a group of former shareholders of a competitor company the "victims" of a Foreign Corrupt Practices Act violation by a subsidiary of Och Ziff Capital Management Group. Victim status entitles the claimants to mandatory restitution from the defendant. Any restitution that the court orders will be on top of Och Ziff's $412 million settlement with the U.S. government.

MITIGATING ESG LITIGATION RISKS

With their recent successes in court, claimants likely will continue to pursue novel legal theories that erode traditional barriers of jurisdiction and corporate separation.

Companies can mitigate these emerging risks through practical steps:

- Adopt strong ESG policies, procedures, and training programs, and monitor their implementation and effectiveness. Consider industry benchmarks and what peer companies are doing.
- Think carefully about how you communicate with stakeholders about your ESG commitments and plans.
- Before acquiring or partnering with another company, do your ESG due diligence.
- If an ESG failure occurs, consider whether a proactive, broad-based remedial approach may limit any resulting litigation.

Many of the cases discussed in this article are in their preliminary stages, and the legal doctrines they espouse are still evolving. Companies facing novel ESG claims should consider all their defenses, and remember that claimants' arguments can be challenged, both on the law and on the facts.

Major mining companies are also likely to consider the reputational implications of these high profile disputes. Even where novel legal theories do not ultimately succeed, the willingness of the courts to consider these issues presents a risk in itself. This emphasizes the importance of maintaining strong community relations and being an ESG champion. It also presents a challenge for the traditional "junior developer" role, as the ultimate operators may seek to control projects from their inception.

* * *

This article has three objectives.

First, we synthesize significant ESG litigation developments in three areas: labor issues, environmental damage, and bribery claims. Claimants in these suits are increasingly seeking damages not only from local operators, but also from parent companies in their home jurisdictions. These claimants are asserting novel theories of liability in an attempt to overcome the legal hurdles that have historically limited such claims.

Second, as we emphasize in our concluding remarks, this case-law synthesis presents a fresh angle on the wide-ranging reputational and litigation risks for mining companies—including through multiple jurisdictions and complex chains of supply and labor. A single ESG incident today is likely to trigger

multiple lawsuits, by different groups of claimants, in multiple jurisdictions, under varying causes of action. New and ongoing projects that reflect a sophisticated, informed understanding of these risks will be better able to manage them.

Third, the article presents a potential call to action for constructive, creative, effective solutions that advance ESG principles. Mining companies should take the initiative to formulate these solutions. Should the sector leave those initiatives to litigants, the longer-term result may be that claimants' novel theories of liability take root and expand. Disputes trends like the ones we describe often carry a significant risk of abuse and overreach, as claimants try to apply precedents to situations that scarcely resemble the facts that originally justified them. Allowing claimants to set the ESG agenda could deprive mining companies of the flexibility to tailor more pragmatic, effective solutions.

With a clearer view of the disputes risks to come, mining companies can meet these challenges and make the changes ESG scrutiny may demand.

LITIGATION OF LABOR ISSUES—THE TIDE IS TURNING

Labor-related human rights claims have often foundered on jurisdictional obstacles. In the United States, such claims traditionally have been based on the customary international law norms prohibiting slavery and forced labor. Yet these claims raise a host of legal problems—e.g., the content of the norms, whether they apply to private corporate actors, and whether courts have the power to enforce such norms regarding extraterritorial conduct.

New case law and statutes, however, show that these obstacles are eroding, as courts and legislatures tackle transnational accountability for alleged labor abuses.

As the United States Closes the Door on Customary International Law Claims, Canada Opens a Window: *Nevsun Resources Ltd. v. Araya*

U.S. courts for years have been shutting the door to claims based on customary international law. Most recently, in 2018, the U.S. Supreme Court held that, absent further intervention from Congress, foreign corporations are categorically exempt from such claims under the Alien Tort Statute.[1] The U.S.

