

The Rising Role of China and Chinese Enterprises in Transnational Labour Law: Theoretical Inquiries and Case Studies in the Context of Chinese Outward Mining Investment in Africa

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Abstract

Transnational labour law scholarship has emerged over the past three decades. However, relatively limited scholarship has explored the role of actors from emerging market economies and the challenges and opportunities they have brought for achieving decent work in a globalized economy. This thesis addresses the research gap through an in-depth investigation into the role of actors from China in the dynamics of multi-level governance of labour rights in a globalized economy. Building on a multi-level, actor-centred and processual approach, this thesis argues that China and Chinese enterprises are playing a rising role in developing and shaping the dynamics of multi-level governance of labour rights in the global cobalt supply chain. Furthermore, the thesis suggests that actors from China have started challenging some unequal patterns of existing labour governance in the global cobalt supply chain and have demonstrated the potential to form a counterbalancing force to challenge the dominant role of actors from the global North.

A multi-level governance framework has recently emerged and rapidly evolved in the global cobalt supply chain to eliminate child labour in the artisanal copper-cobalt mining sector in the Democratic Republic of the Congo. This framework is complex, pluralistic, and decentred. A wide range of state and non-state actors are developing various governance initiatives and shaping the dynamics of multi-level governance. Actors from China are playing a rising role in the global cobalt supply chain alongside a few other actors that have also provided proposals from the global South. Over the past decade, Chinese state agencies, nationwide industry associations and mining enterprises have proactively engaged in developing and shaping the multi-level governance framework to address governance deficits on decent work in the global cobalt supply chain. State agencies have developed various regulatory documents to enhance the social dimension of the Chinese regulatory framework for outward foreign direct investment. Nationwide industry associations have further conceptualized the term “corporate social responsibility” and have taken labour rights as key to the social responsibilities of Chinese enterprises operating overseas. Specifically, a Chinese nationwide industry association for the mining industry has developed comprehensive guidelines and initiatives to clarify and operationalize the labour component of social responsibilities in Chinese outward mining investment. The changing dynamics of multi-level governance have played a crucial role in shaping the private labour governance initiatives that Chinese mining enterprises are developing in the global cobalt supply chain.

The contributions of this thesis are original, significant, and timely, given the notable research gaps on China and Chinese enterprises’ engagement with the dynamics of multi-level governance of labour rights in a globalized economy and the ongoing development of a multi-level governance framework in the global cobalt supply chain.

Résumé

La recherche dans le domaine du droit transnational du travail a émergé au cours des trois dernières décennies. Cependant, un nombre limité de ces recherches a exploré le rôle des acteurs des économies de marché émergentes, ainsi que les défis et opportunités que cela a entraîné, dans la réalisation de l'objectif de travail décent dans une économie mondialisée. La présente thèse traite de ce manque de recherches en effectuant une enquête approfondie sur le rôle des acteurs chinois dans la dynamique de la gouvernance à plusieurs niveaux des droits des travailleurs dans une économie mondialisée. La présente thèse, en s'appuyant sur une approche à plusieurs niveaux centrée sur les acteurs et les procédés, soutient que la Chine et les entreprises chinoises jouent un rôle croissant dans le développement et la création d'une dynamique de gouvernance à plusieurs niveaux en matière des droits des travailleurs dans la chaîne d'approvisionnement mondiale en cobalt. En outre, la présente thèse suggère que les acteurs chinois ont commencé à remettre en question certains modèles inégaux de gouvernance du travail existants au sein de la chaîne d'approvisionnement mondiale en cobalt et ont démontré avoir le potentiel nécessaire pour faire contrepoids face au rôle dominant des acteurs du Nord.

Un cadre de gouvernance à plusieurs niveaux a récemment émergé et a rapidement évolué dans le secteur de la chaîne d'approvisionnement mondiale en cobalt afin d'éliminer le travail des enfants dans le secteur minier artisanal du cuivre et du cobalt en République démocratique du Congo. Ce cadre est complexe, pluraliste et décentré. Un large éventail d'acteurs étatiques et non étatiques développe des initiatives de gouvernance et façonne une dynamique de gouvernance à plusieurs niveaux. Les acteurs chinois, agissant aux côtés de quelques autres acteurs ayant également fourni des propositions depuis la perspective des pays du Sud, jouent un rôle croissant au sein de la chaîne d'approvisionnement mondiale en cobalt. Au cours de la dernière décennie, les organismes publics chinois, les associations industrielles et les entreprises minières se sont engagées de manière proactive dans le développement et la création d'un cadre de gouvernance à plusieurs niveaux afin de remédier aux déficits de gouvernance en matière de travail décent au sein de la chaîne d'approvisionnement mondiale en cobalt. Les organismes publics ont façonné divers documents réglementaires afin de renforcer la dimension sociale du cadre réglementaire chinois en matière d'investissements directs à l'étrangers. Les associations industrielles ont amélioré la conceptualisation du terme « responsabilité sociale des entreprises » et ont estimé que les droits des travailleurs était la clé de la responsabilité sociale des entreprises chinoises opérant à l'étranger. Plus précisément, une association industrielle chinoise pour l'industrie minière a façonné des directives et des initiatives détaillées pour clarifier et rendre opérationnelle la composante liée au travail de la responsabilité sociale dans les investissements miniers chinois à l'étranger. Les

évolutions récentes de la gouvernance à plusieurs niveaux a joué un rôle crucial dans la création des initiatives privées de gouvernance du travail que les entreprises minières chinoises développent au niveau de la chaîne d'approvisionnement mondiale en cobalt.

Les contributions de la présente thèse sont originales, significatives et opportunes en raison des lacunes notables de la recherche sur l'engagement de la Chine et des entreprises chinoises dans la dynamique de gouvernance à plusieurs niveaux des droits des travailleurs dans une économie mondialisée, et le développement continu d'un cadre de gouvernance à plusieurs niveaux dans la chaîne d'approvisionnement mondiale en cobalt.

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List of Abbreviations

Abbreviations

3TG	tin, tungsten, tantalum, and gold
ASM	artisanal and small-scale mining
BHR	business and human rights
BRI	Belt and Road Initiative
BRICS	Brazil, Russia, India, China, and South Africa
CACE	China Association of Communication Enterprises
CCCMC	China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters
CDM	Congo Dongfang International Mining SARL., a subsidiary of Zhejiang Huayou Cobalt Co., Ltd
CESA	Chinese Electronics Standardization Association
CHINCA	China International Contractors Association
CMOC	CMOC Group Limited
CNMC	China Nonferrous Metal Mining (Group) Co., Ltd.
CNTAC	China National Textile and Apparel Council
COCs	codes of conduct
CSR	corporate social responsibility
DRC	Democratic Republic of the Congo
ESG	environmental, social, and governance
EU	European Union
FCA	Fair Cobalt Alliance
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GSC	global supply chain
HC	Zhejiang Huayou Cobalt Co. Ltd
HRDD	human rights due diligence
ICMM	International Council on Mining and Metals
ICT	information and communication technology
ILO	International Labour Organization
IGO	intergovernmental organization
INGO	international non-governmental organization
MOC	Ministry of Commerce
NBS	National Bureau of Statistics
NDRC	National Development and Reform Commission
OECD	Organisation for Economic Co-operation and Development

OFDI	outward foreign direct investment
OHCHR	Office of the United Nations High Commissioner for Human Rights
POE	private-owned enterprise
RCI	Responsible Cobalt Initiative
RMI	Responsible Minerals Initiative
RBC	responsible business conduct
SAFE	State Administration of Foreign Exchange
SASAC	State-owned Assets Supervision and Administration Commission
SMAP	Sustainable Mining Action Plan
SOE	state-owned enterprise
SOMO	Centre for Research on Multinational Corporations
TL	Transnational Law
TLL	Transnational Labour Law
TLO	Transnational Legal Order
TNC	transnational corporation
TPLG	transnational private labour governance
UN	United Nations
UNDP	United Nations Development Programme

Abbreviations of Documents

GSRM

Chinese Guidelines for Social Responsibility in Outbound Mining Investments

Chinese Due Diligence Guidelines

Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains

Cobalt Refiner Standard

Cobalt Refiner Supply Chain Due Diligence Standard

ILO MNE Declaration

ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

OECD Due Diligence Guidance

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-Risk Areas

UNGPs

United Nations Guiding Principles on Business and Human Rights

Introduction

Over the past two decades, research on the role of China in international law and, more broadly, in various aspects of global governance has seen rapid growth.¹ Such interest has certainly been fuelled by China's rise as an increasingly powerful economic actor on the global stage and its increasingly active role in shaping the production and diffusion of international and transnational norms. The enhanced engagement between China and other actors in these processes may indicate the further adaptation of international norms in China. Furthermore, the development of the Belt and Road Initiative (BRI) may also imply China's growing influence in transnational legal processes.

With more than two decades since the adoption of the "Going Global" Strategy² and nearly one decade since the announcement of the BRI,³ the presence of Chinese outward foreign direct investment (OFDI) and its implications for labour governance is now truly global.⁴ The rise of China in the global economy has raised considerable debates about its impact on the sustainable development of the global economy and social justice. Since the early 21st century, an increase in OFDI from China to Africa has generated contentious debates in academic and policy arenas because such investment has – and will continue to have – implications for both economic development and social justice inside and outside Africa.

This thesis investigates the role of China and Chinese enterprises in the dynamics of multi-level governance of labour rights in a globalized economy. The thesis draws on three distinct strands of literature. The first strand is the vast body of scholarship in China-Africa studies. The second

¹ The term "China" in this thesis refers to the People's Republic of China.

² The "Going Global" Strategy was initially proposed in the 1990s, and it was formally adopted in the 2000s and further developed through various policies over the past two decades. For a review of key policies, regulations and laws that related to Chinese OFDI, see e.g. Karl P. Sauvart & Victor Zitian Chen, "China's Regulatory Framework for Outward Foreign Direct Investment" (2014) 7:1 China Economic J 141. For analyses of China, globalization and global economic governance, see e.g. Huiyao Wang & Lu Miao, eds, *Handbook on China and Globalization* (Cheltenham: Edward Elgar, 2019).

³ The BRI was initially launched in 2013 and further developed over the past decade. For an analysis of legal dimensions of the BRI, see e.g. Giuseppe Martinico & Xueyan Wu, eds, *A Legal Analysis of the Belt and Road Initiative Towards a New Silk Road?* (Cham, Switzerland: Palgrave Macmillan, 2020).

⁴ In 2021, China had more Fortune Global 500 companies than the United States for the second consecutive year, with 143 enterprises on the list. The State Grid Corporation of China, China National Petroleum Corporation and China Petroleum & Chemical Corporation rank second, fourth, and fifth place, respectively. See Xinhua Net, "China's Fortune Global 500 Companies Rise to 143" (3 August 2021), online: *Xinhua* <http://www.xinhuanet.com/english/2021-08/03/c_1310104838.htm> [perma.cc/M7ZS-FZ2M].

strand is primarily concerned with the evolving agenda of transnational labour law (TLL) alongside struggles to understand and address the implications of “polycentric” globalization. The third strand is relevant to the rise of emerging market economies and their impacts on global and transnational governance.

China-Africa Studies: Dominant Perceptions and the Counter-Discourse

Over the past two decades, China-Africa studies have proliferated, and discourses have evolved.⁵ While dominant perceptions seem to indicate that China’s social impacts on Africa are mainly negative, empirical studies present different scenarios of China’s presence in Africa. Over the past decade, a growing body of empirical studies has demonstrated that many negative allegations about China’s social impacts on Africa are unsubstantiated.⁶ These studies show that many negative allegations were based on unverified reports and fragmented media outlets rather than in-depth investigations. Furthermore, these studies indicate that the engagement between China and Africa is dynamically shaped by a wide range of state and non-state actors rather than the widely perceived notion of China’s unidirectional negative impacts on African countries.

While having touched upon the labour practices of Chinese enterprises, ongoing academic debates have paid minimal attention to broader questions about how labour rights have been governed in China’s economic engagement in Africa and how the rise of China and Chinese enterprises influence the governance of labour rights in this contentious transnational context. Therefore, this thesis starts from a critical engagement with China-Africa studies to ensure a solid research foundation for the theoretical inquiries and case studies in Chinese outward mining investment in southern Africa.

⁵ See e.g. Deborah Brautigam, *The Dragon’s Gift: The Real Story of China in Africa* (Oxford: Oxford University Press, 2009); Giles Mohan et al, *Chinese Migrants and African Development: New Imperialists or Agents of Change?* (London: Zed Books, 2014); Deborah Brautigam, *Will Africa Feed China?* (New York: Oxford University Press, 2015); Chris Alden & Daniel Large, eds, *New Directions in Africa-China Studies* (London: Taylor and Francis, 2018); Karsten Giese & Laurence Marfaing, eds, *Chinese and African Entrepreneurs: Social Impacts of Interpersonal Encounters* (Leiden: Brill, 2019).

⁶ See e.g. Yan Hairong & Barry Sautman, “Chasing Ghosts: Rumours and Representations of the Export of Chinese Convict Labour to Developing Countries” (2012) 210 *China Quarterly* 398 [Yan & Sautman, “Rumours and Representations of the Export of Chinese Convict Labour”]; Ching Kwan Lee, *The Specter of Global China: Politics, Labor, and Foreign Investment in Africa* (Chicago: University of Chicago Press, 2017) [Lee, *The Specter of Global China*].

The Evolving Agenda of Transnational Labour Law and the Rise of Emerging Market Economies

In response to globalization, diversified state and non-state actors have participated in shaping the production and diffusion of labour norms in transnational spheres, leading to “the emergence of ‘transnational labour law’.”⁷ TLL is “a form of multi-level governance of labour rights, including the international, the regional, the national, and the shop floor.”⁸ In addition to the frequent use of the term “transnational labour law,” several similar terms have also been used as alternatives, for instance, “transnational labour regime,” “transnational labour regulation,” and “transnational labour governance.”⁹ The terminological choices hint at unresolved debates. The question is key to TLL scholarship: how to conceptualize the role of the “state” and non-state actors (especially private actors such as corporations) in the dynamics of multi-level governance of labour rights in a globalized economy.

The shift from *international* to *transnational* labour law holds not only promises but also risks. A transnational law approach has helped to bring in transnational corporations (TNCs)¹⁰ as important non-state actors in the governance of labour rights in a globalized economy. However, as Anne Trebilcock contends, the involvement of more actors can create “a dispersion of norms” that may lead to “a loss of legal coherence.”¹¹ As Adelle Blackett cautions, “The ‘transnational’ provides a way to open up, but it does so not without risk.”¹² For instance, theorizing transnational law around

⁷ David M. Trubek, “Review Essay: The Emergence of Transnational Labor Law” (2006) 100 AJIL 725.

⁸ Adelle Blackett & Anne Trebilcock, “Conceptualizing Transnational Labour Law” in Adelle Blackett & Anne Trebilcock, eds, *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) [Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*] 3 at 4.

⁹ See e.g. Zobaida Khan, “Transnational Labour Governance: A Critical Review of Proposals for Linkage through the Lens of the Rana Plaza Collapse in Bangladesh” (2018) 33:2 CJLS/RCDS 177.

¹⁰ Several terms are frequently used in literature and international instruments to describe large corporations that are engaged in transnational business activities, including transnational corporations, multinational corporations, and multinational enterprises. These terms seem to have been used interchangeably to describe private actors whose business ties stretch across more than one national jurisdiction. To be consistent, this thesis chooses to use the term “transnational corporations” (TNCs), following the transnational approach taken in this thesis. On some occasions, this thesis also uses other alternative terms, following the routines of various authors and international organizations that are cited in this thesis.

¹¹ Anne Trebilcock, “Why the Shift from International to Transnational Law is Important for Labour Standards” in Henner Gött, ed, *Labour Standards in International Economic Law* (Cham: Springer, 2018) 57 [Trebilcock, “Why the Shift”] at 58.

¹² Amin Parsa & Niklas Selberg, “Decolonizing Labour Law: A Conversation with Professor Adelle Blackett” (2020) 5 Third World Approaches to International Law Review – TWAILR: Dialogues at 3, online (pdf): <<https://twailr.com/decolonizing-labour-law-a-conversation-with-professor-adelle-blackett/>>.

powerful TNCs may “take us away from investing legitimacy in the claims of individuals and communities.”¹³ Furthermore, focusing on labour standards and operational mechanisms developed by powerful TNCs may take us away from exploring alternatives the states can do to rebalance the asymmetries between workers and TNCs.

In the meantime, there is growing recognition that emerging market economies, notably BRICs, will bring radical shifts in global governance.¹⁴ The rise of emerging market economies in the global economy has started challenging the existing power dynamics and has brought new alternatives for the ongoing development of transnational legal ordering. Emerging examples suggest that rising powers have started transforming the contours of the global economy. For instance, a recent report suggests that an asymmetric, China-centric system is emerging in the world order.¹⁵ The rise of China has also been described as a new model for global economic ordering.¹⁶ Gregory Shaffer and Henry Gao understand China’s model of trade governance as “building from, layering on, and repurposing existing international economic law and institutions as part of the changing ecology of international economic governance.”¹⁷ They argue that China has the potential to create “an expansive, regional, rival Sino-centric economic order.”¹⁸ These contributions underline the capability and potential of China in shaping new global and transnational ordering. However, most of those contributions have focused on the economic and political aspects of the rising role of China in global governance. Few contributions have investigated the emerging role of China and Chinese enterprises in shaping transnational legal orders (TLOs) on social rights. Recent scholarship in various disciplines calling for more research in this direction has also underlined the scarcity of knowledge and information on this important

¹³ *Ibid.*

¹⁴ BRICs is an acronym for five leading emerging market economies, namely Brazil, Russia, India, China and South Africa. In recent years, scholars have developed the term “rising powers” to refer to large developing economies. Khalid Nadvi has provided a six-fold definition of “rising powers”: consistent and substantive economic growth, increasing participation in international economic activities, significant economic scale, a strong role of the state, local capital as a key element of the productive landscape and increasingly international players, and growing space for civil society engagement. See Khalid Nadvi, “‘Rising Powers’ and Labour and Environmental Standards” (2014) 42:2 Oxford Development Studies 137 at 140–141.

¹⁵ National Bureau of Asian Research, “An Emerging China-centric Order: China’s Vision for a New World Order in Practice” (Special Report No. 87, 25 August 2020), online (pdf): <<https://www.nbr.org/publication/an-emerging-china-centric-order-introduction/>>.

¹⁶ Gregory Shaffer & Henry Gao, “A New Chinese Economic Order?” (2020) 23:3 J Intl Econ L 607.

¹⁷ *Ibid* at 635.

¹⁸ *Ibid.*

topic.¹⁹ Notably, since transnational private governance has initially been developed and proliferated in the global North, business enterprises from the global South have been largely marginalized in the existing literature in the field of transnational private governance. Only in recent years have scholars turned to investigate the rising role of business enterprises from the global South in transnational private governance.²⁰

The Rise of China and Chinese Enterprises in a Globalized Economy: Challenges and Opportunities for the Governance of Labour Rights

A recent study on state regulation and decent work in the Asia Pacific region suggests that “there have been only very limited State efforts to positively influence the extent to which companies domiciled in their territories respect labour rights in their extraterritorial operations and business relationships.”²¹ Despite its unique contribution to easing the scarcity of such scholarship on countries in the Asia Pacific region, this contribution has intentionally left China outside of its selection of focus countries. The study focuses on three countries in the global North, namely Australia, Japan, and South Korea.

While TLL scholarship has emerged over the past three decades, limited research efforts have been dedicated to exploring the challenges and opportunities brought by actors from emerging market economies. Furthermore, increasingly interconnected production networks and extended supply chains have necessitated in-depth investigations into the practices of these rising power actors to

¹⁹ For calls for studying emerging market economies and TNCs from these countries, see e.g. Nadvi, *supra* note 14; Rudolf R. Sinkovics et al, “Rising Powers from Emerging Markets — The Changing Face of International Business” (2014) 23 Intl Bus Rev 675; Joonkoo Lee & Gary Gereffi, “Global Value Chains, Rising Power Firms and Economic and Social Upgrading” (2015) 11:3/4 Critical Perspectives Intl Bus 319; Elisa Giuliani, Grazia D. Santangelo & Florian Wettstein, “Human Rights and International Business Research: A Call for Studying Emerging Market Multinationals” (2016) 12:3 Management & Organization Rev 631; Florian Wettstein et al, “International Business and Human rights: A Research Agenda” (2019) 54:1 J World Bus 54.

²⁰ Recent studies on private actors and initiatives derived from the global South and their implications for transnational governance, see e.g. Philip Schleifer & Yixian Sun, “Emerging Markets and Private Governance: The Political Economy of Sustainable Palm Oil in China and India” (2018) 25:2 Rev Intl Political Economy 190; Philip Schleifer, Matteo Fiorini & Luc Fransen, “Missing the Bigger Picture: A Population-Level Analysis of Transnational Private Governance Organizations Active in the Global South” (2019) 164 Ecological Economics, DOI: <10.1016/j.ecolecon.2019.106362>; Hamish van der Ven, Yixian Sun, & Benjamin Cashore, “Sustainable Commodity Governance and the Global South” (2021) Ecological Economics, DOI: <10.1016/j.ecolecon.2021.10706>; Hongying Wang & Hanzhi Yu, “Aspiring Rule-Makers: Chinese Business Actors in Global Governance” (2022) 7:1 J Chinese Governance 137.

²¹ Ingrid Landau & John Howe, “State Extraterritorial Regulation and Decent Work in the Asia Pacific” in Janice R. Bellace & Beryl ter Haar, eds, *Research Handbook on Labour, Business and Human Rights Law* (Cheltenham, UK: Edward Elgar Publishing, 2019) 466 at 485.

understand how they engage with the production and diffusion of labour norms in transnational spheres and how they will shape the future of TLL. A close examination of the ongoing engagement between actors from China and the dynamics of multi-level governance of labour rights in a globalized economy contributes to narrowing down the research gaps.

The rise of emerging market economies in the global economy has brought new power dynamics to transnational legal processes. Furthermore, the interconnected production networks and extended supply chains have necessitated specifying how labour governance is developed and shaped across different levels and sites of law. Over the past decade, the rise of actors from emerging market economies has sparked scholars' attention in international relations, international business, and social justice.²² The emerging role of these actors and their implications for TLL have not been investigated through comprehensive research contributions.²³

Actors from China have become rising-power actors in global mineral supply chains. Taking the global cobalt supply chain as an example, China has become the largest refined cobalt producer in 2021.²⁴ The global cobalt market is highly concentrated, with more than half of the cobalt mined in the Democratic Republic of the Congo (DRC), more than half of the cobalt refined by Chinese refiners, and most cobalt-containing batteries sourced by large companies in Asia (especially

²² See e.g. Giuliani, Santangelo & Wettstein, *supra* note 19.

²³ A handful of recent contributions have helped narrow down the research gaps on the rise of emerging economic markets in TLL. See e.g. Ulla Liukkunen & Yifeng Chen, eds, *China and ILO Fundamental Principles and Rights at Work* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2014); Sean Cooney, "China's Challenge to Labour Law in both the Global North and the Global South" in Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8, 150; Sean Cooney et al, "Building BRICS of Success?" in Matthew W. Finkin & Guy Mundlak, eds, *Comparative Labor Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 440; Mimi Zou, "Labour Standards along 'One Belt One Road'" in Lutz-Christian Wolff & Chao Xi, *Legal Dimensions of China's Belt and Road Initiative*, eds (Hong Kong: Wolters Kluwer, 2016) 357 [Zou, "Labour Standards along 'One Belt One Road'"]; Ulla Liukkunen & Yifeng Chen, eds, *Fundamental Labour Rights in China: Legal Implementation and Cultural Logic* (Cham: Springer International Publishing, 2016); Yifeng Chen & Ulla Liukkunen, "Enclave Governance and Transnational Labour Law: A Case Study of Chinese Workers on Strike in Africa" (2019) 88:4 *Nordic J Intl L* 558; Mimi Zou, "China and The Belt and Road Initiative: Transnational Labor Law Under State Capitalism 4.0" (2019) 113 *AJIL Unbound* 418 [Zou, "China and The Belt and Road Initiative"].

²⁴ In 2021, the DRC produced 74% of mined cobalt, and China provided around 70% refined cobalt supply. The cobalt-containing batteries were used by large companies in Asia, Europe, and North America to manufacture electric vehicles and other battery applications such as mobile phones and laptops. See Cobalt Institute, "Cobalt Market Report 2021" (May 2022) at 4, online (pdf): <<https://www.cobaltinstitute.org/resource/state-of-the-cobalt-market-report-2021/>>.

China and South Korea), Europe, and North America.²⁵ In 2016, at least 23 refinery companies produced cobalt.²⁶ Eight of these 23 refinery companies are headquartered in China.²⁷

The Research Question, Objective, and Argument

While there is no doubt that China's rise in the globalized economy indicates complex consequences of its role in transnational norm-making and norm-diffusion processes, the role of China and Chinese enterprises in TLL is yet to be explored. For several reasons, the role of China and Chinese enterprises in the dynamics of multi-level governance of labour rights have been overlooked in TLL scholarship. First, the widespread allegations of China's negative social impacts on Africa may have been misleading and have discouraged the efforts to investigate this topic through a more balanced approach. Second, existing scholarship in English is limited since most Chinese regulatory documents were promulgated in Chinese and access to company data was limited. Third, existing scholarship has not captured the regulatory designs and company examples rapidly developing in Chinese outward mining investment in recent years.

Building on a multi-level, actor-centred and processual approach, this thesis draws on the emerging examples and ongoing processes to understand the role of China and Chinese enterprises in the dynamics of multi-level governance of labour rights in a globalized economy. The thesis aims to achieve the following three objectives: (a) to question the stereotypes about China's large-scale negative social impacts on Africa and highlight the importance of a balanced investigation into the governance of labour rights in China's economic engagement in Africa; (b) to theorize and investigate the role of China and Chinese enterprises in the production and diffusion of labour norms in Chinese outward mining investment; (c) to probe how the rise of actors from emerging market economies influences the transnational futures of international labour law and the conceptualization of a counter-hegemonic TLL.

²⁵ *Ibid.*

²⁶ Susan van den Brink et al, "Identifying Supply Risks by Mapping the Cobalt Supply Chain" (2020) 156 Resources, Conservation & Recycling (open access), DOI: <10.1016/j.resconrec.2020.104743> [van de Brink et al, "Identifying Supply Risks by Mapping the Cobalt Supply Chain"] at 3.

²⁷ *Ibid* at 7. Amongst the identified 23 refinery companies, the following eight companies are headquartered in China: Quzhou Huayou Cobalt New Material Co., Ltd., Jiangsu Cobalt Nickel Metal Co., Ltd., Zhejiang Huayou Cobalt Co., Ltd., Lanzhou Jinchuan Advanced Materials Technology Co., Ltd., Ganzhou Tengyuan Cobalt New Material Co., Ltd., Ganzhou Yi Hao Umicore Industry Co., Ltd., Nanjing Hanrui Cobalt Co., Ltd., Tianjin Maolian Technology Co., Ltd. Furthermore, Quzhou Huayou Cobalt New Material Co., Ltd. is a wholly-owned subsidiary of Zhejiang Huayou Cobalt Co., Ltd.

To develop a contextualized and in-depth investigation, this thesis situates China and Chinese enterprises in the emerging multi-level governance framework initiated to eliminate child labour in the global cobalt supply chain. The thesis critically investigates how China and Chinese enterprises have engaged with various forms of labour governance and have shaped the dynamics of multi-level governance in the global cobalt supply chain. It considers whether actors from China contribute to embedding and extending the deep-rooted global North-South inequalities in global supply chains (GSCs), or they may help to develop a counterbalancing force to challenge the existing inequalities.²⁸

The Problem: Governance Deficits on Decent Work in the Global Cobalt Supply Chain

Expanded production networks and extended supply chains have become a defining feature of globalization and have significant implications for the realization of decent work. Various governance initiatives are operating horizontally (across public and private sites of law) and vertically (across international, regional, national, and subnational levels of law). Despite the proliferation of governance initiatives in GSCs, it has been repeatedly reported that both substantive and participatory rights of workers are abused across various tiers of supply chains.

²⁸ Several terms are used in academic publications and in international fora to describe the complexity of multiple layers of global production, value, and supply networks. The commonly used ones are global production networks (GPNs), global value chains (GVCs), and global supply chains (GSCs). The GPN, GVC, and GSC frameworks have all been used in research on various aspects of relationships in globally fragmented production. Debates about the distinctions between these terms have not been resolved. Many authors seem to use these terms interchangeably to describe the complexities and interconnections of the globalized economy. See e.g. Neil M. Coe & Henry Wai-Chung Yeung, *Global Production Networks: Theorizing Economic Development in an Interconnected World* (Oxford: Oxford University Press, 2015); Stefano Ponte, Gary Gereffi & Gale Raj-Reichert, *Handbook on Global Value Chains*, eds (Cheltenham, UK: Edward Elgar Publishing, 2019); Sarosh Kuruvilla, *Private Regulation of Labor Standards in Global Supply Chains: Problems, Progress, and Prospects* (Ithaca New York: ILR Press, an imprint of Cornell University Press, 2021); International Labour Organization (ILO), *Decent Work in a Globalized Economy: Lessons from Public and Private Initiatives* (Geneva: ILO, 2021), online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma995114892502676> [ILO, *Decent Work in a Globalized Economy*]. The term “global supply chains” is widely used by the ILO, including its attention to constructing a policy framework on decent work in GSCs. See e.g. ILO, *Report IV Decent Work in Global Supply Chains*, ILOILCOR, 105th Sess, Agenda Item 4, UN Doc ILC.105/IV (2016); ILO, *Achieving Decent Work in Global Supply Chains*, Report for Discussion at the Technical Meeting on Achieving Decent Work in Global Supply Chains (Geneva: ILO, 2020), online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma995112093502676>. To be consistent, this thesis chooses to use the term “global supply chains,” following the general practices of the ILO. On some occasions, this thesis also uses alternative terms such as “global production networks” and “global value chains,” following the routines of various authors that are cited in this thesis.

The problem addressed in this thesis is labour rights-oriented. The perceived problem is the failure to ensure labour rights in the context of GSCs. The desired outcome is decent work in GSCs, notably the establishment and institutionalization of TLOs on decent work to ensure labour rights in GSCs. Both the perceived problem and the desired outcome are critical in the formation of a TLO. As suggested by the TLO framework, in an institutionalized TLO, the link between problems and outcomes is shaped through legal means, as well as through dynamic interactions amongst actors.²⁹ Various state and non-state actors have proposed various legislative measures, regulatory arrangements, and governance initiatives as alternative solutions to address the failure to ensure labour rights in the context of GSCs. However, TLOs on decent work are yet to be established and institutionalized in GSCs.

This thesis focuses on a problem recognized by relevant actors: the issue of child labour, especially the worst forms of child labour, at the bottom of the global cobalt supply chain. Global mineral supply chains' social and environmental impacts have been heavily criticized due to reported labour and human rights abuses. Artisanal and small-scale mining (ASM) is a sector with high risks of labour and human rights abuses. The issue of child labour, especially the worst forms of child labour, has been persistent in the ASM sector globally and has been repeatedly reported in the ASM sector in the DRC. Alongside large-scale industrial mining, an estimated 15 percent of the total cobalt production in the DRC comes from artisanal mining.³⁰ Research contributions by scholars, intergovernmental organizations (IGOs), and international non-governmental organizations (INGOs) have provided extensive evidence of labour and human rights abuses associated with artisanal copper-cobalt mines in the Katanga region of southern DRC.³¹ A recent empirical study observes different forms of child labour at artisanal copper-cobalt mining sites in the DRC.³² Another empirical study detects the presence of children in 29 percent (17 of 58) of

²⁹ Terence C. Halliday & Gregory Shaffer, "Transnational Legal Orders" in Terence C. Halliday & Gregory Shaffer, eds, *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015) 3 at 8.

³⁰ Federal Institute for Geosciences and Natural Resources of Germany (BGR), "Mapping of the Artisanal Copper-Cobalt Mining Sector in the Provinces of Haut-Katanga and Lualaba in the Democratic Republic of the Congo" (8 October 2019) at 4, online (pdf): <https://www.bgr.bund.de/EN/Themen/Min_rohstoffe/Downloads/studie_BGR_kupfer_kobalt_kongo_2019_en.html>.

³¹ See e.g. Karlien Cheyns *et al*, "Pathways of Human Exposure to Cobalt in Katanga, a Mining Area of the D.R. Congo" (2014) 490 *Science Total Environment* 313.

³² Organisation for Economic Co-operation and Development (OECD), *Interconnected Supply Chains: A Comprehensive Look at Due Diligence Challenges and Opportunities Sourcing Cobalt and Copper from the*

active artisanal copper-cobalt mining sites accessed.³³ The study finds that many of those children carried out work related to artisanal mining activities.³⁴

The bottom of the supply chain, which primarily concerns mine workers and local communities in developing countries, is not the only problematic part of global mineral supply chains. However, the mining sites are undoubtedly one of the most challenging parts of achieving decent work in GSCs, considering the power asymmetries between workers and large companies in GSCs and the insufficiency of labour law enforcement in those host countries with rich mineral resources. The use of child labour in the artisanal copper-cobalt mining sector in the DRC is not the only negative impact of transnational mining activities but one of the key challenges in global mineral supply chains. The issue of child labour interacts with social, economic, and environmental issues caused or exacerbated by the extraction of minerals. The problem of child labour is undoubtedly one of the most severe abuses, together with other forms of abuse in artisanal mines, such as forced labour, hazardous working conditions, prolonged working hours and payment under minimum wage.

Cobalt is one of the critical raw materials that are paramount in technologies for a low-carbon and green economy. Being an essential component of rechargeable lithium-ion batteries, cobalt is a critical enabler of technological innovation of battery technologies and a green economy. Cobalt-containing batteries are a technology of choice for many car manufacturers in all major automotive markets of China, Europe, and North America.³⁵ In 2021, electric vehicles became the largest end-use sector at 34 percent of cobalt demand.³⁶ Other major lithium-ion battery applications include electronics and information and communication technology (ICT) products, ranging from mobile phones to laptops.

While cobalt is critical for technological innovation and the transition toward a green economy, the irresponsible mining and sourcing of cobalt will exacerbate the social and environmental issues in the mining sector in the DRC. Therefore, there is “a need to raise the profile of cobalt

Democratic Republic of the Congo (Paris: OECD, 2019) at 6, online (pdf): <<https://mneguidelines.oecd.org/interconnected-supply-chains-a-comprehensive-look-at-due-diligence-challenges-and-opportunities-sourcing-cobalt-and-copper-from-the-drc.htm>>.

³³ BGR, *supra* note 30 at 43.

³⁴ *Ibid.*

³⁵ Cobalt Institute, *supra* note 24 at 3

³⁶ *Ibid* at 4.

mining challenges and fully inscribe the industry in a green and sustainable transition.”³⁷ The traceability of minerals is generally low when compared to biotic commodities such as food and wine.³⁸ The low traceability of cobalt is more obvious in global mineral supply chains since cobalt is not classified as “conflict minerals” and thus is not subject to the regulatory developments surrounding conflict minerals. Refiners are in crucial positions in global mineral supply chains. They are seen as “chokepoints” since the number of refiners is much smaller than those of component producers and end-use product manufacturers. Chokepoints present a constriction in complex global mineral supply chains where there are few actors and fewer sites, thus providing strategic opportunities for efficient engagement, education, development, and standardization.³⁹

A research report released by Amnesty International in 2016 highlighted the severity of the problem of child labour at the bottom of the global cobalt supply chain, which refocused international attention on the use of child labour in the ASM sector in the primary cobalt-producing country—the DRC.⁴⁰ The refocused international attention has triggered a rapid co-evolution of various public and private governance responses to governance deficits on decent work in the global cobalt supply chain.

The desired outcome of the ongoing transnational legal processes is the effective elimination of child labour in the ASM sector in the DRC. However, despite the proliferation of various instruments and initiatives focusing on the perceived problem, TLOs on decent work are yet to be established and recognized as appropriate regulatory frameworks to be applied in the global cobalt supply chain. Therefore, this thesis examines the changing dynamics of multi-level governance of

³⁷ Raphael Deberdt & Philippe Le Billon, “The Green Transition in Context—Cobalt Responsible Sourcing for Battery Manufacturing” (2022) 35:7 *Society & Natural Resources* 784 [Deberdt & Le Billon, “Cobalt Responsible Sourcing”] at 798.

³⁸ Steven B. Young, Shannon Fernandes & Michael O. Wood, “Jumping the Chain: How Downstream Manufacturers Engage with Deep Suppliers of Conflict Minerals” (2019) 8:1 *Resources* (open access), DOI: <10.3390/resources8010026> at 4.

³⁹ *Ibid.*

⁴⁰ Amnesty International, “‘This is What We Die for’: Human Rights Abuses in The Democratic Republic of the Congo Power the Global Trade in Cobalt” (Index number: AFR 62/3183/2016, 19 January 2016), online (pdf): <<https://www.amnesty.org/en/documents/afr62/3183/2016/en/>> [Amnesty International, “‘This is What We Die for’”].

labour rights in the global cobalt supply chain, focusing on the role of China and Chinese enterprises in constructing and shaping the ongoing transnational processes.

The Argument: The Rising Role of China and Chinese Enterprises in Constructing and Shaping the Multi-level Governance Framework on Labour Rights in the Global Cobalt Supply Chain

This thesis argues that China and Chinese enterprises are playing a rising role in shaping the dynamics of multi-level governance of labour rights in a globalized economy. The thesis underlines the crucial role of China in incrementally integrating the social dimension into the Chinese regulatory framework for OFDI. Furthermore, it highlights the rising role of Chinese enterprises in developing transnational private labour governance (TPLG) initiatives⁴¹ and engaging with the changing dynamics of multi-level governance in GSCs. Specifically, both China and Chinese mining enterprises have played an important role in constructing and shaping the multi-level governance framework in the global cobalt supply chain that aims to address the governance deficits on decent work, especially the elimination of child labour. The role of China and Chinese mining enterprises is important considering their rising power and proactive engagement in transnational legal processes. However, their role is not decisive since the dynamics of multi-level governance in the global cobalt supply chain are continuously shaped by a wide range of state and non-state actors with vastly different power. The dynamics of multi-level governance are complex processes in which the various actors propose and promote optional normative paths and practical measures from different perspectives. The development of new labour governance initiatives and the diffusion of labour norms and practices are complex and incremental rather than simple transplantation or passive adaptation processes.

This thesis develops two sets of observations surrounding the rising role of China and Chinese enterprises in TLL. First, a multi-level governance framework in the global cobalt supply chain is emerging, and the diffusion of labour norms and practices is ongoing. The framework has

⁴¹ Some scholars have used the terms such as “private regulation” and “private governance” interchangeably. For instance, the “private regulation model” has also been referred to as the “private governance model” or “private politics.” See Kuruvilla, *supra* note 28 at 2 and 289. To be consistent, this thesis uses the term “labour governance” to capture private responses, initiatives, and various private forms of power (including rules, norms, and measures) surrounding labour standards in the global economy. “Transnational private labour governance” refers to initiatives and norms within the global economy designed to transcend constraints associated with nation-states, amidst the cross-border movement of labour and capital. On some occasions, this thesis also uses alternative terms, following the routines of various authors that are cited in this thesis.

highlighted the reconfiguration of actors and the evolving multipolarity of labour governance in the chain. Governance deficits on decent work at the bottom of global mineral supply chains have prompted the co-evolution of various forms of governance initiatives, including public, private, and hybrid initiatives. These initiatives are developed and shaped by a wide range of state and non-state actors across various levels and sites of law. The reconfiguration of actors and the emerging multipolarity in the governance of the global cobalt supply chain does not necessarily bring positive impacts on labour practices and worker outcomes in GSCs. However, the emerging multipolarity can challenge the existing unipolarity in the governance of the global cobalt supply chain that is dominated by powerful actors from the global North. The multipolarity can allow alternative normative paths to be developed to address the governance deficits on labour and human rights in GSCs. The majority of labour governance initiatives have been led by actors from the global North and fail to address deeply rooted global North-South inequalities in GSCs. In recent years, governance initiatives developed by actors from China have become an important part of the emerging multi-level governance framework, especially because these initiatives are part of a limited number of normative paths that actors from the global South have proposed.

Second, China and Chinese enterprises are playing a rising role in shaping the dynamics of multi-level governance of labour rights in the global cobalt supply chain. The ongoing experimentation of China's facilitation and regulation of its OFDI provides an opportunity to explore the practices, challenges, and potential of the home state of TNCs in the exercise of transnational public and private authority over labour standards. Through a state-centric approach to corporate social responsibility (CSR),⁴² China has integrated a social dimension into its regulatory framework for OFDI. While there are emerging practices in developing legislative measures to regulate TNCs

⁴² The emergence of CSR has paralleled the development of globalization. CSR is a business management and ethics strategy. According to the frequency counts conducted by Alexander Dahlsrud, the definition provided by the Commission of the European Communities in 2001 received the highest number of uses. CSR was defined as "A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis." See Alexander Dahlsrud, "How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions" (2008) 15:1 Corporate Social Responsibility Environmental Management 1 at 7. However, the conceptualization of CSR has been evolving, with an ongoing tendency to incorporate labour and human rights as key components. In recent years, the CSR discourse has become closely related to social sustainability, human rights, labour rights, and law. As Karin Buhmann pointed out, "CSR is a dynamic and open term, which continues to undergo change in regard to its substantive contents and application." See Karin Buhmann, *Changing Sustainability Norms through Communication Processes: The Emergence of the Business and Human Rights Regime as Transnational Law* (Cheltenham: Edward Elgar Publisher, 2017) at 41.

with respect to human rights in transnational business activities, there are only a few examples of such legislative measures in addressing transnational challenges for labour and human rights. The enhancement of the social dimension of the Chinese regulatory framework for OFDI shows that, alongside legislative measures, regulatory arrangements can also play a role in shaping the social impacts of TNCs. Over the past decade, Chinese state agencies have contributed to facilitating, guiding, and regulating Chinese OFDI toward a socially responsible mode, including directing applicable laws, regulations, rules, and relevant standards regarding labour practices. The China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC), a Chinese nationwide industry association for the mining industry, has contributed to detailing the labour component of social responsibilities and constructed operational mechanisms. In particular, the CCCMC has developed industry-specific CSR guidelines for Chinese enterprises to follow in Chinese outward mining investment.

The role of TNCs in TLL is dynamic rather than fixed. In the complex labour governance networks in transnational legal processes, TNCs can be both subjects and emerging sources of labour governance.⁴³ Upon the rise of first and middle-tier suppliers, some TNCs will play a “double agency” role in labour governance in GSCs, as targets of TPLG initiatives derived from downstream companies and as emerging sources of TPLG initiatives for upstream companies.⁴⁴ Therefore, transnational refiners, which connect upstream and downstream segments of global mineral supply chains, will have the capability and potential to coordinate and connect different levels, sites, and forms of labour norms. The site of the TNC can be understood as “a critical way to consider a multi-level governance framework in the construction of the social.”⁴⁵ Between 2016 and 2021, a group of Chinese mining enterprises developed private initiatives to respond to the governance deficits on decent work in the global cobalt supply chain, especially the issue of child labour in the artisanal mining sector in the DRC. These TPLG initiatives not only have their limits

⁴³ For a case study of Gap Inc. and the regulation of its suppliers in India, see Larry Catá Backer, “Multinational Corporations as Objects and Sources of Transnational Regulation” (2008) 14:2 ILSA J Intl & Comp L 499 [Backer, “Multinational Corporations as Objects and Sources of Transnational Regulation”] at 508–517.

⁴⁴ For a detailed analysis of the emerging “double agency role” of the first-tier suppliers, see Miriam M. Wilhelm et al, “Sustainability in Multi-Tier Supply Chains: Understanding the Double Agency Role of the First-Tier Supplier” (2016) 41:1 J Operations Management 42.

⁴⁵ Adelle Blackett & Christian Lévesque, “Introduction: Social Regionalism in the Global Economy” in Adelle Blackett & Christian Lévesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011) 1 at 12.

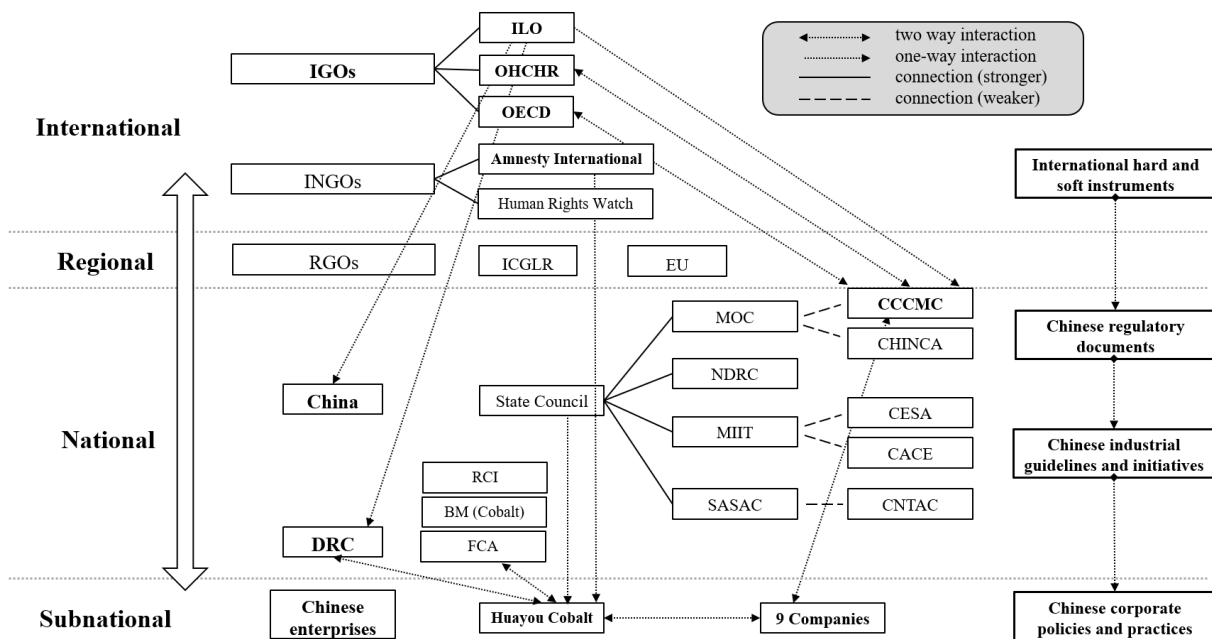
regarding the legitimacy and effectiveness in improving labour standards and working conditions but also can bring hidden costs for labour governance in the chain, including unintended consequences, perverse effects, and unacknowledged impacts. Against this backdrop, the role of the state in the multi-level governance framework is crucial in that public initiatives can shape the development of private initiatives and can contribute to improving the effectiveness of private initiatives.

This thesis shows that the diffusion of labour norms across various levels and sites of law is not necessarily unidirectional but rather multipolar and multidirectional, and it is likely to be ongoing. This thesis takes labour norms concerning the elimination of child labour in a globalized economy as an example and unfolds the overlooked processes of the diffusion of labour norms across levels and sites of law in GSCs. Standards and mechanisms set at the international level are incrementally incorporated into the Chinese regulatory framework for OFDI, notably through industry guidelines on CSR. These standards and mechanisms continue to be diffused to other levels and sites of law through various channels, notably incorporated into TPLG initiatives (such as CSR policies and mechanisms) that Chinese mining enterprises are developing. An important outcome of these dynamic transnational processes is that the two ILO fundamental Conventions on the effective elimination of child labour have been incorporated into both industry guidelines and corporate policies on CSR in the context of Chinese outward mining investment. The two ILO fundamental Conventions are the *Minimum Age Convention* (ILO Convention No. 138) and the *Worst Forms of Child Labour Convention* (ILO Convention No. 182).⁴⁶ Several key actors have contributed to shaping the substance, direction, and outcome of the ongoing processes, including actors from China, international governmental organizations (GOs) such as the International Labour Organization (ILO), Office of the United Nations High Commissioner for Human Rights (OHCHR), Organisation for Economic Co-operation and Development (OECD), as well as INGOs such as Amnesty International and Global Witness. The findings also reflect the tendency under ongoing debates that public international law, national law, and private CSR standards are gradually converging.

⁴⁶ *Minimum Age Convention*, 26 Jun 1973, ILO Convention No. 138, Fundamental Convention (entered into force 19 June 1976) [*Minimum Age Convention*]; *Worst Forms of Child Labour Convention*, 17 Jun 1999, ILO Convention No. 182, Fundamental Convention (entered into force 19 November 2000) [*Worst Forms of Child Labour Convention*].

A multi-level, actor-centred and processual approach helps to map out key elements of the emerging multi-level governance framework across national borders and various levels and sites of law. Figure 1 presents the diversity of actors, norms and processes in the dynamics of multi-level governance of labour rights in a globalized economy. Building on the mapping exercise, this thesis illustrates how actors from China can dynamically shape the future of TLL.

Figure 1 A Simplified Overview of the Dynamics of Multi-level Governance of Labour Rights in a Globalized Economy: Multiple Actors, Norms and Processes



Source: Developed by the author

The findings of this thesis suggest that actors from China have started challenging some unequal patterns of existing labour governance in the global cobalt supply chain and have demonstrated the potential to form a counterbalancing force to challenge the dominant role of actors from the global North in GSC governance. The ILO has only recently made enhanced efforts to develop its policy framework for achieving decent work in the context of GSCs. In the emerging multi-level governance framework in the global cobalt supply chain, the role of the ILO is less visible compared to the higher profile of the OHCHR and the OECD in disseminating and promoting

international instruments relevant to responsible business conduct (RBC)⁴⁷ and human rights due diligence (HRDD).⁴⁸ Against this backdrop, actors from China, specifically the CCCMC and Chinese mining enterprises, have contributed to proactively and explicitly adopting, referencing, and diffusing the two ILO fundamental conventions concerning the elimination of child labour as a key source alongside other international standards for RBC in GSCs. Furthermore, the CCCMC has developed an additional step to the existing five-step risk management due diligence framework developed by the OECD, “community participation [社区参与].” Huayou Cobalt, a Chinese cobalt refiner, has implemented the innovative six-step framework in the global cobalt supply chain. Actors from China have acknowledged and underlined that it is essential to effectively engage with local communities (including stakeholders at the local level such as artisanal miners) and to address the root causes of severe labour issues in GSCs, which contrasts with the top-down risk management approach taken by large downstream companies to mitigate their reputational risks.

The contributions of this thesis are original, significant, and timely, given the notable research gaps on China and Chinese enterprises’ engagement with the dynamics of multi-level governance of labour rights, the ongoing development of a multi-level governance framework in the global cobalt supply chain, and the increasing importance of a just transition toward a

⁴⁷ The increasing use of the term “responsible business conduct” and other related terms such as “responsible sourcing” can be noted in guidelines, policies, and reports issued by various actors, including INGOs, NGOs, governments, and corporations. The absence of a comprehensive and coherent international framework for transnational mining activities poses challenges to defining “responsible business conduct” or “responsible sourcing” in global mineral supply chains.

⁴⁸ “Human rights due diligence” has been developed and implemented as a regulatory response to labour and human rights challenges in a globalized economy. The concept of HRDD was introduced through the “UN Protect, Respect and Remedy: A Framework for Business and Human Rights” and the “UN Guiding Principles on Business and Human Rights.” These instruments were developed by John Ruggie during his mandate as UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises and were endorsed by the UN Human Rights Council in 2008 and 2011, respectively. See Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie*, UNHRCOR, 17th Sess, Annex, Agenda Item 3, UN Doc A/HRC/17/31 (2011) (endorsed by the Human Rights Council through Resolution 17/4, A/HRC/RES/17/4) [Human Rights Council, *Report of the Special Representative of the Secretary-General*]. Various actors then developed the concept through different instruments, initiatives, and practices. One of the most frequently used instruments for transnational mining activities is the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-Risk Areas* (OECD Due Diligence Guidance), initiated in 2011 and revised in 2013 and 2016, respectively. By the end of 2021, the OECD Due Diligence Guidance for responsible mineral supply chains was endorsed by a variety of hard and soft law instruments across international, regional, national, and corporate levels. The labour dimension of HRDD is now being developed by the ILO and other actors in TLL.

green economy. The thesis makes an original contribution by examining a group of increasingly influential actors that have not received comprehensive examinations in TLL scholarship and related fields such as GSC governance. It makes a novel contribution by investigating the production and diffusion of labour norms across levels and sites of law in GSCs and the rising role of actors from China. It also illustrates how international labour Conventions concerning the elimination of child labour have been diffused, shaped, interpreted, contested, and implemented in a globalized economy beyond ratifications by ILO member states. Overall, the thesis represents a valuable addition to the literature and a point of departure that invites further research into the rising role of actors from China and other countries of the global South.

The Methodological Framework

The methodology of this thesis is informed by the trend in contemporary legal scholarship that indicates the evolving taxonomy for incorporating insights from other disciplines, particularly the social sciences, into reform-oriented legal research.⁴⁹ The thesis follows the traditional doctrinal approach, but it also incorporates methods from social sciences, including qualitative document analysis⁵⁰ and the case study method.⁵¹ Therefore, the thesis is methodologically interdisciplinary in that it uses multiple methods from law and social sciences. It incorporates mixed methods to verify data and research findings.⁵² The strategy of methods triangulation and data triangulation helps to ensure the validity of sources and the quality of research outcomes.⁵³ The use of multiple data collection methods and the collection of data from reliable sources helps to ensure that the research outcomes are valid and reliable. While the methods and data have their strengths and

⁴⁹ While the doctrinal core of legal scholarship remains intact, legal scholars are endeavouring to accommodate social science evidence and methods within the legal research framework. For a detailed analysis, see Terry Hutchinson, “The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law” (2015) 8:3 *Erasmus L Rev* 130.

⁵⁰ Glenn A. Bowen, “Document Analysis as a Qualitative Research Method” (2009) 9:2 *Qualitative Research J* 27.

⁵¹ Derek Beach & Rasmus B. Pedersen, *Process-tracing Methods: Foundations and Guidelines* (Ann Arbor: University of Michigan Press, 2013).

⁵² John W. Creswell & J. David Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 5th eds (Thousand Oaks, California: SAGE Publications, 2018).

⁵³ Veronica A. Thurmond, “The Point of Triangulation” (2001) 33:3 *J Nursing Scholarship* 253; Uwe Flick, “Triangulation in Data Collection” in Uwe Flick, ed, *The SAGE Handbook of Qualitative Data Collection* (Los Angeles: SAGE Publications, 2018) 527.

limitations when considered in isolation, the strategy of methods triangulation is used to ensure the validity of the sources and the quality of the research outcome.

Combining Multiple Methods

As Bruce L. Berg submits, by combining several methods, researchers obtain “A better, more substantive picture of reality; a richer, more complete array of symbols and theoretical concepts; and a means of verifying many of these elements.”⁵⁴ This thesis addresses the research question by combining multiple methods, including literature review, doctrinal research, qualitative document analysis and case study. First, the literature review is based on both primary and secondary sources, including materials in both English and Chinese. The thesis is based on an in-depth literature review of three branches of inter-related scholarship: China-Africa studies, TLL scholarship, and the rise of emerging market economies and their impacts on global and transnational governance. Second, the legal method of doctrinal research, accompanied by qualitative document analysis from the social sciences, is conducted on labour norms and regulatory updates at different levels and sites of law, including international, regional, national, and subnational levels. Data collection focuses on labour standards and other norms relevant to labour rights, human rights, and corporate responsibility to better capture the emerging multi-level governance of labour rights in China’s economic engagement in Africa. Specific attention is paid to emerging cross-references amongst labour norms generated at different levels and sites of law. There are at least two trends of interactions and cross-references: (a) the reference to core international labour norms in documents at the national level (Chinese law, policies, and guidance, etc.); and (b) the reference to international labour norms and the above-mentioned Chinese documents at the corporate level (the websites of corporations, corporate policies, corporate public statements, contracts, etc.). The combination of doctrinal research and qualitative document analysis helps to reveal the interactions between different levels and sites of law. Furthermore, it deepens the understanding of how those interactions may influence labour norm diffusion across various levels and sites of law. Third, the case study method is employed to trace and illustrate the

⁵⁴ Bruce L. Berg & Howard Lune, *Qualitative Research Methods for the Social Sciences* (Boston: Pearson, 2017) at 5.

production, diffusion, and institutionalization of labour norms across various levels and sites of law in China's economic engagement in Africa.⁵⁵

Data Collection and Organization

Data collection and organization create challenges for this thesis. First, Chinese regulatory arrangements for OFDI are fragmented and complex. The regulatory arrangements include laws, regulations, policies, and guidelines. Most of these regulatory arrangements were published in Chinese, and many were issued over the past decade. To date, relatively limited scholarship has presented comprehensive overviews of the legal dimensions of the Chinese regulatory framework for OFDI, and even less scholarship has focused on the social or, more specifically, labour provisions in the framework. Furthermore, key scholarly contributions have only addressed regulatory arrangements promulgated up to 2016, which means that recent regulatory developments have not been analyzed. Within the limited body of scholarship in this field, the main efforts made so far can be grouped into three categories: (a) scholarly contributions concerning the development of Chinese regulatory arrangements for OFDI,⁵⁶ (b) scholarly contributions concerning CSR considerations and labour provisions in these arrangements,⁵⁷ and

⁵⁵ The application of the case study method in this thesis draws insights from the following key literature. Beach & Pedersen, *supra* note 51; Audie Klotz & Deepa Prakash, eds, *Qualitative Methods in International Relations. A Pluralist Guide* (New York: Palgrave Macmillan, 2008); Oisín Tansey, "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling" (2007) 40:4 PS: Political Science & Politics 765; David Collier, "Understanding Process Tracing" (2011) 44 PS: Political Science & Politics 823; Adrian Kay & Phillip Baker, "What Can Causal Process Tracing Offer to Policy Studies? A Review of the Literature" (2015) 43.1 Policy Studies J 1.

⁵⁶ For key examples of a comprehensive analysis of the Chinese regulatory framework for OFDI, see Sauvant & Chen, *supra* note 2; Victor Zitian Chen, Yuanyuan Li & Sara Hambright, "Regulatory Institutions and Chinese Outward FDI: An Empirical Review" (2016) 24:4 Multinational Bus Rev 302; Tong Yin, Lisa De Propriis & Liza Jabbour, "Assessing the Effects of Policies on China's Outward Foreign Direct Investment" (2021) 30:5 Intl Bus Rev, DOI: <10.1016/j.ibusrev.2021.101818>.

⁵⁷ For key examples of a comprehensive analysis of CSR considerations and labour provisions in the Chinese regulatory framework for OFDI, see e.g. Zou, "Labour Standards along 'One Belt One Road'", *supra* note 23; Xiaohui Liang, "Business and Human Rights: A Study of the Interaction between Policy Concept Shifts and Business Practices in China" (2019) 18:1 J Human Rights 46; Ciprian N. Radavoi & Yongmin Bian, "Isomorphic Mutation and Strategic Adaptation in China's CSR Standards for Overseas Investors" in Díaz Díaz Belén *et al*, *Responsible Business in a Changing World: New Management Approaches for Sustainable Development*, eds (Cham: Springer, 2020) 247; Guangjian Tu & Si Chen, "Private International Law for Corporate Social Responsibility: National Report for China" in Catherine Kessedjian & Humberto Cantú Rivera, eds, *Private International Law Aspects of Corporate Social Responsibility* (Berlin: Ius Comparatum series, Springer, 2020) 257.

(c) research reports concerning the social and environmental safeguards in these arrangements.⁵⁸ Second, access to policy-making processes in Chinese state agencies and Chinese enterprises is generally limited. The limited access to comprehensive and reliable data on policies and practices developed by powerful actors such as states and large enterprises is generally challenging for most research topics that address such powerful actors. Third, due to the author's minimal language proficiency in the French language, which is the official language of the DRC (the focus African country of this thesis), this thesis has had limited access to data conveyed in French scholarship.

While the data collection and analysis processes have been challenging, this thesis has developed strategies to overcome the difficulties and minimize the risks of misunderstanding. To ensure the reliability and accuracy of data, the thesis benefits from data triangulation, which suggests the collection and application of data from multiple sources.⁵⁹ The data was collected through a variety of reliable channels, including university libraries, online research databases, as well as the website of IGOs, INGOs, state agencies, industry associations, and business enterprises.⁶⁰ The data collection focuses on January 2014 and December 2021 and covers the years before and after this time frame when necessary. Both English and Chinese data have been applied in this thesis. The author has translated the data from Chinese to English to her best knowledge.

This thesis has examined the following three comprehensive data sets. The first data set is primary sources. According to the objectives of the thesis, the following primary sources were prioritized:

⁵⁸ See e.g. International Institute for Sustainable Development, *Chinese Outward Investment: An Emerging Policy Framework. A Compilation of Primary Sources* (Winnipeg: IISD & IIER, 2013), online (pdf): <<https://www.iisd.org/library/chinese-outward-investment-emerging-policy-framework>>; United Nations Development Programme China, *2015 Report on the Sustainable Development of Chinese Enterprises Overseas* (Beijing: UNDP China, 2015), online (pdf): <<https://www.cn.undp.org/content/china/en/home/library/south-south-cooperation/2015-report-on-the-sustainable-development-of-chinese-enterprise.html>>; Inclusive Development International, "Safeguarding People and the Environment in Chinese Investments: A Reference Guide for Advocates (Second Edition)" (May 2019), online (pdf): <<https://www.inclusivedevelopment.net/idi-releases-revised-edition-of-safeguarding-people-and-the-environment-in-chinese-investments/>>; United Nations Development Programme China, *40 Years of Opening Up and Reform: The Evolution of the Business Ecosystem and Sustainable Development in China* (Beijing: UNDP China, 2019), online (pdf): <https://www.cn.undp.org/content/china/en/home/library/human_development/40-years-of-opening-up-and-reform--the-evolution-of-the-business.html>.

⁵⁹ See e.g. Thurmond, *supra* note 59; Flick, *supra* note 59.

⁶⁰ In addition to libraries and databases, this thesis benefits from comprehensive research reports published by IGOs and INGOs. Specifically, several widely-known organizations have published empirically-based research reports on labour and human rights impacts of TNCs, including the International Labour Organization, United Nations Development Programme, Amnesty International, Global Witness, and Business & Human Rights Resource Centre.

(a) core international labour standards, (b) the Chinese regulatory framework for OFDI, which encompasses Chinese laws, regulations, policies, and guidelines that are relevant to the facilitation, promotion, and regulation of Chinese OFDI; and (c) corporate policies and mechanisms developed by Chinese enterprises. In the mid-2000s, only a few primary sources of Chinese laws, regulations, rules and policies addressed the social and environmental dimensions of Chinese OFDI. At the beginning of the third decade of the 21st century, hundreds of Chinese regulatory arrangements for OFDI have emerged, and many have contributed to enhancing the social dimension of the emerging Chinese regulatory framework for OFDI. This thesis reviews over 100 Chinese regulatory documents and industry guidelines that are closely relevant to Chinese OFDI. Amongst these documents, the thesis identifies over 30 documents that are closely relevant to labour and human rights considerations, particularly in the form of CSR, social impacts and labour protections. The data set and in-depth analysis constitute an original contribution to the existing literature and form part of the research foundation for the remainder of the thesis. Furthermore, supplementary data on the production, diffusion and implementation of CSR and labour provisions in the Chinese regulatory framework on OFDI and at the corporate level have been collected through extensive literature review and document analysis. The increasing data transparency has also enabled an in-depth investigation in this thesis. The data sets concerning companies include but are not limited to the CSR section of company websites, CSR policies and statements, annual CSR reports, and reports on stock exchanges. The remaining limited access to information highlights the importance of increasing transparency at the corporate and supply chain levels. It also confirms how important it is to compile available data for a timely investigation despite these difficulties.

The second data set is existing literature. This thesis relies on an in-depth literature review of three branches of inter-related scholarship: China-Africa studies, TLL scholarship, and the rise of emerging market economies and their impacts on transnational governance. Emerging literature on social issues and regulatory updates relevant to GSCs have provided rich resources for the investigation into Chinese enterprises. Furthermore, several projects and initiatives running between 2015 and 2021 have provided considerable empirical findings and practical knowledge on the changing transnational regulatory environment. These include initiatives to commemorate

the centenary of the ILO,⁶¹ the investigation into Chinese enterprises and employment in Africa,⁶² the theoretical and empirical inquiries into transnational business governance interactions,⁶³ and the global implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) in the next 10 years.⁶⁴

The third data set is supplementary data from empirical research projects and multi-stakeholder conferences. This thesis draws insights from 25 research reports and 10 multi-stakeholder online conferences (listed in the Annexes) to strengthen the understanding of ongoing processes and practical knowledge in the global cobalt supply chain. The research reports were recently published and closely connected with the issue of child labour in the ASM sector in the DRC and social risks in the global cobalt supply chain. They were published by IGOs, such as the ILO, OHCHR, and OECD, and INGOs and research institutions. Most of those contributions were based on fieldwork and empirical data.

These comprehensive data sets are crucial for this thesis since they contribute to achieving the following goals: (a) to uncover the implicit assumptions derived from literature review and data analysis, for example, the assumption about the rising role of China and Chinese mining enterprises in the global cobalt supply chain; (b) to verify the data and assumptions collected from existing literature, for instance, the assumption about the flow of labour norms from the

⁶¹ For instance, in 2019, Adelle Blackett at the Faculty of Law of McGill University provided a bilingual seminar course on TLL, “The transnational futures of international labour law – La justice sociale dans le monde du travail.” See Adelle Blackett, “Introduction: Transnational Futures of International Labour Law” (2020) 159:4 Intl Labour Rev 455 [Blackett, “Introduction: Transnational Futures of International Labour Law”] at 457–458.

⁶² For instance, between 2015 and 2019, Carlos Oya at the School of Oriental and African Studies of the University of London conducted a four-year empirical research project on the labour practices of Chinese enterprises in Angola and Ethiopia, “Industrial Development, Construction and Employment in Africa: A Comparative Analysis”. The project was based on firm-level and worker-focused surveys in the construction and manufacturing sectors of Angola and Ethiopia. The survey covers over 1,500 workers in nearly 80 firms in Ethiopia and Angola. As of June 30, 2022, the research project has produced seven working papers, eleven research reports, and six peer-reviewed journal articles and chapters. For key publications, see e.g. Carlos Oya, “Labour Regimes and Workplace Encounters between China and Africa” in Arkebe Oqubay & Justin Yifu Lin, *China-Africa and an Economic Transformation*, eds (Oxford: Oxford University Press, 2019) 239 [Oya, “Labour Regimes and Workplace Encounters between China and Africa”].

⁶³ The research project “Transnational Business Governance Interactions” focuses on the nature of business governance interactions as they develop across time and global space. For key publications, see e.g. Stepan Wood et al, eds, *Transnational Business Governance Interactions: Advancing Marginalized Actors and Enhancing Regulatory Quality* (Cheltenham, UK: Edward Elgar Publishing, 2019).

⁶⁴ See e.g. United Nations Working Group on Business and Human Rights, “UNGPs 10+: A Roadmap for the Next Decade of Business and Human Rights” (29 November 2021), online (pdf): <<https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf>>.

international level to the national and corporate levels; and (c) to collect supplementary data, for example, data about how Chinese regulatory arrangements are developed, diffused, and shaped by various actors, and how these arrangements influence the policy updates and behaviour changes of Chinese enterprises.

Applying the Case Study Method

Another challenge of this thesis is applying the case study method in investigating the policy updates and behaviour changes at Chinese mining enterprises. This thesis employs a research method known as “explaining-outcome process-tracing.”⁶⁵ Process-tracing is generally used to make within-case inferences about the role of causal mechanisms in the processes that link causes and outcomes.⁶⁶ Explaining-outcome process-tracing attempts to craft a minimally sufficient explanation of a puzzling outcome in a specific historical case. Its aim is not to build or test more general theories but to craft a (minimally) sufficient explanation of the outcome of the case where the ambitions are more case-centric than theory-oriented.⁶⁷

Case selection strategies in explaining-outcome process-tracing are driven by a strong interest in accounting for a particular outcome.⁶⁸ Rather than focusing on dependent or independent variables, case selection in the context of process-tracing requires selecting cases that make it possible to trace the causal mechanisms that link one or more causes to a particular outcome.⁶⁹ This thesis grounds the case studies in the context of Chinese outward mining investment in Africa and its relevance to the global cobalt supply chain. The focus enterprise, industry and country selection is based on the following three criteria. First, Chinese outward mining investment in Africa has a history of more than two decades. Chinese mining enterprises are amongst the first sets of Chinese enterprises operating overseas. Therefore, existing literature and practical data can enable further in-depth qualitative research. Second, the mining industry is a labour-intensive industry, and global

⁶⁵ Beach & Pedersen, *supra* note 51 at 18–21. The method of process-tracing can be used for three distinct research purposes: theory-testing, theory-building, and explaining-outcome.

⁶⁶ *Ibid* at 1–4, and Chapter 5 “Causal Inference and Process-Tracing Methods” at 68, “Even with the best measuring instruments, we can gain only a selected sample of observations of a given phenomenon. Therefore, we are forced to infer from a small set of empirical observations that a theory was the cause of the phenomenon. In other words, we make an inferential leap from what we can observe empirically to conclude that an underlying causal explanation exists.”

⁶⁷ *Ibid* at 3.

⁶⁸ *Ibid* at 156.

⁶⁹ *Ibid* at 146–154.

mineral supply chains have been heavily criticized for failing to address labour rights issues at the bottom of the chains. Third, the selected country, the DRC, is rich in mineral resources and faces controversial labour rights issues in the artisanal mining sector.

Therefore, the focus enterprise, industry, and country are suitable to be re-examined in the changing transnational labour regulatory environment in a time of global economic shifts. The data collection focuses on the following three sites in the multi-tier cobalt supply chain: (a) the artisanal mining sector of the DRC, namely the major producing country of cobalt ores; (b) Chinese cobalt refiners operating in the DRC, namely large upstream companies; and (c) Chinese regulatory framework for OFDI, namely a key home state of transnational cobalt refiners. In addition, supplementary data is collected from consumer-faced brand companies in the electronics, automotive, and ICT industries, namely large downstream companies and lead firms.

The case study method is applied to explore how Chinese mining enterprises have engaged with the dynamics of multi-level governance in the global cobalt supply chain. It focuses on two ends of the interactive processes: (a) how the emerging multi-level governance framework in the global cobalt supply chain, especially the enhanced labour dimension of the Chinese regulatory framework for OFDI, has shaped policy updates and behaviour changes at the corporate level, and (b) how policy updates and behaviour changes at Chinese mining enterprises will influence labour governance in the global cobalt supply chain.

Policy Updates and Behaviour Changes at the Corporate Level in China: The Development of Transnational Private Labour Governance Initiatives by Chinese Mining Enterprises

Over the past decades, lead firms primarily from the global North have dominated the governance of GSCs. However, ongoing global economic shifts indicate that power structures in GSCs are changing. Emerging market economies such as China and India have been in rapid economic growth, and “rising power” companies from these countries have increased their influence in GSCs.⁷⁰ For instance, in recent years, Chinese mining enterprises have notably joined the group of large mining TNCs from countries such as Belgium, Canada and Finland and have become major private actors in the global cobalt supply chain.⁷¹ The rise of Chinese mining enterprises challenges the existing power structure in the global cobalt supply chain that was dominated by

⁷⁰ Lee & Gereffi, *supra* note 19 at 324–331.

⁷¹ van den Brink et al, “Identifying Supply Risks by Mapping the Cobalt Supply Chain”, *supra* note 26 at 7.

lead firms in the electronics, automotive, and ICT industries. After being extracted from mining sites in countries such as the DRC, cobalt ores are refined and processed, then supplied to battery manufacturers as cobalt products. These cobalt products are then turned into batteries for electronics, automotive vehicles and ICT devices and supplied to lead firms in these industries, including Apple Inc., BMW AG, and Huawei Investment & Holding Co., Ltd..

Recognizing TNCs from emerging market economies (hereafter referred to as “emerging TNCs”) as rising-power actors in GSCs, this thesis considers how Chinese enterprises have engaged with transnational legal processes of labour norm production and diffusion across levels and sites of law. The proliferation of various forms of labour governance initiatives presents new challenges and opportunities for achieving decent work in GSCs. This also triggers organizational impulses to change how companies coordinate tasks across borders and manage labour across transnational operations. The method of case study explores how Chinese mining enterprises experiment, interpret, enact, and negotiate resultant changes in transnational processes.

While the proliferation of private governance initiatives in GSCs is an “old story” for established TNCs that are primarily from countries in the global North, it is a “new story” for many emerging TNCs that are largely from the global South. Emerging TNCs have only recently become important actors in the globalized economy. For instance, in the context of Chinese outward mining investment, Chinese enterprises have only recently started developing comprehensive private labour governance initiatives in GSCs. These recent developments in private governance can shed new light on labour governance in the global cobalt supply chain by bringing in corporate policies, mechanisms, and practices that may differ from those of established TNCs. Furthermore, it is important to investigate whether these private initiatives will contribute to embedding and extending the existing global North-South inequalities of GSCs, or instead, they will be likely to acknowledge and challenge these inequalities and contribute to dislodging them.

An In-depth Case Study of a Chinese Cobalt Refiner in the Global Cobalt Supply Chain

This thesis identifies Zhejiang Huayou Cobalt Co., Ltd. [浙江华友钴业股份有限公司] (hereafter referred to as “Huayou Cobalt” or “HC”) as a representative case that can help to exemplify the ongoing development of TPLG initiatives by Chinese mining enterprises. Choosing HC for an in-depth study is based on the following three considerations. First, HC is one of the largest transnational cobalt refiners around the world. HC is headquartered in Zhejiang Province in China.

HC is a private-owned enterprise (POE) established in 2002 and listed on Shanghai Stock Exchange in 2015.

Second, HC was identified by the Amnesty International Report (2016) as a “choke point” of the global cobalt supply chain. The report identified HC as one of 26 companies connected to the global cobalt supply chain that allegedly benefit from child labour in the artisanal copper-cobalt mining sector in the DRC. The report refocused international attention on labour rights at the bottom of global mineral supply chains, especially in the artisanal mining sector. Since the release of the report, HC has been a subject of heated debate.

Third, since being targeted in the report, HC has shown a proactive engagement with other actors in the global cobalt supply chain and has presented a rapid update of its CSR policies and mechanisms. Since 2016, the company has developed a set of new CSR policies and mechanisms to respond to the governance deficits identified in the report and refocused international attention on the recurring issue of child labour in the artisanal mining sector in the DRC. Furthermore, HC has been a pilot company example for the CCCMC’s Responsible Cobalt Initiative (RCI). Meanwhile, the Kasulo artisanal mine site in Kolwezi, one of the ASM sites targeted by the report, became HC’s pilot project in the DRC for addressing issues related to child labour and other issues in the artisanal mining sector. Developments in the Kasulo mine site have presented advanced examples of quick responses and collaborative platforms to improve labour rights on the ground.

These preliminary observations suggest an in-depth investigation into HC regarding its rising role in labour governance in the global cobalt supply chain. An in-depth case study of HC can provide an illustrative example of how Chinese mining enterprises have engaged with the changing dynamics of multi-level governance of labour rights in the global cobalt supply chain.

A Critical Investigation into 10 Chinese Mining Enterprises in the Global Cobalt Supply Chain

Focusing on one single case has several limitations. The most notable is the limited generalizability of the findings. Focusing on HC limits the ability to observe closely other enterprises’ approaches and practices regarding labour governance in the global cobalt supply chain. This may give rise to the possibility that the findings are HC specific and thus not generalizable. To reduce this risk, this thesis has compiled a group of 10 Chinese mining enterprises to investigate their recent development of TPLG initiatives.

This thesis has identified more than 20 Chinese mining enterprises as closely connected to the global cobalt supply chain and has selected five state-owned enterprises (SOEs) and five POEs (including HC).⁷² The combination of an in-depth case study into HC and a critical investigation into 10 Chinese mining enterprises helps to develop a comprehensive overview of the recent developments and trends, as well as the limitations and potential of these private initiatives with a view to fostering decent work in the global cobalt supply chain. In this sense, the findings from the in-depth case study and the critical investigation are not isolated examples but represent emerging trends amongst Chinese mining enterprises. To minimize any risks of unnecessary generalization of findings from a single case, the in-depth case study focuses on tracking, presenting, and articulating the observed policy updates and behaviour changes regarding labour governance at the corporate level; the critical investigation focuses on critically investigating the effectiveness and potential of these recently developed TPLG initiatives. This thesis also makes efforts to provide careful concluding remarks for future investigations.

The Structure

In addition to the introductory and concluding remarks, this thesis is structured in the following three parts. Part I contextualizes the investigation through engaging with existing China-Africa studies (chapter 1), developing an analytical framework (chapter 2), and applying the analytical framework to map out the emerging multi-level governance framework in the global cobalt supply chain (chapter 3). Part II provides a comprehensive review of the labour rights agenda in the emerging Chinese regulatory framework for OFDI (chapter 4) and an in-depth study into the labour rights agenda of the ongoing development of industry guidelines in Chinese outward mining investment (chapter 5). Finally, Part III conducts an in-depth case study of TPLG initiatives that a large Chinese cobalt refiner has developed (chapter 6) and a critical investigation into TPLG initiatives that many Chinese mining enterprises are developing (chapter 7). The flow of the chapters showcases two primary complexities of the evolving TLL in a time of global economic shifts: first, the emerging multipolarity of labour governance in a globalized economy, specifically the dynamic processes of norm making and diffusion, both horizontally and vertically; and second, the rising role of China and Chinese enterprises in the processes.

⁷² These Chinese mining enterprises are identified through a review of academic publications, research reports, and the website of Chinese enterprises. Chapter 7 of this thesis provides further details.

Chapter 1 contextualizes the investigation by critically engaging with existing literature in China-Africa studies. This critical analysis is motivated and informed by a notable contrast between the long-standing allegations surrounding the negative labour practices of Chinese enterprises in Africa and a growing body of empirical studies that oppose such allegations. The findings of this chapter challenge the widely perceived stereotypes about China's negative social impacts on Africa and highlight the importance of a balanced approach to the role of China and Chinese enterprises in labour governance in the context of China's economic engagement in Africa.

Chapter 2 contextualizes the investigation by chronicling the evolving trajectory of TLL and developing a theoretical and analytical framework based on a TLL approach and a TLO framework. This framework anchors in a multi-level, actor-centred and processual understanding of the production and diffusion of labour norms in a globalized economy. The thesis understands TLL as *a form of multi-level and multidirectional governance of labour rights developed and shaped by a wide range of state and non-state actors with vastly different power*. This conceptualization of TLL recognizes not only the important role of state actors but also the emerging role of non-state actors in the interactive dynamics across various levels and sites of law, that is, the dynamics of multi-level governance of labour rights in transnational spheres. Moving from a "state-centred" approach to an "actor-centred" approach, this analytical framework underlines the importance of both state and non-state actors in the dynamically changing transnational labour regulatory environment in an era of global economic shifts. A plural and processual conception of legal ordering in TLL inspires us to investigate labour norms developed and shaped through multiple sites, modes, and forms of law that are not subordinate to the authority of sovereign states nor subsumed within a state-centred conception of law.

Chapter 3 contextualizes the role of China and Chinese enterprises in the emerging multi-level governance framework that was initiated to eliminate child labour in the global cobalt supply chain. This chapter shows that a multi-level governance framework has emerged in recent years to respond to the governance deficits on decent work in the global cobalt supply chain, explicitly in the artisanal copper-cobalt mining sector in the DRC. The chapter maps out two sets of labour governance initiatives advanced within this contentious transnational context: (a) *public* governance, through legislative measures and regulatory arrangements associated with the activities of the state; and (b) *private* governance, through governance initiatives associated with the activities of non-state actors, such as individual companies, industry associations, civil society

organizations, or a mix of these actors, the latter of which is referred to as “multi-stakeholder initiatives.” The emerging multi-level governance framework is characterized by fragmentation and incoherence, notably the lack of public “hard” instruments, the proliferation of private “soft” instruments, and the absence of a worker-centred approach to the emerging HRDD system. In the ongoing transnational legal processes, actors from China have demonstrated a proactive engagement with various hard and soft law instruments and initiatives that promote RBC in global mineral supply chains. Situating the role of China and Chinese mining enterprises in the emerging multi-level governance framework helps to better understand its consequences and implications for labour governance in and beyond the global cobalt supply chain. The findings of this chapter suggest that the emerging multipolarity in the global cobalt supply chain can potentially allow the development of alternative normative paths that may differ from existing paths established and consolidated by actors from the global North.

Chapters 4 and 5 critically assess the labour component of the evolving social dimension in the Chinese regulatory framework for OFDI, focusing on its relevance and implications for labour governance in the context of Chinese outward mining investment. The two chapters find that China has been taking a pragmatic, experimental, and gradualist approach to its role in the emerging multi-level governance of labour rights in transnational spheres. The regulatory changes and innovations are ongoing in the development of the Chinese regulatory framework for OFDI. China is incrementally developing a pragmatic experimentation approach to labour governance through a web of various forms of regulatory arrangements for labour governance in the context of Chinese OFDI. This increasingly enriched web consists of regulations, policies, and guidelines promulgated by state agencies, as well as other forms of CSR guidance, such as industry guidelines and initiatives developed by nationwide industry associations and supported by state agencies. As the two chapters show, Chinese state agencies and industry associations have greatly contributed to making labour rights a central component of the conceptualization of CSR in the context of Chinese OFDI. Chinese regulatory arrangements for labour protections in OFDI have been formulated and implemented by two groups of actors: state agencies and nationwide industry associations. Both groups have considerably contributed to making labour rights a central component of the evolving conceptualization of CSR in the Chinese regulatory framework for OFDI. Regulatory documents promulgated by state agencies have played an essential role in setting general CSR guidance for Chinese enterprises’ overseas operations and making labour

rights a key component of CSR. Industry guidelines launched by nationwide industry associations have played a critical role in detailing, advancing, and operationalizing the labour component of the CSR guidance set by state agencies. Specifically, by developing and promoting a six-step supply chain due diligence framework, the CCCMC guidelines have considerably contributed to infusing key international labour standards for eliminating child labour into CSR policies and daily practices of Chinese mining enterprises. Furthermore, as will be shown in the last two chapters of the thesis, this conceptualization has contributed to making labour rights a central component of CSR initiatives that Chinese mining enterprises are developing and implementing in the global cobalt supply chain.

Chapter 4 provides a critical investigation into the social dimension of the emerging Chinese regulatory framework for OFDI, focusing on the considerations and implications concerning the labour component. This investigation articulates the most recent regulatory updates and emerging trends in China's approach to labour governance in OFDI, laying a solid foundation for understanding their consequences for labour rights in the context of Chinese outward mining investment. The investigation identifies and examines 20 documents reflecting the social dimension of the Chinese regulatory framework for OFDI. It unfolds a regulatory shift toward enhancing the social responsibilities and impacts of Chinese enterprises in Chinese OFDI over the past decade. Furthermore, the investigation focuses on five regulatory documents promulgated by Chinese state agencies and five industry guidelines issued by Chinese nationwide industry associations. In recent years, CSR provisions in regulatory documents promulgated by state agencies have increased, but they frequently tend to be general and abstract. In contrast, the conceptualization of CSR in industry guidelines is more detailed and often accompanied by specific steps and mechanisms for implementation. Notably, labour rights constitute a central component of the conceptualization of CSR in both types of documents.

Chapter 5 provides an in-depth investigation into a set of industry guidelines and initiatives for the social responsibilities of Chinese outward mining investment. Since 2014, the CCCMC, a Chinese nationwide industry association for the mining industry, has launched a set of comprehensive guidelines and initiatives to facilitate, guide, and foster Chinese enterprises toward socially responsible outward mining investment. The foundational guidelines are *Chinese Guidelines for Social Responsibility in Outbound Mining Investment* (hereafter referred to as GSRM). The guidelines are comprehensive and detailed, aligning with a wide range of international labour and

human rights standards. This chapter identifies the development and implementation of the CCCMC guidelines and initiatives as ongoing experimentation toward socially responsible outward mining investment. The chapter considers how labour rights are advanced in the ongoing experimentation in Chinese outward mining investment. The chapter shows that industry guidelines have made considerable contributions to detailing, advancing, and operationalizing the labour component of the CSR guidance set by state agencies. Furthermore, the chapter suggests that the CCCMC guidelines and initiatives have addressed, while partially, governance deficits on decent work in the context of Chinese outward mining investment.

Chapters 6 and 7 critically assess TPLG initiatives that Chinese mining enterprises have been developing to articulate how and to what extent Chinese enterprises have engaged with the changing dynamics of multi-level governance of labour rights in the global cobalt supply chain. These two chapters examine recent CSR policy updates and behaviour changes made by Chinese mining enterprises that are connected to the global cobalt supply chain. Based on an in-depth case study of one Chinese mining enterprise and a critical investigation into 10 Chinese mining enterprises, this thesis develops an original understanding of the rising role of Chinese enterprises as non-state actors in TLL.