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[1] The Alien Tort Statute ("ATS") states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATS allows for lawsuits by foreign plaintiffs against foreign defendants claiming violations of customary international law. In *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386 (2018), however, the U.S. Supreme Court held that ATS liability does not extend to foreign *corporate* defendants, which effectively foreclosed customary international law claims against foreign corporations in the United States.

government has asked the Supreme Court to extend this holding to U.S. corporations.[2]

In February 2020, the Supreme Court of Canada went in the opposite direction and endorsed for the first time the litigation of customary international law claims in Canada—including against corporate defendants.

In *Nevsun Resources Ltd. v. Araya*, three Eritrean refugees sued Canadian miner Nevsun on the ground that they were "indefinitely conscripted through Eritrea's military service into a forced labour regime where they were required to work" at Eritrea's Bisha mine. Nevsun, through various subsidiaries, owns a majority stake in the mine. Though Eritrean-state-controlled subcontractors of Nevsun's local subsidiary committed the alleged abuses, the refugees claimed that Nevsun itself should be liable for breaching the international-law prohibitions against forced labor; slavery; cruel, inhuman, and degrading treatment; and crimes against humanity.

The trial court denied Nevsun's request for a dismissal, including under the doctrine of *forum non conveniens*, noting that it was doubtful the plaintiffs could get a fair trial in Eritrea. *Forum non conveniens* is a common law doctrine by which courts may dismiss claims because another forum for the litigation is more appropriate.

Nevsun did not appeal the *forum non conveniens* decision to the Canadian Supreme Court. Instead, Nevsun's appeal focused on two issues: (1) the application of the "act-of-state" doctrine (i.e., whether the Eritrean government's alleged involvement in the conduct barred the suit), and (2) whether plaintiffs' customary international law claims had any reasonable chance of success.

The Canadian Supreme Court denied Nevsun's appeal, holding that (1) Canadian law does not recognize the act-of-state doctrine, and (2) customary international law is incorporated into Canadian law and thus Canadian courts have the jurisdictional power to remedy breaches of such law.

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[2] Though *Jesner* did not expressly foreclose customary international law claims against U.S. corporations, the logic of *Jesner* arguably applies to such claims, as well. Two companies have argued in petitions for certiorari to the U.S. Supreme Court for precisely this result, and the U.S. Solicitor General recently filed a brief on behalf of the United States agreeing with those positions. *See* Pet. for Certiorari, *Nestlé USA, Inc. v. Doe*, No. 19-416 (Sept. 25, 2019); Pet. for Certiorari, *Cargill, Inc. v. Doe I*, No. 19-453 (Oct. 2, 2019); Br. for the U.S. as Amicus Curiae, *Nestlé USA, Inc. v. Doe*, Nos. 19-416, 19-453 (May 26, 2020). The U.S. Supreme Court heard oral arguments in these cases on December 1, 2020, and had not issued a decision when this article went to press. Media reports about the oral argument, however, noted that several justices' questioning expressed surprising suspicion of the companies' contention that the ATS should exempt U.S. corporations from liability.

The court further rejected Nevsun's argument that customary international law does not support corporate liability, finding no such "blanket exclusion." The court reasoned that it is up to the trial judge to decide whether a Canadian parent company may be sued on a claim grounded in customary international law and remanded the case for further proceedings.[3]

A Statutory Avenue into U.S. Courts: *Doe v. Apple, Inc.*

Although judicially created grounds for U.S. transnational human-rights litigation are waning, Congress retains the power to create causes of action for such lawsuits. In 2008, Congress did precisely that in amending the Trafficking Victims Protection Reauthorization Act ("TVPRA") to authorize extraterritorial labor claims against companies "present in the United States."

The TVPRA prohibits slavery, forced labor, peonage, and human trafficking. The law is notable in extending civil liability to anyone in the supply chain who "knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of [the statute]."[4]

In late 2019, an anonymous, or "Doe," group of parents and children from the DRC filed a class-action lawsuit under the TVPRA against Apple and several other international, hi-tech companies. Plaintiffs allege that the defendants knowingly benefited from the use of child labor and trafficked forced labor in the DRC by their cobalt suppliers, UK-based Glencore and Chinese company Zhejiang Huayou Cobalt Co. Glencore and Zhejiang Huayou were *not* named as defendants, likely because they are not "present in the United States," as the TVPRA's extraterritoriality provision requires.