Chapter 6 provides an in-depth case study of Huayou Cobalt, a Chinese private and listed mining enterprise, to exemplify how and to what extent Chinese mining enterprises have responded to governance deficits on decent work in GSCs identified in the artisanal copper-cobalt mining sector in the DRC. The HC case provides an opportunity to understand the rising role of Chinese enterprises in the changing dynamics of multi-level governance in the global cobalt supply chain. By investigating recent policy updates and behaviour changes of HC, this case study demonstrates that HC has proactively engaged with the changing dynamics of multi-level governance in the global cobalt supply chain since 2016. Through interactive processes, public labour norms have been diffused from the international level to the national and industry levels; then, they have been incorporated into CSR-related policies and mechanisms at the corporate level and have been continuously diffused to other sites of law through various channels of HC's engagement with other actors in the global cobalt supply chain. The HC case shows how public labour norms set at the international, national, and industry levels are incorporated and reflected in CSR policies and mechanisms at the corporate level. Furthermore, the case study suggests that policy updates made

by HC will create both challenges and opportunities for developing a responsible global cobalt supply chain that puts workers at the centre.

Chapter 7 provides a critical investigation into TPLG initiatives recently developed by Chinese mining enterprises that are connected to the global cobalt supply chain. The findings of this chapter suggest the rising role, with multifaceted implications, of Chinese mining enterprises in diffusing and implementing labour norms in the global cobalt supply chain. By reviewing private governance initiatives developed by Chinese mining enterprises, this chapter demonstrates that the development of TPLG initiatives is an emerging trend amongst Chinese mining enterprises rather than an isolated example identified at HC. By assessing the effectiveness of TPLG initiatives, this chapter shows that the development of TPLG initiatives in the Chinese context further complicates the ongoing debates in TLL. On the one hand, the development of TPLG initiatives has contributed to the protection of labour rights in China's economic engagement in Africa, including adding one more form of protection, mainstreaming labour and human rights in GSCs, and providing good practices for both Chinese and non-Chinese enterprises in the development and implementation of such initiatives. On the other hand, TPLG initiatives developed in the Chinese context are confronted with their limitations as a form of private governance, suffering from the critique of their legitimacy and effectiveness in improving compliance with labour standards in GSCs. The development of TPLG initiatives at Chinese mining enterprises exemplifies how labour governance is perceived at the corporate level in China. The institutional emergence of TPLG initiatives amongst Chinese mining enterprises was initiated and driven by Chinese private mining enterprises rather than Chinese state-owned mining enterprises that are more experienced and powerful actors in global mineral supply chains. Since the initial phase, these TPLG initiatives have been characterized as actively engaging with and adopting labour norms established in public labour governance initiatives.

The concluding remarks situate the main findings of the thesis in the dynamics of multi-level governance of labour rights in a globalized economy. The concluding remarks underline the rising role of China and Chinese enterprises in shaping the production and diffusion of labour norms and establishing new TLOs in TLL.

Limitations

In this thesis, the role of China and Chinese enterprises are primarily investigated through actors and laws at the national level. Actors at subnational levels, such as subnational governance institutions, are playing an increasingly important role in the context of Chinese OFDI.

This thesis illustrates the complex governance system in the Chinese regulatory framework for OFDI and clarifies the role of key actors and regulatory arrangements at the national level. To focus on the broad landscape of the Chinese regulatory framework, this thesis has made limited efforts to explore regulatory arrangements made at the provincial and local levels of law in China. Upon the rapid development of Chinese OFDI, a wide group of POEs and provincial-level SOEs have carried out many overseas projects. In the context of Chinese outward mining investment, many large private-owned mining enterprises are headquartered in several provinces such as Zhejiang, Jiangxi, Guangdong, and Hunan.

The formidable challenge for the governance of labour rights in a globalized economy is to govern a wide variety of labour and human rights issues that transcend spatial and jurisdictional boundaries and involve multiple actors, norms and processes. Orchestrating the various forms of labour governance initiatives outlined within and beyond this thesis and ensuring their effectiveness will be a core task on the long road ahead. This thesis lays a solid foundation to explore further in this direction.

Part I Contextualizing the Role of China and Chinese Enterprises in Transnational Labour Law: A Multi-level, Actor-centred and Processual Approach to Understanding the Production and Diffusion of Labour Norms in a Globalized Economy

Chapter 1 The Rise of China in a Globalized Economy: A Call for a Critical and Constructive Approach to the Role of China and Chinese Enterprises in Transnational Labour Law

1.1 Introduction

Research on China's economic engagement in Africa has increased in various disciplines, including sociology, anthropology, international relations, international politics, and law. Over the past two decades, China-Africa studies have proliferated, and the discourse has been evolving. Based on content configuration analysis of existing literature, a recent study shows that there is a notable dichotomous approach to China's engagement with Africa, perceiving China as a new neo-colonial power on the one hand and a development partner on the other hand.⁷³ Indeed, whether China is a neo-colonialist or a development partner with Africa has been a recurrent question in China-Africa studies over the past two decades.⁷⁴

A primary allegation in existing China-Africa discourse is notable: China has been pursuing a neo-colonialist path in Africa, grabbing natural resources and abusing labourers. While the allegation is not substantiated, it has been widely disseminated, influencing popular perceptions and academic publications inside and outside Africa. The widespread negative views about China's presence in Africa have contributed to deep-rooted stereotypes about China's negative impacts on Africa. However, as illustrated in this chapter, a growing body of in-depth empirical studies has challenged and debunked the commonly held, demonized image of China's presence in Africa. Various empirical studies have underlined that it is misleading to depict China's engagement in Africa as a singular "China" imposing negative impacts on a singular and vulnerable "Africa."⁷⁵

⁷³ For further details, see Jin Ding, Christoph Ratz & Manfred Max Bergman, "What Do We See When Looking at China's Engagements in Africa? An Analysis of Mainstream Academic Perspectives" (2022) 31:135 J Contemporary China 398 at 406–408.

⁷⁴ For monographs and collective volumes, see e.g. Marcus Power, Giles Mohan & May Tan-Mullins, *China's Resource Diplomacy in Africa Powering Development?* (Basingstoke: Palgrave Macmillan, 2012); Mohan et al, *supra* note 5; Steve Hess & Richard Aidoo, *Charting the Roots of Anti-Chinese Populism in Africa* (Cham: Springer, 2015); Kobus Jonker & Bryan Robinson, *China's Impact on the African Renaissance: The Baobab Grows* (Singapore: Palgrave Macmillan, 2018); Alden & Large, *supra* note 5. For journal articles, see e.g. Ding, Ratz & Bergman, *supra* note 73.

⁷⁵ See e.g. Ching Kwan Lee, "Raw Encounters: Chinese Managers, African Workers and the Politics of Casualization in Africa's Chinese Enclaves" (2009) 199 China Quarterly 647 at 665.

Despite various perspectives of China's presence in Africa, the continuous dissemination of allegations about Chinese enterprises' negative labour practices in Africa has led to considerable misunderstandings and even stereotypes about the role of China and Chinese enterprises in Africa. Many allegations originated from unsubstantiated opinions disseminated by political leaders and news agencies, especially those from the United States and the United Kingdom. The alleged negative labour practices of Chinese enterprises have been used as key evidence of China's negative impacts on Africa, specifically the neocolonial label on China.

Against the backdrop of the evolving China-Africa discourse, this chapter seeks to engage critically with existing academic publications and other research resources to debunk the unsubstantiated myths and highlight the importance of a balanced approach to understanding China's economic engagement in Africa. The chapter shows that, despite the growing body of literature, the labour practices of Chinese enterprises in Africa can hardly be generalized due to the diversity of actors and conditions, the complexity of problems, and the scarcity of comparable data. This finding also indicates that attempts to generalize the practices of all or most Chinese enterprises in Africa as "bad" or "good" are questionable. By debunking the most controversial myths surrounding the labour practices of Chinese enterprises in Africa, the chapter provides a balanced starting point for investigating labour governance in this contentious, controversial, and dynamic transnational context.

In addition to this introductory section and concluding remarks, this chapter consists of the following two sections. Section two examines the persistent allegations surrounding the labour practices of Chinese enterprises in Africa and debunks two allegations concerning the workforce localization rates of Chinese enterprises in Africa. Section three provides a comparative analysis of two reports relevant to the labour practices of Chinese mining enterprises in African resource-rich countries. The chapter concludes by highlighting the importance of a critical and constructive approach to the role of China and Chinese enterprises in labour governance in the context of China's economic engagement in Africa.

This chapter is based on a critical engagement with existing literature and a comparative analysis of two research reports released by human rights INGOs. This chapter reveals the overlooked aspects of China's presence in Africa that are contrary to the dominant "neo-colonialism" discourse. The findings challenge the widespread allegations concerning China's negative social

impacts on Africa and question the persistent stereotypes about the role of Chinese enterprises in Africa. This chapter reconfirms that many allegations regarding the largely negative social impacts of China's economic engagement in Africa are unsubstantiated. Amongst other inquiries, this chapter focuses on the labour practices of Chinese enterprises in two African resource-rich countries, notably Zambia and the DRC.

1.2 Revisiting Allegations Surrounding the Negative Labour Practices of Chinese Enterprises in Africa: Understanding the Origins of the Allegations and Debunking the Myths

Labour issues in the context of China's engagement in Africa have been the subject of heated debates that tend to reflect ideological standpoints rather than focus on the problems and challenges surrounding labour governance in transnational contexts.⁷⁶ The labour practices of Chinese enterprises have generally been perceived as largely negative, partly due to the increase in cases of labour unrest and the continuous dissemination of allegations concerning negative labour practices of Chinese enterprises in Africa.⁷⁷ Since the early 21st century, western politicians and news agencies have widely disseminated the alleged negative labour practices of Chinese enterprises and have claimed that the negative examples exemplify China's "new scramble" and "colonizing" of Africa.⁷⁸ The allegations have been widely spread and highlighted in media outlets.⁷⁹

⁷⁶ For instance, Giles Mohan et al have pointed out that the research on Chinese migrants in Africa in the early 21st century tended to "reflect ideological standpoints as opposed to a focused engagement with reality." As the authors pointed out, the produced data concerning the migration flow of Chinese to Africa is "speculative" and "dubious." See Giles Mohan et al, *supra* note 5 at 3.

⁷⁷ For instance, a recent report recorded 679 human rights abuse allegations linked to Chinese business conduct abroad between 2013 and 2020. Labour issues (126 allegations, 19% of the total records) are amongst the most frequently identified issues. Africa recorded the second-highest number of human rights allegations (181) linked to Chinese OFDI. See Business & Human Rights Resource Centre, "'Going Out' Responsibly: The Human Rights Impact of China's Global Investments" (August 2021) at 17–19, online (pdf): <https://www.business-humanrights.org/documents/36365/2021_BHRRC_China_Briefing.pdf>.

⁷⁸ See e.g. Barry Sautman & Yan Hairong, "Bashing 'the Chinese': Contextualizing Zambia's Collum Coal Mine Shooting" (2014) 23:90 J Contemporary China 1073.

⁷⁹ See e.g. David Smith, "Workers Claim Abuse as China Adds Zimbabwe to Its Scramble for Africa" (2 January 2012), online: *The Guardian* <<https://www.theguardian.com/world/2012/jan/02/china-zimbabwe-workers-abuse>> [perma.cc/C75D-HHU4]; Joseph Goldstein, "Kenyans Say Chinese Investment Brings Racism and Discrimination" (15 October 2018), online: *The New York Times* <<https://www.nytimes.com/2018/10/15/world/africa/kenya-china-racism.html>> [perma.cc/L35S-SNA5].

This section examines the widely disseminated allegations concerning negative labour practices of Chinese enterprises in Africa. Subsection one introduces the evolving discourse in China-Africa studies concerning labour practices of Chinese enterprises in Africa. On the one hand, after two decades of debate, allegations of negative labour practices remain crucial components of a broader attempt to demonize China's rise globally, specifically to establish a neo-colonialism discourse of China's economic engagement in Africa. On the other hand, a growing body of in-depth empirical studies has challenged and opposed such allegations, highlighting the importance of close and balanced examination of the labour practices of Chinese enterprises in Africa. Subsection two debunks two allegations surrounding the negative labour practices of Chinese enterprises in Africa: (a) China's exportation of prison labour to Africa, and (b) the low workforce localization rates of Chinese enterprises in Africa.

This section shows that dominant, negative views surrounding the labour practices of Chinese enterprises in Africa have not been substantiated by reliable empirical data sets, balanced analytical frameworks, or appropriate investigations that aim to identify and address problems in labour protections. It shows that many allegations were developed by misrepresenting the data, misunderstanding the interactions between different actors, and neglecting the complexity of labour governance in transnational spheres. The section reveals that many widely disseminated allegations result from political attempts to demonize China's economic engagement in Africa. Consequently, the allegations combine facts, myths, fallacies, and rumours to be verified, investigated, and distinguished rather than "facts" and "realities."

1.2.1 Perceptions of the Labour Practices of Chinese Enterprises in Africa: Widespread Allegations and the Evolving Discourse

China's presence in Africa has been highly complex and controversial. Commentators of China's presence in Africa have long perceived China's role in Africa as unequal, rapacious, and even colonial.⁸⁰ While existing literature has evaluated China's presence in Africa through various approaches, public perceptions and academic discussions have been heavily influenced by a "neo-colonialism" discourse and relevant terms such as "neo-imperialism," "scramble for Africa,"

⁸⁰ For instance, as Tukumbi Lumumba-Kasongo observes, "There is a *sino-phobia* under *simplistic stereotyping* or as *bad comparative predispositions* (apples versus oranges) between China and the former colonial Western powers [emphasis added]." See Tukumbi Lumumba-Kasongo, "China-Africa Relations: A Neo-Imperialism or a Neo-Colonialism? A Reflection" (2011) 10:2-3 *African & Asian Studies* 234 at 239.

“conquest of Africa,” and “empire in Africa.” The depiction of China as a “neo-colonialist” in Africa has been repeatedly highlighted in various sources, including online posts, media outlets, political statements, and academic publications.⁸¹ This depiction has been fuelled by many sub-allegations, including overarching negative views about China’s economic and social impacts on Africa and specific negative views such as grabbing natural resources and abusing labourers. Notably, labour issues have been at the centre of the discourse and have been taken as exemplifying China’s neo-colonialist path in Africa.

In contrast to a dichotomous and oppositional approach to conceptualizing China as a “neo-colonialist,” a group of scholars in China-Africa studies have offered alternative readings, drawing on statistics, cases, and examples of China’s engagement with Africa. For instance, Junbo Jian and Donata Frasheri have compared China’s economic engagement with Africa and the conceptualization of neo-colonialism.⁸² As the authors point out, the characteristics of neo-colonialism include “political control, cultural penetration and economic exploitation in colonized countries or regions,” amongst others.⁸³ Drawing on statistics and case examples of China’s trading and investing engagement with African countries such as South Africa, Zambia, and the DRC, the authors show that the political and economic engagement between China and African countries are based on equality and independence, rather than China’s control of those countries. Therefore, Jian and Frasheri argue that China’s engagement in Africa is not neocolonial and that China has engaged with Africa through political equality and win-win economic approaches.⁸⁴

Regarding the question of whether China is “colonizing” Africa, Adams Bodomo highlights that framing China’s Africa foreign policy by using dichotomous and oppositional categories is “ill-

⁸¹ For online posts, see e.g. Department of State of the United States, “Interview: Hillary Rodham Clinton, Secretary of State of the US” (11 June 2011), online: *Department of State of the United States* <<https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/06/165941.htm>> [perma.cc/4MDB-7X8U]. For academic publications, see e.g. Denis M. Tull, “China’s Engagement in Africa: Scope, Significance and Consequences” (2006) 44:3 *J Modern African Studies* 459; Ali Askouri, “China’s Investment in Sudan: Displacing Villages and Destroying Communities” in Firoze Manji & Stephen Marks, eds, *African Perspectives on China in Africa* (Oxford: Fahamu, 2007) 71; James Dever & Jack Dever, “Information Age Imperialism: China, ‘Race,’ and Neo-Colonialism in Africa and Latin America” (2021) 52:2 *U Miami Inter-Am L Rev* 1. These academic publications fail to engage closely with the conceptualization of “neo-colonialism,” and they draw heavily on examples from media outlets and unsubstantiated allegations in their argumentation.

⁸² Junbo Jian & Donata Frasheri, “Neo-Colonialism or De-colonialism? China’s Economic Engagement in Africa and the Implications for World Order” (2014) 8:7 *African J Political Science & Intl Relations* 185.

⁸³ *Ibid* at 186.

⁸⁴ *Ibid* at 200.

suited.”⁸⁵ Bodomo clearly distinguishes two related concepts: “colonialism” and “neo-colonialism.” While noting that China certainly has a lot of room for improvement regarding its presence in Africa, he suggests that “there is wide ground to dismiss the contention that China is colonizing Africa, at least in the historical meaning of the term colonialism.”⁸⁶ Having compared the standardly accepted definitions of “colonialism” with the records used by some western and African politicians on China’s presence in Africa, Bodomo concludes that “there is a tendency to whitewash or downplay the real nature of colonialism which involved forcible occupation of land followed by an often violent occupation accompanied by political and military subjugation.”⁸⁷ As he added, obviously, “contrary to Europe, China never engaged in unilateral military activities in Africa and never set-up civilian administrations dependent from the government in Beijing.”⁸⁸ Bodomo points out that the allegations of “neo-colonialism” are “more difficult to assess” due to China’s alleged negative impacts on Africa, including the alleged unprecedented numbers of Chinese nationals who have come to Africa in the past decade.⁸⁹ He argues that “an objective and balanced way to approach the topic is to take a closer look at the historical and factual features of China’s political, economic and cultural engagement in Africa.”⁹⁰ Drawing on data and case examples about the roots of Africa-China relations and the nature of today’s Chinese engagement in Africa, Bodomo shows an extensive set of positive examples of China’s engagement in Africa. These examples include China’s higher ratio of foreign direct investment and trade volumes to Africa as compared to western countries, its investment far beyond resource extraction as contrary to much of the Western rhetoric on Chinese investments in Africa, and its explicit highlighting of the equality of partnership such as “win-win partnerships.”⁹¹

Furthermore, imposing the “neo-colonialist” label on China’s engagement with Africa is problematic since it is neither helpful for understanding the reality of China’s engagement with Africa nor meaningful for addressing the contentious issues in this complicated transnational

⁸⁵ Adams Bodomo, “Is China Colonizing Africa? Africa– China Relations in a Shifting Global Economic Governance System” in Simone Raudino & Arlo Poletti, *Global Economic Governance and Human Development*, eds (Abingdon, Oxon: Routledge, 2019) 120.

⁸⁶ *Ibid* at 129.

⁸⁷ *Ibid* at 122.

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at 123.

⁹⁰ *Ibid*.

⁹¹ *Ibid* at 123–128.

context. With decades of research experience on China's labour politics in outbound Chinese state investment, Ching Kwan Lee concludes that "the frame of colonialism (or neocolonialism) [is] not intellectually productive."⁹² As she explains, concepts surrounding "colonialism" refer to regimes of geospatial power consolidated over centuries, and they are "ill-defined" and ambiguous to account for the contemporary phenomenon, considering that Chinese OFDI in Africa began only two decades ago.⁹³ Lee also highlights that the application of these terms to China is "not grounded in empirical evidence."⁹⁴

In addition to the counter-discourse that challenges the neo-colonialist discourse, a group of scholars has contributed to debunking various rumours and myths around China's engagement in Africa. For instance, while general perceptions tend to believe that Chinese enterprises attempt to avoid or discourage workers from forming unions, empirical studies show that questions surrounding how Chinese enterprises interact with local labour unions in African countries remain under-researched and inconclusive. Over the past decade, several empirical studies have provided some examples of the dynamic engagement between the two groups of actors. Angela Dziedzom Akorsu and Fang Lee Cooke have investigated how and to what extent a Chinese POE, Ghana Utensils Manufacturing Company Limited, enforced the labour standard of "freedom of association." Based on both empirical research and document analysis, Akorsu and Cooke find that "freedom of association is enforced" at the company operating in Ghana.⁹⁵ Their conclusion is based on the following three observations. First, apart from the three Chinese managers and the 142 casual workers, all the 108 permanent workers at the company are unionized and are members of the Industrial and Commercial Workers Union.⁹⁶ Second, workers interviewed indicated that they are free to join the union.⁹⁷ The workers' representative interviewed also confirmed that workplace union officers are allowed to enjoy a leave of absence to participate in union activities such as training. Third, the company provides a notice board for the local union and an office for its day-to-day operations.⁹⁸ Yijun Xing et al have examined the human resource management

⁹² Lee, *The Specter of Global China*, *supra* note 6 at xi.

⁹³ *Ibid* at 153.

⁹⁴ *Ibid*.

⁹⁵ Angela Dziedzom Akorsu & Fang Lee Cooke, "Labour Standards Application among Chinese and Indian Firms in Ghana: Typical or Atypical?" (2011) 22:13 Intl J Human Resource Management 2730 at 2738.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

practices of Chinese managers in Africa. Their empirical study is based on in-depth narrative interviews with 32 Chinese managers' professional experience in African countries. The study suggests that Chinese enterprises tend to adapt their human resource management practices to the local environment in Africa rather than bringing Chinese practices.⁹⁹ As Yijun Xing et al find, the adaptation includes both the engagement with local labour unions and the use of the local workforce.¹⁰⁰

1.2.2 Gaps between Myths and Realities: Debunking Two Allegations Surrounding the Low Workforce Localization Rates of Chinese Enterprises in Africa

The largely negative views, especially the demonized image of China, underline the tension between the continuous spread of unsubstantiated allegations and the development of various empirical studies concerning Chinese enterprises' labour practices in Africa. There are two widely perceived allegations regarding the use of the workforce of Chinese enterprises in Africa: (a) the allegation that China has exported prison labour to African countries, and (b) the allegation that workforce localization rates of Chinese enterprises in Africa are generally low. These allegations have been widely disseminated through political assertions and media outlets. However, increasing empirical evidence has shown that these allegations are not substantiated and that they are far from the reality of Chinese enterprises' labour practices in Africa. Based on an extensive review of existing literature, this subsection debunks these two myths surrounding Chinese enterprises' overseas operations in Africa.

(1) Debunking the Allegation of “China’s Exportation of Prison Labour to Africa”

Since the late 2000s, a global rumour circulating in Africa and beyond asserted that Chinese employees in Africa were convict labourers sent by the Chinese government.¹⁰¹ While no verified

⁹⁹ Yijun Xing et al, “Intercultural Influences on Managing African Employees of Chinese Firms in Africa: Chinese Managers’ HRM Practices” (2016) 25:1 Intl Bus Rev 28 at 32–33. Chinese managers interviewed are from 21 Chinese enterprises (including both SOEs and POEs) and with three to eight years of professional experience in African countries.

¹⁰⁰ *Ibid.*

¹⁰¹ For examples of media outlets on China’s exportation of prison labour to Africa, see e.g. Roberta Cohen, “China Has Used Prison Labor in Africa” (11 May 1991), online: *The New York Times* <<https://www.nytimes.com/1991/05/11/opinion/1-china-has-used-prison-labor-in-africa-540291.html>> [perma.cc/542W-CYU3]; Brahma Chellaney, “China Now Exports Its Convicts” (5 July 2010), online: *The Japan Times* <<https://www.japantimes.co.jp/opinion/2010/07/05/commentary/china-now-exports-its-convicts/>> [perma.cc/6HPL-ZWWG]; Brahma Chellaney, “China’s Newest Export: Convicts” (29 July 2010), online: *The*

evidence is ever presented to support the allegation of Chinese prison labour being exported to Africa, the allegation has been widely circulated in western and local media outlets. Despite the absence of evidence and the Chinese government's denial of the allegation, the rumour has been widely promoted both locally in Africa and globally through various channels, such as think-tank writings, foreign government reports and politicians' statements, commentaries on popular websites in Africa and elsewhere, and even election campaign speeches of African politicians.¹⁰² Consequently, the rumour has gone viral on the internet and in popular perception.

One of the earliest claims can be traced back to Roberta Cohen's letter to *The New York Times* published on May 11, 1991, with the headline "China Has Used Prison Labor in Africa."¹⁰³ Cohen was a former Deputy Assistant Secretary of State for Human Rights in the Carter Administration of the United States. Cohen alleged that "While living in West Africa a few years ago, I *learned* of the case of a Chinese construction company building a road in Benin using prison labor."¹⁰⁴ She submitted that "Seventy percent to 75 percent of the construction workers were known to be prisoners" on the Dassa-Parakou road in central Benin.¹⁰⁵ However, Cohen did not provide any further information or source about how this claim is substantiated.¹⁰⁶

Soon after the media outlet, Chen Guoqing, a Press Counselor of the Embassy of the People's Republic of China in the United States of America, wrote a letter to *The New York Times* to respond to the claims about China's use of prison labour in Africa. The letter was published on June 1, 1991, with the headline "China Doesn't Use Prison Labor in Africa."¹⁰⁷ Chen commented that Cohen's claim was "a despicable practice" and based on "hearsay."¹⁰⁸ Furthermore, Chen

Guardian <<https://www.theguardian.com/commentisfree/libertycentral/2010/jul/29/china-export-convict-labour>> [perma.cc/BJB6-K2LR].

¹⁰² Observations by scholars in China-Africa studies, see e.g. Yan & Sautman, "Rumours and Representations of the Export of Chinese Convict Labour", *supra* note 6 at 399, Lee, *The Specter of Global China*, *supra* note 6 at 13.

¹⁰³ Cohen, *supra* note 101.

¹⁰⁴ *Ibid* [emphasis added].

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*.

¹⁰⁷ Chen Guoqing, "China Doesn't Use Prison Labor in Africa" (1 June 1991), online: *The New York Times* <<https://www.nytimes.com/1991/06/01/opinion/1-china-doesn-t-use-prison-labor-in-africa-819991.html>> [perma.cc/H64U-SNHV].

¹⁰⁸ *Ibid*.

highlighted that “the allegation is an insult to the African countries engaged in economic cooperation with China.”¹⁰⁹

Over the past two decades, a group of renowned scholars in China-Africa studies have challenged the allegations through online commentary and academic publications. For instance, Deborah Brautigam, a political scientist, has heavily critiqued the proliferation of allegations about China’s exportation of prisoners to work overseas.¹¹⁰ Brautigam points out that these allegations are “unsubstantiated,” and she highlighted that “[I] have never come across any hard facts or evidence of Chinese prisoners working in Africa.”¹¹¹

Yan Hairong, an anthropologist, and Barry Sautman, a political scientist and lawyer, have published extensively on allegations, discourses, and practices surrounding the labour practices of Chinese enterprises in Africa. Yan and Sautman have provided an in-depth examination of the origins of the allegation of prison labour and the mechanisms of its dissemination. They highlight that “while the rumour often originates at the grass roots in developing countries, it is promoted locally and globally by *political, economic and media elites* with distinct agendas that often involve building support for *opposition parties, competition in obtaining contracts, or geo-strategic and ideological rivalry*.”¹¹² The examination shows that the rumoured images of Chinese convict labour in developing countries “began locally, ‘from below,’ as conjectures of non-elites.”¹¹³ As illustrated by the examination, the rumours were then put into circulation through the internet, and “They [the rumours] are further promoted ‘from above,’ as part of a global discourse of Chinese activities overseas, by those political and media elites who seek to discredit the Chinese presence in the developing world and national governments that approve of it.”¹¹⁴

Ching Kwan Lee, a sociologist, understands the allegation as a “continent-wide rumor” disseminated through various channels, including political statements.¹¹⁵ Lee explains that the

¹⁰⁹ *Ibid.*

¹¹⁰ Deborah Brautigam, “Is China Sending Prisoners to Work Overseas?” (13 August 2010), online: *China-Africa Research Initiative (Johns Hopkins University School of Advanced International Studies)* <<http://www.chinaafricarealstory.com/2010/08/is-china-sending-prisoners-to-work.html>> [perma.cc/H3V2-JTEG].

¹¹¹ *Ibid.*

¹¹² Yan & Sautman, “Rumours and Representations of the Export of Chinese Convict Labour”, *supra* note 6 at 398 [emphasis added].

¹¹³ *Ibid* at 399.

¹¹⁴ *Ibid.*

¹¹⁵ Lee, *The Specter of Global China*, *supra* note 6 at 13.

rumour was fueled by a salient point of cultural contestation of Chinese workers in Zambia and, more generally, Africa: the “‘excessively hard-working’ and ‘overproductive’” culture of the Chinese.¹¹⁶ Furthermore, Lee underlines that “Over time, though, I have noted changes in both Chinese and African perceptions and practices toward each other.”¹¹⁷

(2) Debunking the Allegation of the “Low Workforce Localization Rates of Chinese Enterprises in Africa”

The allegation of China’s “colonization” of Africa was largely based on the alleged large number of Chinese workers brought by Chinese enterprises to Africa. While the allegation has not been substantiated by concrete empirical data or comprehensive investigations, bringing a large number of Chinese workers has repeatedly been reported as a consistent and general feature of Chinese enterprises in Africa. Chinese workers were allegedly competing with local workers over the employment opportunities and social benefits in Africa.

(a) An Estimated and Imagined Number of Overseas Chinese in Africa: “One Million”

In 2011, The Guardian published a media outlet with the headline “China’s Economic Invasion of Africa.”¹¹⁸ The media outlet stated that “A million Chinese people, from engineers to chefs, have moved to work in Africa in the past decade.”¹¹⁹ As recognized by the outlet, the number “one million” was an estimation. However, this “one million” estimation has been highlighted over the past decade partly due to the continuous dissemination of sources such as media outlets and the publication of the book by American journalist Howard W. French in 2015, titled *China’s Second Continent: How a Million Migrants Are Building a New Empire in Africa*.¹²⁰ Though no authentic figures are available for the number of Chinese who have migrated to the African continent, French assumes that the figure “one million” is a conservative estimation of the number.¹²¹

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Xan Rice, “China’s Economic Invasion of Africa” (6 February 2011), online: *The Guardian* <<https://www.theguardian.com/world/2011/feb/06/chinas-economic-invasion-of-africa>> [perma.cc/B4L4-ENNR].

¹¹⁹ *Ibid.*

¹²⁰ Howard W. French, *China’s Second Continent: How a Million Migrants Are Building a New Empire in Africa* (New York: Vintage Books, a Division of Random House LLC, 2015).

¹²¹ *Ibid.*

It is worth noting that the estimated number was used without being substantiated or evidenced. As Giles Mohan et al point out, “a major problem in assessing these migration flows is that data are speculative.”¹²² Furthermore, the estimation of “one million” counts all *overseas Chinese*,¹²³ including at least the following three categories: (a) Chinese migrants who started migrating to the African continent temporarily or permanently to begin their new life there, which can be dated back to centuries ago; (b) individuals who chose to live, work, or study in Africa in recent decades; and (c) Chinese workers who were brought to Africa along with the overseas operations of Chinese enterprises in Africa. The last category can be further distinguished through three different ways: workers dispatched by their parent companies in China to subsidiaries in Africa, workers dispatched through foreign labour services cooperation, and workers dispatched through international contractors such as for construction projects. Media outlets and political statements have tended to blur the distinction between Chinese workers working for Chinese enterprises and other overseas Chinese in Africa. The existing literature has also tended to mix the different categories of overseas Chinese to highlight the claim that Chinese enterprises bring a large number of Chinese workers when operating in Africa.

A review of the existing literature leads to two critical observations on the number of overseas Chinese in Africa. First, the exact total number of overseas Chinese in Africa is currently unavailable. There are at least two difficulties in developing a total number of overseas Chinese in Africa. The first difficulty is that the concept of “overseas Chinese” remains undefined. For instance, it is unsure whether to count those for short-term stays, such as studying or working in Africa. The time scope to distinguish between “short-term” and “long-term” stay in Africa is also not defined. The second difficulty is that the exact data on overseas Chinese in each African country remains unavailable. For instance, the data is not managed through a unified system, and it changes according to the different criteria and the dynamic flow of overseas Chinese within and beyond African countries. Similarly, the total number of “Chinese workers” in Africa is also unavailable since there are few official records of the number for each African country or the total number across African countries. A recent estimation of the total number of Chinese workers in

¹²² Mohan et al, *supra* note 5 at 3.

¹²³ Alternative terms such as “Chinese diaspora” and “ethnic Chinese” are also used in research contributions in English. The Overseas Chinese Affairs Office of the State Council of the People’s Republic of China uses the term “overseas Chinese” to refer to ethnic Chinese [华侨] who are residing outside of China.

Africa varies at around 0.2 million between 2009 and 2019.¹²⁴ As estimated, the total number may have decreased to around 0.1 million in 2020, possibly due to the outbreak of the Covid-19 pandemic.¹²⁵

Second, the “one million” estimation might serve as a rough imagination for the total number of overseas Chinese. The “one million” estimation has been cited in both Chinese and English scholarly contributions that aim to provide an overview of overseas Chinese in Africa.¹²⁶ While the estimated number has not been appropriately substantiated with supportive sources or data, it seems to have been endorsed by scholars and researchers in China-Africa studies. It is important to emphasize that this estimation is about *all overseas Chinese* rather than about Chinese workers that have come along with Chinese enterprises over the past two decades.

(b) Workforce Localization Rates of Chinese Enterprises in Africa: Fragmented Examples and Mixed Results

Alongside the allegation about the large number of Chinese workers brought by Chinese enterprises to Africa, a widespread allegation is the low workforce localization rates of Chinese enterprises in Africa. This allegation has originated from and has been disseminated through western political assertions, media outlets, and online posts without substantiating evidence.¹²⁷

¹²⁴ The estimated number “0.2 million” covers two major categories of Chinese workers in Africa: (a) Chinese workers sent to work on Chinese enterprises’ construction contracts in Africa (“workers on contracted projects”), and (b) Chinese workers hired for other labour services, such as working in factories (“workers doing labour services”). The calculation of the total number is based on several official data sets released by Chinese state agencies, including the China Statistical Yearbooks, the official website of the National Bureau of Statistics, the China Annual Bulletin of Statistics of Contracted Projects, and the Almanac of China’s Foreign Economic Relations and Trade, as well as the Almanac of China’s Foreign Economic Relations and Trade. See China-Africa Research Initiative (Johns Hopkins University School of Advanced International Studies), “Data: Chinese Workers in Africa” (2022), online: <<http://www.sais-cari.org/data-chinese-workers-in-africa>> [perma.cc/3DUX-4W9Z].

¹²⁵ *Ibid.*

¹²⁶ See e.g. Xinfeng Li et al, *The Overseas Chinese in Africa* (Beijing: China Social Science Press, 2020) at 18.

¹²⁷ Examples of media outlets on the low workforce localization rates of Chinese enterprises in Africa, see e.g. Louise Redvers, “Angola’s Chinese-built Ghost Town” (3 July 2012), online: *BBC News* <<https://www.bbc.com/news/world-africa-18646243>> [perma.cc/FDY8-CUHY]. Examples of online posts on the low workforce localization rates of Chinese enterprises in Africa, see e.g. Loro Horta, “China in Africa: Soft Power, Hard Results” (13 November 2009), online: *YaleGlobal Online* <<https://archive-yaleglobal.yale.edu/content/china-africa-soft-power-hard-results>> [perma.cc/S3ZP-U6WP]. When affiliated as a Visiting Fellow at Nanyang Technological University, Singapore, Loro Horta published an online commentary through *YaleGlobal Online* without providing any source of the data for his general claims. Horta submitted:

In Angola, where Western companies rely primarily on local labor, *Chinese companies bring 70 to 80 percent of their labor from home*. For instance, while nearly 90 percent of Chevron’s workers are

Consequently, over the past two decades, the low percentage of the local African workforce in Chinese enterprises has been widely taken as a “fact” rather than a “question” that may need further investigations.

Over the past two decades, several political leaders in the United States have repeatedly raised criticisms against China’s presence in Africa, disseminating the general allegation that Chinese enterprises bring their own workers and do not hire local workers in Africa.¹²⁸ Recently, in April 2021, when speaking to alumni of the Young African Leaders Initiative, Secretary of State Antony J. Blinken highlighted that “we’re not asking anyone to choose between the United States or China, but I would encourage you to ask those tough questions ... *whether when other countries come in to build a big infrastructure project, are they bringing their own workers with them or are they giving jobs to people in the country where they’re making investments?*”¹²⁹

Over the past two decades, a growing body of in-depth empirical studies has challenged and opposed the above-introduced allegation. These studies focus on different enterprises, industries,

Angolan, including specialized personnel such as engineers and managers, *Chinese oil companies employ fewer than 15 percent Angolan labor and usually at the end of the pay scale*. For instance in 2006 at a Portuguese run construction site in Maputo, Mozambique, there were only five Portuguese out of 120 workers. While nearby, *a Chinese run site had 78 Chinese workers and only eight locals*, three of which were night watchmen [emphasis added].

These case examples and claims have been repeatedly published by Loro Horta in other online posts. However, the examples and claims disseminated by Loro Horta have not been substantiated or supported by sources. Furthermore, Loro Horta’s claim about China’s “land grabbing” in Africa was debunked by Deborah Brautigam. See Deborah Brautigam, “‘The Zambezi Valley: China’s First Agricultural Colony?’ Fiction or Fact?” (12 January 2012), online: *China-Africa Research Initiative (Johns Hopkins University School of Advanced International Studies)* <<http://www.chinaafricarealistory.com/2012/01/zambezi-valley-chinas-first.html>> [perma.cc/KXG6-CK75].

¹²⁸ For instance, the former President of the United States, Barack Obama, repeatedly questioned whether Chinese enterprises hire local African workers. “My advice to African leaders is to make sure that if, in fact, China is putting in roads and bridges, number one, that they’re hiring African workers.” See *The Economist*, “An Interview with the President” (2 August 2014), online: *The Economist* <<https://www.economist.com/democracy-in-america/2014/08/02/an-interview-with-the-president>> [perma.cc/RVZ9-JQ68]. On 28 July 2015, Barack Obama delivered remarks to a group of African ambassadors in Ethiopia, which seemed to point the finger at China, “economic relationships can’t simply be about building countries’ infrastructure with foreign labor or extracting Africa’s natural resources. Real economic partnerships have to be a good deal for Africa -- they have to create jobs and capacity for Africans.” See White House Press Secretary of the United States, “Remarks by President Obama to the People of Africa” (28 July 2015), online: <<https://obamawhitehouse.archives.gov/the-press-office/2015/07/28/remarks-president-obama-people-africa>> [perma.cc/V9K8-GHNW].

¹²⁹ Department of State of the United States, “Secretary Antony J. Blinken Virtual Discussion with Alumni of the Young African Leaders Initiative (YALI)” (8 April 2021), online: *Department of State of the United States* <<https://www.state.gov/secretary-antony-j-blinken-virtual-discussion-with-alumni-of-the-young-african-leaders-initiative-yali/>> [perma.cc/7RYT-F655] [emphasis added].

and countries in Africa, having identified varying rates in each study. These empirical findings reveal fragmented examples and mixed results in workforce localization rates of Chinese enterprises in Africa. Most studies are quite limited in the sense of providing comparative data or analysis between enterprises, industries, or countries. Therefore, existing studies can hardly substantiate a broad allegation about the low workforce localization of Chinese enterprises in Africa, nor other allegations that attempt to generalize cross-enterprise, cross-industry, or cross-country results.

Sautman and Yan conducted a review of resources available as of 2015. Based on the data from over 400 Chinese enterprises and projects in Africa from multiple sources, they conclude that the workforce localization rates are over 85 percent.¹³⁰ They highlighted that “Contrary to much of the mainstream discourse on the subject, Chinese enterprises in Africa are often highly localized and are becoming increasingly localized.”¹³¹ Jing Gu’s research focuses on Chinese POEs in Africa. Gu suggests that “the majority of the employment is drawn from the local labour force.”¹³² Her study provides three examples of Chinese POEs’ workforce localization rates in three African countries, 93 percent, 91 percent and 90 percent, respectively.¹³³ Antoine Kernén and Katy N. Lam’s collaborative research focus on Chinese SOEs in Ghana. The authors find that the workforce localization rates are higher than 85 percent in two Chinese SOEs investigated.¹³⁴ The China State Hualong Construction Engineering Co. Ltd, a pioneer SOE, has about 94 percent local workforce, while Sinohydro Corporation, which is with only a few years’ experience in Ghana, has about 85 percent local workforce.¹³⁵ The study suggests that a Chinese company with longer experience in Ghana may have a much higher localization rate than a company with shorter experience.¹³⁶ As the authors illustrated, this is partly because new Chinese construction companies in Ghana need to take some time to build up a team and train local workers and the companies tend to bring in

¹³⁰ Barry Sautman & Yan Hairong, “Localizing Chinese Enterprises in Africa: From Myths to Policies” (HKUST Institute for Emerging Market Studies, 2015), online (pdf): <<https://iems.ust.hk/tlb5>> [Sautman & Yan, “Localizing Chinese Enterprises in Africa”] at 1.

¹³¹ *Ibid.*

¹³² Jing Gu, “China’s Private Enterprises in Africa and the Implications for African Development” (2009) 21 *European J Development Research* 570 at 576.

¹³³ *Ibid.* The study suggests that the workforce localization of Haitian Suitcase and Baggage Company in Nigeria is about 93%, Songlin Company in Ghana is 91%, and Glory Garment Co. Ltd in Madagascar is 90%.

¹³⁴ Antoine Kernén & Katy N. Lam, “Workforce Localization among Chinese State-Owned Enterprises (SOEs) in Ghana” (2014) 23:90 *J Contemporary China* 1053 at 1059.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

skilled Chinese workers at the beginning phase of the business operations. The study shows that the degree of localization of construction workers seems to increase proportionally with Chinese enterprises' business duration in Ghana, "as the Chinese firms gradually find or more often train local construction workers to replace the Chinese skilled workers."¹³⁷

A four-year comprehensive research project has provided a series of research results concerning the workforce localization rates of Chinese enterprises in the construction and manufacturing sectors in Angola and Ethiopia.¹³⁸ This collaborative research project led by Carlos Oya is titled "Industrial Development, Construction and Employment in Africa: A Comparative Analysis." Oya has reaffirmed that, unlike what has been disseminated through western media and some academic resources, China's presence in Africa has presented a different and positive picture.¹³⁹ Between 2015 and 2019, Oya conducted an extensive quantitative survey amongst local workers and qualitative interviews with other actors related to Chinese enterprises' engagement with Ethiopia and Angola. He finds that the workforce localization rates in Chinese enterprises are much higher than 70 percent in the construction and manufacturing sectors in Angola.¹⁴⁰ Furthermore, he finds that the workforce localization rates are over 90 percent in the construction and manufacturing sectors in Ethiopia.¹⁴¹ As he explains, the higher workforce localization rates of Chinese enterprises in Ethiopia than in Angola lie partially in Ethiopia's stronger restriction of work permits for Chinese enterprises.¹⁴² The findings highlight that variations are notable between different sectors and countries, either the workforce localization or other labour practices of Chinese enterprises in Africa.

As shown below, figures fall primarily between 60 and 95 percent and amount to an estimated average rate of around 85 percent.

¹³⁷ *Ibid* at 1060.

¹³⁸ Oya, "Labour Regimes and Workplace Encounters between China and Africa", *supra* note 62.

¹³⁹ See e.g. Florian Schaefer & Carlos Oya, "Employment Patterns and Conditions in Construction and Manufacturing in Ethiopia: A Comparative Analysis of the Road Building and Light Manufacturing Sectors" (Research Report, SOAS, University of London, 2019) at 22, online (pdf): <<https://www.soas.ac.uk/idcea/publications/reports/file141205.pdf>>.

¹⁴⁰ Carlos Oya & Fernandes Wanda, "Employment Patterns and Conditions in Angola: A Comparative Analysis of the Infrastructure Construction Sector and Building Materials Industry" (Research Report, SOAS, University of London, 2019) at 24, online (pdf): <<https://www.soas.ac.uk/idcea/publications/reports/file142336.pdf>>.

¹⁴¹ Schaefer & Oya, *supra* note 139.

¹⁴² *Ibid*.

Table 1 Mixed Examples and Results of Workforce Localization Rates of Chinese Enterprises in Africa

Year	Author	Company/ Project	Owner ship	Industry	Country	African workers	Chinese workers	African workers (% total)
2007	Tang	55 companies	various	various	Angola	5,482	3353	62%
2007	Lee	CNMC	SOE	mining	Zambia	2,063	189	92%
2009	Akorsu and Cooke	GUMCO	POE	manufacturing	Ghana	250	3	99%
2012	Warmer dam and Dijk	42 companies	various	various	Uganda	9,845	1,004	91%
2014- 2015	Brautigam et al	88 companies	various	manufacturing	Ethiopia, Ghana, Nigeria, Tanzania	20,154	1,358	94%
2015- 2019	Oya et al	various	various	construction and manufacturing	Angola	N/A	N/A	over 70%
2015- 2019	Oya et al	various	various	construction and manufacturing	Ethiopia	N/A	N/A	over 90%

Year: The year of the empirical study.

Rates: The rates in studies on various companies, industries, or countries are better understood as an average rate according to the total number of workers.

N/A: The rates were published through research reports. The further details of research outcomes are published in ongoing processes. The rate of each company varies.

Source: Data collected and compiled by the author¹⁴³

1.3 A Comparative Analysis of Two Reports on the Labour Practices of Chinese Mining Enterprises in Africa

This section comparatively presents two reports released by two widely-known INGOs in the field of human rights, Human Rights Watch and Amnesty International. Human Rights Watch was founded in 1978, and it is headquartered in the United States.¹⁴⁴ Amnesty International was

¹⁴³ The data was compiled through an extensive literature review on the workforce localization rates of Chinese enterprises in Africa. The data was extracted from each article. Amongst other resources, the table is based on the following key resources. See “Table A12.1. Estimated employment localization rates in Chinese firms in Africa from most significant studies/cases” in Oya, “Labour Regimes and Workplace Encounters between China and Africa”, *supra* note 62 at 258–259; “Table 1. Data on localisation rate of labour in Chinese investment in Africa (individual firms/projects)” and “Table 2. Data on localisation rate of labour in Chinese investments in Africa (cluster of firms)” in George Ofosu & David Sarpong, “The Evolving Perspectives on the Chinese Labour Regime in Africa” (2021) *Economic & Industrial Democracy*, DOI: <10.1177/0143831X211029382> at 9–10; Yujeong Yang, “Bring Your Own Workers: Chinese OFDI, Chinese Overseas Workers, and Collective Labor Rights in Africa” (2022) 152 *World Development* (in press), DOI: <10.1016/j.worlddev.2021.105808> at 3.

¹⁴⁴ Human Rights Watch, “About Us” (2022), online: <<https://www.hrw.org/about/about-us>> [perma.cc/55NP-7USL].

founded in 1961, and it is headquartered in the United Kingdom.¹⁴⁵ Both organizations have paid attention to the labour practices of Chinese mining enterprises in African resource-rich countries. In 2011, Human Rights Watch released a report titled *“You’ll Be Fired if You Refuse”: Labor Abuses in Zambia’s Chinese State-owned Copper Mines* (hereafter referred to as “HRW Report”).¹⁴⁶ In January 2016, Amnesty International, jointly with African Resources Watch, released a research report titled *‘This is What We Die for’: Human Rights Abuses in The Democratic Republic of the Congo Power the Global Trade in Cobalt* (hereafter referred to as “Amnesty International Report (2016)” or “AI Report”).¹⁴⁷ While both reports highlight the challenge of labour protections in transnational mining activities, they provide different accounts of the labour practices of Chinese mining enterprises in Africa and have had different impacts on such enterprises.

1.3.1 Two Reports, Two Stories

Table 2 A Comparative Introduction of Two Reports on Chinese Enterprises’ Labour Practices in Africa

	Civil society organization	Focus issues	Focus companies
2011	Human Rights Watch	Serious abuses of labour rights, including health and safety, working hours, and union rights, in copper mining sites in Zambia	China Nonferrous Metal Mining (Group) Co., Ltd, a Chinese state-owned mining enterprise
2016	Amnesty International	Serious abuses of labour and human rights (especially the use of child labour) in artisanal cobalt mining sites in the DRC	26 companies in the global cobalt supply chain, including Huayou Cobalt as a critical cobalt refiner upstream of the global cobalt supply chain and 25 downstream companies that are headquartered in China, Germany, Japan, South Korea, the UK, and the US

Source: Data collected and compiled by the author¹⁴⁸

¹⁴⁵ Amnesty International, “Who We Are” (2022), online: <<https://www.amnesty.org/en/who-we-are/>> [perma.cc/6P75-T7GU].

¹⁴⁶ Human Rights Watch, “‘You’ll Be Fired if You Refuse’: Labor Abuses in Zambia’s Chinese State-owned Copper Mines” (New York, 2011), online (pdf): <<https://www.hrw.org/report/2011/11/04/youll-be-fired-if-you-refuse/labor-abuses-zambias-chinese-state-owned-copper-mines>>.

¹⁴⁷ Amnesty International, “‘This is What We Die for’”, *supra* note 40.

¹⁴⁸ The data was collected from the above-introduced two reports. See Human Rights Watch, *supra* note 146; Amnesty International, “‘This is What We Die for’”, *supra* note 40.

(1) “You’ll Be Fired if You Refuse”: Labor Abuses in Zambia’s Chinese State-owned Copper Mines”

The HRW Report singles out China Nonferrous Metal Mining (Group) Co., Ltd. [中国有色矿业集团有限公司] (CNMC),¹⁴⁹ a Chinese state-owned mining enterprise, as an abuser of labour rights at Zambian mining sites. The 130-page report focuses on the labour practices of CNMC’s four subsidiaries in Zambia: (a) Non-Ferrous Metal China, Africa, the holding company of Chambishi Copper Mine; (b) Sino Metals Leach Zambia, a copper processing plant; (c) Chambishi Copper Smelter, a copper smelting plant; and (d) China Luanshya Mine, an underground and open-cast mining operation.¹⁵⁰

The report suggests that CNMC was far from satisfactory in its workforce localization efforts in Zambia and the company violated a wide range of labour rights during its operation there. The report states that “Chinese copper operations were the country’s worst when it comes to health and safety.”¹⁵¹ While finding that “Miners universally recognize that CNMC saved jobs and is creating thousands of new ones,” the report depicts the four subsidiaries of CNMC as “bad employers” compared to five Western-based major foreign investors in Zambia’s copper mining industry.¹⁵² The report concludes that “in Zambia, while other multinationals are responsible for certain labour abuses, the Chinese-run companies are *generally the worst* on issues involving health and safety, hours of work, and the right to organize.”¹⁵³ Despite its focus on one industry (mining) in one country (Zambia), Human Rights Watch asserted that its report “begin[s] to paint a picture of China’s broader role in Africa.”¹⁵⁴

(2) “‘This is What We Die for’: Human Rights Abuses in The Democratic Republic of the Congo Power the Global Trade in Cobalt”

The AI Report identifies Huayou Cobalt, a Chinese POE and the focus of this thesis, as relevant to the reported labour rights issues at the bottom of the global cobalt supply chain. The 92-page report focuses on severe labour and human rights abuses at the bottom of the global cobalt supply

¹⁴⁹ Founded in 1983, China Nonferrous Metal Mining (Group) Co., Ltd. (CNMC) is a large central SOE under the management of the State-owned Assets Supervision and Administration Commission of the State Council. CNMC is one of the earliest and largest Chinese nonferrous metal enterprises.

¹⁵⁰ Human Rights Watch, *supra* note 146 at 3.

¹⁵¹ *Ibid.*

¹⁵² *Ibid* at 18.

¹⁵³ *Ibid* at 97 [emphasis added].

¹⁵⁴ *Ibid* at 1.

chain in artisanal cobalt mining sites in the DRC. The report finds that “children as young as seven scavenge for rocks containing cobalt in the discarded by-products of industrial mines and wash and sort the ore before it is sold.”¹⁵⁵ The report identifies a total of 26 companies that may be connected to the sourcing of processed cobalt ore products from artisanal cobalt mines in the DRC.¹⁵⁶ These companies are headquartered in China, Germany, Japan, South Korea, the United Kingdom, and the United States. They encompass a wide range of TNCs that are headquartered in developed countries and emerging market economies, including some of the world’s largest and best-known electronics companies, such as Apple Inc., Dell Inc., Samsung, and Huawei. Amongst these companies, the report identifies HC as being in a key position and, therefore, a “choke point” of the global cobalt supply chain.¹⁵⁷ In addition to collecting data through desk review and on-site fieldwork, Amnesty International contacted 26 companies with a questionnaire and received responses and information from the companies directly.

While highlighting that HC is in a key position to ensure decent work at the bottom of the global cobalt supply chain, the report points out that several actors are crucial to achieving decent work in artisanal mines in a globalized economy: (a) first and foremost, the DRC government as the host state of transnational mining companies; (b) companies in the global cobalt supply chain, including both upstream and downstream companies; (c) home state governments of companies that are connected to the global cobalt supply chain, especially China as the home state of the key cobalt refiner identified; and (d) other actors, such as the International Conference on the Great Lakes Region and the OECD. Based on HC’s response to Amnesty International’s questionnaire, the report argues that “it [Huayou Cobalt] was failing to take these crucial steps and carry out due diligence in line with the OECD Guidance, which has been accepted by the Chinese Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters.”¹⁵⁸ The report underlines that “[HC] is failing to respect human rights and there is *a high risk* that HC is buying (and subsequently selling) cobalt from artisanal mines in which children and adults work in hazardous conditions.”¹⁵⁹ Furthermore, the report concludes that “companies along the cobalt supply chain [both

¹⁵⁵ Amnesty International, “‘This is What We Die for’”, *supra* note 40 at 16.

¹⁵⁶ *Ibid* at 8.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid* at 9.

¹⁵⁹ *Ibid* [emphasis added].

smelters/refiners and downstream companies] are failing to conduct adequate human rights due diligence.”¹⁶⁰

1.3.2 Impacts and Implications of the Two Reports

Both reports are widely circulated in the international media and cited in academic publications. Both reports have refocused international attention on the labour practices of Chinese mining enterprises in resource-rich countries in Africa. However, the impacts of the two reports on Chinese mining enterprises have shown a clear difference.

(1) Impacts on Chinese Mining Enterprises: Ongoing Policy Updates and Behaviour Changes

The HRW Report refocused international attention on labour rights at Zambian mining sites and prompted some changes by CNMC. However, the release of the report and the subsequent changes did not lead to institutional impacts amongst Chinese mining enterprises and along global mineral supply chains. In contrast, the AI report contributed to substantive policy updates and behaviour changes by HC and, more broadly, by other actors in the global cobalt supply chain.¹⁶¹

The different impacts on Chinese mining enterprises can be understood through three major differences between the two reports. First, there are several notable differences between the two reports, such as the tone, methodology, supportive evidence, and perspective, as well as how the authors of the reports developed conclusions. The HRW Report targeted a single company, CNMC, which is a large Chinese SOE. The report targeted CNMC as an abuser of Zambian mine workers and highlighted that CNMC’s labour practices are worse than that of other foreign investors in the mining industry in Zambia. Over the past decade, scholarly contributions have shown that the report was not based on and substantiated by accurate data, sound methodology, and contextual analysis. Based on field interviews, statistics, and documentary evidence, Yan and Sautman examined Human Rights Watch’s claims about the safety, wages, hours, and unionization of CNMC.¹⁶² The authors show that “the discourse [in the report] is highly inaccurate:

¹⁶⁰ *Ibid.*

¹⁶¹ Chapters 3, 5, 6, and 7 of this thesis will illustrate in further detail the impacts of the Amnesty International Report (2016) on Chinese enterprises and other actors in the global cobalt supply chain.

¹⁶² Yan Hairong & Barry Sautman, “‘The Beginning of a World Empire’? Contesting the Discourse of Chinese Copper Mining in Zambia” (2013) 39:2 *Modern China* 131 [Yan & Sautman, “Contesting the Discourse of

methodological mistakes compound elementary empirical errors, even as the politics of the discourse serve up a synecdoche for the global rise of a monolithic China.”¹⁶³ They highlight that “In singling out a Chinese SOE based on nationality and state ownership, HRW differs from other INGOs that have done firm-level studies of Zambian copper mining [that aim to identify labour issues and rights abuses in Zambian mining industry generally rather than targeting the nationality of the firms].”¹⁶⁴ Furthermore, Oya et al underline that “It is impossible to understand labour practices in Zambian mining without an analysis of historical changes in the sector and especially the dramatic process of deregulation, privatization and liberalization that took place in the 1990s.”¹⁶⁵ Oya et al point out that “reports like HRW (2011) seem to obviate these important factors and focus on *what they regard as exploitative practices intrinsic to Chinese firms*.”¹⁶⁶ In contrast, the AI report mapped out several key actors in the global cobalt supply chain and identified a large group of companies that may be directly or indirectly connected to labour issues at the bottom of the chain. The report not only highlighted the critical position of HC as a transnational refinery but also pointed out the responsibilities of both upstream and downstream companies in the global cobalt supply chain. While underlining HC as a “choke point” of the global cobalt supply chain, Amnesty International contacted 26 companies to request information on how they were addressing risks of labour rights abuses through supply chain management. The report concluded by providing recommendations to, first and foremost, the DRC government and then the Chinese government, as well as other actors that are relevant to ensuring decent work in the global cobalt supply chain, notably HC and other companies. The report provided both critiques and recommendations to state and non-state actors through a critical yet constructive approach.

Second, the two reports were released at two different stages of the transnational labour regulatory environment in China’s economic engagement in Africa. As of 2011, there were few regulatory arrangements on the social impacts of Chinese outward mining investment. Over the past decade,

Chinese Copper Mining in Zambia”]; Barry Sautman & Yan Hairong, “Chinese Mining in Africa and Its Global Controversy” in Saleem H. Ali, Kathryn Sturman & Nina Collins, eds, *Africa’s Mineral Fortune: The Science and Politics of Mining and Sustainable Development* (London: Routledge, Taylor & Francis Group, 2019).

¹⁶³ Yan & Sautman, “Contesting the Discourse of Chinese Copper Mining in Zambia”, *supra* note 162 at 131.

¹⁶⁴ *Ibid* at 151.

¹⁶⁵ Carlos Oya et al, “Researching Chinese Firms and Employment Dynamics in Sub-Saharan Africa: Context, Analytical Framework and Research Design” (2019) at 19, online (pdf): <<https://www.soas.ac.uk/idcea/publications/reports/>>.

¹⁶⁶ *Ibid* [emphasis added].

both transnational public and private labour governance have been enhanced at various levels in this transnational context. Furthermore, due to the increasing international attention on labour issues in the global cobalt supply chain, the year 2016 is a milestone for the development of various labour governance initiatives in the chain. The increased global awareness and continued attention have sparked updates on regulatory arrangements, multi-stakeholder initiatives, and practical measures by both state and non-state actors in the global cobalt supply chain. Furthermore, within two years after the release of the AI Report, Amnesty International again visited the artisanal cobalt mining sites in the DRC and released a follow-up report.¹⁶⁷ The follow-up report publicizes how key actors have responded to the identified problems, what kind of improvements are achieved, and what kind of limitations are identified and need to be further addressed. The follow-up report fostered an encouraging and supportive external environment for HC and other Chinese mining enterprises, allowing them to become closely engaged in the evolving transnational labour regulatory environment. The follow-up report showed that both state and non-state actors that are closely connected to the global cobalt supply chain responded quickly to the identified risks of the worst forms of child labour. For instance, key actors identified in the AI Report in 2016 have all taken some early measures to respond to the identified problems, including the governments of the DRC and China, the OECD, HC, as well as a group of downstream companies.¹⁶⁸ In the rapidly evolving transnational labour regulatory environment, HC has shown an engaging attitude and cooperative approach in establishing CSR-related policies and mechanisms at the corporate level. The transparent engagement and constructive dialogue between Amnesty International and HC have supported HC in taking the first steps in establishing such policies and mechanisms amongst its peers. HC's proactive engagement with Amnesty International is notable. In 2015, after receiving the letter from Amnesty International, HC provided a quick response to Amnesty International's questionnaire concerning the company's practices in the DRC. Since its practices were highlighted by the AI Report, HC has engaged with a wide range of transnational labour regulatory initiatives. In late 2017, Amnesty International presented its critical assessment of HC's

¹⁶⁷ Amnesty International, "Time to Recharge: Corporate Action and Inaction to Tackle Abuses in the Cobalt Supply Chain" (Index number: AFR 62/7395/2017, 15 November 2017), online (pdf): <https://www.amnesty.org/en/documents/afr62/7395/2017/en/> [Amnesty International, "Time to Recharge"].

¹⁶⁸ *Ibid.*

behaviour changes between January 2016 to November 2017, recognizing both the improvements and shortcomings of the changes made by HC.

Third, the two reports targeted two different types of Chinese mining enterprises, SOEs and POEs. Chinese SOEs started investing in Africa more than two decades ago. While growing rapidly over the past decade, Chinese POEs are less experienced in overseas operations. The HRW Report targeted a large Chinese state-owned mining enterprise. The changes and improvements fostered by the report seem limited to the specifically singled-out company.¹⁶⁹ CNMC responded to Human Rights Watch's letter and questionnaire through a 10-page letter.¹⁷⁰ The letter provided information that disagreed with the allegations made by Human Rights Watch and concluded by committing to further investigating the issues raised by Human Rights Watch. It states that

The above [responses on standards and practices] are the result from our preliminary investigation into the issues raised in your letter; we shall also take immediate action to rectify any mistakes...The next step for us is to conduct more detailed, comprehensive, and in-depth investigations, focusing on the issues that you have raised, or have yet to raise.

To a large extent, the incentives for Chinese SOEs to implement social and environmental considerations come from external political pressure by state regulation.¹⁷¹ In the case of CNMC, the company cares about its international reputation, yet it is less sensitive to market-based pressure. Furthermore, changes made by one company can hardly influence the practices of other Chinese mining enterprises and companies in other positions in global mineral supply chains. In contrast, the AI Report targeted three groups of actors that are most relevant to the identified problem, specifically a large Chinese cobalt refiner and its counterparts in the global cobalt supply chain, and the host state and home states of these enterprises. The AI Report also mapped out other relevant actors in the global cobalt supply chain, including Chinese and non-Chinese enterprises

¹⁶⁹ Lee, *The Specter of Global China*, *supra* note 6 at 138. Lee interviewed a Deputy Chief Executive Officer of CNMC's Non-Ferrous Metal China, Africa, about how the company responded to the HRW Report and other similarly critical commentaries by international NGOs. As the Officer mentioned, "We explained how they got the facts wrong, and thank them for their attention. That's the end of it."

¹⁷⁰ Human Rights Watch, *supra* note 146 at 103–112.

¹⁷¹ Based on in-depth interviews and analysis of the Standard Gauge Railway project in Kenya, Bingyu Liu suggests that "close institutional, relational, and bureaucratic ties between the state and the business community give the Chinese government the power to influence the behaviour of Chinese SOEs overseas." Furthermore, Liu illustrates that "the Chinese government can influence the CSR practices of Chinese companies [SOEs] overseas by mandating, facilitating, endorsing and partnering in order to minimize the negative externalities of companies' overseas activities." See Bingyu Liu, "China's State-Centric Approach to Corporate Social Responsibility Overseas: A Case Study in Africa" (2020) *Transnational Environmental L* 57 at 57.

that may be clients of HC and, therefore, relevant to the use of cobalt products from artisanal cobalt mining.¹⁷² In addition to changes made by HC, the AI Report contributes to policy updates and behaviour changes amongst a broad range of Chinese mining enterprises, including both SOEs and POEs, which amounts to an institutional emergence of private labour governance initiatives at the corporate level of Chinese mining enterprises.¹⁷³ This development was initiated at Chinese private mining enterprises rather than state-owned mining enterprises because incentives and driving forces for incorporating labour standards for these two types of enterprises differ.

(2) Implications for Investigations of Actors from China: A Critical and Constructive Approach to the Role of China and Chinese Enterprises in Transnational Labour Law

While many parts of the HRW Report have been discredited, the report has been cited in academic publications as key supporting evidence for claims about Chinese enterprises' largely negative labour practices in Africa.¹⁷⁴ The opinions and conclusions concerning labour practices by CNMC are cited as "fact" without being cross-checked for accuracy. Only a few publications have made use of the HRW report appropriately by contextualizing and challenging its findings. One such publication is a recent study on understanding and mitigating the social risks associated with China's BRI.¹⁷⁵ The findings of the study are based on an extensive literature review and fieldwork in Nepal and Zambia involving semi-structured interviews with a wide range of stakeholders.¹⁷⁶ In the literature review part, the study cites the HRW Report as one of the empirical examples of Chinese enterprises' labour practices in the Zambian mining industry. Subsequently, it provides

¹⁷² Amnesty International, "This is What We Die for", *supra* note 40 at 55.

¹⁷³ Chapters 6 and 7 of this thesis investigate policy updates and behaviour changes regarding labour governance developed by Chinese mining enterprises.

¹⁷⁴ See e.g. Steve Hess & Richard Aidoo, "Charting the Roots of Anti-Chinese Populism in Africa: A Comparison of Zambia and Ghana" (2014) 49:2 J Asian & African Studies 129 at 137; Wethal Ulrikke, "Workplace Regimes in Sino-Mozambican Construction Projects: Resentment and Tension in a Divided Workplace" (2017) 35:3 J Contemporary African Studies 383 at 394; Aaron Halegua, "Where is the Belt and Road Initiative Taking International Labour Rights? An Examination of Worker Abuse by Chinese Firms in Saipan" in Maria Adele Carrai, Jean-Christophe Defraigne & Jan Wouters, eds, *The Belt and Road Initiative and Global Governance* (Cheltenham, UK: Edward Elgar Publishing Limited, 2020) 225 at 228; Hagan Sibiri, "The Emerging Phenomenon of Anti-Chinese Populism in Africa: Evidence from Zambia, Zimbabwe and Ghana" (2021) 13:1 Insight on Africa 7 at 15; According to a search through Google Scholar, the HRW Report has been cited in about 34 academic publications as of June 30, 2022.

¹⁷⁵ See Shawn Shieh et al, "Understanding and Mitigating Social Risks to Sustainable Development in China's BRI: Evidence from Nepal and Zambia" (2021) at 39–40, online (pdf): ODI <<https://odi.org/en/publications/understanding-and-mitigating-social-risks-to-sustainable-development-in-chinas-bri-evidence-from-nepal-and-zambia/>>. The ODI is an independent, global think tank headquartered in the United Kingdom.

¹⁷⁶ *Ibid* at 4 and 62–64.

scholarly resources that challenge the findings of the HRW Report and resources contributed by other scholars such as Oya. On risks related to decent work based on the fieldwork from Zambia and Nepal, the study concludes as follows:

In Zambia and Nepal, we found *a mixed picture* with regard to risks to decent work, with Chinese companies performing somewhat better with regard to health and safety, and less well on wages and working conditions. Overall, local stakeholders credited Chinese companies with *a willingness to address workplace issues, and to recognise and work with unions to improve safety, wages and other workplace-related problems over time*.¹⁷⁷

In contrast to the HRW Report, the AI Report has refocused international attention on identifying the “governance deficits” concerning labour protections in the global cobalt supply chain and seeking alternative normative paths to address the identified governance deficits in the artisanal mining sector in the DRC. The AI Report has been cited in scholarship concerning labour protections in global mineral supply chains.¹⁷⁸ The AI Report is usually cited as one of the illustrative resources to show the connections between labour issues in artisanal mines in the DRC and supply chain management in global mineral supply chains. Meanwhile, the AI Report has raised the attention of a wide range of actors, including companies, civil society organizations, governments, and international organizations. Since 2016, these actors have produced more than 25 research reports on various aspects of labour issues in artisanal mining sites in the DRC.¹⁷⁹ The comprehensive data sets have provided resources for in-depth investigations into the persistent problems and challenges on labour protections and the ongoing developments that aim to address them.

The different messages conveyed by the HRW Report and the AI Report have highlighted the importance of critical engagement with reports and other sources for scholarly analysis. Critical engagement does not mean that the validity of data is rejected. Rather, it underlines the importance of cross-checking the accuracy of the data and developing findings carefully. Therefore, to ensure

¹⁷⁷ *Ibid* at 41 [emphasis added].

¹⁷⁸ See e.g. Benjamin Rubbers, “Mining Boom, Labour Market Segmentation and Social Inequality in the Congolese Copperbelt” (2020) 51:6 Development & Change 1555; Iain J. Fraser, Martin Müller & Julia Schwarzkopf, “Transparency for Multi-Tier Sustainable Supply Chain Management: A Case Study of a Multi-tier Transparency Approach for SSCM in the Automotive Industry” (2020) 12:5 Sustainability 1814. According to a search through Google Scholar, the Amnesty International Report (2016) has been cited in about 27 academic publications as of June 30, 2022.

¹⁷⁹ See Annex A of this thesis, “List of 25 Research Reports Concerning Labour and Human Rights in the Artisanal and Small-scale Mining Sector in the Democratic Republic of the Congo.”

an in-depth investigation, this thesis draws data from a broader range of resources, including primary legal sources, secondary academic publications, and various research resources contributed by IGOs, INGOs, and research institutions.

1.4 Preliminary Conclusions

This chapter critically engages with the existing literature in China-Africa studies, focusing specifically on the labour practices of Chinese enterprises in Africa. Drawing insights from a comprehensive set of data, the chapter has debunked several persistent allegations about China and Chinese mining enterprises' labour abuses in Africa. As analyzed in this chapter, dominant, negative views surrounding Chinese enterprises' labour practices in Africa have primarily resulted from unsubstantiated allegations. The allegations are far from the companies' real practices; they should be better understood as a mix of myths, fallacies, and facts that must be carefully sorted, verified, and examined before being applied in scholarly discussion.

Over the past decade, scholars have underlined the importance of “debunking myths” in China-Africa studies.¹⁸⁰ These contributions have helped us distinguish between “myths” and “facts” surrounding China's economic engagement with Africa. As Chris Alden and Daniel Large recently point out, the research perspective on China-Africa engagement has developed from “China in Africa” to “global African studies.”¹⁸¹ The research has progressed from a singular view of China's influence in Africa to “a more globally diffused geography of studies amidst evolving patterns of transnational research collaboration.”¹⁸² With diverse voices of scholars from different parts of the world, the discourse is now moving away from a dichotomous approach based on stereotypes to a more balanced approach that acknowledges both positive and negative aspects of China's social impacts on Africa. Emerging literature has provided several in-depth investigations into Chinese

¹⁸⁰ See e.g. Yan & Sautman, “Rumours and Representations of the Export of Chinese Convict Labour”, *supra* note 6; Simplice A. Asongu & Gilbert A. A. Aminkeng, “The Economic Consequences of China-Africa Relations: Debunking Myths in the Debate” (2013) 11:4 J Chinese Economics & Bus Studies 261; Miwa Hirono & Shogo Suzuki, “Why Do We Need ‘Myth-Busting’ in the Study of Sino-African Relations?” (2014) 23:87 J Contemporary China 443; Sautman & Yan, “Localizing Chinese Enterprises in Africa”, *supra* note 130; George Ofosu & David Sarpong, “The Evolving Perspectives on the Chinese Labour Regime in Africa” (2021) Economic & Industrial Democracy, DOI: <10.1177/0143831X211029382>; George Ofosu & David Sarpong, “China in Africa: On the Competing Perspectives of the Value of Sino-Africa Business Relationships” (2022) 56:1 J Economic Issues 137.

¹⁸¹ Chris Alden & Daniel Large, “Studying Africa and China” in Alden & Large, *supra* note 5, 3 at 10.

¹⁸² *Ibid.*

enterprises' social and environmental impacts in Africa.¹⁸³ In recent years, a few western media outlets have also started changing their tone in reporting about Chinese enterprises' labour practices in Africa. For instance, in 2019, the Financial Times reported that "It is wrong to demonise Chinese labor practices in Africa," citing Oya's research findings regarding Chinese enterprises in Angola and Ethiopia.¹⁸⁴

Two decades of academic publications have provided a wide range of empirical data and theoretical explorations that help us understand the role of China and Chinese enterprises in TLL. A growing body of empirical findings has made it clear that there are certainly both "good" ("positive") and "bad" ("negative") labour practices of Chinese enterprises in Africa, similar to the case of other foreign investors in Africa. Instead of an oversimplified label such as "positive" or "negative" on China's presence in Africa, we need to critically investigate the labour practices of Chinese enterprises taking into the following insights that have been reflected in the ongoing China-Africa studies. First, China's economic engagement in Africa has been rooted in a transnational context in which state and non-state actors interact with each other. Second, similar to TNCs from other countries, Chinese enterprises may have both negative and positive labour practices in Africa. Third, the labour practices of Chinese enterprises in Africa have been dynamically shaped by both state-based and market-based incentives.

This chapter underlines the importance of a more balanced approach to investigating labour governance in the context of Chinese outward mining investment in Africa. The following chapters of this thesis investigate transnational labour regulatory arrangements and governance initiatives developed by China and Chinese enterprises. This thesis makes efforts to reduce the risk of an unsubstantiated investigation by employing the following three measures: (a) developing an analytical framework that can contextualize the role of China and Chinese enterprises in TLL; (b) using multiple methods and sources to cross-check and validate data, and (c) taking a critical yet constructive approach to investigating the role of China and Chinese enterprises in TLL. In this way, this thesis aims to develop an in-depth understanding of the role of China and Chinese

¹⁸³ See e.g. Lee, *The Specter of Global China*, *supra* note 6; Oya, "Labour Regimes and Workplace Encounters between China and Africa", *supra* note 62; Xiaoyang Tang, "Social and Environmental Responsibility" in Xiaoyang Tang, *Coevolutionary Pragmatism: Approaches and Impacts of China-Africa Economic Cooperation* (Cambridge, United Kingdom: Cambridge University Press, 2021) 232.

¹⁸⁴ David Pilling, "It is Wrong to Demonise Chinese Labour Practices in Africa" (3 July 2019), online: *Financial Times* <<https://www.ft.com/content/6326dc9a-9cb8-11e9-9c06-a4640c9feebb>> [perma.cc/2LCD-MNM6].

enterprises that recognizes both the achievements and limitations of these actors in challenging and advancing labour governance in transnational spheres. The findings will be informative for further investigations into the role of state and non-state actors in the field of TLL.

This chapter has preliminarily mapped out several actors that may play a role, in addition to states, in shaping the dynamics of labour governance in the context of China's economic engagement in Africa: mining enterprises, workers, trade unions, and INGOs, as well as news agencies. All these actors can play a role in driving and shaping the development and diffusion of applicable labour standards in transnational business activities. Drawing insights from this chapter, the next chapter develops a theoretical and analytical framework that enables a critical yet constructive investigation into the role of China and Chinese enterprises in TLL.

Chapter 2 Theorizing the Role of China and Chinese Enterprises in the Governance of Labour Rights in a Globalized Economy: A Transnational Labour Law Approach

2.1 Introduction

The governance challenges posed by economic globalization have fostered the co-evolution of both public and private forms of labour governance initiatives. Horizontally, the co-existence of public and private governance of labour rights has become increasingly prevalent in a globalized economy. Meanwhile, vertically, the diffusion of labour norms within and between different sites and levels of law is increasing in transnational contexts, specifically in extended GSCs. To optimize governance interactions for labour protections, it is critical to understand the role of the state and TNCs in a multi-level governance framework consisting of the interconnected horizontal and vertical governance of labour rights in the era of economic globalization. Mapping the dynamics of governance interactions can identify potential ways to better harness them.¹⁸⁵

TLL scholarship has long highlighted the need to shift from a *top-down* regulatory approach that is assumed in traditional international law frameworks to a *multi-level* governance approach that pays close attention to various actors, norms and processes that are relevant to the governance of labour rights in a globalized economy. Over the past decade, TLL scholarship has further advanced the *actor-centred* and *multidirectional* feature of labour norm diffusion, which challenges the pre-existing assumptions about the diffusion of labour norms from the centre, that is, the ILO, or from the global North to the global South.

This analytical framework builds on the existing knowledge in TLL. Furthermore, it draws insights from the TLO framework to understand the different roles of actors in constructing and shaping the dynamics of multi-level governance of labour rights in transnational spheres. The analytical framework recognizes horizontal interactions (across sites of law located at the same level) and vertical interactions (through *top-down* and *bottom-up* approaches and across sites of law located

¹⁸⁵ A country study on the uncoordinated combination of state and private regulators, see Matthew Amengual, “Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic” (2010) 38:3 World Development 405 at 413. To help analyze and understand how some dialogic dynamics occur, Kevin Kolben has proposed a conceptual framework, which is premised on the recognition of the pragmatic and conceptual limits of private regulation. See Kevin Kolben, “Dialogic Labor Regulation in the Global Supply Chain” (2015) 36 Mich J Int’l L 425.

at different levels) in transnational processes of labour norm production, diffusion, and institutionalization. The framework has been inspired by scholarship in the following interrelated fields: transnational law,¹⁸⁶ TLL,¹⁸⁷ GSC governance,¹⁸⁸ and private governance/regulation of labour norms,¹⁸⁹ as well as sustainability and responsible sourcing in multi-tier supply chains.¹⁹⁰

In addition to this introductory section and concluding remarks, this chapter consists of the following three sections. Section two reviews the conceptualization of transnational law and TLL and illustrates why shifting from *international* to *transnational* labour law is necessary to address the challenges arising from globalization. Section three introduces a multi-level and actor-centred approach advanced in existing TLL scholarship and explains how a processual conception of transnational legal ordering can help to understand the changing dynamics of multi-level governance of labour rights in a globalized economy. Section four highlights the persistent power asymmetries and social inequalities in GSCs and the counter-hegemonic potential of TLL.

2.2 Shifting from International to Transnational Labour Law

Over the past few decades, scholars from various fields have drawn on the notion of “transnational law” to understand the role of law in addressing transnational challenges, for instance, corporate governance, environmental governance, and labour governance.¹⁹¹ While subject to ongoing debates, a transnational law approach has proliferated and evolved. The approach has been applied

¹⁸⁶ See e.g. Halliday & Shaffer, *supra* note 29; Peer Zumbansen, ed, *The Many Lives of Transnational Law: Critical Engagements with Jessup’s Bold Proposal* (New York: Cambridge University Press, 2020) [Zumbansen, *The Many Lives of Transnational Law*]; Peer Zumbansen, ed, *Oxford Handbook of Transnational Law* (Oxford: Oxford University Press, 2021) [Zumbansen, *Oxford Handbook of Transnational Law*]; Nico Krisch, ed, *Entangled Legalities Beyond the State* (Cambridge: Cambridge University Press, 2021).

¹⁸⁷ See e.g. Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8.

¹⁸⁸ See e.g. Coe & Yeung, *supra* note 28; Ponte, Gereffi & Raj-Reichert, *supra* note 28; Kuruvilla, *supra* note 28.

¹⁸⁹ See e.g. Richard M. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge: Cambridge University Press, 2013); Kuruvilla, *supra* note 28.

¹⁹⁰ Recent studies, see e.g. Elcio M. Tachizawa & Chee Yew Wong, “Towards a Theory of Multi-tier Sustainable Supply Chains: A Systematic Literature Review” (2014) 19 *Supply Chain Management* 643; Esteban Koberg & Annachiara Longoni, “A Systematic Review of Sustainable Supply Chain Management in Global Supply Chains” (2019) 207 *J Cleaner Production* 1084; Kannan Govindan, Mahesh Shaw & Abhijit Majumdar, “Social Sustainability Tensions in Multi-Tier Supply Chain: A Systematic Literature Review Towards Conceptual Framework Development” (2021) 279 *J Cleaner Production* (open access), DOI: <10.1016/j.jclepro.2020.123075>; Meng Jia, Mark Stevenson & Linda Hendry, “A Systematic Literature Review on Sustainability-oriented Supplier Development” (2021) *Production Planning & Control* (open access), DOI: <10.1080/09537287.2021.1958388>.

¹⁹¹ Recent studies see e.g. Zumbansen, *The Many Lives of Transnational Law*, *supra* note 186; Zumbansen, *Oxford Handbook of Transnational Law*, *supra* note 186; Krisch, *supra* note 186.

by an increasing number of scholars to seek alternative normative paths for issues arising from globalization. A “transnational” approach can better capture a complex and diverse regulatory framework arising in the context of globalization that cannot be adequately captured by the concept of traditional international law or the recent concept of global law.¹⁹² Building on scholarship in transnational law and TLL, this section illustrates why the shift from “international” to “transnational” labour law is necessitated in a globalized economy and how the conceptualization of TLL has evolved over the past two decades.

2.2.1 The Evolving Conceptualization of Transnational Law

In 1956, Philip C. Jessup, a foundational thinker in the field of transnational law, conceptualized the term “transnational law.”¹⁹³ Jessup defines transnational law as “all law which regulates actions or events that transcend national frontiers.”¹⁹⁴ For Jessup, states are “not the only subjects of international law.”¹⁹⁵ Transnational law could involve a wide group of actors, including individuals, corporations, states, organizations of states, or other groups.¹⁹⁶

The conceptualization of transnational law has been evolving.¹⁹⁷ Scholars have been engaging with and stepping beyond Jessup’s illustration.¹⁹⁸ Today there are various conceptualizations of transnational law inspired by Jessup’s original contribution and continuous engagement with it. These conceptualizations have addressed several key elements, including the scope and operational mechanism of transnational law and the role of the state in transnational law. Amongst others, the role of the state has been at the centre of ongoing debates.

¹⁹² Halliday & Shaffer, *supra* note 29 at 4 [footnotes omitted].

¹⁹³ For a comprehensive analysis, see Peer Zumbansen, “Introduction: Transnational Law, with and beyond Jessup” in Zumbansen, *The Many Lives of Transnational Law*, *supra* note 186, 1 at 4.

¹⁹⁴ “I shall use, instead of ‘international law’, the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.” See Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) at 2.

¹⁹⁵ *Ibid* at 3.

¹⁹⁶ *Ibid* at 4.

¹⁹⁷ Peer Zumbansen, “Transnational law, Evolving” in Jan M. Smits, ed, *Elgar Encyclopedia of Comparative Law*, 2nd ed (Cheltenham, UK: Edward Elgar, 2012) 899 at 900.

¹⁹⁸ For an overview of the theoretical scholarship of transnational law dating back to Philip Jessup’s introduction of the term in the 1950s to the year 2020, see Peer Zumbansen, “Introduction: Transnational Law, with and beyond Jessup” in Zumbansen, *The Many Lives of Transnational Law*, *supra* note 186, 1 at 35–37.

Scholars have used several terms to refer to the production and diffusion of legal norms in transnational spheres, for instance, “transnational law,”¹⁹⁹ “transnational legal process,”²⁰⁰ “the concept of law from a transnational perspective,”²⁰¹ “transnational private law,”²⁰² and “transnational legal order.”²⁰³ More than two decades ago, Harold H. Koh started using the term “transnational legal process” to analyze the multiple pathways through which states internalize rules of international law.²⁰⁴ Koh acknowledges the role and interactions of both public actors, which he calls “governmental norm sponsors,” and private actors, which he calls “transnational norm entrepreneurs.”²⁰⁵ This broad group of actors includes nation-states, international organizations, TNCs, INGOs, and private individuals, all of which can play a role in “interact[ing] in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.”²⁰⁶ Koh highlights four distinctive features of transnational legal processes: non-traditional, non-statist, dynamic, and normative.²⁰⁷ He uses metaphors developed from “*computer-age imagery*” to illustrate his operational definition of “transnational law”: (a) law that is *downloaded* from international to domestic law, (b) law that is *uploaded* from domestic to international law, then *downloaded* from international to domestic law, (c) law that is *borrowed or horizontally transplanted* from one national system to another.²⁰⁸ Koh’s metaphors help convey the idea of transnational legal processes, capturing both the *vertical* and *horizontal* dimensions of the transnational flow of legal norms. However, Koh’s conception of transnational legal processes focuses on a *top-down* approach to the ultimate internalization of

¹⁹⁹ See e.g. Jessup, *supra* note 194; Zumbansen, *The Many Lives of Transnational Law*, *supra* note 186.

²⁰⁰ See e.g. Harold H. Koh, “Transnational Legal Process” (1996) 75 Nebraska L Rev 181 [Koh, “Transnational Legal Process”]; Harold H. Koh, “Why Transnational Law Matters” (2006) 24:4 Penn State Intl L Rev 745 [Koh, “Why Transnational Law Matters”].

²⁰¹ See e.g. Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Burlington, VT/Farnham, UK: Ashgate Publishing, 2010); Roger Cotterrell, “What is Transnational Law?” (2012) 37:2 Law & Social Inquiry 500.

²⁰² See e.g. Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Portland, OR/Oxford: Hart Publishing, 2010); Peer Zumbansen, “Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism” (2012) 21:2 Transnat’l L & Contemp Probs 305.

²⁰³ See e.g. Gregory Shaffer, ed, *Transnational Legal Ordering and State Change* (Cambridge: Cambridge University Press, 2013); Halliday & Shaffer, *supra* note 29.

²⁰⁴ Koh, “Transnational Legal Process”, *supra* note 200; Koh, “Why Transnational Law Matters”, *supra* note 200.

²⁰⁵ Koh, “Why Transnational Law Matters”, *supra* note 200 at 746.

²⁰⁶ Koh, “Transnational Legal Process”, *supra* note 200 at 184–185.

²⁰⁷ *Ibid* at 184 [emphasis added].