By relying on a federal statute, the Doe plaintiffs are seeking to avoid the legal hurdles that tend to undermine claims based on foreign or international law.

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[3] The *Nevsun* opinion, 2020 SCC 5, did not address the parent-subsidiary divide between Nevsun and its Eritrean subsidiary, though we expect this issue may be raised in later proceedings. A decision in 2013 by the Ontario Superior Court suggests one way the plaintiffs may be able to bypass this issue without "piercing the corporate veil." In that case, the Ontario Superior Court used reasoning similar to the U.K. Supreme Court's analysis in *Vedanta*, *see infra*, to hold that mining company Hudbay Minerals could be liable for human-rights abuses allegedly committed by the security personnel of its Guatemalan subsidiary. The Ontario court stated that it was a question of fact whether Hudbay itself had an actionable duty of care to the victims and noted, in particular, Hudbay's "public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs." *See Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.

[4] 18 U.S.C. § 1595(a).

Yet significant substantive hurdles still exist—including whether the TVPRA applies to the conduct plaintiffs have alleged. Another major hurdle is likely to be whether the conduct alleged satisfies the statutory requirement of "participation in a venture." Some U.S. courts have interpreted this phrase in line with the TVPRA's separate sex-trafficking provision, which broadly defines "venture" to mean "any group of two or more individuals associated in fact, whether or not a legal entity."[5]

But other courts, analogizing to the Racketeer Influenced and Corrupt Organizations Act, have held that "participation in a venture" requires taking "part in the operation and management of the enterprise," which a mere supply-chain relationship is unlikely to satisfy.[6] The trial court in the *Apple* case will need to wrestle with these and other questions that the defendants raised in their motions to dismiss filed in August 2020.

ENVIRONMENTAL LITIGATION—GROWING RISKS, ESPECIALLY FOR COMPANIES BASED IN EUROPE

Transnational environmental litigation is also on the rise, especially for mining concerns based in Europe. Because environmental claims are often based on the tort law of the foreign jurisdiction, parent corporations traditionally could raise strong jurisdictional and corporate-veil defenses.

In Europe, however, such defenses may be eroding. In a landmark decision in 2019 in *Vedanta Resources PLC v Lungowe*,[7] the U.K. Supreme Court held that a parent company's public human-rights commitments and its lack of due diligence regarding the activities of its local affiliate could be enough to create parent-company liability for foreign torts committed by a subsidiary.

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[5] *See Bistline v. Parker*, 918 F.3d 849, 873 (10th Cir. 2019) (discussing 18 U.S.C. § 1591(e)(6)); *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (similar).

[6] *See* Order Granting Defs. Rubicon Resources, LLC and Wales & Co. Universe, Ltd.'s Mot. for Summ. J. at 5 (Dec. 21, 2017) (ECF No. 226), *Ratha v. Phatthana Seafood Co., Ltd.*, No. CV16-04271-JFW (ASx) (C.D. Cal.):

> Plaintiffs contend that it is not necessary for a defendant to have any direct role in the illegal activities of the venture because the TVPRA criminalizes merely "passive" beneficiaries. However, Plaintiffs' argument relies on the definition of "venture" in the TVPRA that expressly relates solely to sex trafficking . . . and, thus, is not applicable in this case. In addition, the relevant case law requires more than receipt of a passive benefit to satisfy the TVPRA's participation in a venture element.

See also United States v. Afyare, 632 Fed. App'x 272, 286 (6th Cir. 2016) (holding that a defendant must "actually participate and commit some 'overt act' that furthers" the criminal "aspect of the venture" and that the TVPRA "did not criminalize" any lesser conduct).

[7] [2019] UKSC 20.

Creating a "Duty of Care" Through Public Human-Rights Commitments: *Vedanta Resources PLC v. Lungowe*

In 2015, a group of Zambian citizens sued Vedanta and its Zambian subsidiary Konkola Copper Mines Plc ("KCM") in an English court for negligence and fault-based liability regarding toxic discharges from the Nchanga copper mine. Vedanta argued that the English court lacked jurisdiction and that it should stay the proceedings on the ground of *forum non conveniens* because the relevant conduct occurred in Zambia and the cause of action was based on Zambian law.

The U.K. Supreme Court ruled in April 2019 that the claim could proceed. The court first held that, under EU precedent, Article 4.1 of the Recast Brussels Regulation bars dismissal on *forum non conveniens* grounds of any case brought in England against an English-domiciled defendant—a rule that severely constrains the power of the *forum non conveniens* doctrine.[8]

Despite finding that Zambia would have been the proper place for conduct of the litigation, the U.K. Supreme Court dismissed KCM and Vedanta's appeal on the basis that the claimants would have been unable to obtain substantial justice in Zambia. This was a highly influential factor in the decision, which referred specifically to the limited arrangements in Zambia for funding litigation and the absence of counsel of sufficient size and experience to pursue cases of this size and complexity.

The court then held that a parent company may in some circumstances owe an actionable "duty of care" to victims of its subsidiary's conduct—and that the existence of such a duty "depend[s] on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations . . . of the subsidiary." By analyzing the issue as a question of the parent company's own "duty to care" to the plaintiffs, the court omitted any analysis regarding piercing the corporate veil.

In Vedanta's case, the court found there was a real issue to be tried on whether Vedanta had a duty of care because the parent company allegedly had:

- Published a sustainability report emphasizing its oversight over its

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[8] Article 4.1 of the Recast Brussels Regulation states that "persons domiciled in a[n] [EU] Member State shall, whatever their nationality, be sued in the courts of that Member State." The court explained that, under European Court of Justice precedent, this regulation "confer[s] a right on any claimant (regardless of their domicile) to sue an English domiciled defendant in England, free from jurisdictional challenge upon forum non conveniens grounds[.]" *Vedanta*, [2019] UKSC 20. Because *forum non conveniens* otherwise can be applied regardless of the defendant's domicile (as is the case under U.S. law, *see infra*), this limitation may dissolve post Brexit.

subsidiaries;

- Entered into an agreement to provide various services (including employee training) to KCM, and actually provided such training; and
- Released public statements emphasizing its commitment to address environmental risks and technical shortcomings in KCM's mining infrastructure.

The court noted that a parent company that holds itself out as exercising supervision and control over its subsidiaries—even if the parent does not actually do so—could theoretically become liable for the failure of such supervision. The claimants will now proceed to the merits of their claim.[9]

Vedanta highlights the tension between ESG transparency and litigation risk. As parent companies disclose more information about their human-rights commitments, they may increase their exposure to lawsuits based on the ESG failures of their affiliates. This tension underscores the discipline and care a company must exercise in disclosing information about its ESG commitments, as well as the importance of monitoring the implementation of those commitments.

Mandatory Corporate Human Rights Diligence: *The French Duty of Vigilance Law*

France's 2017 Duty of Vigilance Law follows the same path toward increased corporate due diligence.

The law requires large companies headquartered in France or with large French subsidiaries[10] to implement a due diligence plan that maps and prioritizes business-related human rights and environmental risks for all companies directly or indirectly controlled by the parent.

This obligation also extends to the suppliers and subcontractors with whom those companies have an established business relationship. Regulated compa-

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[9] The holding of *Vedanta* may be particularly surprising to lawyers trained in U.S. law, which features strong *forum non conveniens* and corporate-veil doctrines. Unlike the EU, no rule in the United States prevents a *forum non conveniens* dismissal of claims against domiciled defendants. In fact, one of the U.S. Supreme Court's foundational decisions on the issue, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), affirmed the dismissal of a damages suit against two U.S.-based defendants. The United States also has a longstanding, strong corporate-veil doctrine (a doctrine the *Vedanta* court treated as irrelevant). *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries.").

[10] Companies are subject to the Duty of Vigilance Law if they are headquartered in France and have 5,000 or more employees in France (or at least 10,000 employees worldwide), or if they are headquartered elsewhere and have a subsidiary in France with at least 5,000 employees.

nies must establish an internal whistleblowing procedure, take reasonable measures to prevent or mitigate serious violations, evaluate the effectiveness of measures taken, and communicate the implementation of the due diligence plan in their annual reports.