²⁰⁸ Koh, “Why Transnational Law Matters”, *supra* note 200 at 745–746.

international law into domestic law. Koh defines “transnational legal process” as “the transsubstantive process in each of these issue areas whereby states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law.”²⁰⁹ Interpretations of applicable global norms, as Koh argues, are “eventually internalized into states’ domestic legal systems” through “repeated cycles of ‘interaction-interpretation-internalization.’”²¹⁰

Over the past decade, scholars have illustrated their conception of transnational law from various perspectives. Based on the analysis of “law and social norms” through a legal pluralism approach, Gralf-Peter Calliess and Peer Zumbansen propose a theory of transnational private law.²¹¹ It could be thought of (again provisionally and pragmatically) as “bottom-up” law (developed in social interaction) rather than “top-down” (legislated) law.²¹² As Roger Cotterrell points out, “Transnational law remains an imprecise notion.”²¹³ While the term has been widely and increasingly invoked by scholars and practitioners, the conceptualization and usage of the term transnational law continue to be disputed. The uses of transnational law do not seem to be conceptually coherent, even if the term tends to be more frequently referred to by many legal practitioners and scholars. Apart from other circumstances, the differences derive from different approaches to the conceptions of transnational law, specifically different approaches to the role of the state in transnational law. For instance, Zumbansen takes a radical and disruptive approach to the role of the “state” in transnational law. Zumbansen views transnational civil society as a lawmaker, but he does not include public international law within his conception of transnational law.²¹⁴ While Zumbansen chose a “retreat” from Jessup’s inclusive approach to transnational law, Terence Halliday and Gregory Shaffer further develop the inclusion of both public and private lawmaking, which transcend the nation-state.²¹⁵ They employ the concept of “transnational legal order” to analyze the construction, conveyance, and institutionalization of legal orders in transnational law. Taking a socio-legal approach, Halliday and Shaffer define a TLO as “a

²⁰⁹ *Ibid* at 746.

²¹⁰ *Ibid* at 747.

²¹¹ Calliess & Zumbansen, *supra* note 202.

²¹² *Ibid* at 125.

²¹³ Cotterrell, *supra* note 201 at 522.

²¹⁴ Peer Zumbansen, “Transnational Legal Pluralism” (2010) 10 *Transnational Legal Theory* 141.

²¹⁵ Halliday & Shaffer, *supra* note 29 at 12.

collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”²¹⁶ Through the TLO framework, Halliday and Shaffer expand the analysis of transnational legal processes to a wide range of actors and legal norms to investigate how “transnational legal orders rise and fall in their capacity to constrain and enable behaviours in diverse spheres of social life.”²¹⁷ In contrast to Koh’s focus on the “top-down” aspect and Zumbansen’s focus on the “bottom-up” aspect, Halliday and Shaffer construct the TLO framework that addresses both “bottom-up” and “top-down” aspects of transnational law.²¹⁸ Unlike Zumbansen, Halliday and Shaffer highlight the ongoing importance of the “nation-state” in transnational law.²¹⁹

In recent years, the conceptualization of transnational law and the debates on key controversies have continued. As Zumbansen points out, the study of transnational law is “only at its beginning” and, at the same time, “already in its middle, navigating a project ship of doctrinal, conceptual and critical theory” in a time of turbulence.²²⁰

2.2.2 The Evolving Conceptualization of Transnational Labour Law

The development of the conceptualization of TLL shares commonalities with that of transnational law. Similar to the term “transnational law,” the term TLL is used frequently but inconsistently. First, scholars have used several similar terms on different occasions, including “transnational labour law,”²²¹ “transnational labour regulation,”²²² and “transnational/global labour

²¹⁶ *Ibid* at 5.

²¹⁷ *Ibid*. The concept of TLOs focuses researchers and practitioners on how social problems are conceived and ordered through law and how that legal ordering transcends and penetrates state boundaries.

²¹⁸ Halliday & Shaffer, *supra* note 29 at 3, 16, 20, and 22.

²¹⁹ *Ibid* at 13–14.

²²⁰ Peer Zumbansen, “Introduction: Transnational Law, with and beyond Jessup” in Zumbansen, *The Many Lives of Transnational Law*, *supra* note 186, 1.

²²¹ Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8. In this collective volume, “transnational labour law” and “transnational labour regulation” have been applied by different authors.

²²² See e.g. Katherine Van Wezel Stone, “Labor and the Global Economy: Four Approaches to Transnational Labor Regulation” (1995) 16:4 *Mich J Int’l L* 987; Kerstin Ahlberg, *Transnational Labour Regulation: A Case Study of Temporary Agency Work* (Brussels: P. Lang, 2008); Kevin Kolben, “Transnational Labor Regulation and the Limits of Governance” (2011) 12 *Theor Inq L* 403 [Kolben, “Transnational Labor Regulation and the Limits of Governance”]; Ludger Pries & Martin Seeliger, “Work and Employment Relations in a Globalized World: The Emerging Texture of Transnational Labour Regulation” (2013) 4:1 *Global Labour J* 26; Kevin Kolben, “Transnational Private Labour Regulation, Consumer-citizenship and the Consumer Imaginary” in Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8, 361; Kolben, “Dialogic Labor Regulation in the Global Supply Chain”, *supra* note 185.

governance,”²²³ as well as other expressions such as transnational policy initiatives for labour rights.²²⁴ Some authors use these terms interchangeably. Second, the term TLL has been applied to investigate a wide range of transnational standards, instruments, and initiatives that may relate to labour rights in the era of economic globalization. These transnational standards, instruments, and initiatives include trade agreements, corporate codes of conduct (COCs), consumer-led or consumer-focused initiatives, and international framework agreements reached between TNCs and trade union federations, amongst others. Discussions have addressed a wide range of topics, including the following: (a) the potential and risks for labour rights brought by globalization;²²⁵ (b) the emergence of private labour standards in transnational spheres, particularly COCs, other CSR policies and mechanisms, and their impacts on existing transnational governance regimes;²²⁶ (c) the relevant actors in transnational labour regulation, including the expansion of actors, their interactions, and impact on labour rights;²²⁷ and (d) the effectiveness of labour standards in transnational spheres.²²⁸

²²³ See e.g. Anke Hassel, “The Evolution of a Global Labor Governance Regime” (2008) 21:2 Governance 231; Guglielmo Meardi & Paul Marginson, “Global Labour Governance: Potential and Limits of an Emerging Perspective” (2014) 28:4 Work, Employment & Society 651; Frank Hendrickx, Axel Marx, Glenn Rayp & Jan Wouters, “The Architecture of Global Labour Governance” (2016) 155 Int’l Lab L 339; Sabrina Zajak, *Transnational Activism, Global Labor Governance, and China* (New York, NY: Palgrave Macmillan, 2017); Huw Thomas & Peter Turnbull, “From Horizontal to Vertical Labour Governance: The International Labour Organization and Decent Work in Global Supply Chains” (2018) 71:4 Human Relations 536; Khan, *supra* note 9.

²²⁴ See e.g. Axel Marx *et al*, *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives*, eds (Cheltenham, UK: Edward Elgar Publishing, 2015).

²²⁵ Kimberly Ann Elliott & Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* (Washington, DC: Institute for International Economics, 2003); Ronaldo Munck, *Labour and Globalisation: Results and Prospects*, ed (Liverpool: Liverpool University Press, 2004).

²²⁶ See e.g. Tim Bartley, “Corporate Accountability and the Privatization of Labour Standards: Struggles over Codes of Conduct in the Apparel Industry” (2005) 14 Research in Political Sociology 211; Ngai-Ling Sum & Pun Ngai, “Globalization and Paradoxes of Ethical Transnational Production: Code of Conduct in a Chinese Workplace” (2005) 9:2 Competition & Change 181.

²²⁷ For instance, the role of regional bodies such as the EU and a future Free Trade Area of the Americas, the role of the trade regime, as well as the role of international organizations, such as the ILO and United Nations human rights regimes in the increasingly globalized economy. See Trubek, *supra* note 7.

²²⁸ For comprehensive discussions of the issues investigated in the early 21st century, see David M. Trubek, Jim Mosher & Jeffrey S. Rothstein, “Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks” (2000) 25:4 Law & Social Inquiry 1187; David M. Trubek & Lance Compa, “Trade Law, Labor, and Global Inequality” in Paul D. Carrington & Trina Jones, *Law and Class in America: Trends Since the Cold War*, eds (Critical America Series) (New York: New York University Press, 2006) 217; Trubek, *supra* note 7.

Bob Hepple's account of labour laws and global trade in 2005 is comprehensive and informative since his work addresses most of the contested questions raised around TLL in the early 21st century. Hepple provides a comprehensive assessment of established ideas on transnational labour regulation, the effectiveness of international labour standards, and new regulatory directions for fundamental rights and decent work.²²⁹ He provides in-depth accounts of multiple, overlapping layers of norm-creation and norm-application relating to labour rights in the era of economic globalization, including privatized labour regulation such as codes, agreements, and guidelines, unilateral social clauses by the European Union (EU) and the United States, social clauses in bilateral and regional agreements, social clauses in World Trade Organization agreements, and new methods and initiatives in the EU. For instance, based on the analysis of a wide range of reviews and surveys of corporate codes issued by 2000, Bob Hepple argued that "these private sector initiatives generally impose *lower* standards and are more *selective* in their choice of human and labour rights than the public regulatory frameworks, and that they are inadequately monitored and enforced."²³⁰ Supporting an institutional vision of state labour regulatory action, Hepple advocates for "a public international regulatory mechanism which can ensure that transnational corporations observe international norms."²³¹

David Trubek captures the missing pillar in the architecture of global governance. He underlined that "Globalization has shifted the worldwide balance of power between labour and capital."²³² While international law recognizes the importance of labour rights, as he pointed out, "the international mechanisms to protect rights and raise standards, never terribly robust, have proven inadequate in the face of global economic forces."²³³ David M. Trubek and Lance Compa used the term "transnational labour law" to refer to "a package of measures that would operate at various levels from the local to the global, involve the private as well as the public sector, deploy a range of instruments from hard law to soft guidelines and principles, use new tools to foster a 'race to the top', and provide funding where needed."²³⁴ According to Trubek and Compa, TLL includes a

²²⁹ Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005).

²³⁰ *Ibid* at 76 [emphasis in original].

²³¹ *Ibid* at 87.

²³² Trubek, *supra* note 7 at 725.

²³³ *Ibid*.

²³⁴ David M. Trubek & Lance Compa, eds, "Trade Law, Labor, and Global Inequality" in Paul D. Carrington & Trina Jones, *Law and Class in America: Trends Since the Cold War* (New York: New York University Press, 2006) 217–243 at 223.

wide range of public and private rules, standards, tools, and codes. These may include trade rules relevant to protecting labour rights, programs to augment social protection schemes for people adversely affected by trade, regional or global labour norms setting forth obligations and mechanisms to assess compliance, new tools that could encourage a race to the top, programs to strengthen domestic labour codes in countries with weak systems, and public-private COCs providing for voluntary restraint.²³⁵

Over the past decade, the conceptualization and theorization of TLL have deepened. The scope, substance, features, and directions of TLL have been explored, elaborated on, and advanced by scholars from different perspectives. Recent contributions have made efforts to conceptualize TLL in a more constructive, informative, and directive way. Antonio Ojeda Avilés has contributed to an in-depth study of the term and field of TLL.²³⁶ He addresses a wide range of labour law issues from the transnational perspective through both procedural and substantive transnational law. He draws heavily on ILO and EU standards and addresses issues relating to the conflict of laws, employment relations, collective bargaining, as well as CSR, and COCs. More importantly, he brings attention to the role of TNCs in TLL. Avilés sets out his understanding of TLL, highlighting both the “transnational” perspective (the power of TNCs and the diminished authority of nation-states) and “an extended view of law” (“laws, treaties, arbitral awards, collective agreements and contracts, custom and usage, and even business decisions and practices with a regulatory character”).²³⁷ In addition to the conceptualization of TLL, he deals with the institutional architecture of the emerging TLL, focusing on European Works Councils, international framework agreements, and transnational industrial action.²³⁸

Adelle Blackett and Anne Trebilcock have developed a comprehensive conceptualization of TLL.²³⁹ Blackett and Trebilcock suggest that TLL is “a form of multi-level governance, including

²³⁵ *Ibid* at 223.

²³⁶ Antonio Ojeda Avilés, *Transnational Labour Law* (Alphen Aan Den Rijn, The Netherlands: Kluwer Law International, 2015).

²³⁷ *Ibid* at 6.

²³⁸ *Ibid*, chapters 8–10.

²³⁹ Blackett & Trebilcock, *supra* note 8. Further contributions by Adelle Blackett, see e.g. Adelle Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct” (2001) 8 *Ind J Global Legal Stud* 401 [Blackett, “Global Governance, Legal Pluralism and the Decentered State”]; Adelle Blackett, “‘A New Thing: Shall Ye Not Know It?’ On Living Metaphors in Transnational Labour Law” in Simon Archer, Daniel Drache & Peer Zumbansen, *The Daunting Enterprise of*

the international, the regional, the national, and the shop floor.”²⁴⁰ Their understanding of TLL acknowledges and addresses “the complexity, diversity and asymmetries across time and space – amongst states, across uneven regional development, amongst vastly differently empowered institutions and actors.”²⁴¹ Blackett and Trebilcock illustrate their conceptualization of TLL by interrogating the three components of TLL: “its characterization as law, its relationship to ‘labour’ and ‘labour law’ and its ‘transnational’ character.”²⁴² In a collective volume, the 37 chapters connected by this introductory conceptualization address a wide range of issues in the field of TLL, including the methods of TLL, the North-South challenge to TLL, the emerging role of the ILO in TLL, the distinction and interaction between public and private labour norms, labour rights and trade agreements, and key issues relating to the eight fundamental ILO Conventions, amongst others.²⁴³ Blackett and Trebilcock insist that “TLL is rooted in a quest for social justice.”²⁴⁴ They suggest that TLL has the potential to construct counter-hegemonic alternative normative paths.²⁴⁵ Rather than taking an absolute position in the debates of public-private distinction in lawmaking, Blackett and Trebilcock observe the co-existence of both public and private labour governance initiatives in transnational spheres,²⁴⁶ question the legitimacy of private standard-setting and the involvement of actors other than states in TLL,²⁴⁷ and investigate the interaction between actors and their impacts on legal orders in TLL.²⁴⁸

the Law: Essays in Honour of Harry W. Arthurs, eds (Montreal: McGill-Queen's University Press, 2017) 286; Adelle Blackett, “Introduction: Decolonizing Labour Law — Contributions to an Emergent Transnational Labour Law/Vers un droit du travail décolonisé — Contributions au droit transnational du travail en émergence” (2018) 33: 2 CJS/RCDS 111; Adelle Blackett & Laurence R. Helfer, “Introduction to the Symposium on Transnational Futures of International Labor Law” (2019) 113 AJIL 385; Adelle Blackett, “Theorizing Emancipatory Transnational Futures of International Labor Law” (2019) 113 AJIL 390; Adelle Blackett, *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Ithaca, New York: Cornell University Press, 2019) [Blackett, *Everyday Transgressions*]; Adelle Blackett, “Architects, Landscapers, and Gardeners in the Transnational Futures of International Labor Law” in Zumbansen, *Oxford Handbook of Transnational Law*, *supra* note 186, 591. Further contributions by Anne Trebilcock, see e.g. Anne Trebilcock, “Due Diligence on Labour Issues: Opportunities and Limits of the UN Guiding Principles on Business and Human Rights” in Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8, 93 [Trebilcock, “Due Diligence on Labour Issues”]; Trebilcock, “Why the Shift”, *supra* note 11.

²⁴⁰ Blackett & Trebilcock, *supra* note 8 at 4.

²⁴¹ *Ibid.*

²⁴² *Ibid* at 5.

²⁴³ See Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8.

²⁴⁴ Blackett & Trebilcock, *supra* note 8 at 31.

²⁴⁵ *Ibid* at 4 and 31 [footnotes omitted].

²⁴⁶ *Ibid* at 24–25.

²⁴⁷ See e.g. Blackett, “Global Governance, Legal Pluralism and the Decentered State”, *supra* note 239.

²⁴⁸ See e.g. Blackett, *Everyday Transgressions*, *supra* note 239.

2.3 Transnational Labour Law and Its Counter-hegemonic Potential: A Multi-level, Actor-centred and Processual Approach to the Production and Diffusion of Labour Norms in a Globalized Economy

Drawing insights from both TLL and TLO scholarship, this thesis develops a theoretical and analytical framework to understand the role of China and Chinese enterprises in TLL. This framework anchors in a multi-level, actor-centred and processual understanding of the production and diffusion of labour norms in a globalized economy. This framework draws insights from three sets of scholarship to illustrate how the analytical designs can help better understand the role of China and Chinese enterprises in the production and diffusion of labour norms in a globalized economy: (a) the conceptualization of TLL by Blackett and Trebilcock, (b) the conceptualization of TLO by Halliday and Shaffer, and (c) the application of the TLO framework by Sébastien Jodoin. Building on the existing scholarship, this thesis understands TLL as *a form of multi-level and multidirectional governance of labour rights developed and shaped by a wide range of state and non-state actors with vastly different power*.

2.3.1 A Multi-level and Actor-centred Approach to the Production and Diffusion of Labour Norms in a Globalized Economy

As the normative core of TLL, international labour law can play a crucial role in addressing the challenge of achieving the objective of decent work in a globalized economy and reshaping the transnational legal architecture.²⁴⁹ However, as Blackett points out, “No international standard *alone* could establish a transnational legal order.”²⁵⁰ Indeed, a wide range of actors have played a role in deepening the interplay between the economic and social architecture beyond national borders.

(1) A Multi-level and Actor-centred Approach: Framing Transnational Labour Law in relation to its Counter-hegemonic Potential

The shift from international to transnational labour law recognizes the diversification of actors, norms and processes in transnational spheres. The shift allows alternative normative paths to emerge from different sites of law that are not limited to the ILO or the powerful actors from the

²⁴⁹ Blackett, “Introduction: Transnational Futures of International Labour Law”, *supra* note 61 at 455.

²⁵⁰ Blackett, *Everyday Transgressions*, *supra* note 239 at 12.

global North.²⁵¹ Since a few decades ago, TLL scholars have developed a *multi-level* and *actor-centred* approach to understanding the dynamics of multi-level governance in transnational legal processes.²⁵² Adelle Blackett and Christian Lévesque have developed a multi-level and actor-centred approach to understanding the construction of social regionalism.²⁵³ This approach recognizes “the interaction of norms from an enterprise and sectoral level through to national and transnational regulatory initiatives.”²⁵⁴ The approach highlights the role of a wide range of actors in the construction of social regionalism, including TNCs, trade unions, domestic courts, and international organizations.²⁵⁵ Furthermore, the approach underlines that the processes of social integration across governance levels are far from a “linear, top-down process” or a “univocal direction.”²⁵⁶ As Blackett and Lévesque illustrate, directions of the processes can be both “top-down” and “bottom-up,” and “the range of actors’ choices in engaging with and ability to affect the processes is *hardly predetermined* and *in fact quite variable*.”²⁵⁷

Over the past decade, a growing body of TLL scholarship has contributed to further illustrating the dynamics of multi-level governance in the production and diffusion of labour norms across various levels and sites of law. Both state and non-state actors have played a role in shaping the diffusion of labour norms and the establishment of new legal orders in TLL in multiple directions and ways. Sean Cooney has explored how BRICs, particularly China, have engaged with international labour standards and challenged the substance and direction of TLL.²⁵⁸ Cooney highlights the role of the state in China’s extensive labour law reforms as opposed to the “deregulatory” approach taken in many countries in the global North.²⁵⁹ He illustrates how developments in China have affected debates on labour norms in other countries and argues that

²⁵¹ Blackett & Trebilcock, *supra* note 8 at 31; Blackett, *Everyday Transgressions*, *supra* note 239 at 167.

²⁵² See e.g. Blackett & Lévesque, *supra* note 45. For earlier developments of the multi-level governance approach on the law of regional integration in Europe, see e.g. Gary Marks, “An Actor-centred Approach to Multi-Level Governance” (1996) 6:2 *Regional & Federal Studies* 20; Gary Marks, Liesbet Hooghe & Kermit Blank, “European Integration from the 1980s: State-Centric v. Multi-Level Governance” (1996) 34:3 *J Common Mkt Stud* 341; Paul Marginson & Keith Sisson, *European Integration and Industrial Relations: Multi-Level Governance in the Making* (New York: Palgrave Macmillan, 2004).

²⁵³ Blackett & Lévesque, *supra* note 45.

²⁵⁴ *Ibid* at 10.

²⁵⁵ *Ibid* at 15.

²⁵⁶ *Ibid* at 15 and 19.

²⁵⁷ *Ibid* at 1 [emphasis added].

²⁵⁸ See Cooney, *supra* note 23; Cooney et al, *supra* note 23.

²⁵⁹ Cooney, *supra* note 23.

the evolution of Chinese labour regulation has the potential to continue to affect debates over the direction of TLL.²⁶⁰ For Cooney, China might hold the potential to challenge labour law in both the global North and the global South. First, China may help to forge the direction of transnational labour regulation, in part by providing “a counterweight to ‘deregulatory’ trends and/or policy stagnation in other parts of the world,” especially countries in the global North with simplistic deregulatory prescriptions.²⁶¹ Second, China may serve as “a model that can be imitated by countries of the South.”²⁶²

Adelle Blackett has showcased the crucial role of domestic workers in standard-setting processes at the ILO that contributes to establishing a TLO on decent work for domestic workers.²⁶³ As Blackett highlights, both the role of various actors and the interactive processes are important to allow “an alternative, transgressive transnational legal order on decent work for domestic workers to emerge,” including the role of domestic workers, the ILO, and the interactions between the parties in building a community of learning.²⁶⁴ Furthermore, Blackett argues that “the diffusion of decent work for domestic workers has been multidirectional.”²⁶⁵ The direction of the diffusion process has been shaped by not only countries of the global North but also influential countries of the global South, which challenges the traditional understanding of legal transplantation that imagine law reform to migrate from the global North to the global South.²⁶⁶ She finds that norms concerning decent work for domestic workers can emerge from a range of sites of law and that domestic workers have played an important role in these processes.²⁶⁷ She finds that “diffusion is not necessarily a unidirectional process.”²⁶⁸ Therefore, Blackett highlights that the transnational process is “multipolar and multidirectional” and is “likely to be ongoing.”²⁶⁹

Tonia Novitz has analyzed the multi-level disputes regarding the linkage between the freedom of association and the right to strike, focusing on the role of the International Organization of

²⁶⁰ *Ibid.*

²⁶¹ *Ibid* at 161.

²⁶² *Ibid.*

²⁶³ Blackett, *Everyday Transgressions*, *supra* note 239.

²⁶⁴ *Ibid* at 12.

²⁶⁵ *Ibid* at 15.

²⁶⁶ *Ibid* at 16.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid* at 142.

²⁶⁹ *Ibid.*

Employers that attempts to challenge the long-established ILO norms on the one hand and the role of the International Trade Union Confederation that seeks to resist such challenge on the other hand.²⁷⁰ Yifeng Chen and Ulla Liukkunen have identified multiple actors involved in the governance of Chinese posted workers' rights in Africa, including Chinese posted workers, Chinese enterprises, Guinean local government bodies, and Chinese government bodies.²⁷¹ The case of Chinese posted workers has led to “a reinforced regulation of posted workers,” such as an Urgent Notice concerning the rights and voices of Chinese posted workers issued by the Ministry of Commerce (MOC) of China.²⁷²

Increasing examples have shown that the diffusion of labour norms can be multidirectional, beyond the two directions expected in the traditional transplantation literature: from the ILO to the national and local levels of law or from the global North to the global South. Indeed, labour norms can be diffused from the periphery to the centre that is the ILO, from the global South to the global North, as well as from the bottom-up through the deep supply chains to the top where lead firms are, as opposed to the expected top-down approach in the current GSC governance. For instance, Mark Anner shows that workers' resistance, such as through strikes in Vietnam, Bangladesh, and Honduras, can challenge the dominant position of lead firms and help achieve increased wages, better benefits, and other workplace improvements in the global apparel supply chains.²⁷³ Furthermore, Miriam Saage-Maaß et al have unfolded the role of various local and transnational actors (especially human rights litigators and activists) in strengthening human and labour rights protections and GVC governance in the aftermath of the 2012 Ali Enterprises factory fire tragedy.²⁷⁴

²⁷⁰ Tonia Novitz, “Multi-level Disputes Relating to Freedom of Association and the Right to Strike: Transnational Systems, Actors and Resources” (2020) 36:4 Intl J Comp Lab L & Ind Rel 471.

²⁷¹ Chen & Liukkunen, *supra* note 23.

²⁷² *Ibid* at 577.

²⁷³ Mark Anner, “Worker Resistance in Global Supply Chains: Wildcat Strikes, International Accords and Transnational Campaigns” (2015) 7:1-2 Intl J Labour Research 17.

²⁷⁴ Miriam Saage-Maaß et al, *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice*, eds (Cham: Springer 2021).

(2) Insights from the Transnational Legal Ordering Framework

A group of scholars in the field of transnational law have developed and advanced the TLO approach. Halliday and Shaffer have provided a nuanced articulation of the framework.²⁷⁵ The TLO framework provides a way to assess empirically how legal norms interact in terms of their construction, conveyance, and institutionalization in the complex and dynamic context of multiple sites and levels of law and diverse actors with different interests and levels of power. Some of the key elements of the TLO framework resonate with the conceptualization of TLL and can help clarify the complexity and diversity of actors, norms and processes of TLL.

Halliday and Shaffer have developed a TLO framework to reframe the study of law and society in today's world from the dichotomized study of international law and national law to a transnational perspective "that places processes of local, national, international, and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame."²⁷⁶ The TLO framework shifts the attention from "a dualist orientation toward international law and national law" to "a focus on how legal norms are developed, conveyed, and settled transnationally, integrating both bottom-up and top-down analyses."²⁷⁷ The TLO framework is used to analyze and understand the formation, conveyance, and potential institutionalization of legal norms in transnational legal processes.²⁷⁸ The institutionalization of a TLO occurs "multi-directionally and recursively up from and down to the national and local levels."²⁷⁹ A key feature of the TLO framework is that "the TLO project replaces a global-centric, top-down concept of norms travelling from the center to the periphery," and it proposes "a *dynamic, recursive process* of exchange and negotiation between transnational, national, and even local norms."²⁸⁰ This proposal helps to understand the dynamics and complexity of norm production and diffusion in transnational legal processes.

²⁷⁵ Halliday & Shaffer, *supra* note 29; Gregory Shaffer & Terence Halliday, "With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering" in Zumbansen, *Oxford Handbook of Transnational Law*, *supra* note 186, 987.

²⁷⁶ Halliday & Shaffer, *supra* note 29 at 3.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid* at 12.

²⁷⁹ *Ibid* at 5.

²⁸⁰ *Ibid* at 25 [emphasis in original].

The TLO framework has been applied to address a wide range of specific transnational legal issues in a globalized economy.²⁸¹ Jodoin has employed the TLO framework to study the production and diffusion of legal norms relating to the rights of Indigenous peoples and local communities in transnational legal processes for reducing emissions from deforestation and forest degradation in developing countries (known by the acronym “REDD+”).²⁸² Drawing insights from the TLO framework, Jodoin develops an analytical framework for transnational legal processes that consists of the following five key elements: legal norms, sites and levels, directions, actors, and outcomes of transnational legal processes.²⁸³ Jodoin suggests that transnational legal processes for REDD+ seemed to have disrupted some traditional patterns in the development and implementation of legal norms relating to the rights of Indigenous peoples and local communities and offered opportunities for multiple actors to shape the processes relating to these rights.²⁸⁴ Furthermore, he found that a multiplicity of public and private actors have played a critical role in building linkages between human rights and REDD+ and these diverse actors have deployed a variety of normative pathways to exert influence on the rights of Indigenous peoples and local communities, through top-down and bottom-up approaches and across multiple sites of law.²⁸⁵

The TLO framework has already been applied to deepen investigations in the field of TLL. For instance, Prabha Kotiswaran et al have combined the TLO framework and the transnational legal pluralism approach to provide social scientific and legal-doctrinal critiques on the complexity of the law and governance of trafficking, forced labour, and modern slavery.²⁸⁶ Blackett has drawn

²⁸¹ The following issues have been addressed through a TLO framework: human trafficking, lack of access to life-saving medicines, the unaccountability of perpetrators of atrocities, the risks of climate change, double taxation across borders, harmful tax competition, insufficient domestic credit, monetary stability, and financial contagion. See Halliday & Shaffer, *supra* note 29 at 7.

²⁸² Sébastien Jodoin, “Forests, Carbon & Rights: The Transnational Legal Process for REDD+ and the Rights of Indigenous Peoples and Local Communities” (Doctoral thesis, Yale University, 2015), online (pdf): <<https://www.proquest.com/pqdtglobal>> [Jodoin, “The Transnational Legal Process for REDD+”]; Sébastien Jodoin, *Forest Preservation in a Changing Climate: REDD+ and Indigenous and Community Rights in Indonesia and Tanzania* (Cambridge, United Kingdom: Cambridge University Press, 2017) [Jodoin, *REDD+ and Indigenous and Community Rights*]. REDD+ is short for “Reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests, and enhancement of forest carbon stocks in developing countries.”

²⁸³ Jodoin, “The Transnational Legal Process for REDD+”, *supra* note 282 at 36.

²⁸⁴ Jodoin, *REDD+ and Indigenous and Community Rights*, *supra* note 282 at 189.

²⁸⁵ *Ibid* at 191.

²⁸⁶ Prabha Kotiswaran, “From Sex Panic to Extreme Exploitation: Revisiting the Law and Governance of Human Trafficking” in Prabha Kotiswaran, *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, ed (Cambridge: Cambridge University Press, 2017) 1.

insights from the TLO framework “to sharpen the focus on acknowledging and dislodging asymmetrical power [in the existing law of the household workplace].”²⁸⁷ Blackett shows that domestic workers have played an important role in challenging the unequal law of the household workplace and establishing a TLO on decent work for domestic workers through the standard-setting process at the ILO, notably the ILO Convention No. 189 - Domestic Workers Convention (2011).²⁸⁸ Blackett’s observations of the processes and directions of the diffusion of norms on decent work for domestic workers challenge the pre-existing assumptions of the diffusion of labour norms from the ILO, the centre, or from the global North to the global South. Rather, as shown by Blackett, these norms have emerged from a range of sites of law, and they have shaped and been shaped by domestic workers’ transnational activism.²⁸⁹ These multidirectional and interactive processes allow “the new transnational legal order on decent work for domestic workers to become recognized and understood as the appropriate regulatory framework to be applied in the household workplace.”²⁹⁰

2.3.2 A Plural and Processual Conception of Legal Ordering in Transnational Labour Law

As analyzed above, various contributions in TLL scholarship have analyzed the interactive processes amongst various actors across multiple levels and directions in the production and diffusion of labour norms. These investigations have unfolded the diversity of actors and the complexity of interactive processes in which labour norms are developed, shaped, and diffused. Building on the existing TLL scholarship, this thesis draws insights from Halliday and Shaffer’s plural and processual conception of transnational legal ordering to highlight the processual character of legal ordering in TLL.²⁹¹ This analytical framing of TLL resonates with the understanding of the *processes* in TLL as “multi-level,” “multidirectional,” and “ongoing,” as discussed above. Furthermore, it highlights the “fluidity” and “recursivity” of the dynamic of multi-level governance in TLL, contextualizing multiple legal norms, diverse actors, and interactive processes in a singular analytical frame.

²⁸⁷ Blackett, *Everyday Transgressions*, *supra* note 239 at 13.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid* at 167.

²⁹⁰ *Ibid.*

²⁹¹ Halliday & Shaffer, *supra* note 29 at 18.

Halliday and Shaffer have explained from a socio-legal perspective that “law establishes generalized normative expectations understood and used by actors within a particular context for purposes of constraining and facilitating particular behaviours.”²⁹² Halliday and Shaffer’s TLO framework builds on transnational legal pluralism but differs from it by focusing not only on differences and conflicts amongst various sites and levels of law but also on interactive processes that may give rise to transnational normative settlement and alignment.²⁹³

The TLO framework suggests a plural and processual conception of the five key elements of transnational legal processes.²⁹⁴ First, *legal norms* encompass both hard and soft law norms. Second, the production and diffusion of legal norms can take place at various *sites and levels of law*. Third, *actors* are diverse, including both state actors and non-state actors, and they can play a critical role in driving and shaping the production and diffusion of legal norms. Fourth, interactive processes of the production and diffusion of legal norms can be *multidirectional, recursive, and dynamic*. Fifth, the settling of legal norms has the potential to affect behaviours, which can generate behavioural outcomes. While these five elements dynamically interact with each other, this subsection will introduce the first three elements, focusing on the plural feature of sources and actors, and it then illustrates the interactive processes and outcomes, focusing on the processual nature of transnational legal ordering.

(1) A Plural Conception of Transnational Legal Ordering: Multiple Sources of Legal Norms and Diverse Actors in Transnational Labour Law

A plural conception of transnational legal ordering helps address the variety of levels, sites, and forms of labour norms and the diversity of actors in TLL.

(a) Multiple Forms of Legal Norms in Transnational Labour Law

While pursuing a socio-legal approach to law, Halliday and Shaffer distinguish legal norms from other social norms. Halliday and Shaffer explain from a socio-legal perspective that “law establishes generalized normative expectations understood and used by actors within a particular context for purposes of constraining and facilitating particular behaviours.”²⁹⁵ They stipulate three

²⁹² *Ibid* at 11.

²⁹³ *Ibid* at 28.

²⁹⁴ Halliday & Shaffer, *supra* note 29 at 3; Jodoin, “The Transnational Legal Process for REDD+”, *supra* note 282 at 36.

²⁹⁵ Halliday & Shaffer, *supra* note 29 at 11.

attributes of legal norms in transnational legal processes: (a) transnational legal organizations or networks, (b) multiple nation-states, and (c) recognizable legal forms.²⁹⁶ For Halliday and Shaffer, the norm is “legal” when “it involves international or transnational legal organizations or networks, directly or indirectly engages multiple national and local legal institutions, and assumes a recognizable legal form.”²⁹⁷ The recognizable legal forms include formal texts, such as written rules, standards, model codes, or judicial judgments.²⁹⁸ Accordingly, legal norms in transnational legal processes encompass both hard law and soft law norms. For instance, if they meet the three attributes outlined above, formal texts developed by non-state actors, such as industry associations and TNCs, can be taken as part of legal norms in transnational legal processes. These may include guidelines, policies, COCs, and contracts, as well as other formal texts, which can shape behaviours through supply chains

The socio-legal concept of law is useful to cope with the complexity and diversity of transnational legal phenomena, including the governance of labour rights in a globalized economy.

(b) A Multi-level Governance Approach to the Production and Diffusion of Labour Norms: Levels, Sites, and Forms of Law in Transnational Labour Law

A wide range of levels, sites and forms of law may be involved in transnational legal processes. Halliday and Shaffer categorize the key arenas of law production and diffusion as international, transnational, national, and subnational (local) levels.²⁹⁹ This thesis also pays attention to the regional level as captured from the TLL scholarship.³⁰⁰ In this thesis, legal norms are understood as produced and diffused in transnational legal processes through and across multiple sites and forms of law at the *international*, *regional*, *national* and *subnational* levels.³⁰¹ This thesis suggests that each of the four levels has the potential to be connected to transnational spheres and thus be part of transnational legal processes.

A brief review of various levels, sites, and forms of law in the multi-level governance of labour rights is summarized in Table 3. This categorization is designed to provide an overview, mainly

²⁹⁶ *Ibid* at 11–18.

²⁹⁷ *Ibid* at 11.

²⁹⁸ *Ibid* at 15.

²⁹⁹ Halliday & Shaffer, *supra* note 29 at 38.

³⁰⁰ Blackett & Trebilcock, *supra* note 8 at 4.

³⁰¹ See Blackett & Trebilcock, *supra* note 8 at 4; Halliday & Shaffer, *supra* note 29 at 38; Jodoin, “The Transnational Legal Process for REDD+”, *supra* note 282 at 36.

for discussions in the context of the diversity and complexity of the levels, sites, and forms of law. The categorization and list are not exclusive. As is summarized in the table, various state and non-state actors have engaged in the production and diffusion of labour norms within and across multiple sites, levels, and forms of law in transnational spheres.

Table 3 The Multi-level Governance of Labour Rights in a Globalized Economy

Levels of Law	Sites of Law	Forms of Law
International level	International labour conventions and policy frameworks	ILO conventions Decisions of ILO supervisory mechanisms The ILO MNE Declaration
	The United Nations Human Rights Mechanisms	Human rights treaties United Nations Global Compact UNGPs United Nations Business and Human Rights Treaty Initiative
	Judgements and decisions by international courts Decisions and standards by international organizations Other intergovernmental initiatives Multilateral agreements and negotiations Multilateral programs Bilateral agreements and negotiations Bilateral programs	Instruments and agreements adopted within international organizations Operational safeguards Guidance materials and methodologies Laws and policies governing bilateral programs Bilateral agreements Regional agreements
Regional level	Regional treaties Other regional initiatives with labour rights considerations	Laws, regulations, policies, and guidelines for TNCs concerning labour rights
National level	Home state laws, regulations, and policies for TNCs concerning labour rights	Laws, regulations, policies, and guidelines for TNCs concerning labour rights
	Host state laws, regulations, and policies for TNCs concerning labour rights	Laws, regulations, policies, and guidelines for foreign investors concerning labour rights
Subnational level	Multi-stakeholder initiatives Non-governmental initiatives CSR policies and mechanisms by TNCs Supply chain due diligence mechanisms by TNCs Workplace rules and practices Other initiatives with labour rights considerations	Private initiatives in GSCs Certification standards and rules Guidance materials and methodologies Private custom Local rules Workplace rules Corporate policies and mechanisms (COCs, guidelines, contracts, supply chain management mechanisms)

Source: Developed by the author³⁰²

³⁰² This table is nonexclusive but inclusive and explanatory, aiming to provide a typology to map out the diverse levels, sites, and forms of law in TLL. The design of this table draws insights from scholarship on the variety of levels, sites, and forms of law in the fields of TLL and transnational law. See e.g. Blackett & Trebilcock, *supra* note 8 (“TLL [transnational labor law] is a form of multi-level governance, including the international, the regional, the national, and the shop floor” at 4); Halliday & Shaffer, *supra* note 29 (“[i]t [transnational recursivity

(c) An Actor-centred Approach to Lawmaking and Practice in Transnational Labour Law

Instead of focusing on nation-states as the sole relevant actors, the TLO framework suggests a shift from a state-centric approach to an actor-centric approach to the role of actors in driving and shaping the production and diffusion of legal norms in transnational spheres.³⁰³ It calls attention to state agencies and the key role of non-state actors, such as corporations, industry associations, and civil society organizations, in developing and diffusing labour norms. Despite the emerging role of multiple actors, the state remains central in transnational legal processes. Halliday and Shaffer pay attention to various forms of legal norms in transnational spheres and contend that “They [Nation-states] do not alone define the territorial boundaries of legal ordering.”³⁰⁴ However, they emphasize that “the nation-state remains central to lawmaking, law recognition, and law enforcement in the world today, and it is not simply bypassed by transnational legal ordering.”³⁰⁵

The thesis acknowledges that both state and non-state actors can be critical drivers in transnational legal processes and focuses on the role of actors in developing and shaping labour norms across levels and sites of law in TLL. Various state and non-state actors have engaged in the production and diffusion of labour norms within and across multiple levels, sites, and forms of law in transnational spheres. Non-state actors in TLL may include international organizations, industry associations, corporations, civil society organizations, local communities, labour unions and federations, as well as individuals (such as officials, experts, professionals, activists, consumers, and workers).³⁰⁶ These actors can drive and shape the production and diffusion of labour norms across levels and sites of law through various activities, such as initiating and leading lawmaking processes, participating in and coordinating lawmaking processes, providing capacity-building support, and lobbying or advocacy. The diversified group of actors may cooperate and sometimes compete and conflict with each other in shaping the production and diffusion of labour norms.³⁰⁷

theory] assesses how the production and implementation of transnational legal norms among international, transnational, national, and local law-makers and law practitioners dynamically and recursively affect each other” at 38 and “Table 1.2. Sites for normative settling in TLOs Forms” at 43); Jodoin, *REDD+ and Indigenous and Community Rights*, *supra* note 282 (“Table 1.1. The elements of jurisdictional REDD+ under the UNFCCC” at 40).

³⁰³ Halliday & Shaffer, *supra* note 29 at 22 and 27.

³⁰⁴ *Ibid* at 6.

³⁰⁵ *Ibid* at 13.

³⁰⁶ See Blackett & Trebilcock, *supra* note 8 at 4; Halliday & Shaffer, *supra* note 29 at 23; Koh, “Transnational Legal Process”, *supra* note 200 at 183–184; Trebilcock, “Why the Shift”, *supra* note 11 at 58.

³⁰⁷ See Gary Gereffi & Joonkoo Lee, “Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters” (2016) 133:1 J Bus Ethics 25 at 34–35.

(2) A Processual Conception of Transnational Legal Ordering: Interactive Processes and Desired Outcomes in Transnational Labour Law

The TLO framework underscores the importance of a “processual” conception of transnational legal ordering.³⁰⁸ Halliday and Shaffer underline that “transnational legal ordering is ultimately processual in nature.”³⁰⁹ They highlight that the process of legal ordering is “both top-down and bottom-up, involving the formation, conveyance, and practice of legal norms and the recursive interaction between different levels of social organization through which legal norms become institutionalized.”³¹⁰

A processual conception of legal ordering helps to address the complexity, diversity, and dynamism of the multi-level governance of labour rights in transnational spheres. It helps to illustrate the connections between the production and diffusion of labour norms, the role of actors, and the interactive processes whereby labour norms are developed, diffused and shaped. These dynamic processes may generate impacts on behaviour, that is, behavioural outcomes of such legal processes.³¹¹ The processual conception of legal ordering has several key characteristics that are informative for understanding legal orders in TLL.³¹² First, the processual conception of legal ordering suggests not only paying close attention to the production of labour norms but also following the interactive processes of international, regional, national, and subnational lawmaking, implementation, and practice. Second, the processual conception dilutes the normative criteria of law in TLL. The processual lens helps to discuss both legally binding labour standards and non-binding labour norms that various state and non-state actors are developing in TLL. These diverse standards and norms are often referred to as “hard” and “soft” law instruments or “mandatory” and “voluntary” instruments in TLL scholarship. Therefore, this conception helps to accommodate the diverse forms of governance and a wide range of state and non-state actors, as well as both public and private norms that public and private actors are developing in transnational spheres. Third, the processual conception addresses both public and private transnational lawmaking that may be developed by various actors at various sites of law. Accordingly, actors can be diverse, ranging

³⁰⁸ Halliday & Shaffer, *supra* note 29 at 16–18.

³⁰⁹ *Ibid* at 16.

³¹⁰ *Ibid*.

³¹¹ *Ibid* at 55.

³¹² *Ibid* at 16–18.

from state agencies, international organizations such as the ILO, OHCHR, and the OECD, and private actors such as individual companies and their associations, as well as other individuals and groups, such as civil society organizations and workers. Fourth, the processual conception understands the law as “constituted by both power and reason, exercising its authority through coercion and a normativity that is grounded in legal reasoning and process.”³¹³ Accordingly, powerful economic and geopolitical actors may often have their interests and normative goals reflected and furthered in transnational legal processes. For instance, as shown in existing TLO and TLL literature, legal norms that are produced by actors from the United States and Europe are often reflected in transnational ones.³¹⁴

Through a processual conception of legal ordering, Halliday and Shaffer articulate the connections between the production and diffusion of legal norms, the role of actors, and interactive processes whereby the produced legal norms generate impacts on behaviours when a TLO becomes institutionalized. The formation of a TLO depends on at least four key elements, including the perceived problem, one or more actors, appropriate behaviours, and, potentially, the desired outcome. According to Halliday and Shaffer’s conceptualization, a TLO is produced and oriented by an actor, or interactions amongst actors, to regulate behaviour to address “problems” resulting from recognized misbehaviour.³¹⁵ Such problems could be human trafficking, child labour, and forced labour in transnational spheres, amongst others. For these perceived problems, desired outcomes could be the effective elimination of such abuses, providing remedies for the abuses, remedial measures for the abuses, and greater protections for labour and human rights.

(a) Multiple Directions of Interactive Processes: Horizontal and Vertical Pathways of Lawmaking and Diffusion in Transnational Labour Law

Traditional international law tends to follow a top-down and unidirectional approach which treats the production and implementation of law separately and independently from each other.³¹⁶ Mechanisms that can drive the diffusion and implementation of international law may include bargaining, coercion, persuasion, modelling, and socialization, amongst others.³¹⁷ These

³¹³ *Ibid* at 17 [footnotes omitted].

³¹⁴ *Ibid*.

³¹⁵ *Ibid* at 7.

³¹⁶ *Ibid* at 38.

³¹⁷ Gregory Shaffer & Thomas Ginsburg, “The Empirical Turn in International Legal Scholarship” (2012) 106 *AJIL* 1.

mechanisms can help understand how the law is diffused and implemented through a top-down approach. However, focusing on these mechanisms alone will miss other potential pathways and directions of interactive processes in transnational spheres. For instance, while the mechanism of socialization³¹⁸ may help to explain China's participation in international labour law agendas and its uptake of international labour standards domestically, the mechanism alone can hardly explain why and how China has engaged with various transnational labour regulatory initiatives and evaluate to what extent China and the evolving TLL agenda can influence each other.

Transnational recursivity theory is key to the processual conception of legal ordering.³¹⁹ While engaging with transnational recursivity theory, Halliday and Shaffer suggest that the production, diffusion, and institutionalization of legal norms in transnational legal processes is *multidirectional*, *recursive*, and *dynamic*.³²⁰ The processual conception of legal ordering suggests that transnational legal normmaking is "punctuated and characterized by cycles" rather than being constant and unidirectional.³²¹ Furthermore, the production and diffusion of legal norms in transnational spheres are not largely top-down as that was perceived in the traditional international law approach. Rather, such legal processes can be multidirectional, operating through and across multiple sites, levels, and forms of law.

Transnational recursivity theory helps to explain how various forms of legal norms co-exist in a multi-level governance framework and how both the vertical and horizontal interactions of these legal norms run across sites and levels of law. The impetus for the formation and diffusion of legal norms may come from "below" or "above" amongst international, regional, national and subnational levels, may be developed and shaped by various actors and may be in the form of public, private or hybrid norms.³²² The interactive processes of the formation and diffusion of legal norms can be shaped by various recursive mechanisms, ranging from actors' diverging perceptions of the problem and proposed lawmaking to actors' ideological or institutional contradictions.³²³ The interactive processes can take place across multiple levels and sites of law through "repeated recursive cycles."³²⁴

³¹⁸ Ryan Goodman & Derek Jinks, "How to Influence States: Socialization and International Human Rights Law" (2004) 54 Duke LJ 621.

³¹⁹ Halliday & Shaffer, *supra* note 29 at 37–42.

³²⁰ *Ibid* at 3, 5, 18, 21, 22, 25, 38, 40 and 56.

³²¹ *Ibid* at 32.

³²² *Ibid* at 38.

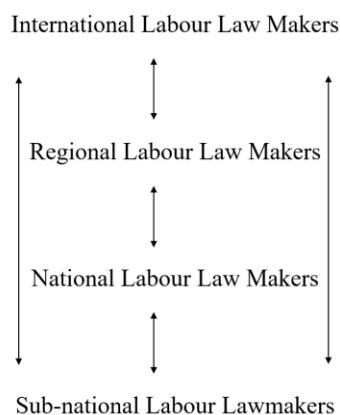
³²³ *Ibid* at 38–40.

³²⁴ *Ibid* at 50.

Accordingly, the processual conception of legal ordering directs to the understanding of interactive processes as running across sites and levels of law both horizontally and vertically.³²⁵ Horizontally, the interactive processes of production and diffusion of legal norms can take place across different sites of law at the same level, between public and private sites, or within the same form of law. Vertically, interactive processes can be both top-down and bottom-up across different sites and levels of law, involving the production, diffusion, and practice of legal norms and the recursive interaction between different lawmakers and implementers. Similar to the multiple sources of law, the multiple directions of interactive processes do not guarantee that legal norms will settle in transnational spheres. Rather, they highlight that the meaning and application of legal norms may be contested and shaped until some sort of settlement or unsettlement is reached.³²⁶

Following Halliday and Shaffer's processual conception of legal ordering, this thesis treats the production, diffusion, and institutionalization of labour norms in transnational spheres as hypothetically *multidirectional*, *recursive*, and *dynamic*. This processual framing can deepen investigations in TLL by capturing the multi-level governance dynamics, the various possibilities of interactions amongst multiple forms, sites, and levels of law, as well as the engagement between actors with vastly different power (Figure 2).

Figure 2 A Hypothetical Model of the Recursivity of the Production and Diffusion of Labour Norms in Transnational Legal Processes



Source: Developed by the author³²⁷

³²⁵ *Ibid* at 40.

³²⁶ *Ibid* at 42.

³²⁷ The hypothetical model of the recursivity of the production and flow of labour norms in transnational legal processes is constructed based on the identification of the five key elements of the plural and processual

(b) Outcomes of Transnational Legal Processes: Normative Settling, Behavioural Changes, and Worker Outcomes in Transnational Labour Law

The settling of legal norms at a certain site or level means that legal norms become internalized and are reflected in practice at that site or level. According to Halliday and Shaffer, the settling of legal norms can take various forms, such as legally binding laws and regulations promulgated by the state, or policies, official documents, national guidelines developed by state agencies, or other forms of texts developed by non-state actors, such as guidelines and practical guides developed by industry associations, and policies and statements developed by companies.³²⁸ Accordingly, the settling of legal norms can take place at various sites and levels of law, including international, regional, national, and subnational (e.g. the workplace, local communities, corporations) levels.³²⁹

The settling of legal norms can affect behaviours. According to transnational recursivity theory, the settling of legal norms and the practice of behaviours engage with each other in the development of legal orders, and the “discernible fit” between the two may be enhanced.³³⁰ Accordingly, when the settling of labour standards is identified at a certain site of law, it is possible to predict with some confidence about relevant behaviours; and when certain behaviours emerge, it is also possible to assume that relevant legal norms may have emerged to govern these behaviours. It is important to note that the settling processes of labour standards, the exhibition of relevant behaviours, and the fit between the two are dynamic rather than static since the processes can be recursive and multidirectional.³³¹

While Halliday and Shaffer focus on behavioural outcomes in assessing the impacts of legal orders, this thesis takes a step further to investigate the ultimate outcomes for workers, that is, whether the behavioural outcomes have contributed to the improvement of labour rights. This further step is necessitated by the specificity of labour law and the urgency to address the widely reported *practice-outcomes decoupling* in the implementation of private labour governance initiatives in GSCs.³³²

conception of legal ordering in TLL. The hypothetical model draws insights from Halliday and Shaffer’s illustration of transnational recursivity theory, see Halliday & Shaffer, *supra* note 29 at 37–42. The typology of four levels of law draws insights from Blackett and Trebilcock’s conceptualization of TLL, see Blackett & Trebilcock, *supra* note 8 at 4.

³²⁸ Halliday & Shaffer, *supra* note 29 at 44.

³²⁹ *Ibid* at 43.

³³⁰ *Ibid* at 56.

³³¹ *Ibid*.

³³² Kuruvilla, *supra* note 28 at 15.

2.4 The Counter-hegemonic Potential of Transnational Labour Law in Fostering Decent Work in a Globalized Economy

The TLL approach and the TLO framework have not sufficiently addressed how GSCs have further complicated the production and diffusion of legal norms in a globalized economy. While both approaches have touched upon issues and challenges relating to GSCs, they approached the term in a generalized manner and have not deeply explored the complexities of GSC governance. Notably, both approaches have yet to clarify how the rise of actors from the global South brings new challenges and opportunities for establishing and institutionalizing TLOs in GSCs. Against this backdrop, this section illustrates how a multi-level, actor-centred and processual approach provides an opportunity to consider the dynamics of multi-level governance, such as between international labour standards, corporate practices and local communities, and state and non-state actors from different countries and segments of GSCs. Furthermore, it identifies how rising-power actors from the global South can challenge the existing power structures in GSCs.

2.4.1 Persistent Power Asymmetries and Social Inequalities in Global Supply Chains

GSCs have now become an integral part of the globalized economy. The expanded production networks and extended supply chains have affected the development of economic and social rights in developing countries.³³³ Over the past three decades, considerable concerns have been raised around social justice in economic globalization. There are massive power asymmetries between large TNCs and their suppliers and between companies and vulnerable groups. The power asymmetries have consolidated the social inequalities in GSCs, especially the abuse of rights of local workers and communities at the bottom of GSCs in developing countries. The current governance of GSCs showcases how powerful downstream companies can exert their influence on less powerful actors that are primarily the upstream segments of GSCs and responsible for producing and processing raw materials. The impact can penetrate the supply chains and negatively influence the rights of workers at the bottom of the supply chains. In the context of power asymmetries in GSCs, downstream lead firms primarily from the global North have maintained the dominant role in higher value-added activities, whereas lower value-added

³³³ ILO, *Global Supply Chain Dynamics and Labour Governance: Implications for Social Upgrading*, ILO Research Paper No. 14 (Geneva: ILO, 2016) at 3–6, online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma994949292502676>.

activities are outsourced to upstream companies that are primarily from the global South.³³⁴ Garment supply chains are a typical example of “buyer-driven” supply chains where lead firms have the dominant power in the chains. Lead firms’ inappropriate purchasing practices, such as lowering the purchasing price, are a critical root cause of workers’ low wages in developing countries at the bottom of garment supply chains.³³⁵ Global mineral supply chains are a typical example of “producer-driven” supply chains where lead firms such as large manufacturers of end-use products in the electronics, automotive, and ICT industries have the dominant power in the chains.

For decades, efforts seeking solutions to address social and environmental issues in GSCs have focused on *actors from the global North*.³³⁶ The initial and primary focus is on the home States of lead firms, probing how legislative and regulatory measures to regulate these companies’ overseas operations can solve the broader transnational problem. However, to facilitate the liberalization of economic development, states from the global North have intentionally chosen to “deregulate” labour or “‘regulate’ labour loosely” while actively developing a new global legal regime of trade, investment, and intellectual property agreements.³³⁷ Only in recent years have a few states started developing legislative measures to regulate the social impacts of companies’ overseas operations, while most states from the global North have not taken any legislative measures in that direction. Furthermore, these legislative measures are primarily disclosure-based, which has been heavily critiqued in that “they lack any clear sanctions for non-compliance, and any regulatory or enforcement role for the governments enacting this legislation.”³³⁸

The secondary focus is placed on the lead firms themselves, exploring how private governance initiatives developed by individual companies and industry associations can solve the problem left by the failure of public regulation. Much hope has been placed on lead firms to explore how a top-

³³⁴ Christina Teipen & Fabian Mehl, “Social Upgrading in Global Value Chains—The Role of Labor and Industrial Relations” in Christina Teipen et al, eds, *Economic and Social Upgrading in Global Value Chains: Comparative Analyses, Macroeconomic Effects, the Role of Institutions and Strategies for the Global South* (Cham, Switzerland: Palgrave Macmillan, 2022) 97 at 99.

³³⁵ ILO, *Purchasing Practices and Low Wages in Global Supply Chains: Empirical Cases from the Garment Industry*, Conditions of Work and Employment Series No. 86 (Geneva: ILO, 2017) at 2, online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/1jaulmn/alma994967591002676>.

³³⁶ Teipen & Mehl, *supra* note 334 at 99.

³³⁷ Blackett & Trebilcock, *supra* note 8 at 5.

³³⁸ Frederick W. Mayer & Nicola Philips, “Outsourcing Governance: States and the Politics of a ‘Global Value Chain World’” (2017) 22:2 *New Political Economy* 134 at 145.

down, self-regulated and voluntary approach could lead the way to a solution.³³⁹ However, a top-down approach alone does not seem to have provided an appropriate or effective solution to the problem. To begin with, as dominant beneficiaries of the deep-rooted asymmetries in GSCs, lead firms can hardly develop disruptive solutions for the unequal patterns of GSCs. Furthermore, there has been growing evidence of the ineffectiveness of private governance initiatives developed by lead firms in improving social rights in GSCs. Moreover, the multi-tier supply chains are too complex for lead firms to reach lower-tier suppliers. As shown in recent theoretical and empirical studies, the role of lead firms in GSC governance can be multi-faceted in different GSCs.³⁴⁰ In earlier investigations of GSC governance, lead firms are believed to control access to major resources and to play a dominant role. However, recent investigations indicate that lead firms' direct influence on deep suppliers can be diluted due to their lack of willingness to enact change and the complexity and fragmentation of supplier networks.³⁴¹ The current GSC governance structure is characterized by a lack of a public regulatory agenda from states and the dominant role played by lead firms primarily from the global North. As suggested by Frederick W. Mayer and Nicola Philips, the current unipolar governance structure led by lead firms "will not produce an inclusive and sustainable global economy."³⁴² Private governance can be part of the solution for addressing the social impacts of economic activities, "but it will never be sufficient."³⁴³

2.4.2 Decent Work in Global Supply Chains: New Transnational Legal Orders in the Making?

Various public and private labour governance initiatives have emerged to respond to the governance deficits in GSCs over the past three decades. While there are already diverse governance initiatives and labour norms for decent work in GSCs, there seems still a long way to go to achieve the desired outcomes for workers in the complicated context of GSCs. TLOs on

³³⁹ See e.g. Young, Fernandes & Wood, *supra* note 38.

³⁴⁰ See e.g. Gary Gereffi, John Humphrey & Timothy Sturgeon, "The Governance of Global Value Chains" (2005) 12:1 Review of International Political Economy 78; Stefano Ponte & Timothy Sturgeon, "Explaining Governance in Global Value Chains: A Modular Theory-building Effort" (2014) 21:1 Review of International Political Economy 195; Rachel Alexander, "Emerging Roles of Lead Buyer Governance for Sustainability across Global Production Networks" (2020) 162 J Bus Ethics 269.

³⁴¹ Rachel Alexander, "Limits of Buyer-driven Governance for Sustainability: Inherent Challenges of Fragmented Supplier Networks" (2022) 22:4 J Economic Geography 801 at 822.

³⁴² Mayer & Philips, *supra* note 338 at 136.

³⁴³ *Ibid.*

decent work for GSCs have not emerged as recognized appropriate regulatory frameworks but are still in the making.

At first sight, the emergence of various instruments and initiatives in promoting decent work in GSCs may present signs and potential for the formation of transnational legal ordering on decent work in GSCs. However, these instruments and initiatives, be they hard or soft, are still in the making and are far from receiving sufficient recognition from the majority of actors in transnational legal processes in GSCs. Even for the nearly universal endorsement of the elimination of child labour, the consensus on lawmaking and practice in GSCs is far from satisfactory. Newly developed instruments and initiatives can influence the establishment and institutionalization of new TLOs in different ways.³⁴⁴ Taking decent work as an example, newly developed instruments and initiatives may uphold, challenge, or dislodge pre-existing legal orders in GSCs. They may pre-empt the formation of new legal orders or allow new legal orders on decent work to be developed, shaped, recognized and understood as the appropriate regulatory framework to be applied in GSCs.

The role of actors in shaping the dynamics of multi-level governance in GSCs will be crucial to allowing the development of new TLOs on decent work that address the asymmetries in GSCs and the need of workers rather than consolidating the unequal patterns in the existing GSC governance. The role of actors will also be crucial for such new TLOs to become recognized and understood as the appropriate regulatory frameworks to be applied in GSCs.

2.4.3 Challenging the Unequal Patterns in Global Supply Chains: Will the Rise of Actors from the Global South Make a Difference?

Both powerful actors and less powerful actors can have their interests and goals reflected and furthered in transnational legal processes through recursive processes. It might be easier for more powerful economic and geopolitical actors to have their voices heard in transnational processes and their interests reflected and furthered in law, for example, the reflection of legal norms from the United States and European countries in transnational legal processes.³⁴⁵ Powerful actors are in an advantageous position to support existing hegemonic structures and impose their influence on the formation process and the ultimate outcomes of a transnational legal process in a site of

³⁴⁴ Halliday & Shaffer, *supra* note 29 at 61–62; Blackett, *Everyday Transgressions*, *supra* note 239 at 136.

³⁴⁵ Halliday & Shaffer, *supra* note 29 at 17.

law.³⁴⁶ However, as transnational recursivity theory suggests, less powerful actors can also influence transnational legal norm making.³⁴⁷ Despite the lack of an advantageous position, less powerful actors can still seize spatial and temporal opportunities through the production and diffusion of labour norms to make counter-hegemonic efforts, as evidenced by many empirical examples presented in existing TLL scholarship.

Existing TLL scholarship has effectively documented the reconfiguration of actors in the governance of GSCs, including states, TNCs, international organizations such as the ILO, and other actors such as civil society organizations, consumers and workers.³⁴⁸ Considerable efforts have been devoted to the debates on the distinction and interaction between public and private governance initiatives and standards, as well as the effectiveness of private governance initiatives in GSCs.³⁴⁹ While these contributions have showcased the emerging multipolarity in the governance of GSCs, the majority of existing scholarship addresses actors, norms and processes in different contexts; a processual approach focusing on the actors, norms and processes in a specific context is missing.³⁵⁰ Furthermore, only a handful of recent contributions have considered actors from the global South.

Recent studies indicate that the rise of actors from emerging market economies can potentially chart alternative normative paths for addressing globalization's asymmetries. Notably, in China and India, the state has played an important role in driving the public regulatory agenda for regulating the social responsibilities and social impacts of companies.³⁵¹ The rise of TNCs

³⁴⁶ *Ibid* at 61.

³⁴⁷ *Ibid* at 40.

³⁴⁸ See e.g. individual chapters in Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8.

³⁴⁹ See e.g. Kolben, "Dialogic Labor Regulation in the Global Supply Chain", *supra* note 185; Kolben, "Transnational Labor Regulation and the Limits of Governance", *supra* note 222; Marx et al, *supra* note 224.

³⁵⁰ See e.g. Roger Blanpain et al, eds, *Protecting Labour Rights in a Multi-Polar Supply Chain and Mobile Global Economy* (Alphen aan den Rijn: Wolters Kluwer, 2015).

³⁵¹ For analyses of emerging market economies, see e.g. Gary Gereffi, "Global Value Chain Perspective on Industrial Policy and Development in Emerging Markets" (2013) 24 *Duke J Comparative & Intl L* 433; Paul Alexander Haslam, "States and Firms Co-Producing Corporate Social Responsibility in the Developing World" (2020) 36:3 *J Developing Societies* 270. For analyses of China, see academic publications listed in *supra* note 23. For analyses of India, see e.g. Lucia Gatti et al, "Are We Moving Beyond Voluntary CSR? Exploring Theoretical and Managerial Implications of Mandatory CSR Resulting from the New Indian Companies Act" (2019) 160 *J Bus Ethics* 961; Jitendra Aswani, N.K.Chidambaran & Iftekhar Hasan, "Who Benefits from Mandatory CSR? Evidence from the Indian Companies Act 2013" (2021) 46 *Emerging Markets Rev* (in press), DOI: <10.1016/j.ememar.2020.100753>.

originating from emerging market economies has started challenging the power dynamics in GSCs. Over the past decade, emerging TNCs have made their mark globally.³⁵² The rise of emerging TNCs as strategic suppliers in GSCs has become evident, particularly in GSCs known to be buyer-driven and unipolar.³⁵³ In buyer-driven and unipolar contexts such as apparel supply chains, lead firms are deemed to be the driving forces behind the configuration and coordination of the chain.³⁵⁴ Large suppliers of lead firms have fundamentally challenged the governance structure of the lead-firm dominant and unipolar GSCs. For instance, the rise of first-tier suppliers has disrupted the dominant role of lead firms in apparel supply chains.³⁵⁵

The role of actors in transnational legal processes is dynamic rather than fixed.³⁵⁶ The power dynamics in GSCs have started changing along with global economic shifts. Power structures could change dynamically and significantly in the globalized economy. Over the past decade, actors from emerging market economies, especially rising-power TNCs, have marked their role in GSC governance. Their ability to shape the dynamics of multi-level governance of labour rights in GSCs is likely to become more visible and influential in the coming decade. The rise of actors from the global South can bring rising-power actors into the governance of GSCs, potentially challenging the existing power asymmetries and social inequalities that powerful actors from the global North have continuously enabled. Emerging TNCs can rise in any part of GSCs. On some occasions, a few giant emerging TNCs may become lead firms in industries related to global mineral supply chains, such as Chinese enterprises Huawei Technologies Co., Ltd. in the electronics industry and BYD Co., Ltd. in the automotive industry.³⁵⁷ More disruptively for the

³⁵² See e.g. Henry Wai-chung Yeung & Neil M. Coe, “Toward a Dynamic Theory of Global Production Networks” (2014) 91:1 *Economic Geography* 29; Gary Gereffi, “Global Value Chains in a Post-Washington Consensus World” (2014) 21:1 *Rev Intl Political Economy* 9.

³⁵³ See e.g. Claes Alvstam, Inge Ivarsson & Bent Petersen, “Are Multinationals and Governments from Emerging Economies Configuring Global Value Chains in New Ways?” (2019) 15:1 *Intl J Emerging Markets* 111.

³⁵⁴ Stefano Ponte & Timothy Sturgeon, “Explaining Governance in Global Value Chains: A Modular Theory-building Effort” (2014) 21:1 *Review of Intl Political Economy* 195.

³⁵⁵ See e.g. Hyunji Kwon *et al*, “Toward a Bipolar Apparel GVC? From the Perspective of First-Tier Suppliers” (2021) 50:1 *J Asian Sociology* 9.

³⁵⁶ Instead of stylized categorizations of actors that portray them as having fixed roles in transnational legal processes, Jodoin argues that “the roles played by actors may differ based on the transnational legal process being analyzed and at the particular stage that it has reached.” See Jodoin, “The Transnational Legal Process for REDD+”, *supra* note 282 at 42.

³⁵⁷ See e.g. Yun Wen, *The Huawei Model: The Rise of China's Technology Giant* (Urbana: University of Illinois Press, 2021); Hanzhi Yu & Hongying Wang, “The Emergence of Chinese High- and New-technology

existing power structure in GSCs, some emerging TNCs are becoming powerful refiners (upstream) and manufacturers (downstream) for lead firms in the electronics, automotive, and ICT industries that are primarily from the global North.³⁵⁸ When adapting to the existing TLOs on decent work and economic development, these rising-power actors, which are latecomers of GSCs, can be disruptive to the unequal patterns in GSCs. Therefore, the rise of actors from the global South can potentially strengthen the counterbalancing force against the dominant role of actors from the global North and its asymmetrical and unequal consequences. Notably, these new actors can play an important role in allowing alternative normative paths to emerge from different sites of law that are not limited to powerful actors from the global North. They will also play an important role in establishing and institutionalizing new TLOs on decent work in GSCs.

2.5 Preliminary Conclusions

This chapter builds on a multi-level and actor-centred approach advanced in TLL scholarship and a plural and processual conception of transnational legal ordering to carve out a nuanced analytical framework. A multi-level and actor-centred approach highlights the role of different actors in shaping the dynamics of multi-level governance, which allows the development of new TLOs on decent work in GSCs that considers the need of workers rather than consolidates the unequal patterns of GSC governance. The plural conception of transnational legal ordering helps to include laws, regulations, policies, guidelines, COCs, contracts and other formal texts that state and non-state actors develop at various levels and sites of law as part of legal ordering in TLL. The processual conception of transnational legal ordering helps to highlight that the production, diffusion, and institutionalization of labour norms in transnational processes can be multidirectional and recursive rather than unidirectional.

Over the past decade, a growing body of TLL scholarship has provided concrete examples for the hypothetical propositions surrounding the dynamics of multi-level governance. By reviewing these examples, this chapter showcases that the diffusion of labour norms in a globalized economy can be multidirectional, recursive, and dynamic. The interactive processes run across different levels and sites of law and through both top-down and bottom-up approaches. In an era of economic

Companies in the Global Arena: Challenges and Opportunities for Governance Innovation” (2022) 7:1 J Chinese Governance 52.

³⁵⁸ See e.g. van den Brink et al, “Identifying Supply Risks by Mapping the Cobalt Supply Chain”, *supra* note 26.

globalization, the dynamic diffusion and refining of labour norms on decent work will allow new TLOs on decent work to be developed and recognized as the appropriate regulatory frameworks to be applied in GSCs.

These theoretical accounts are informative for observing and understanding how labour norms are produced, diffused, and on some occasions, institutionalized in complex and dynamic transnational spheres. This thesis provides a new and timely example through the context of GSC governance, that is, the dynamics of multi-level governance to address a specific and persistent problem identified at the bottom of the global cobalt supply chain: child labour in the artisanal mining sector.

In recent years, developments in the global cobalt supply chain suggest that a multi-level governance framework is emerging to respond to labour issues at the bottom of the chain, especially to severe issues such as the use of child labour. Various instruments and initiatives have been developed and shaped in the chain. As illustrated throughout this thesis, an investigation into the development, dissemination, and reception of some of the instruments and initiatives has unfolded both rapid developments of new initiatives and painful processes in implementing labour standards and achieving worker outcomes in GSCs. It demonstrates that, while the relevant international labour standards can be understood as the appropriate standards for an emerging TLO on decent work in GSCs, the fragmentation of law, the divergence between actors, and differences between standards continue to exist, and the processes of institutionalization are far from over.

Similar to the general situation of GSCs, there is a significant power imbalance amongst actors in the global cobalt supply chain. There is a considerable imbalance between powerful downstream lead firms and upstream actors such as workers, local communities, traders for cobalt ores, cobalt smelters and refiners, and governments of developing countries. The rise of actors from the global South in GSC governance, including upstream companies such as cobalt refiners and state actors such as the DRC and China, can be disruptive to the existing imbalanced power structures of the chain. China and Chinese mining enterprises are an important part of a small group of actors from the global South in the ongoing transnational legal processes in the global cobalt supply chain. Therefore, this thesis focuses on the rising role of China and Chinese mining enterprises in shaping the evolving agenda of the multi-level governance framework. An investigation into China and Chinese enterprises provides a new opportunity to examine the rise of actors from the global South and its implications for the establishment and institutionalization of TLOs on decent work in GSCs.

This thesis pays close attention to the production and diffusion of labour norms in Chinese outward mining investment and its connection to the global cobalt supply chain. The multiple levels and sites of law that are involved in the processes encompass the international, national, and subnational levels. The subnational level may include the industry level and corporate level, as well as the workplace and local communities that are connected to Chinese enterprises' transnational business activities through multi-tier supply chains. Emerging examples of regulatory innovations and behaviour changes indicate that these ongoing transnational processes of norm production and diffusion are likely to be recursive and dynamic.

Based on the analytical framework developed in this chapter, chapter 3 maps out the emerging multi-level governance framework initiated to eliminate child labour in the global cobalt supply chain. By critically engaging with the evolving agenda of the framework, this thesis contextualizes the role of China and Chinese enterprises alongside a wide range of state and non-state actors that are primarily from the global North. China and Chinese enterprises are becoming critical actors for the future of TLL, considering their rising economic and geopolitical power, their expansion of economic, social, and cultural engagement with the rest of the world, and their demonstrated increasing influence on the development of new TLOs on decent work in GSCs. The thesis will sharpen the focus on alternative normative paths that China and Chinese enterprises are developing. It identifies actors from China as an important part of a small group of actors from the global South in engaging and shaping the emerging dynamics of multi-level governance of labour rights. It probes how the development of governance initiatives and diffusion of labour norms driven by actors from China can add texture to the establishment and institutionalization of TLOs on decent work in GSCs.

Chapter 3 The Reconfiguration of Actors in Transnational Labour Law: The Emerging Multi-level Governance of Labour Rights in the Global Cobalt Supply Chain

3.1 Introduction

This chapter highlights the importance of a multi-level approach to understanding GSC governance in its concern with the interaction of actors, norms and processes from various levels and sites of law, including the international and national levels and the industry and corporate levels. Based on a multi-level approach, the chapter develops a comprehensive overview of various governance measures initiated to eliminate child labour in the global cobalt supply chain. This emerging multi-level governance framework encompasses both public and private labour governance initiatives for addressing labour and human rights issues in transnational business activities. The framework consists of various labour norms and interactive processes that are developed and shaped by a wide range of state and non-state actors: international organizations, states (both host and home states of TNCs), individual companies, industry associations, as well as civil society organizations, local communities, and workers. The chapter underlines that it is insufficient to understand the governance of labour rights in a globalized economy through one singular actor or site of law. The chapter highlights that it is necessary to shift from a top-down approach to a multi-level approach to understand the production and diffusion of labour norms in transnational spheres.

In addition to this introductory section and concluding remarks, this chapter consists of the following three sections. Section two introduces the definition of “child labour” and “worst forms of child labour” in international labour Conventions and explains why a shift from international to transnational labour law is important for addressing governance deficits on decent work in GSCs. Section three maps out the emerging multi-level governance framework initiated to eliminate child labour in the global cobalt supply chain, focusing on recent regulatory updates at multiple levels and sites of law. Section four provides critical commentary on the emerging multipolarity in the global cobalt supply chain, focusing on the limitations and potential of the multi-level governance framework in fostering decent work in GSCs.

3.2 Shifting from International to Transnational Labour Law: Seeking Alternative Normative Paths toward the Effective Elimination of Child Labour in a Globalized Economy

The abolition of child labour was one of the key objectives of the ILO when it was founded in 1919. It was then reiterated through several key ILO instruments, including two ILO fundamental Conventions, ILO Convention No.138 on minimum age and Convention No. 182 on the worst forms of child labour, and two ILO Declarations, ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) (1977) and ILO Declaration on Fundamental Principles and Rights at Work (1998). The two Conventions have received nearly universal ratification.³⁵⁹ The two Declarations have been endorsed by all member states of the ILO. Under the ILO Declaration on Fundamental Principles and Rights at Work, all ILO member States have an obligation to respect, promote, and realize the abolition of child labour, even if they have not ratified the Conventions in question.³⁶⁰

3.2.1 The Definition of “Child Labour” and “Worst Forms of Child Labour” in International Labour Conventions

According to the two ILO fundamental Conventions, the minimum age for admission to employment or work is 14 years for regular work and 18 years for hazardous work.

(1) Minimum Age Convention, 1973 (ILO Convention No. 138) and its Recommendation No. 146

To ensure that children do not start working too young, ILO Convention No. 138 has set two key requirements for states to effectively abolish child labour: (a) to establish a minimum age for admission to employment or work, and (b) to establish national policies for the elimination of child labour. Article 1 of the Convention requires each member state “to pursue a national policy

³⁵⁹ China and the DRC have both specified their national policies and laws regarding the minimum age for work. China specified the minimum age for work as “16 years.” The DRC specified the minimum age for work as “14 years.”

³⁶⁰ Adopted in 1998, the ILO Declaration on Fundamental Principles and Rights at Work commits Member States of the ILO to respect, promote, and realize four categories of principles concerning fundamental rights, even if they have not ratified the Conventions in question. Article 2 of the Declaration stipulated the four categories as follows: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. See ILO, *Declaration on Fundamental Principles and Rights at Work*, ILOILCOR, 86th Sess (1998).

designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work.” Article 2 of the Convention establishes a minimum age for admission to employment or work and exceptional circumstances. Paragraph (3) of Article 2 establishes a bottom line for a minimum age for admission to employment or work: 15 years. Meanwhile, Paragraph (4) of Article 2 provides that “Notwithstanding the provisions of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.” Furthermore, Article 3 of the Convention underlines the elimination of child labour in hazardous employment or work. Paragraph (1) of Article 3 stipulates the minimum age of 18 years for admission to “any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons.”³⁶¹

ILO Recommendation No. 146, which accompanies ILO Convention No. 138, clarifies the priorities of national policies, the progressive raising of minimum age, and the scope of hazardous employment or work. Article 10 of the Recommendation helps to clarify the types of employment or work to which Article 3 of the Convention applies. Paragraph (1) of Article 10 states that “In determining the types of employment or work to which Article 3 of the Minimum Age Convention, 1973, applies, full account should be taken of *relevant international labour standards*, such as those concerning *dangerous substances, agents or processes (including ionising radiations), the lifting of heavy weights and underground work*.”³⁶²

(2) Worst Forms of Child Labour Convention, 1999 (ILO Convention No. 182) and its Recommendation No. 190

The ILO Convention No. 182 requires countries to take immediate, effective, and time-bound measures to eliminate the worst forms of child labour as a matter of urgency. Article 1 of the Worst Forms of Child Labour Convention stipulates that “Each Member which ratifies this Convention *shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency*.”³⁶³ Article 2 of the Convention clarifies that the term

³⁶¹ *Minimum Age Convention*, *supra* note 46.

³⁶² *Minimum Age Recommendation*, 26 Jun 1973, ILO Recommendation No. 146 [emphasis added].

³⁶³ *Worst Forms of Child Labour Convention*, *supra* note 46 [emphasis added].

child applies to “all persons under the age of 18.” Article 3 of the Convention clarifies the scope of the worst forms of child labour, including the following four categories: (a) all forms of slavery; (b) the use of a child for prostitution, (c) the use of a child for illicit activities, and (d) “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

The ILO Recommendation No. 190, which accompanies ILO Convention No. 182, helps to clarify the scope of “hazardous work.” Article 3 of the Recommendation suggests that the definition of “hazardous work” should include the following types of work: (a) work that exposes children to physical, psychological or sexual abuse; (b) work underground, under water, at dangerous heights or in confined spaces; (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or temperatures, noise levels, or vibrations damaging to their health; (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

(3) Ratifications of ILO Convention No. 138 and Convention No. 182

Both ILO Convention No. 138 and Convention No. 182 have been widely ratified by ILO member states. ILO Convention No. 138 on minimum age has been widely ratified by ILO member states. On June 13, 2022, the Convention received 175 ratifications.³⁶⁴ ILO Convention No. 182 on the worst forms of child labour is the first ILO Convention to achieve universal ratification. It was also the most rapidly ratified Convention in the history of the ILO, with the majority of ratifications occurring within the first three years after it was adopted in 1999. On August 4, 2020, the Convention achieved universal ratification by all 187 member states of the ILO.³⁶⁵

³⁶⁴ ILO, “Ratifications of C138 - Minimum Age Convention, 1973 (No. 138)” (2022), online: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312283> [perma.cc/YV5P-P7NJ] [ILO, “Ratifications of C138”]. Liberia ratified ILO Convention No. 138 on June 13, 2022.

³⁶⁵ ILO, “Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)” (2022), online: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312327> [perma.cc/2XCS-QUAP] [ILO, “Ratifications of C182”]. Tonga ratified ILO Convention No. 182 on August 4, 2020.

As shown in Table 4, the specified minimum age by member states varies between 14 and 16 years. Some countries specified the minimum age as “14 years” according to Paragraph 4 of Article 2 of ILO Convention No. 138, such as the DRC and India. The majority of countries followed the minimum requirement set by the Convention and specified the minimum age as “15 years,” such as Germany, Netherlands, Norway, South Africa, Sweden, Switzerland and Zambia. Some countries specified the minimum age as “16 years,” such as Brazil, Canada, China, France, Russian Federation, and the United Kingdom. Notably, the DRC and China have specified their national policies and laws regarding the minimum age for admission to employment or work as “14 years” and “16 years,” respectively.

Table 4 A List of Ratifications of ILO Conventions No. 138 and No. 182 by Selected Countries

Country	Ratification of C138	Minimum age specified	Ratification of C182
Brazil	28 Jun 2001	16 years	02 Feb 2000
Canada	08 Jun 2016	16 years	06 Jun 2000
China	28 Apr 1999	16 years	08 Aug 2002
The Democratic Republic of the Congo	20 Jun 2001	14 years	20 Jun 2001
France	13 Jul 1990	16 years	11 Sep 2001
Germany	08 Apr 1976	15 years	18 Apr 2002
India	13 Jun 2017	14 years	13 Jun 2017
Netherlands	14 Sep 1976	15 years	14 Feb 2002
Norway	08 Jul 1980	15 years	21 Dec 2000
Russian Federation	03 May 1979	16 years	25 Mar 2003
South Africa	30 Mar 2000	15 years	07 Jun 2000
Sweden	23 Apr 1990	15 years	13 Jun 2001
Switzerland	17 Aug 1999	15 years	28 Jun 2000
United Kingdom of Great Britain and Northern Ireland	07 Jun 2000	16 years	22 Mar 2000
United States of America	Not ratified	N/A	02 Dec 1999
Zambia	09 Feb 1976	15 years	10 Dec 2001

Source: Data collected and compiled by the author³⁶⁶

3.2.2 Emerging Normative Paths in Addressing Governance Deficits on Decent Work in Global Mineral Supply Chains

The effective elimination of child labour is a crucial component of achieving decent work for all in GSCs. An ideal outcome of the ratification and endorsement of international instruments may be the effective abolition of child labour, especially the worst forms of child labour, such as the use of child labour in artisanal mining sites. However, while child labour has been banned

³⁶⁶ ILO, “Ratifications of C138”, *supra* note 364; ILO, “Ratifications of C182”, *supra* note 365.

internationally for several decades, the use of child labour continues to be reported. A report published by the ILO finds that “child labour in mining is most commonly found in artisanal and small-scale mines.”³⁶⁷ A recent report published by the ILO and the United Nations Children’s Fund finds that 160 million children were in child labour as of 2020.³⁶⁸ More than half of them were young children aged under 12.³⁶⁹ In the meantime, nearly half of the children in child labour were in hazardous work, including in the context of artisanal mining sites.³⁷⁰ The report estimates that the number of children in child labour could reach 168.9 million by the end of 2022 if no additional mitigation measures are taken.³⁷¹

In responding to the repeatedly reported issues of child labour in the artisanal mining sector, the ILO has recently started taking measures through its supervisory system of international labour standards, including the annual reports and direct requests to require the DRC government to take action to address issues related to child labour in artisanal cobalt mines. However, these measures have focused only on the role of the DRC government in addressing the issue of child labour in artisanal cobalt mines.³⁷² This subsection highlights the challenges and complexities in achieving decent work in global mineral supply chains. Furthermore, it identifies alternative normative paths that have emerged not only from the centre that is the ILO but also from other sites and levels of law in the global cobalt supply chain.

(1) Achieving Decent Work at the Bottom of Global Mineral Supply Chains: Challenges and Complexities Beyond Conflict Minerals

Global mineral supply chains have long been criticized due to severe labour and human rights abuses that have been reported as occurring at the bottom of the chains.³⁷³ Legislative measures

³⁶⁷ ILO, *Child Labour in Mining and Global Supply Chains* (Geneva: ILO, 2019) [ILO, *Child Labour in Mining and Global Supply Chains*] at 2, online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma995095792802676>.

³⁶⁸ ILO & UNICEF, *Child Labour: Global Estimates 2020, Trends and the Road Forward* (Geneva: ILO & UNICEF, 2021) at 21, online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma995130393102676>.

³⁶⁹ *Ibid* at 28.

³⁷⁰ *Ibid* at 21.

³⁷¹ *Ibid* at 13.

³⁷² See e.g. ILO, *Application of International Labour Standards 2022*, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part A), ILOILCOR, 110th Sess, Agenda Item 3, UN Doc ILC.110/III(A) (2022) at 446–452.

³⁷³ See e.g. Myriam M. Elenge & Christophe De Brouwer, “Identification of Hazards in the Workplaces of Artisanal Mining in Katanga” (2011) 24:1 Intl J Occupational Medicine & Environmental Health 57; Hannes Hofmann, Martin C. Schleper & Constantin Blome, “Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-tier Supply Chains” (2018) 147 J Bus Ethics 115.

and regulatory arrangements to tackle risks and challenges at the bottom of global mineral supply chains have initially and primarily focused on four minerals, namely tantalum, tin, tungsten, and gold (3TG), which may come from conflict areas. These four minerals are known and usually referred to as “3TG minerals”, or “conflict minerals”. The legislative measures and regulatory arrangements aim to stop importing, sourcing, and using conflict minerals. The 3TG minerals from conflict areas may finance armed conflict or may be mined with high risks to labour and human rights, such as using forced labour and child labour. The use of 3TG minerals may perpetuate armed conflicts and serious human rights abuses.

Despite being produced with potentially high risks to labour and human rights, other minerals are not subject to the legislative measures and regulatory arrangements dedicated to eradicating conflict minerals since those minerals are not classified as “conflict minerals” and are much less spotlighted by responsible mineral sourcing initiatives. In addition to 3TG that might come from conflict areas, several critical raw minerals are being extracted, refined, and transported massively from African resource-rich countries and supplied to the rest of the world. These minerals, including copper, cobalt, lithium, and nickel, are significant for the global clean energy transition and especially the need to decarbonize transport. Cobalt is often a by-product of copper and nickel. While mining activities in the eastern DRC are still suffering from ongoing conflicts, mining activities in southern DRC have now been under a regular commercial model since the end of the Second Congo War in 2003. The extraction of cobalt is operated massively in the southern DRC along with the copper and cobalt belt.

Addressing the issue of child labour in the ASM sector in the DRC has been a persistent challenge for achieving decent work in GSCs. When it comes to the regulation of TNCs with respect to labour rights in the context of GSCs, there are notable governance deficits in the current international labour law framework that mostly address the obligation of states to protect labour rights within their territories. The economic and social contexts in the ASM sector and the complexity of GSCs make it even more challenging to address labour issues across national borders. These contexts must be carefully considered to better address governance deficits on decent work in the global cobalt supply chain.

In addition to the notable governance deficits in the current international labour law framework, there have been several economic and social challenges in the ASM sector in the DRC. First, the

ASM sector in the DRC is largely informal. The operation of ASMs often comes with high risks of labour and human rights abuses, low levels of safety measures, health care, or environmental protection.