The French Duty of Vigilance Law differs from transparency statutes like the U.K. Modern Slavery Act, however, because it expressly provides for tort liability for the resulting human rights or environmental harms for regulated companies that fail to establish or implement a due-diligence plan. No cases have been brought under this new theory yet, but the law's standing requirement is broad and could potentially allow for corporate negligence claims by, e.g., local citizens, employees, consumers, trade unions, associations, or non-governmental organizations ("NGOs").

We expect mandatory corporate human-rights diligence to spread in some form throughout the EU. On April 29, 2020, the European Commissioner for Justice, Didier Reynders, announced that the EC was planning to introduce rules for mandatory corporate human-rights due diligence.[11] A number of EU countries have already proposed such laws and, in 2019, the Netherlands enacted a law requiring all companies that sell goods and services to Dutch end-users to determine whether child labor occurs in their supply chains and, if so, to create a plan of action to prevent such occurrences.[12]

BRIBERY-RELATED CLAIMS—"PIGGYBACK" RESTITUTION CLAIMS ARE RAISING THE STAKES OF GOVERNMENT ENFORCEMENT

Government enforcement and civil lawsuits are established litigation risks in the mining-and-metals sector.[13] What is new, however, is the approach that a group of former shareholders of Africo Resources Limited took to obtaining

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[11] Business & Human Rights Resource Centre, *EU Commissioner for Justice commits to legislation on mandatory due diligence for companies* (Apr. 29, 2020), https://www.business-humanrights.org/en/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies#:~:text=EU%20Commissioner%20for%20Justice%20commits%20to%20legislation%20on%20mandatory%20due,and%20human%20rights%20due%20diligence.

[12] *See, e.g.*, Business & Human Rights Resource Centre, *Dutch Senate votes to adopt child labour due diligence law* (May 14, 2019), https://www.business-humanrights.org/en/dutch-companies-issue-open-letter-in-support-of-child-labour-regulation.

[13] In late 2011, for example, Vancouver-based First Quantum Minerals Ltd. filed suit against Kazakh miner Eurasian Natural Resources Corporation ("ENRC") in the British Virgin Islands claiming the loss of the Kolwezi tailings project due to bribery by a company that ENRC later acquired. In September 2011, after the court denied ENRC's application to strike the claim, the parties settled for US $1.25 billion. *See, e.g.*, Richard Wachman," *ENRC pays $1.25bn to settle dispute over Congo mining deal*," The Guardian (Jan 5, 2012), https://www.theguardian.com/business/2012/jan/05/enrc-settles-congo-mine-dispute.

compensation from a competitor that had paid bribes to obtain business: a "piggyback" restitution claim to a U.S. Foreign Corrupt Practices Act ("FCPA") plea agreement.

In 2016, U.S.-based hedge fund Och Ziff Capital Management Group LLC ("Och Ziff"), agreed to pay approximately $412 million to the U.S. government to settle the government's FCPA allegations. Och Ziff's subsidiary, OZ Africa Management GP LLC ("OZ Africa"), agreed to plead guilty to an FCPA conspiracy.

Part of Och Ziff's settlement related to the Kalukundi mine, for which Africo previously held a 75 percent ownership interest. In 2007, Akam Mining SPRL obtained an ex parte default judgment against Africo following an employment dispute and seized Africo's interest in the Democratic Republic of the Congo mine. Africo sought relief from the seizure in the DRC courts. Och-Ziff and Dan Gertler, an Israeli businessman, allegedly conspired to obtain the rights to the mine by:

(1) Bribing DRC officials to delay a ruling on Africo's claim;

(2) Acquiring Akam; and then

(3) Offering to buy out Africo.

With no favorable ruling in sight, the Africo shareholders approved the takeover.

Rather than filing a lawsuit directly against Gertler or Och Ziff, a group of former Africo shareholders sent a letter to the U.S. district court supervising OZ Africa's plea and asked to be named "victims" of OZ Africa's FCPA offense under the Mandatory Victims Restitution Act ("MVRA").