Second, while the ASM sector brings high risks for labour and human rights abuses, it is also a major source of livelihood and economic development for local communities that rely on mining sites. For instance, the ASM sector means employment opportunities for over 25 million people in sub-Saharan Africa.³⁷⁴ According to a recent estimation, 200,000 people work directly in the ASM sector, and 1,200,000 people are connected to these employment opportunities as dependents.³⁷⁵ Against this dynamic context, simply ceasing business relationships with local partners to avoid involvement with the issue of child labour may exacerbate the issue of poverty and leave local communities at risk of losing jobs and sources of income.³⁷⁶ Existing empirical literature on child labour suggests that “no proven solutions exist if the objective is to limit child labor while also preventing the deterioration of the livelihoods of children and their families who rely on child labor.”³⁷⁷

Third, labour protections at the bottom of global mineral supply chains are complex due to the complexities of multi-tier supply chains, from ore minerals to end-use products. The processes and company sites of generic mineral supply chains include mine, trader, smelter and/or refiner, component producer, contract manufacturer and/or assembly, and electronics and car companies. These companies may be located in a range of countries across the global South and global North. In addition to this simplified version of the complexity in GSCs, there are many more interconnected production networks and complicated multi-layer supply chains which rely on minerals

³⁷⁴ Gavin Hilson *et al*, “Artisanal and Small-scale Mining, and COVID-19 in Sub-Saharan Africa: A Preliminary Analysis” (2021) 139 *World Development*, DOI: <10.1016/j.worlddev.2020.105315> at 1.

³⁷⁵ “Table 1. Estimates of ASM employment in selected countries in sub-Saharan Africa.” in Gavin Hilson *et al*, “Artisanal and Small-scale Mining, and COVID-19 in Sub-Saharan Africa: A Preliminary Analysis” (2021) 139 *World Development*, DOI: <10.1016/j.worlddev.2020.105315> at 2.

³⁷⁶ Most recently, Hugh Brown, documentary photographer and ASM advocate, points out:

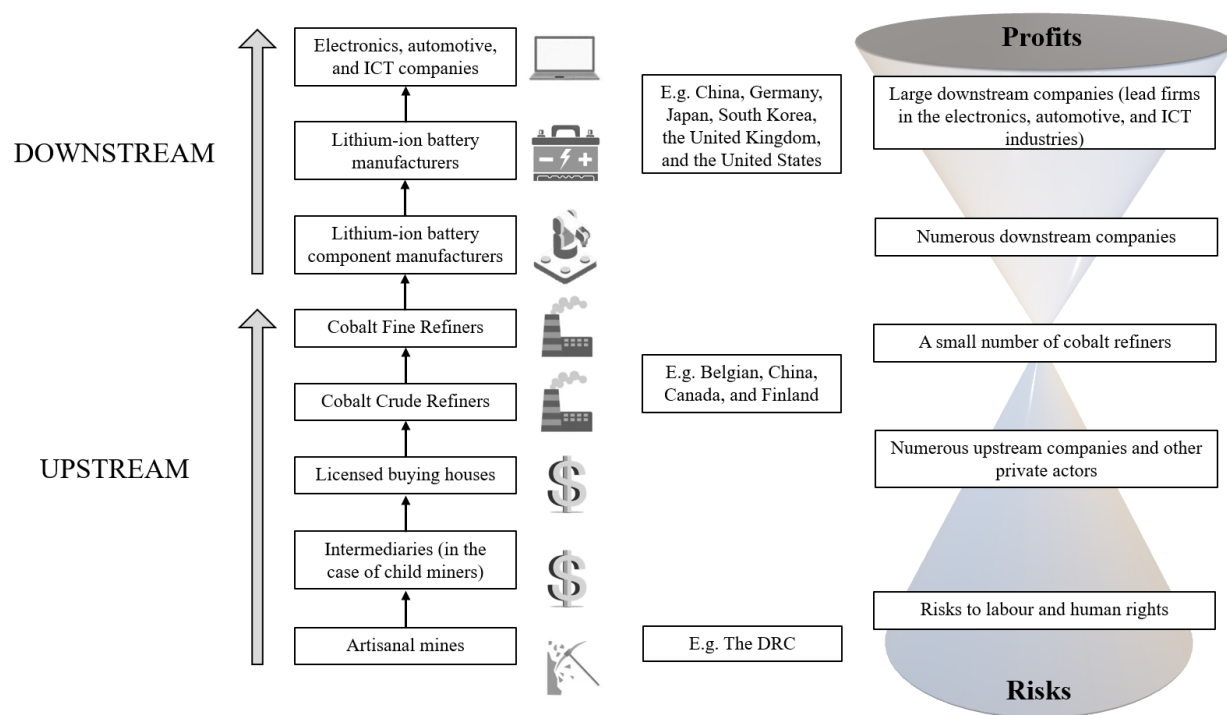
ASM is not going anywhere any time soon, so we can either choose to work with it or not at all. The latter not being an option given the dependence of global supply chains on the ASM contribution and the sheer weight of people that the sector employs.

See Hugh Brown, “Reflections by Hugh Brown on ASM around the World” (May 2022), online: *Fair Cobalt Alliance* <<https://www.faircobaltalliance.org/blog/asm-for-the-prospect-of-better-lives-for-themselves-and-their-families/>> [perma.cc/34XA-G5KT].

³⁷⁷ Center for Effective Global Action of the University of California, Berkeley (CEGA), “Artisanal Mining, Livelihoods, and Child Labor in the Cobalt Supply Chain of the Democratic Republic of Congo” (May 2017) at 11, online (pdf): <<https://escholarship.org/uc/item/17m9g4wm>>.

and expand all over the world. The global cobalt supply chain extends across different national borders. The processes of extracting, processing, and assembling may cover at least three different countries: (a) countries of cobalt ore mining and crude refining companies (e.g. the DRC), (b) countries of fine refining and cobalt products manufacturing companies (e.g. Belgian, China, Canada, and Finland), and (c) countries of electronics, automotive, and ICT companies (e.g. China, Germany, Japan, South Korea, the United Kingdom, and the United States).³⁷⁸ From extracting cobalt ore to producing and selling a product that is based on cobalt as a critical metal, there is generally a long and complex list of production networks and supply processes. Figure 3 shows some of the complexities discussed above.

Figure 3 A Simplified Version of the Complexities in the Global Cobalt Supply Chain: Multiple Tiers, Actors, Norms and Processes



Source: Developed by the author³⁷⁹

³⁷⁸ For a detailed analysis, see Amnesty International, “‘This is What We Die for’”, *supra* note 40.

³⁷⁹ This figure is a simplified version of the global cobalt supply chain to show the complexities of multiple tiers of supply chains, diversity of state and non-state actors involved in the processes, variety of labour norms, and interactive processes in the context of GSCs. The figure draws insights from the following key sources. Cobalt Institute, *supra* note 24; Young, Fernandes & Wood, *supra* note 38 at 4; Amnesty International, “‘This is What We Die for’”, *supra* note 40 at 46–66; Qing Shi et al, “The Multiplex Network Structure of Global Cobalt Industry Chain” (2022) 76 Resources Policy (in press), DOI: <10.1016/j.resourpol.2022.102555>; Meng Liu et al, “Analysis of Material Flow among Multiple Phases of Cobalt Industrial Chain Based on a Complex Network” (2022) 77 (in press), DOI: <10.1016/j.resourpol.2022.102691>.

(2) Addressing Governance Deficits in the Global Cobalt Supply Chain: A Turning Point in 2016?

The Amnesty International Report (2016) has spotlighted and amplified risks to labour rights in GSCs. As a result, various actors have responded to the issue of child labour in the DRC. These actors encompass governments, enterprises, and industry associations, as well as consumers of end-use products of cobalt ore that may be extracted and/or processed through child labour. The relevant actors are diversified not only in the sense of their role as state or non-state actors across various levels of law but also in the sense of their positions in different segments of the global cobalt supply upstream or downstream, and their locations in different parts of the world, developed or developing countries.

Accordingly, increasing instruments, standards, and initiatives have been relevant to labour governance in the global cobalt supply chain. While the exact number may depend on the calculation criteria, intergovernmental organizations and individual states have developed more than ten international, regional, and national instruments. These instruments encompass both *mandatory and voluntary* instruments. The relevant provisions are general and broad in rights and sectors. In addition to these instruments, more than ten multi-stakeholder initiatives have emerged. These *voluntary* initiatives are primarily led by industry associations and other business partnership networks. These initiatives focus on responsible mining and sourcing of minerals. Most initiatives on cobalt were developed between 2018 and 2021.

Table 5 shows that various instruments and initiatives have emerged from multiple levels and sites of law in the global cobalt supply chain. These instruments and initiatives encompass various forms of law: (a) public governance initiatives, including both hard law instruments and soft law instruments associated with activities of the state; and (b) private governance initiatives, including various voluntary initiatives associated with activities of non-state actors.

Table 5 The Emerging Multi-level Governance of Labour Rights in the Global Cobalt Supply Chain

Levels of Law	Sites of Law	Forms of Law (Selected)
International sites	International labour conventions and policy frameworks	C138 - Minimum Age Convention, 1973 C182 - Worst Forms of Child Labour Convention, 1999 R146 - Minimum Age Recommendation, 1973 (No. 146) R190 - Worst Forms of Child Labour Recommendation, 1999 (No. 190) The ILO MNE Declaration (5 th edition, 2017)

	The UN Human Rights Mechanisms	Convention on the Rights of the Child (1989) UNGPs (2011) UN 2030 Sustainable Development Goals (2015)
	Intergovernmental initiatives	OECD Guidelines for Multinational Enterprises (5 th edition, 2011) OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (3 rd edition, 2016) OECD Practical Actions for Companies to Identify and Address the Worst Forms of Child Labour in Mineral Supply Chains (2017) OECD Due Diligence Guidance for Responsible Business Conduct (2018)
	Other international initiatives with labour rights considerations Non-governmental initiatives Multi-stakeholder initiatives	Responsible Minerals Initiative (2008) Responsible Cobalt Initiative (2016) Cobalt for Development Initiative (2019) Policy on Responsible Sourcing of LME-Listed Brands of London Metal Exchange (2019) Cobalt Industry Responsible Assessment Framework of Cobalt Institute (2019) Cobalt Action Partnership of the Global Battery Alliance (2020) Fair Cobalt Alliance (2020)
Regional sites	Regional treaties and regulations Other regional initiatives with labour rights considerations	Charter of Fundamental Rights of the EU (2000) European Commission's "A Renewed EU Strategy 2011-14 for Corporate Social Responsibility" (2011) EC's Proposal for a Regulation of the European Parliament and of the Council Concerning Batteries and Waste Batteries (2020) EU Conflict Minerals Regulation (2021) EU Strategy on the Rights of the Child (2021) EU Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labour in Their Operations and Supply Chains (2021) EC's Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (2022)
National sites	Home state laws, regulations, and policies for TNCs concerning labour rights	Chinese Measures for the Administration of Overseas Investment (2004, 2009, 2014) Chinese Guidelines for Social Responsibility in Outbound Mining Investments (2014) Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (2015) Chinese Code of Conduct for the Operation of Overseas Investments by Private Enterprises (2017) Cobalt Refiner Supply Chain Due Diligence Standard (2018, 2019, 2021, by the CCCMC and the RMI)
	Host state laws, regulations, and policies for TNCs concerning labour rights	DRC Mining Code (2002, revised in 2018) DRC decree n°18/042 (2018) DRC decree n°19/15 (2019)
Subnational sites	CSR policies and mechanisms by TNCs Workplace rules and practices	COCs, policy commitments, and supply chain due diligence management mechanisms

Host state: Taking the DRC as an example

Home state: Taking China as an example

Source: Compiled by the author³⁸⁰

³⁸⁰ This table covers key instruments and initiatives that the author has identified as relevant to labour governance in the global cobalt supply chain. The table is a non-exhaustive list of instruments and initiatives that are often referred to in the context of responsible and sustainable cobalt supply chain management. The list of standards presented here is by no means complete but instead addresses the most widely known instruments and initiatives.

3.3 The Diverse Actors, Norms and Processes to Address Governance Deficits on Decent Work in a Globalized Economy: An Emerging Multi-level Governance Framework in the Global Cobalt Supply Chain

This section develops a comprehensive overview of the emerging multi-level governance framework initiated to eliminate child labour at the bottom of the global cobalt supply chain, namely in the artisanal mining sector in the DRC. It highlights the different roles of actors in producing and diffusing labour norms across transnational spheres, notably the important role of international organizations, the rising role of state actors, and the emerging role of enterprises. Subsection one provides a baseline assessment of labour governance in the global cobalt supply chain as of 2015. Subsection two provides a mapping review of the emerging multi-level governance framework in the global cobalt supply chain, focusing on developments between 2016 and 2021.

3.3.1 A Baseline Assessment of the Governance of Labour Rights in the Global Cobalt Supply Chain as of 2015

This baseline assessment provides an overview of the institutional structure in the governance of the global cobalt supply chain, focusing on the designs for labour governance as of 2015, a year before the release of the Amnesty International Report (2016). The instruments and initiatives analyzed below are not specifically designed for cobalt, but they are considered applicable to the global cobalt supply chain based on their broad coverage.

(1) Public Governance of Labour Rights in the Global Cobalt Supply Chain

International labour Conventions and other Conventions are legally binding to states that have ratified them. The Conventions require that states ensure the protection of workers' rights and access to remedy in cases of labour rights abuses. However, international Conventions have not imposed direct legal obligations on enterprises to respect and protect labour rights in the context of transnational business activities.

Nonetheless, some international organizations, regional organizations, and home states of TNCs had already started taking measures to ensure that business enterprises respect labour and human rights in their overseas operations. The ILO, OHCHR, and OECD made some progress as of 2015. The EU, a proactive regional organization in the field of business and human rights (BHR), also

made considerable efforts according to its commitments to upholding the UNGPs. A few home states of large mining TNCs, including the United States and the United Kingdom, as well as Canada and China, had made legislative or regulatory arrangements for social responsibilities in transnational mining activities.

International-level Instruments: The Role of the ILO, OHCHR, and OECD

Three key sets of international soft law instruments are relevant to transnational labour rights risks in the context of a globalized economy: (a) the ILO MNE Declaration (the 4th edition, 2006, ILO);³⁸¹ (b) the UNGPs (2011, OHCHR),³⁸² and (c) OECD guidelines, notably the OECD Guidelines for Multinational Enterprises (2011, OECD) and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (the 2nd edition, 2013, OECD).³⁸³ The ILO MNE Declaration was adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) Sessions.

The UNGPs were unanimously endorsed by the Human Rights Council in June 2011. The OECD Guidelines for Multinational Enterprises were initially adopted by OECD member states in 1976 and last updated in 2011 to include a new chapter on human rights that aligns with the UNGPs. Furthermore, the 2011 OECD Guidelines' chapter on "Employment and Industrial Relations" aligned with ILO labour standards, including the ILO MNE Declaration. As noted in the OECD Guidelines, "The ILO MNE Declaration can therefore be of use in understanding the [OECD] Guidelines to the extent that it is of a greater degree of elaboration. *However, the responsibilities for the follow-up procedures under the ILO MNE Declaration and the Guidelines are institutionally separate.*"³⁸⁴

The ILO, the custodian of international labour standards and the UN agency for the world of work, has made various efforts toward the goal of eliminating all forms of child labour. As analyzed in the previous section, the ILO has developed a set of Conventions and Recommendations, as well as Declarations that aim to effectively eliminate child labour in a globalized economy. The ILO

³⁸¹ ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 4th edition, ILOGBOR, 295th Sess, Agenda Item 1, Appendix, UN Doc GB.295/MNE/1/3 (2006).

³⁸² Human Rights Council, *Report of the Special Representative of the Secretary-General*, *supra* note 48.

³⁸³ OECD, *Guidelines for Multinational Enterprises*, updated 25 May 2011 (Paris: OECD, 2011), online (pdf): <<https://mneguidelines.oecd.org/>>.

³⁸⁴ *Ibid* at 37 [emphasis added].

has also developed several guidelines and tools to provide relevant child labour standards to guide companies connected to GSCs. For instance, in December 2015, the ILO, jointly with the International Organisation of Employers, published the *Child Labour Guidance Tool* for companies to meet the due diligence requirements laid out in the UNGPs, as they pertain to child labour.³⁸⁵

The OHCHR, the custodian of international human rights standards, has made progress in addressing challenges brought by cross-border business activities and extended supply chains. In June 2011, member states of the UN Human Rights Council unanimously adopted the UNGPs, which provided a blueprint for companies to develop robust management systems for HRDD. Crucially, the UNGPs are built on the three-pillar “Protect, Respect and Remedy” framework: (a) the State duty to protect human rights, (b) the corporate responsibility to respect human rights, and (c) access to remedy. The UNGPs do not create new international law obligations. The UNGPs directly reference several key international instruments relevant to the responsibility of business enterprises to respect human rights, notably the International Bill of Human Rights and the eight ILO core Conventions as set out in the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work. ILO Convention No. 138 on minimum age and ILO Convention No. 182 on the worst forms of child labour are ILO fundamental Conventions. While the two Conventions are binding only on states that ratify them, they are relevant standards for eliminating child labour in business activities.

The OECD, an intergovernmental organization with a large group of developed countries as its member states and with many emerging market economies as its key partners, have developed a set of guidelines and tools aiming for RBC. The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for RBC in a global context consistent with applicable laws and internationally recognized standards. The Guidelines are promoted and implemented through a unique implementation mechanism - the National Contact

³⁸⁵ The guidance tool aims to improve GSC governance, due diligence, and remediation processes to advance the progressive elimination of child labour. See ILO & International Organisation of Employers, *ILO-IOE Child Labour Guidance Tool for Business: How to do Business with Respect for Children’s Right to be Free from Child Labour* (Geneva: ILO & IOE, 2015), online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma994892223402676>.

Point (NCP).³⁸⁶ The NCP is an important non-judicial grievance mechanism for adverse human rights impacts that are relevant to business activities. The 2011 revision of the Guidelines added a chapter on Human Rights aligned with the language of the UNGPs to the Guidelines. Furthermore, the Guidelines make references to relevant provisions of the ILO MNE Declaration and the Rio Declaration. As such, the NCPs also function as a grievance mechanism for widely recognized expectations with regard to BHR, labour issues and the environment. By the end of 2015, 360 specific instances have been handled by NCPs, addressing impacts from business operations in over 100 countries and territories.³⁸⁷ In addition to the mechanism of NCP, the OECD developed several due diligence guidelines for RBC. For instance, in 2013, the OECD published the second version of its Due Diligence Guidance for responsible mineral supply chains.³⁸⁸

Regional-level Instruments and Initiatives: The Role of the EU

The EU's efforts on sustainable development and CSR can be traced back to the early 21st century.³⁸⁹ In July 2001, the European Commission defined CSR in a green paper as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a *voluntary* basis.”³⁹⁰ Subsequently, following the commitment set through the green paper, the European Commission published a Communication to the European Council, the European Parliament and the Economic and Social Committee, titled *Promoting Core Labour Standards and Improving Social governance in the Context of*

³⁸⁶ National Contact Points are “the only governmental, non-judicial grievance mechanism, providing access to remedy to stakeholders wishing to raise issues related to operations of companies operating in or from adhering countries.” See OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015* (Paris: OECD, 2016) at 22, online (pdf): <mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf> [OECD, *Implementing the OECD Guidelines for Multinational Enterprises*] at 11.

³⁸⁷ *Ibid* at 12.

³⁸⁸ OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd edition (Paris: OECD, 2016), online (pdf): <<https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>> [OECD, *Due Diligence Guidance for responsible mineral supply chains*].

³⁸⁹ Commission of the European Communities, *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, Communication from the Commission, Document 52001DC0264 (Brussels: EC, 2001), online (pdf): <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001DC0264>>.

³⁹⁰ Commission of the European Communities, *Promoting a European Framework for Corporate Social Responsibility*, Green Paper (Brussels: EC, 2001) at 6, online (pdf): <[https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2001\)366&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2001)366&lang=en)> [emphasis added].

Globalisation.³⁹¹ In October 2011, the European Commission published “A Renewed EU Strategy 2011-14 for Corporate Social Responsibility,” which put forward a new definition of CSR as “the responsibility of enterprises for their impacts on society.”³⁹² This renewed strategy for CSR commits to “implementing the UN Guiding Principles on Business and Human Rights” and “improving the coherence of EU policies relevant to business and human rights.”³⁹³ The EU objectives regarding specific human rights issues and core labour standards include “child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining.”³⁹⁴

National-level Instruments and Initiatives: Examples of Host and Home States of Transnational Mining Enterprises

Host states of TNCs are key to ensuring labour protections in a globalized economy. As of 2015, the 2002 Mining Code is key legislation relevant for protecting labour and human rights in the artisanal mining sector in the DRC.³⁹⁵ The Code provides several specific requirements regarding artisanal mining activities. For instance, Article 21 of the Code defines artisanal mining as “any activity by means of which a person of Congolese nationality carries out extraction and concentration of mineral substances using artisanal tools, methods and processes, within an artisanal exploitation area limited in terms of surface area and depth up to a maximum of thirty metres.”³⁹⁶ Article 23 of the Code sets out the requirement that all miners must be adults.³⁹⁷ However, it is widely reported that the government agency that is responsible for overseeing artisanal mining has failed to implement the requirements adequately.³⁹⁸

³⁹¹ Commission of the European Communities, *Promoting Core Labour Standards and Improving Social governance in the Context of Globalisation*, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Document 52001DC0416 (Brussels: EC, 2001), online (pdf): <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52001DC0416>>.

³⁹² European Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Document 52011DC0681 (Brussels: EC, 2011) at 6, online (pdf): <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0681>>.

³⁹³ *Ibid* at 14.

³⁹⁴ *Ibid*.

³⁹⁵ For an analysis of the DRC’s 2002 Mining Code and an evaluation of its implementation, see Amnesty International, “‘This is What We Die for’”, *supra* note 40 at 17–18.

³⁹⁶ Amnesty International, “‘This is What We Die for’”, *supra* note 40 at 17.

³⁹⁷ *Ibid*.

³⁹⁸ *Ibid* at 18 [footnotes omitted].

Home states of TNCs play an important role in labour governance in transnational business activities. In the first decade of the 21st century, several countries in the global North, for instance, the United States, the United Kingdom, Australia, and Canada, attempted to address the corporate accountability of labour and human rights through extraterritorial legislation. These attempts focused on a set of serious abuses such as modern slavery, forced labour, damage to health, etc. However, all these legislative attempts failed.³⁹⁹ In dealing with the tensions and needs associated with OFDI in the developing world, countries from the global North rely, as a normative framework, on the voluntary OECD Guidelines for Multinational Enterprises, last updated in 2011, with the important update of incorporating the UNGPs. Since then, the non-binding solution of the OECD guidelines was preferred in the global North, with the OECD National Contact Point as an alternative grievance mechanism in the context of few judicial mechanisms available for victims.⁴⁰⁰

As of 2015, only a few home states of TNCs had taken legislative measures or made regulatory arrangements to address labour and human rights issues in the context of transnational business activities. The United States and the United Kingdom have notably taken legislative measures. In July 2010, the US passed the *Dodd-Frank Wall Street Reform and Consumer Protection Act*. Section 1502 of the *Dodd-Frank Act* requires specific disclosures for companies importing 3TG from the DRC and neighbouring countries to make sure they are not funding armed groups or human rights abuses.⁴⁰¹ In January 2012, the California Transparency in Supply Chains Act went into effect in the State of California in the US. In 2015, the United Kingdom enacted the Modern Slavery Act to create more transparency throughout organizational supply chains to uncover modern slavery abuses and human trafficking. Only large TNCs from the two countries were required to report on their actions to eradicate severe labour rights abuses such as modern slavery and human trafficking (including children) in their supply chains.⁴⁰²

³⁹⁹ For detailed analyses of these legislative attempts, see Ciprian N. Radavoi & Yongmin Bian, “Enhancing the Accountability of Transnational Corporations: The Case for ‘Decoupling’ Environmental Issues” (2014) 16:3 *Environmental L Rev* 168; Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014).

⁴⁰⁰ See OECD, *Implementing the OECD Guidelines for Multinational Enterprises*, *supra* note 386.

⁴⁰¹ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 15 USC § 78m (2010). Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* requires specific disclosures for companies importing 3TG from the DRC and neighbouring countries to make sure they are not funding armed groups or human rights abuses.

⁴⁰² ILO, *Child Labour in Mining and Global Supply Chains*, *supra* note 367 at 4.

Despite their notable role in global mineral supply chains, both Canada and China had not taken legislative measures to specifically address labour and human rights issues in the context of transnational mining activities. Instead, both States made regulatory arrangements for responsible outward mining investment. In 2009, Canada launched its first CSR strategy, titled *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad*.⁴⁰³ In November 2014, the government launched the enhanced CSR strategy to strengthen Canada's extractive sector abroad, titled *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*.⁴⁰⁴

In September 2014, the MOC of China promulgated a departmental rule [部门规章], *Measures for the Administration of Overseas Investment* (Order No.3 [2014], MOC).⁴⁰⁵ Article 20 of this departmental rule requires Chinese enterprises to fulfill their social responsibilities, especially labour protections, in their overseas operations. Subsequently, In October 2014, the CCCMC, a Chinese nationwide industry association for the mining industry, launched the GSRM for the social responsibility of Chinese outward mining investment.⁴⁰⁶ The GSRM provides detailed CSR guidance, including clarifying the scope of labour rights and the operational mechanisms to ensure decent work in Chinese outward mining investment.

(2) Private Governance of Labour Rights in the Global Cobalt Supply Chain

In addition to initiatives developed by individual companies, there are various types of private labour governance initiatives, such as those led by a collaborative partnership of a group of companies, industry associations, and a collection of multi-stakeholders, including a wide range of actors such as companies, industry associations, civil society organizations, and international

⁴⁰³ The Government of Canada, *Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad* (Ottawa: The Government of Canada, 2014), online (pdf): <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>>.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Ministry of Commerce of the People's Republic of China, *Measures for the Administration of Overseas Investment*, Order No.3 [2014] (Beijing: MOC, 2014), online: <<http://www.mofcom.gov.cn/article/swfg/swfgbl/gz/201802/20180202715515.shtml>> [translated by author] [MOC, "Measures (2014)"].

⁴⁰⁶ China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC), "Chinese Guidelines for Social Responsibility in Outbound Mining Investments" (2014) [CCCMC, "GSRM (2014)"], online (pdf): <<http://www.cccmc.org.cn/docs/2016-05/20160503161251906597.pdf>>.

organizations.⁴⁰⁷ Given the difficulty of drawing the precise boundaries of each of these initiatives at this stage in their ongoing development, some overlapping is unavoidable. For the convenience of presentation, the following typology of private governance initiatives is structured around company-led initiatives and multi-stakeholder initiatives.

Company-led Private Governance Initiatives

General corporate practices in developing TPLG initiatives can only be assessed through a few recent studies that focus on large companies which are mainly from developed countries. A study that was based on empirical data from the year 2015 revealed that the majority of 152 investigated companies were failing to undertake and implement HRDD.⁴⁰⁸ The study showed that about half of the investigated companies had never undertaken a dedicated HRDD process or a human rights impact assessment.⁴⁰⁹

When Amnesty International released the 2016 report, most of the companies investigated had not yet developed substantive policies or supply chain mechanisms for their investment, sourcing, and producing activities that were relevant to cobalt. The Amnesty International Report (2016) suggests that labour governance in the global cobalt supply chain is even more complex since specific requirements for responsible cobalt sourcing are only emerging in recent years and that the implementation is far from mature. Amongst the 26 companies that were identified in the chain, the report identified HC, a transnational cobalt refiner headquartered in China, as being in a key position and, therefore, a “choke point” of the global cobalt supply chain.⁴¹⁰

Furthermore, the report also provided an assessment of corporate practices by downstream companies which source processed cobalt ore and their customers along the supply chain. As of 2015, most of the downstream companies that were identified as sourcing from the DRC and/or HC had not started publicly disclosing their smelters and other due diligence practices. The report submitted that “most of these downstream companies referred to general codes of conduct and

⁴⁰⁷ For categorization of private labour governance according to the type, sponsor, implementation and examples, see “Table II Implementation and Examples of Private Labor Governance” in Jimmy Donaghey et al, “From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains” (2014) 53:2 Human Resource Management 229 at 235. In this categorization, multi-stakeholder initiatives are distinguished as societal-led, transnational institution-led, and industry-led multi-stakeholder initiatives.

⁴⁰⁸ Robert McCorquodale et al, “Human Rights Due Diligence in Law and Practice: Good Practices and Challenges of Business Enterprises” (2017) 2 Business & Human Rights J 195.

⁴⁰⁹ *Ibid* at 205.

⁴¹⁰ *Ibid* at 8.

internal policies, which require suppliers to respect human rights and not employ children.”⁴¹¹ While many of these companies stated that they have a zero-tolerance policy when it comes to child labour in their supply chains, as critiqued by Amnesty International, “they did not provide details of specific investigations and checks that they have undertaken to identify and address child labor in their cobalt supply chains.”⁴¹² According to the report, many companies were indirectly sourcing from HC. For instance, HC may be at their second or further tier of suppliers. However, these companies denied sourcing cobalt from the DRC and/or HC but failed to explain from whom they source cobalt.⁴¹³ Many of these downstream companies are lead firms in the electronics, automotive, and ICT industries, such as Apple, Samsung, Daimler AG, and Volkswagen. As of 2015, these companies took few measures to trace their suppliers up to the smelters and further upstream of the global cobalt supply chain for their policies and practices concerning child labour and other forms of human rights abuses.

Multi-stakeholder Initiatives

Two decades ago, few instruments were applicable for the elimination of child labour in the context of global mineral supply chains, and relevant instruments had a narrow focus on diamonds and minerals extracted from conflict areas. A notable example is the Kimberly Process. The Kimberly Process is a multilateral trade regime established in 2003 to prevent the flow of conflict diamonds.⁴¹⁴ The core of this regime is the Kimberley Process Certification Scheme under which States implement safeguards on shipments of rough diamonds and certify them as “conflict free.”

Several voluntary initiatives emerged and were primarily led by industry actors. The majority of company members of these initiatives are headquartered in North America and Europe. For instance, the International Council on Mining and Metals (ICMM) was founded in 2002, and it is a large industry initiative with company members accounting for one-third of the global metals and mining industry.⁴¹⁵ The Initiative for Responsible Mining Assurance was founded in 2006,

⁴¹¹ *Ibid* at 9.

⁴¹² *Ibid*.

⁴¹³ *Ibid*.

⁴¹⁴ Kimberley Process, “What is the Kimberley Process?” (2022), online: <<https://www.kimberleyprocess.com/>> [perma.cc/HF9H-Y597].

⁴¹⁵ “We bring together a third of the global metals and mining industry, along with key partners to drive leadership, action and innovation for a safe, just and sustainable world.” See International Council on Mining and Metals, “Our Story: Our Members” (2022), online: <<https://www.icmm.com/en-gb/our-story/our-members>> [perma.cc/46TB-TSCY].

and it is governed by NGOs, organized labor unions, mining-affected communities, mining companies, and companies that purchase mined materials for further production activities.⁴¹⁶ The Responsible Mining Initiative (RMI) was founded in 2008 by members of two large industry coalitions dedicated to CSR and sustainability: the Responsible Business Alliance and the Global e-Sustainability Initiative.⁴¹⁷

3.3.2 A Mapping Review of the Multi-level Governance Framework in the Global Cobalt Supply Chain as of 2021: Toward a Coherent Approach to Responsible Business Conduct?

Since 2016, international organizations have strengthened regulatory efforts for promoting RBC in the context of transnational business activities. In the meantime, several voluntary initiatives that are dedicated to responsible cobalt sourcing have emerged to better address governance deficits regarding labour protections in the chain, with a focus on labour issues at the bottom and upstream of the chain that are mostly located in developing countries. Some existing initiatives for responsible minerals have also expanded their scope of application to cover a broader range of minerals, including cobalt. These emerging regulatory efforts highlight the impunity, lack of control and diffusion of responsibility between numerous actors that have become typical features of GSCs. Furthermore, the proliferated regulatory efforts and initiatives also highlight the lack of consistent efforts, coherent approaches, and collaborative work amongst actors with different mandates and interests.

(1) Public Governance of Labour Rights in the Global Cobalt Supply Chain

This subsection maps out these recent developments of public governance initiatives that may be relevant for labour governance in the global cobalt supply chain in the coming decades. These instruments have their respective mandates, values, and limits, and the cross-references between these instruments are quite recent developments. It is notable that, except for the Chinese-led CCCMC guidelines, these ongoing developments of hard and soft instruments do not specifically focus on responsible cobalt sourcing nor the elimination of child labour in global mineral supply chains.

⁴¹⁶ Initiative for Responsible Mining Assurance, “About: 10 Facts About IRMA” (2022), online: <<https://responsiblemining.net/about/facts/>> [perma.cc/KRV5-L7QC].

⁴¹⁷ Responsible Minerals Initiative, “About the Responsible Minerals Initiative” (2022), online: <<https://www.responsiblemineralsinitiative.org/about/rmi-initiative/>> [perma.cc/Q69W-DGFA].

Between 2016 and 2021, the three sets of instruments developed by these organizations remained key to addressing transnational labour rights risks in the globalized economy. While the OECD has incorporated the UNGPs into its guidelines since 2011, the ILO has struggled to do so. In 2017, the ILO incorporated the UNGPs into its MNE Declaration.⁴¹⁸ These enhanced efforts for RBC in transnational spheres have strengthened the potential of these three organizations to make efforts for a coherent approach to RBC in a globalized economy. In addition to these international instruments, regional and national regulatory efforts have also emerged to respond to the repeatedly reported labour and human rights abuses in transnational business activities.

(a) The Important Role of International Organizations: Toward a Coherent Approach to Responsible Business Conduct through International Organizations?

While the three key international instruments have all outlined their expectations about how companies can act responsibly, they have their respective expertise, mandates and priorities regarding their scope and approach to rights in the context of transnational business activities. The ILO has a unique tripartite structure, its authority on international labour standards, and the mission for advancing social justice and promoting decent work for all women and men. The OHCHR has human rights mandates and its expertise in BHR. The OECD has rich experience in its broad approach to RBC and the capability to strengthen the links to economic policies.

The UNGPs aim to provide authoritative guidance for human rights protection in the context of business activities, including cross-border activities. In 2011, the OECD incorporated the UNGPs into the OECD Guidelines for Multinational Enterprises and started promoting the acceptance and implementation of the UNGPs amongst both member and non-member states. Furthermore, the OECD has developed a wide range of practical guidance and tools to promote the implementation of the UNGPs in the context of transnational business activities and interconnected supply chains. In May 2016, the OECD released the third edition of the OECD Due Diligence Guidance for responsible mineral supply chains, which clarified that its five-step due diligence framework is intended “as a basis for responsible supply chain management of all minerals,” not just 3TG

⁴¹⁸ ILO, *Recommendations of the Tripartite ad hoc Working Group concerning the Review of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy Text, Annex and Addenda and the Interpretation Procedure*, ILOGBOR, 329th Sess, Annex, Agenda Item 7, UN Doc GB.329/POL/7 (2017) [“ILO, MNE Declaration”] at 6–15.

minerals.⁴¹⁹ In 2017, the OECD developed and issued new guidance to help companies identify and address child labour in their mineral supply chains, titled *Practical Actions for Companies to Identify and Address The Worst Forms of Child Labour in Mineral Supply Chains* (OECD Practical Actions for Companies).⁴²⁰ The implementation of the UNGPs and OECD Guidelines has fostered the development of CSR and the change of corporate behaviours in GSCs.

In contrast to the early actions taken by the OECD, the ILO has only recently started fully engaging with the UNGPs and establishing itself as an authority on the labour dimension of HRDD. The ILO has struggled to establish decent work in GSCs as a thematic focus of its agenda for decent work.⁴²¹ The ILO's mission and goal are to advance social justice and promote decent work for all women and men. However, decent work in the context of GSCs became a thematic focus of the ILO only recently. Accordingly, the ILO has only recently started taking measures to conceptualize and promote a specific labour dimension of HRDD in GSCs. Since 2016, the ILO has made considerable efforts to tackle the challenges arising from the context of GSCs.⁴²² In June 2016, the 105th Session of the International Labour Conference (ILC) held a general discussion on decent work in GSCs.⁴²³ The conclusions of the discussion adopted by the 105th International Labour Conference provide guidance on how the ILO and other actors, including states, companies, and social partners, should proceed. Paragraph 23 of the Conclusions Concerning Decent work in Global Supply Chains provides nine specific directions for the ILO to act. Notably, it requires the ILO to “Provide leadership and use the ILO's convening power and unique added value to drive policy coherence amongst all multilateral initiatives and processes related to decent work in global supply chains.”⁴²⁴ It also requires the ILO to “Strengthen its capacity to give guidance to enterprises on the application of labour standards within their supply chains and make information

⁴¹⁹ OECD, *Due Diligence Guidance for responsible mineral supply chains*, *supra* note 388 at 4.

⁴²⁰ OECD, *Practical Actions for Companies to Identify and Address The Worst Forms of Child Labour in Mineral Supply Chains* (Paris: OECD, 2017), online (pdf): <mneguidelines.oecd.org/Practical-actions-for-worst-forms-of-child-labour-mining-sector.pdf>.

⁴²¹ See Valentina Grado, “Decent Work in Global Supply Chains: Mapping the Work of the International Labour Organization” in Marc Bungenberg *et al*, eds, *European Yearbook of International Economic Law 2019* (Cham: Springer, 2020) 53 at 56–73.

⁴²² Thomas & Turnbull, *supra* note 223.

⁴²³ For a detailed analysis of the main reason for ILO's inaction on GSCs till 2016, see Grado, *supra* note 421 at 55–56.

⁴²⁴ ILO, *Resolution Concerning Decent work in Global Supply Chains*, ILOILCOR, 105th Sess (2016) [ILO, *Resolution Concerning Decent work in Global Supply Chains*] at 6, online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma994962093402676>.

available on specific country situations, laws and regulations, including on the implementation of labour rights due diligence in coherence with already existing international frameworks.”⁴²⁵ Notably, between 2016 and 2018, the ILO engaged further with the UNGPs and its key element, HRDD. In March 2017, the Governing Body adopted a Programme of Action and a Roadmap specifically aimed at addressing decent work in GSCs through a comprehensive and coordinated framework.⁴²⁶ At the same time, in March 2017, the Government Body adopted a revised ILO MNE Declaration text with two annexes. This revised version explicitly endorses the UNGPs and incorporates them as a key part, highlighting that different actors have a specific role to play. Specifically, Article 10 of the Declaration highlights that different actors, including governments, employers’ and workers’ organizations of home and host countries and multinational enterprises themselves, have a specific role to play in economic and social progress and the realization of decent work for all. It endorses the three pillars of the UNGPs, namely, the state duty to protect human rights, corporate responsibility to respect human rights, and access to remedy. Furthermore, it states that enterprises “should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights.” As it differs from other general perspectives of HRDD, Article 10 of the ILO MNE Declaration highlights that the HRDD process conducted by multinational enterprises should “involve meaningful consultation with potentially affected groups and other relevant stakeholders including workers’ organizations” and “take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process.” This highlighted point is significant for workers’ rights in the context of GSCs, considering the minimal consideration of workers’ voices and social dialogue in the current five-step due diligence framework that is developed and promoted by the OECD.

The EU has made efforts to develop EU-level legislation and other regulatory measures. Notably, the EU Conflict Minerals Regulation entered into force on 1 January 2021. Aligning with the UNGPs and the OECD Due Diligence Guidance for responsible mineral supply chains, the Regulation lays down supply chain due diligence obligations for importers of tin, tantalum and

⁴²⁵ *Ibid.*

⁴²⁶ ILO, *Follow-up to the Resolution Concerning Decent work in Global Supply Chains (General Discussion)*, ILOGBOR, 328th, UN Doc GB.328/INS/5/1 (2016); ILO, *Follow-up to the Resolution Concerning Decent Work in Global Supply Chains: Roadmap for the Programme of Action*, ILOGBOR, 329th, UN Doc GB.329/INS/3/2 (2017).

tungsten, their ores, and gold originating from conflict-affected and high-risk areas.⁴²⁷ The Regulation identifies child labour as one of the key types of human rights abuses that may occur in resource-rich conflict-affected and high-risk areas. It sets several obligations for EU importers, including management system obligations, risk management obligations, third-party audit obligations, disclosure obligations, and supply chain due diligence schemes.⁴²⁸ Specifically, the Regulation requires that:

Where a Union importer can reasonably conclude that metals are derived only from recycled or scrap sources, it shall, with due regard for business confidentiality and other competitive concerns: (a) publicly disclose its conclusion; and (b) describe in reasonable detail the supply chain due diligence measures it exercised in reaching that conclusion.⁴²⁹

Furthermore, on February 23, 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence, which aims to impose human rights and environmental rights due diligence requirements on corporations and foster responsible corporate behaviour throughout GSCs.⁴³⁰ This proposal applies to corporations' own operations, their subsidiaries and their value chains (direct and indirect established business relationships).

The increasing cross-references signal the potential of cross-fertilization between instruments and a coherent approach to RBC in GSCs. The concept of HRDD can play an important role in bridging and connecting different approaches and priorities. In recent years, the ILO, OECD and OHCHR have started collaborating to develop a coherent approach to RBC in a globalized economy. Through a recent joint statement to the public, the three organizations highlight that “[The three set of instruments] are aligned and complement each other” and “Each organisation brings its own value-added to their implementation.”⁴³¹ The collaborative work aims for “the creation of a

⁴²⁷ European Union, *Regulation (EU) 821/2017 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*, [2017] OJ L 130 [EU, “Conflict Minerals Regulation”].

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.* Art. 7(4).

⁴³⁰ European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, Document 52022PC0071, (Brussels: EC, 2022), online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>>.

⁴³¹ ILO, OHCHR, OECD & EU, *Responsible Business: Key Messages from International Instruments* (Geneva: ILO, OHCHR, OECD & EU, 2019) at 6, online (pdf): <https://www.ilo.org/asia/info/public/background/WCMS_724747/lang--en/index.htm>.

strengthened enabling environment for responsible business conduct.”⁴³² The EU plays an important role in supporting the collaboration processes and joint initiatives for providing technical advice and promoting implementation at the regional and country level.⁴³³

(b) The Rising Role of States in Setting Requirements for Responsible Business Conduct

Having been targeted in the Amnesty International Report (2016), both the DRC and China have made new efforts to address governance deficits regarding the use of child labour in the global cobalt supply chain. Both are increasingly influential in making their voice heard by other actors in the chain. The DRC has updated laws, issued decrees, and set up a new subsidiary of a state-owned mining company to strengthen its monitoring and control of the artisanal copper-cobalt mining sector. China has launched several regulatory arrangements to guide Chinese mining companies toward socially responsible investment. These efforts and practices aim to address the issue of the worst forms of child labour in the global cobalt chain but also step beyond this specific issue.