The MVRA makes restitution mandatory for "an offense against property . . . in which an identifiable victim or victims has suffered a . . . pecuniary loss."[14] A "victim" is any "person directly and proximately harmed as result of the" crime.[15] Though FCPA conspiracy convictions technically fall within the MVRA's scope, they rarely result in restitution orders.

On the rare occasions when they have, the "victim" is almost always a foreign government, not an aggrieved competitor.[16] An MVRA claim is different from

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[14] 18 U.S.C § 3663A(c)(1). The MVRA primarily applies to Title 18 offenses. Though the FCPA is codified in Title 15, an FCPA conspiracy charge arises under the general federal conspiracy statute, which is codified at 18 U.S.C. § 371.

[15] 18 U.S.C. § 3663A(a)(2). The required restitution involves either returning the property or paying an amount equal to its value. 18 U.S.C § 3663A(b)(1).

[16] *See, e.g.*, *United States v. Diaz*, No. 09-cr-20346-JEM (S.D. Fla. Aug. 5, 2010) (ECF No.

a civil lawsuit because it does not require filing a separate lawsuit. Instead, the restitution award is determined by the judge as part of the violator's criminal sentence.

The U.S. Department of Justice ("DOJ") initially opposed the Africo shareholders' claim. Though the DOJ acknowledged that "the bribery of DRC judges and the delayed court ruling . . . were a likely source of harm to Africo," it stated that restitution was inappropriate because it was not clear "the degree of harm, if any, that OZ Africa proximately caused to the Claimants." The DOJ pointed out that Africo had originally lost the rights due to the purported employment dispute and that OZ Africa was not involved in that conduct.[17]

The court ruled in favor of the Africo shareholders. The court found that OZ Africa knew or should have known of Gertler's involvement in the employment dispute, and that a later-entering conspirator can be made to pay restitution for his co-conspirator's pre-conspiracy acts.

The parties then fought over the amount of restitution owed, Och Ziff arguing for restitution at $1.47 per Africo share (which would work out to about $37 million for all claimants), and the DOJ and the claimants arguing for roughly $420 million.[18] In late July 2020, the claimants and Och Ziff announced a "potential settlement framework" for restitution of $136 million, which the court approved in November 2020.

The potential for a significant restitution award in the Och Ziff case casts a long shadow over the longstanding practice of allowing subsidiary companies to enter guilty pleas as part of a global FCPA settlement. And the potential victims claiming restitution may expand beyond competitors to those whose claims are even more tenuous.

The reaction to the U.K. Serious Fraud Office's bribery investigation of ENRC provides a cautionary tale. ENRC has not even been convicted of an offense, but in early 2020, a group of local chiefs, former workers, and community representatives stated their intent to demand restitution under the United Kingdom's "General Principles to compensate overseas victims (includ-

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37) (ordering restitution to Haitian government resulting from guilty plea to FCPA bribery violations involving state-owned telecommunications company); *United States v. F.G. Mason Eng'g, Inc.*, Cr. B-90-29 (D. Conn. 1990) (ordering restitution to West German government for guilty plea to FCPA bribery violations).

[17] Letter to Court at 8 (Mar 2. 2018) (EFC No. 39), *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-cr-00515-NGG-LB (E.D.N.Y.). (We refer to the case hereafter as "*Oz Africa Mgmt. GP, LLP*").

[18] *See* Defendant's Letter to the Court (Mar. 6, 2020) (ECF No. 87) and Victims' Letter to the Court (May 1, 2020) (ECF No. 93), *Oz Africa Mgmt. GP, LLP*.

ing affected States) in bribery, corruption and economic crime cases" should a conviction occur. The putative claimants allege that they are entitled to restitution because they lost their livelihoods and various community benefits when First Quantum lost the Kolwezi tailings project due to the bribes paid by a competitor that ENRC later acquired.

WHAT MAY COME NEXT—A PHASE OF CREATIVE EXPANSION

With the market demanding ever-greater transparency and accountability from operators, ESG litigation is likely to increase, and creative claimants will push the envelope.

Claims based on a novel legal theory like the ones discussed above tend to follow a similar evolutionary path. A court may accept the theory in the preliminary stage of a case, stating only that such a theory is legally possible. Or the court may accept the theory, but based on a unique fact pattern. Once endorsed by any court, however, claimants will start pushing to expand the theory—both to more marginal fact patterns, and even to other jurisdictions with similar legal regimes.

The court's opinion in *Vedanta* presents a useful example. *Vedanta*'s reasoning creates a real tension point for companies in terms of public reporting—namely, the risk that a company's voluntary commitment to a particular industry standard may leave the company *more* exposed to liability if ESG failures occur.

In May 2020, just a little over a year after the U.K. Supreme Court decided *Vedanta*, a group of interveners submitted a brief to the court in another environmental case, *Okpabi vs Royal Dutch Shell*, arguing that Royal Dutch Shell should be held liable for the pollution caused by its Nigerian subsidiary in the Niger Delta on similar grounds.[19] We have also seen similar arguments in Canadian cases.[20] With mandatory reporting rules on the rise, we expect similar arguments to follow in other jurisdictions, as well.

STEPS COMPANIES CAN TAKE TO MITIGATE ESG LITIGATION RISKS

Fortunately, companies informed about their litigation risks can take practical, constructive steps to address and mitigate them.

- Prevention is always the ideal way to mitigate litigation. Companies should proactively look at industry benchmarks and what their peers are doing, and try to put in place strong ESG policies, procedures, and training programs. A strong compliance program will provide a defense

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[19] *See* UKSC 2018/0068. An appeal is currently pending in this case.

[20] *See supra* note 3.

to ESG liability if problems do arise.

- At the same time, companies should think carefully about how they communicate with stakeholders about their ESG commitments and plans. A company that makes and follows through on strong ESG commitments may benefit from a due diligence defense against any claims. Making public commitments without a plan for implementation, however, may create unnecessary litigation exposure.
- Before acquiring or partnering with another company, do your ESG due diligence. A company can end up on the hook for its partner's or predecessor's bad acts, even if they occurred before the partnership or acquisition.
- No operation is perfect. If an ESG failure occurs, instituting a proactive, broad-based remedial approach may allow a company to limit the resulting litigation.
- The law is evolving. Many of the cases discussed above are in their preliminary stages, and the doctrines they espouse are in their infancy. Companies facing novel ESG claims should consider all their defenses and possible remedies.

These suggestions are just the tip of the iceberg. Wherever there is risk, there is also opportunity. Forward-thinking companies that are leaders in ESG compliance can position themselves as strong voices for the industry as ESG law continues to the develop.

Forum	**Event and where it happened**	**Defendants**	**Claimants**	**Cause of action/ Allegations**	**Resource mined**
Canada	Claim of being "conscripted" through Eritrea's military service to work at the Bisha mine in Eritrea	Nevsun	Eritrean nationals	Violations of customary international law prohibiting forced labor and cruel, inhuman, and degrading treatment	gold, copper, zinc

Forum	Event and where it happened	Defendants	Claimants	Cause of action/ Allegations	Resource mined
United States	Claim that defendants knowingly benefitted from the use of child labor in the DRC by their cobalt suppliers	Apple and several other international, hi-tech companies	DRC children and their parents	TVPRA	cobalt
United States	Claim that bribery conspiracy deprived Africo shareholders of their rights to Kalukundi mine in DRC	OZ Africa	Former shareholders of Africo	Restitution under the MVRA following an FCPA conspiracy plea	copper, cobalt
UK	Claim of damages from toxic discharges from Nchanga copper mine in Zambia	Vedanta	Group of Zambian citizens	Tort-based claims under Zambian law	copper
UK	(Unofficial) Claim for compensation based on lost jobs and benefits when First Quantum lost the	ENRC	Group of local chiefs, former workers, and community representatives	UK "General Principles to compensate overseas victims (including affected States) in	copper, cobalt

Forum	Event and where it happened	Defendants	Claimants	Cause of action/ Allegations	Resource mined
	Kolwezi tailings project in DRC due to bribery			bribery, corruption and economic crime cases"	
France		Companies subject to Duty of Vigilance Law	Potentially local citizens, employees, consumers, trade unions, associations, and/or NGOs	Corporate negligence based on ESG due diligence failures	