Host States of Transnational Corporations: The DRC

Between 2016 and 2021, the DRC expanded the oversight of and control over its artisanal copper-cobalt mining sector. After the release of the Amnesty International Report (2016), the DRC’s Ministry of Mines and provincial governments started engaging with Amnesty International and foreign mining companies to discuss plans and measures to address labour and human rights issues in artisanal mining sites. For instance, in August 2017, the government of the DRC committed that it would implement “all of Amnesty International’s recommendations made in the 2016 report,” and it also committed to eliminating child labour in the mining sector by 2025.⁴³⁴

The DRC introduced a set of laws, policies, and measures to tackle the issues identified at artisanal mining sites.⁴³⁵ The most important measures for the cobalt mining industry are the promulgation

⁴³² *Ibid.*

⁴³³ *Ibid.*

⁴³⁴ Amnesty International, “Time to Recharge”, *supra* note 167 at 22 [footnotes omitted].

⁴³⁵ For detailed mapping reviews of developments of DRC laws, policies, and measures for the artisanal mining sector, see e.g. Development International e.V., “Worst Forms of Child Labour in the Democratic Republic of the Congo: Cobalt Refiner Due Diligence Reporting” (Research Report, July 2019) at 14–17, online (pdf): <<https://www.developmentinternational.org>>; The U.S. Department of Labor, “2020 Findings on the Worst Forms of Child Labor: The Democratic Republic of the Congo” (2021) at 3–12, online (pdf): <<https://www.dol.gov/agencies/ilab/resources/reports/child-labor/congo-democratic-republic-drc>>; Leiden Asia Centre, “Chinese Approaches to Overseas Responsible Business: Insights from the DRC Cobalt Industry”

of the updated Mining Code by law n°18/001 in 2018 and the establishment of Entreprise Générale du Cobalt SA, a new subsidiary of the DRC's state-owned mining company GECAMINES in 2019.⁴³⁶ The updated Mining Code highlights a set of key regulatory arrangements to address issues related to responsible business, such as environmental protection, health, safety, as well as labour and human rights.⁴³⁷ The Code also highlights the importance of transparency and traceability in the mining industry.⁴³⁸ Furthermore, the Code contains a specific chapter on “social responsibility” that requires mining companies to contribute to the improvement of socio-economic development and living conditions of local communities affected by mining activities.⁴³⁹ Specifically, it requires that mining companies allocate a minimum of 0.3 percent of turnover for contribution to community development projects managed by the communities themselves to address root causes such as poverty.⁴⁴⁰

Despite existing and new laws, policies, and measures, advancement seems limited. In 2020, the U.S. Department of Labor concluded that “despite new initiatives to address child labor, the Democratic Republic of the Congo is receiving an assessment of no advancement because of the national army’s complicity in the worst forms of child labor.”⁴⁴¹ Similarly, an empirical study finalized in October 2021 suggests that “several issues [such as corruption and the lack of enforcement of laws and standards by the authorities] undermine the effectiveness of legislation in the DRC,” and “the local population still complains about low levels of law enforcement today.”⁴⁴²

(October 2021) at 41, online (pdf): <<https://leidenasiacentre.nl/chinese-approaches-to-overseas-responsible-business-insights-from-the-drc-cobalt-industry/>>.

⁴³⁶ The three missions of Entreprise Générale du Cobalt SA are economic sovereignty, societal responsibility, and supply chain due diligence. For a recent academic review of the role of Entreprise Générale du Cobalt SA in the artisanal cobalt mining sector in the DRC, see Raphael Deberdt, “The Democratic Republic of the Congo (DRC)’s Response to Artisanal Cobalt Mining: The Entreprise Générale du Cobalt (EGC)” (2021) 8:4 Extractive Industries & Society (in press), DOI: <10.1016/j.exis.2021.101013> [Deberdt, “The Entreprise Générale du Cobalt (EGC)”].

⁴³⁷ Leiden Asia Centre, *supra* note 435 at 41.

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ The U.S. Department of Labor, “2019 Findings on the Worst Forms of Child Labor: The Democratic Republic of the Congo” (2020) [The U.S. Department of Labor, “2019 Findings on the Worst Forms of Child Labor”] at 1, online (pdf): <<https://www.dol.gov/agencies/ilab/resources/reports/child-labor/congo-democratic-republic-drc>>.

⁴⁴² Leiden Asia Centre, *supra* note 435 at 41.

Home States of Transnational Corporations: Legislative Measures and Regulatory Arrangements

A series of legislative measures and regulatory arrangements have emerged in the home states of TNCs to respond to the repeatedly reported labour and human rights issues in global mineral supply chains. These hard and soft measures either require companies to conduct supply chain due diligence or assist companies in doing so.

Home States are increasingly expected to adopt domestic legislation mandating companies in their territory or under their jurisdiction to exercise HRDD wherever they operate. Since 2011, pillar one of the UNGPs has suggested that states develop HRDD requirements for companies, and pillar two of the UNGPs has suggested voluntary HRDD for companies to address human rights issues during their transnational business activities.⁴⁴³ In recent years, mandatory HRDD laws have been introduced at a rapidly growing pace. In recent years, mandatory disclosure and due diligence laws regarding labour and human rights have emerged at international, regional, and national levels. These laws have emerged in the wake of the adoption of the UNGPs by the UN Human Rights Council in 2011, as well as the adoption of a Human Rights Council Resolution in 2014 to develop an international legally binding instrument on BHR. From the beginning of the BHR treaty process, there has been a notable divergence between developing countries and developed countries, especially the United States and EU member states.⁴⁴⁴ After eight years of negotiations in the open-ended intergovernmental working group mandated for developing the proposed treaty, there still seems to be a long way to go to achieve sufficient consensus from states.⁴⁴⁵ As Anne Trebilcock points out, while the proposed BHR treaty can be a promising part of a smart mix of multi-level public and private solutions, “The proposals need to be legally fine-tuned, while absorbing lessons

⁴⁴³ Human Rights Council, *Report of the Special Representative of the Secretary-General, supra* note 48, “II. The corporate responsibility to respect human rights”, Guiding Principles 11–24.

⁴⁴⁴ Si Chen, “Towards a Business and Human Rights Treaty” (Master Thesis, University of Oslo, 2015), online (pdf): <<https://www.duo.uio.no/handle/10852/46876?show=full>>.

⁴⁴⁵ The third revised draft of the proposed treaty was published in August 2021. This most recent draft served as the basis for State-led negotiations during the seventh session of the open-ended intergovernmental working group, which took place from 25 to 29 October 2021. See Human Rights Council, *Text of the Third Revised Draft Legally Binding Instrument with the Textual Proposals Submitted by States during the Seventh Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights*, UNHRCOR, 49th Sess, UN Doc A/HRC/49/65/Add.1 (2022) [Human Rights Council, *Text of the Third Revised Draft Legally Binding Instrument*].

from the post-Rana Plaza experiments and due diligence experience from a labour and business perspective.”⁴⁴⁶

In recent years, several states have promulgated binding laws to regulate companies with respect to labour or human rights due diligence concerning their transnational business activities. Recent legislative developments in countries in Europe and North America show a tendency to introduce legislative measures on mandatory HRDD at the national level.⁴⁴⁷ Between 2017 and 2021, several countries in the EU passed mandatory HRDD laws, including France, the Netherlands, Germany, and Norway. It is anticipated that this legislation trend will continue. According to a recent study, legislation related to mandatory HRDD has been in effect in more than six jurisdictions, and it has been proposed and debated recently in more than seven jurisdictions.⁴⁴⁸ Most of these countries are in European and North America. Scholars have underlined that mandatory HRDD laws have both limitations and potential to generate substantive compliance with labour and human rights in GSCs.⁴⁴⁹

The lack of grievance mechanisms and the difficulties in seeking judicial remedies for labour rights abuses in transnational business activities are reflected in two recent examples. On the one hand, in February 2020, the Supreme Court of Canada held, in a 5–4 decision, that a private corporation may be liable under Canadian law for breaches of customary international law committed in other countries.⁴⁵⁰ The *Nevsun* decision is revolutionary in that it is the first case, not only in Canada,

⁴⁴⁶ Anne Trebilcock, “The Rana Plaza Disaster Seven Years on: Transnational Experiments and Perhaps a New Treaty?” (2020) 159:4 Intl Labour Rev 545 at 564.

⁴⁴⁷ Chiara Macchi & Claire Bright, “Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislations” in Martina Buscemi *et al*, *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, eds (Leiden: Brill Nijhoff, 2020) 218.

⁴⁴⁸ Global Business Initiative, “Navigating a Changing Legal Landscape – New Briefing from GBI and Clifford Chance” (17 January 2022) at 12–27, online: <<https://gbihr.org/updates/navigating-a-changing-legal-landscape-new-briefing-from-gbi-and-clifford-chance>>.

⁴⁴⁹ See e.g. ILO, *Mapping and Measuring the Effectiveness of Labour-related Disclosure Requirements for Global Supply Chains*, Research Department Working Paper No. 32 (Geneva: ILO, 2018) at 16, online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma995008793002676>; ILO, *Mapping Interventions Addressing Child Labour and Working Conditions in Artisanal Mineral Supply Chains* (Geneva: ILO, 2020) [ILO, *Child Labour and Working Conditions in Artisanal Mineral Supply Chains*] at 22, online (pdf): <https://labordoc.ilo.org/permalink/41ILO_INST/j3q9on/alma995125991002676>. For in-depth analyses, see e.g. Justine Nolan, “Hardening Soft Law: Are the Emerging Corporate Social Disclosure Laws Capable of Generating Substantive Compliance with Human Rights” (2018) 15:2 Braz J Int’l L 65; Macchi & Bright, *supra* note 447.

⁴⁵⁰ *Nevsun Resources Ltd. v Araya*, CAN 2020 SCC 5. For analysis of the case and its implications for corporate accountability for modern slavery, see e.g. Jason Haynes, “The Confluence of National and International Law

but in the common law world, to create a cause of action in a domestic court based on customary international law to ensure an effective remedy for victims of human rights abuses by TNCs.⁴⁵¹ On the other hand, in November 2021, in the United States, the District Court for the District of Columbia dismissed the class action lawsuit against technology companies Apple, Google, Tesla, Dell and Microsoft that claimed the companies used cobalt mined by child labour in the artisanal copper-cobalt mining sector in the DRC.⁴⁵²

In parallel with legislative developments on HRDD in Europe, several regulatory arrangements have emerged in the context of Chinese outward mining investment. Since 2014, the CCCMC has taken the lead by producing and implementing a set of comprehensive guidelines and initiatives to guide and facilitate Chinese enterprises to invest and source responsibly, including conducting supply chain due diligence.⁴⁵³ Specifically, these guidelines and initiatives have had a positive impact on Chinese cobalt refiners in the context of increasing attention on labour and human rights abuses in the artisanal mining sector in the DRC.⁴⁵⁴

(2) Private Governance of Labour Rights in the Global Cobalt Supply Chain

Private governance of labour rights in GSCs has proliferated in the past decades, particularly in industries such as textile and apparel. However, for the global cobalt supply chain and relevant industries that benefit from cobalt-containing products, private governance of labour rights is still under development. Since 2016, there has been a notable development of private governance initiatives in the global cobalt supply chain, including some advanced examples of company-led initiatives and a growing number of multi-stakeholder initiatives. However, the development is uneven, and the implementation and effectiveness of these initiatives remain primarily unknown.

in Response to Multinational Corporations' Commission of Modern Slavery: Nevsun Resources Ltd. v Araya" (2020) J Human Trafficking, DOI: <10.1080/23322705.2020.1832785>; Akshaya Kamalnath, "Transnational Corporations and Modern Slavery: Nevsun and Beyond" (2021) 21:2 J Corporate L Studies 491.

⁴⁵¹ Haynes, *supra* note 450 at 2.

⁴⁵² *Doe I et al v Apple Inc. et al*, USA 2021 D.D.C. 1:19-cv-03737. For an analysis of the case, see Austin Clements, "Knowingly Benefitting: Blocking Relief for DRC Child Cobalt Miners" (2021) 25:1 Hum Rts Brief 63.

⁴⁵³ Chapter 5 of this thesis will provide an in-depth investigation into guidelines, initiatives and mechanisms that the CCCMC has developed.

⁴⁵⁴ Chapters 5, 6, and 7 of this thesis will provide further details about the guidelines and initiatives and their impacts on Chinese enterprises.

(a) Company-led private governance initiatives

Upon the refocused international attention to the worst forms of child labour in the global cobalt supply chain in 2016, downstream companies of the chain have started paying attention to their suppliers to reduce the risks to their reputations and profits. Downstream companies have started taking action to show that they have made efforts to eliminate the use of child labour in their transnational business activities. Some companies may revise their CSR policies to cover cobalt instead of the previously limited scope of 3TG minerals. Some may provide explicit commitments to eliminating child labour instead of their previous broad statements of respecting human rights. Some may participate in responsible cobalt sourcing initiatives to showcase their practice and determination of responsible sourcing. As shown by recent studies, some downstream companies focus on their first-tier suppliers, and they prefer to exclude ASM from their supply chain or source from other countries to reduce risks.⁴⁵⁵

Academic publications on corporate HRDD policies and practices in the global cobalt supply chain have been relatively scarce compared to the increasing research and data on 3TG minerals. While emerging company examples indicate that there may be some corporate policy updates and behaviour changes regarding responsible cobalt sourcing, it is still unknown to what extent the companies have developed COCs and implemented the policies through corporate practices and to what extent the corporate practices have contributed to positive outcomes for workers in the artisanal mining sector in the DRC.

Recent research reports suggest that corporate HRDD policies and practices of large cobalt refiners are generally *far from satisfying*. Based on publicly available data collected between April-June 2019, an evaluation report concludes that overall corporate practices on supply chain due diligence reporting are far from satisfying.⁴⁵⁶ The report has evaluated 52 large cobalt refiners that are located in a variety of countries, for instance, Australia, Brazil, Canada, China, the DRC, and Zambia. Only six companies have explicitly referenced prohibitions on child labour.⁴⁵⁷ Four of these six companies are Chinese enterprises.

⁴⁵⁵ Lucia Mancini *et al*, “Assessing Impacts of Responsible Sourcing Initiatives for Cobalt: Insights from a Case Study” (2021) 71 Resources Policy (open access), DOI: <10.1016/j.resourpol.2021.102015> at 12.

⁴⁵⁶ Development International e.V., *supra* note 435.

⁴⁵⁷ *Ibid* at 31.

Recent research reports on corporate HRDD policies and practices of large companies in the extractive, automotive, and ICT industries suggest that the practices are similarly far from satisfying. For the automotive industry, an assessment report shows that only a few companies of the 21 investigated companies have started conducting a full cobalt supply chain mapping and disclosing suppliers and cobalt countries of origin.⁴⁵⁸ The report finds that “evidence is absent across the automotive industry that corporations are effectively embedding commitments to ensure respect for human rights.”⁴⁵⁹ The report highlights that the corporate policies are prevalent with vague language that fails to bind a company and its suppliers to any specific actions or requirements.⁴⁶⁰ Furthermore, the report concludes that “it is unclear whether any company in the sector has effective systems in place to meet their human rights responsibilities.”⁴⁶¹

More recently, the Corporate Human Rights Benchmark has assessed the largest companies in the extractive, automotive, and ICT industries against core indicators constructed based on the UNGPs.⁴⁶² For instance, regarding 57 extractive companies investigated, the study finds that 88 percent of these companies had a basic commitment to respecting human rights, with 40 percent referencing specific standards such as the UNGPs or the OECD Guidelines for Multinational Enterprises.⁴⁶³ Regarding respecting workers’ rights, 42 percent of companies had commitments

⁴⁵⁸ The report thoroughly assessed each of the 21 investigated companies’ publicly available disclosures. The report translated the qualitative findings into a numerical assessment that ranged from 1 (strongest) to 3 (weakest) for each point. Amongst the 21 investigated companies, Ford Motor (scored 1.9 points), Volkswagen (scored 1.9 points), and BMW (scored 1.9 points) are evaluated as having the strongest performance, whereas Honda (scored 2.8 points) and Denso (scored 2.9 points) are deemed as having the weakest performance. See Investor Advocates for Social Justice, “An Assessment of Human Rights Risks & Due Diligence in the Automotive Industry” (June 2020) at 12, online (pdf): <<https://iasj.org/iasj-launches-shifting-gears-report-assessing-human-rights-risks-and-due-diligence-in-the-automotive-industry/>>.

⁴⁵⁹ *Ibid* at 3.

⁴⁶⁰ *Ibid*.

⁴⁶¹ *Ibid*.

⁴⁶² The Corporate Human Rights Benchmark assessed 57 of the largest extractive companies, 30 of the largest automotive companies, and 44 of the largest ICT companies. The assessment is based on core indicators constructed based on the UNGPs, including the companies’ governance and policy commitments, HRDD, remedies, and grievance mechanisms. While the assessment does not pay close attention to cobalt sourcing, the findings provide a preliminary overview of corporate HRDD policies and practices in these relevant industries. See Corporate Human Rights Benchmark, “Across Sectors: Agricultural Products, Apparel, Automotive Manufacturing, Extractives & ICT Manufacturing” (2021), online (pdf): <<https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf>>.

⁴⁶³ *Ibid* at 27.

to the ILO core labour standards and expected their suppliers to explicitly commit to respecting each of those core labour rights.⁴⁶⁴

(b) Multi-stakeholder initiatives

Since 2016, there has been an outpouring of new actions, measures, and initiatives that focus on decent work in the global cobalt supply chain, particularly the issue of child labour. In addition to new initiatives, several existing initiatives that did not cover cobalt as a focused mineral have recently expanded their focus areas for responsible cobalt sourcing. The initiatives vary widely, with different legal authority, priorities regarding the scope and type of rights covered, and approaches, as well as partnerships and memberships. Many companies directly or indirectly connected to the global cobalt supply chain have joined these initiatives.

Between 2016 and 2021, more than ten multi-stakeholder initiatives of varying significance emerged. These voluntary initiatives focus on responsible cobalt producing, investing, and sourcing. Key multi-stakeholder initiatives are listed below.

Table 6 Multi-stakeholder Initiatives Focusing on Responsible Cobalt Sourcing

Year	Initiative, Framework, Policy	Led by
2016	Responsible Cobalt Initiative	CCCMC
2016	Responsible Raw Materials Initiative	Electronic Industry Citizenship Coalition and Conflict-Free Sourcing Initiative
2018	Responsible Minerals Assurance Program	Responsible Minerals Initiative
2018	Better Mining programme	RCS Global Group
2019	Cobalt for Development Initiative	Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Bon Pasteur, and Artisanact
2019	Policy on Responsible Sourcing of LME-Listed Brands	London Metal Exchange
2019	Cobalt Industry Responsible Assessment Framework	Cobalt Institute
2020	Cobalt Action Partnership	Global Battery Alliance
2020	Fair Cobalt Alliance	Founded by companies, including Glencore, Huayou Cobalt, Signify and Fairphone; managed by The Impact Facility
2020	Artisanal and Small-Scale Mining Cobalt ESG Management Framework	Responsible Cobalt Initiative and Global Battery Alliance's Cobalt Action Partnership

Year: The year when the initiative was launched (new initiatives) or the year when the initiative started covering cobalt as a focus (existing initiatives).

Source: Data collected and compiled by the author⁴⁶⁵

⁴⁶⁴ *Ibid.*

⁴⁶⁵ This table is nonexclusive but inclusive and explanatory, aiming to provide an overview of key multi-stakeholder initiatives that focus on responsible cobalt sourcing. The table draws insights from 25 research

3.4 Critical Commentary on the Emerging Multipolarity in the Global Cobalt Supply Chain: Implications for Achieving Decent Work in a Globalized Economy

The mapping review provided in the previous section has highlighted the different roles of various state and non-state actors in developing and shaping labour governance in the global cobalt supply chain. This section provides critical commentary on the evolving agenda of the multi-level governance framework regarding its implications for decent work in a globalized economy. Subsection one summarizes the features of the emerging multi-level governance framework. Subsection two discusses its limitations in addressing governance deficits on decent work in the global cobalt supply chain. Finally, subsection three explores the counter-hegemonic potential of the emerging multipolarity of labour governance in the global cobalt supply chain.

3.4.1 An Evolving Agenda of the Multi-level Governance Framework in the Global Cobalt Supply Chain

The mapping review of various governance initiatives identifies two features of the multi-level governance framework in the global cobalt supply chain. The framework has been complex, pluralistic, decentred, and fluid. Various governance initiatives have been developed and shaped by a wide range of state and non-state actors with vastly different power, interests, and mandates. The actors seem hardly coordinated, considering their different interests, mandates, and priorities. Actors retain considerable latitude in determining their approaches to such governance. Accordingly, the norms and initiatives have been highly fragmented, diverse and evolving. The labour norms produced and diffused are pluralistic, including public, private, and hybrid norms. The norm production and diffusion processes are dynamic, potentially across different levels and sites of law.

Furthermore, the effectiveness of the governance initiatives for responsible cobalt sourcing is still under investigation and discussion. Preliminary assessments of the impacts of these initiatives have suggested mixed results, including positive improvements in corporate behaviours and negative consequences for labour rights in the ASM sector in the DRC. A preliminary assessment of the impacts of these initiatives finds that few systems for responsible sourcing of cobalt are actively

reports listed in Annex A of this thesis and a keyword internet search for relevant initiatives. The data presented in this table was compiled from the official website of each initiative.

implemented on the ground and that only two of them incorporate the ASM sector.⁴⁶⁶ A recent study of responsible sourcing initiatives that focuses on conflict minerals and covers cobalt suggests that “Too often, especially when analyzing the impacts of regulations such as the Dodd-Frank Act [enacted by the United States in 2010], unintended consequences have severely impaired the legitimacy and well-intentionality of the laws.”⁴⁶⁷ While having identified some negative consequences of the initiatives, the study suggests that “it would be wrong to only perceive these voluntary or mandatory measures as negative. While the slow change seems to occur at certain levels of the supply chains and in specific commodities.”⁴⁶⁸ Notably, the study points out that the cobalt sector, which has drawn much attention from various state and non-state actors, has spurred “very real efforts,” for instance, “the creation of responsible sourcing pilot projects, blockchain traceability, and importantly the realization that downstream brand companies need to be involved all the way back up to the mines supplying their materials.”⁴⁶⁹

3.4.2 Limitations of the Current Multi-level Governance Framework in the Global Cobalt Supply Chain

As indicated above, the proliferation of multiple governance initiatives does not necessarily lead to decent work in the global cobalt supply chain. Three notable limitations must be addressed carefully for the multi-level governance framework to benefit workers in the global cobalt supply chain. First, the diversified governance initiatives emerging from different levels and sites of law have contributed to the fragmentation of standards, mechanisms, and initiatives for decent work in the global cobalt supply chain. Second, the emerging proliferation of private governance initiatives raises concerns about the legitimacy and effectiveness of private initiatives in improving labour protections in the global cobalt supply chain. Third, while an HRDD approach to RBC might contribute to the coherence and coordination of standards, mechanisms, and initiatives for decent work in the global cobalt supply, labour rights are not yet at the centre of developing HRDD. These three limitations are not exclusively identified in the global cobalt supply chain but are common

⁴⁶⁶ Mancini et al, *supra* note 455.

⁴⁶⁷ Raphael Deberdt & Philippe Le Billon, “Conflict Minerals and Battery Materials Supply Chains: A Mapping Review of Responsible Sourcing Initiatives” (2021) 8:4 Extractive Industries & Society (in press), DOI: <10.1016/j.exis.2021.100935> [Deberdt & Le Billon, “A Mapping Review of Responsible Sourcing Initiatives”] at 11.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

issues in achieving decent work in GSCs. This subsection illustrates these limitations, their potential impacts on workers, and alternative solutions emerging from the multipolarity of the global cobalt supply chain.

(1) The Lack of a Coherent Approach to Responsible Business Conduct

Over the past decade, HRDD has emerged as a key concept in facilitating a common understanding of RBC. In the coming decade, HRDD might be an alternative direction for developing a coherent approach to RBC since it is a key concept from the UNGPs that have achieved considerable uptake over the past decade.⁴⁷⁰ Key international and regional organizations have recently started working on a coherent approach to RBC in a globalized economy.⁴⁷¹ These organizations agreed that “Businesses should undertake due diligence to identify, prevent and mitigate their actual and potential negative impacts and account for how those impacts are addressed.”⁴⁷² Concerning labour rights, these organizations agreed that “consultation with workers’ organisations is particularly important.”⁴⁷³ Nonetheless, while HRDD has emerged as a potentially coherent approach to operationalizing the corporate responsibility to respect labour rights in GSCs, the concept and practice of HRDD are under development. A coherent approach to decent work in GSCs is yet to be developed due to the considerable latitude amongst actors and the deep-rooted global North-South inequalities in GSCs. Actors, especially the states, retain considerable latitude in determining regulatory approaches and corporate practices on HRDD. Few governance initiatives and practical mechanisms have addressed the notable power asymmetries and deep-rooted social inequalities in GSCs.

Since 2016, various state and non-state actors have contributed to addressing the governance deficits on decent work in the global cobalt supply chain. However, there is little consensus on an agreed-to approach, standard, or initiative on decent work in the global cobalt supply chain and, more broadly, other supply chains. Due to the divergence between the global North and the global South in their initiatives and approaches to decent work in GSCs, there are minimal coordinated

⁴⁷⁰ Human Rights Council, *Guiding Principles on Business and Human Rights at 10: Taking Stock of the First Decade*, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UNHRCOR, 47th Sess, UN Doc A/HRC/47/39 (2021) [Human Rights Council, *Guiding Principles on Business and Human Rights at 10*].

⁴⁷¹ ILO, OHCHR, OECD & EU, *supra* note 431 at 4.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

efforts to address transnational challenges in the global cobalt supply chain. Consequently, the many emerging governance initiatives have mostly been operating in an uncoordinated and non-collaborative way. Transnational challenges of ensuring decent work remain. It is crucial for actors to develop a coherent approach to decent work in GSCs so that various initiatives and standards are coordinated and coherent. Furthermore, as a recent study on assessing the impacts of responsible sourcing initiatives for cobalt points out, “agreeing on a common system of assessment, using applicable and shared metrics to determine compliance and progress will be *crucial* in ensuring *credibility* and in making *real progress*.”⁴⁷⁴

(a) The Considerable Latitude in Determining Regulatory Approaches and Corporate Practices on Human Rights Due Diligence

The OHCHR has promoted the UNGPs since 2011. The OECD, ILO, and EU have recently all incorporated the UNGPs and the key concept of HRDD into their policy agendas for promoting RBC. However, actors, especially States, retain considerable latitude in determining their transnational labour regulatory regimes. Over the past decade, the regulatory variation across States shows the diversity and variety of legislative and regulatory approaches. These various national initiatives differ in purpose, scope, and legal status. Many are soft in nature, encouraging or incentivizing rather than mandating business enterprises to engage in concepts relevant to social responsibilities and impacts, including CSR, HRDD, BHR, RBC, “sustainable development,” and “environmental, social, and governance,” amongst others.⁴⁷⁵ In recent years, HRDD requirements have been “hardening” into legal obligations in some jurisdictions in the EU. It is widely anticipated that this legalization trend will continue inside and outside the EU.⁴⁷⁶ However, legislative processes are slow, and the legislative measures have different mandates, scope, focus,

⁴⁷⁴ Mancini et al, *supra* note 455 at 13 [emphasis added].

⁴⁷⁵ For instance, by the end of 2021, 26 countries have issued national action plans on BHR that articulate expectations that business enterprises within the State’s territory or jurisdiction exercise HRDD. More than two-thirds of these countries are European countries. Pakistan launched the most recent one in October 2021. See OHCHR, “National Action Plans on Business and Human Rights” (2022), online: <<https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>> [perma.cc/CJV3-VDNP].

⁴⁷⁶ The “hardening” of soft HRDD is in process across various levels, including the international, regional, and national levels. See e.g. Macchi & Bright, *supra* note 447; Claire Bright et al, “Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?” (2020) 22:4 Business & Politics 667; Lise Smit et al, “Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard (2021) 25:6 Intl JHR 945; Szabados Tamás, “Multilevel Hardening in Progress – Transition from Soft Towards Hard Regulation of CSR in the EU” (2021) 28:1 MJECL 83.

effective dates, and questionable effectiveness in achieving decent work in GSCs. For instance, only a handful of states have promulgated legislation concerning HRDD requirements. The *Transparency Act* promulgated by Norway in 2021 is currently the only one that emphasizes decent work in GSCs.⁴⁷⁷ Therefore, business enterprises from different countries retain considerable latitude in determining whether they follow the UNGPs or other relevant international instruments and apply an HRDD approach in supply chain management. Even if deciding to develop an HRDD system, the business enterprise can be selective in choosing applicable instruments, standards, and mechanisms.

(b) The Inaction on the Persistent Asymmetries in Global Supply Chains

Transnational mining activities in developing countries power global mineral supply chains while putting workers and local communities in the global South at risk of labour and human rights abuses and unhealthy living environments. Large downstream companies in supply chains earn a lot of money by selling end-use products that may benefit from child labour and other forms of abuse. Downstream companies earn lots of benefits from the supply chain but contribute little financial support for responsible supply chain management frameworks. It is also technically difficult for these companies to trace all the way down to the artisanal mines in current supply chain management frameworks.

While the three key sets of international instruments, developed by the OHCHR, OECD and ILO, respectively, play an important role in providing applicable international standards and mechanisms, they fail to address the notable power asymmetries and deep-rooted social inequalities in GSCs. Amongst these three sets of instruments, OECD guidelines have provided comprehensive and detailed guidance for mining companies for responsibly sourcing 3TG minerals from conflict-affected and high-risk areas.

While the OECD guidelines and practical tools help provide steps and frameworks for companies, these guidelines were developed and implemented through a top-down approach, mainly reflecting the interests of OECD member states and their companies. However, the OECD framework has not appropriately addressed the uneven distribution of economic benefits between upstream and

⁴⁷⁷ Norway, “Act Relating to Enterprises’ Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act)” (2021), online: <<https://lovdata.no/dokument/NLE/lov/2021-06-18-99>> [unofficial translation of the Norwegian version of the Act provided by the Ministry of Children and Families of Norway].

downstream global mineral supply chains. Mineral resources flow from selected developing countries to developed countries. Moreover, while having set requirements for enterprises to respect human rights, the current OECD framework has not stepped further to establish any applicable standards or set any requirements regarding the assignment of corporate profits for enhancing CSR, human rights, or labour rights.

In this respect, the OECD framework has had minimal impact on addressing the imbalance between downstream and upstream companies regarding their share of profits. This might result partly from the fact that the guidance is developed and shaped through a top-down approach by state and non-state actors largely from the global North. For instance, a recent assessment of responsible sourcing initiatives for cobalt suggests that downstream companies and other actors may determine certain categories of risks according to their perception of legal and social risks.⁴⁷⁸ For instance, these actors may focus on a few serious types of abuse, such as life-threatening working conditions, child labour, and corruption. However, they may not necessarily address the demands of workers and local communities, nor the existing asymmetries in GSCs. As the assessment highlights, income, price calculation, and gender considerations are “particularly salient aspects” for workers and other local stakeholders, yet these aspects are not usually captured in responsible sourcing frameworks developed primarily by downstream actors.⁴⁷⁹

Without clarifying the financial contributions companies should undertake, the financial burden for upstream companies can exacerbate the imbalance between downstream and upstream companies and worsen the negative social impacts on the bottom of GSCs. While the imbalanced distribution of due diligence costs and benefits along GSCs has been a key concern of downstream actors, the OECD has only recently started paying attention to this important topic. In 2021, after several years’ call from stakeholders, the OECD published a position paper that acknowledges the imbalanced distribution and the need to address questions surrounding the imbalanced distribution of due diligence costs and benefits in global mineral supply chains.⁴⁸⁰

⁴⁷⁸ Mancini et al, *supra* note 455.

⁴⁷⁹ *Ibid* at 11.

⁴⁸⁰ OECD, *Costs and Value of Due Diligence in Mineral Supply Chains*, Position Paper (Paris: OECD, 2021) at 4, online (pdf): <<https://mneguidelines.oecd.org/costs-and-value-of-due-diligence-in-mineral-supply-chains.pdf>>.

According to an assessment of costs for implementing the OECD Due Diligence Guidance for responsible mineral supply chains at the corporate level, as an average estimation, European companies need to spend approximately 270,000 EUR (approximately 298,368 USD) as an initial investment in the first year, and then approximately 535,000 EUR (approximately 591,212 USD) as subsequent annual investments for full implementation.⁴⁸¹ Small and medium-sized companies may need to spend significantly less than larger firms; however, it is important to note that the estimated fewer costs need to be understood in contexts since the size of upstream companies (primarily located in the global South) may be much smaller than those European companies investigated in the study. For instance, the size of a “large” upstream company might only be equal to a “small” or “medium” sized downstream company.⁴⁸²

As illustrated above, the inaction of the OECD on the financial burden and cost distribution in supply chains may exacerbate the existing imbalance between upstream companies and downstream companies. In contrast, a quantitative requirement, such as a percentage requirement on corporate profits for the purposes of CSR, may be a direct and effective approach to enable a unified attitude and level-playing field, requiring all relevant companies in supply chains to contribute toward social development activities.⁴⁸³ The quantitative requirement can potentially enhance professional awareness and understanding of the nature and scope of CSR amongst various actors.⁴⁸⁴ In contrast to the silence of the OECD in providing recommendations or setting requirements for a clear and specific financial contribution requirement, a few national legislative measures in countries in the global South have innovatively introduced mandatory financial contributions based on a certain percentage requirement of net profit. Examples include Mauritius and India.⁴⁸⁵ For instance, legislation in Mauritius requires that Mauritian companies shall dedicate

⁴⁸¹ Constantin Blome, Hannes Hofmann & Martin Schleper, “Stopping Conflict Minerals with the OECD Guidance for Responsible Mineral Supply Chains: Status Quo in Europe” (Project Report, University of Sussex, 2016) at 14, online (pdf): <<http://sro.sussex.ac.uk/id/eprint/65452/>>.

⁴⁸² *Ibid.* For instance, the study classified companies with up to 100 million Euros (approximately 110 million USD) annual revenues as small and medium-sized companies.

⁴⁸³ For an in-depth analysis of the potential and challenges of quantitative requirements set through national legislation, see Jingchen Zhao, “Promoting More Socially Responsible Corporations through a Corporate Law Regulatory Framework” (2017) 37:1 Legal Stud 103 at 127–130.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid* at 127–128.

a CSR fund equivalent to two percent of its chargeable income of the preceding year to implement CSR initiatives.⁴⁸⁶

(c) The Divergence between the Global North and the Global South

Like the widely-known power imbalances and inequalities in GSCs, higher value-added products are produced and sold by large TNCs downstream in global mineral supply chains. These large TNCs are usually lead firms in the electronics, automotive, and ICT industries, primarily headquartered in countries in the global North, such as Germany, Japan, South Korea, the United Kingdom, and the United States. In recent years, a few such large TNCs have risen from emerging market economies, such as China and India.

In the global cobalt supply chain, most instruments, mechanisms, and initiatives were developed and led by actors from the global North, with a few exceptions by actors from the global South. Over the past two decades, labour governance in global mineral supply chains has been driven by a top-down and unidirectional approach led by actors from the global North, such as the OECD, the United States and recently the EU. These powerful actors have focused on reducing the risks around sourcing and using “conflict minerals” rather than the risks related to labour and human rights abuses on the mining sites. While legislative measures and regulatory arrangements concerning conflict minerals have their merits, keeping mineral supply chains “clean” and “free from conflict minerals” does not necessarily lead to protections and benefits for workers and local communities. Excluding sourcing risks and the use of “conflict minerals” by cutting off supply chains with risk areas may take away employment opportunities in local communities and exacerbate the poverty of artisanal miners.⁴⁸⁷

Notably, the OECD Due Diligence Guidance for responsible mineral supply chains seems to have achieved increasing recognition and cross-references by responsible mineral sourcing initiatives and companies that are connected to the mining, electronics, and automotive industries. For instance, more than 11 voluntary initiatives on responsible mineral sourcing have partly aligned

⁴⁸⁶ *Ibid* at 128 [footnotes omitted].

⁴⁸⁷ For instance, studies of the de facto mining embargo in Eastern DRC following the passage of the *Dodd-Frank Act* have found significant unintended consequences. See e.g. Laura E. Seay, “What’s Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy” (Working Paper 284, 5 January 2012), online (pdf): *Center for Global Development* <<https://www.cgdev.org/publication/what%E2%80%99s-wrong-dodd-frank-1502-conflict-minerals-civilian-livelihoods-and-unintended>>.

with the OECD Due Diligence Guidance for responsible mineral supply chains.⁴⁸⁸ Some companies from the global North have started following the OECD Due Diligence Guidance for responsible mineral supply chains. While various initiatives have contributed to addressing governance deficits on decent work in the global cobalt supply chain, most initiatives were developed and led by actors from the global North. Notably, individual companies and industry associations in mining, electronics, automotive, and ICT industries have started proactively developing governance initiatives in the global cobalt supply chain, partly aligning with the OECD Due Diligence Guidance for responsible mineral supply chains. While the instruments and initiatives are designed to address governance deficits and enhance labour protections in GSCs, workers, and other actors from the global South, such as workers' organizations and local communities, are largely marginalized in the ongoing transnational lawmaking processes. For instance, they have been excluded from key arenas such as the processes of developing risk-based due diligence mechanisms at the OECD and processes of developing HRDD policies at large TNCs in global mineral supply chains. Fundamental power imbalances between companies and workers leave workers' voices and rights suppressed.

A potential negative result of the dominant role of actors from the global North will be the determination of workers' rights in developing countries by actors from the global North. The actors may include the OECD, the EU, their member States, national courts, lead firms in GSCs, and for-profit service providers such as supply chain management consultancies, law firms, audit firms, and even stock exchanges.⁴⁸⁹ Furthermore, the persistence of the dominant role of actors from the global North will continuously consolidate the existing economic power imbalance and social inequalities in the global cobalt supply chain.

The divergence between the global North and the global South is further reflected by the disconnect between actors, norms, and initiatives from each part of the globe. Industry associations

⁴⁸⁸ "Table 13: Voluntary due diligence schemes (partly) aligned with the OECD Due Diligence Guidance [for responsible mineral supply chains]" in RE-SOURCING, "State of Play and Roadmap Concepts: Electronics Sector (RE-SOURCING Deliverable 4.3)" (December 2021) [RE-SOURCING, "State of Play and Roadmap Concepts"] at 42–43, online (pdf): <https://re-sourcing.eu/static/c64d598e68b5715b02925eab5c26622d/final_sop_eees.pdf>.

⁴⁸⁹ See e.g. Jean-Marc Thouvenin, "Diffusion and Leveraging of Transnational Labour Norms by the OECD" in Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8, 385; Luc Fransen & Genevieve LeBaron, "Big Audit firms as Regulatory Intermediaries in Transnational Labor Governance" (2019) 13:2 Regulation & Governance 260; Nick Bernards, "Child Labour, Cobalt and the London Metal Exchange: Fetish, Fixing and the Limits of Financialization" (2021) 50:4 Economy & Society 542.

in the global North, or the so-called “global” industry associations, may mostly form by companies and agencies from the global North. Most of their members are downstream companies that may earn significant profit through manufacturing and selling higher value-added products. In contrast, industry associations in the global South may form by companies and agencies from the global South. Most of their members are upstream companies that may earn much less profit through lower value-added products such as raw materials, processed mineral products, components of batteries and other parts of end-use products. Companies from the global South have tended to participate in responsible initiatives developed and led by actors from the global North. Many voluntary responsible sourcing initiatives claim that they are “multi-stakeholder initiatives” and strive to promote the “coherent application of practices for responsible sourcing.”⁴⁹⁰ However, most of them have been led by a majority of members from the global North.

Amongst measures taken by the home states of TNCs, only the GSRM were developed by actors from the global South. Amongst the above-listed 10 voluntary multi-stakeholder initiatives recently developed in the global cobalt supply chain, only the RCI was developed and led by actors from the global South.

(2) The Questionable Effectiveness of Transnational Private Labour Governance Initiatives

Despite growing evidence of the ineffectiveness of private labour governance initiatives in GSCs, there has been explosive growth in the adoption of private governance policies in multiple industries and an emerging trend in the adoption of private governance policies in multiple tiers of supply chains, including lead firms, large first-tier suppliers, as well as deep suppliers such as refiners. These new developments of private initiatives challenge existing governance structures in GSCs.

(a) The Proliferation of Private Governance Initiatives in Global Supply Chains

Private governance initiatives first proliferated in the apparel industry and then expanded to many other industries, such as the mining, automotive, electronics, and ICT industries. Private

⁴⁹⁰ See e.g. RE-SOURCING, <<https://re-sourcing.eu/>>; Cobalt Institute, <<https://www.cobaltinstitute.org/responsible-sourcing/industry-responsible-assessment-framework-ciraf/>>. RE-SOURCING is an EU-funded Multi-Stakeholder Platform that aims to advance Responsible Sourcing of raw materials along and across global mineral value chains. The organization submits that “it strives to promote both strategic agenda setting and coherent application of practices for Responsible Sourcing.” Cobalt Institute claims that the Cobalt Industry Responsible Assessment Framework provides “a unified yet flexible approach towards responsible and sustainable cobalt production and sourcing.”

governance initiatives may share several commonalities. These initiatives are “typically transnational, market-based (i.e., they rely on market sanctions driven by private sector actors), voluntary, and independent of government oversight or regulation.”⁴⁹¹

Over the past three decades, the proliferation of private governance initiatives in GSCs has generated heated debates on the legitimacy, sufficiency and effectiveness of such initiatives in improving compliance with labour standards.⁴⁹² Most in-depth investigations of private governance initiatives in GSCs were grounded in case examples of TNCs from the global North as major powerful non-state actors investing in developing countries. For instance, existing literature has focused on large TNCs such as Nike Inc.,⁴⁹³ Gap Inc.,⁴⁹⁴ and Apple Inc.,⁴⁹⁵ which are headquartered in the United States, as well as Unilever PLC,⁴⁹⁶ which is headquartered in the United Kingdom. As noted by scholars, “In practice, private governance is mostly present in the context of purchasers in developed economies sourcing from less developed economies.”⁴⁹⁷ However, it is important to point out that private governance initiatives are neither present in all supply chains nor all TNCs. Furthermore, it is notable that the development of private labour governance initiatives is uneven amongst different supply chains and different companies. In different segments of supply chains, the role of global buyers and producers in labour governance is also differentiated. Consequently, the impacts of private governance initiatives on improving labour rights are uneven.

⁴⁹¹ Jessica L. Decker Sparks, “Worker-Less Social Responsibility: How the Proliferation of Voluntary Labour Governance Tools in Seafood Marginalise the Workers They Claim to Protect” (2022) 139 *Marine Policy* (open access), DOI: <10.1016/j.marpol.2022.105044> at 1.

⁴⁹² See e.g. Locke, *supra* note 189.

⁴⁹³ See e.g. Richard M. Locke, “Does Private Compliance Improve Labor Standards? Lessons from Nike” in Locke, *supra* note 189, 46.

⁴⁹⁴ See e.g. Backer, “Multinational Corporations as Objects and Sources of Transnational Regulation”, *supra* note 43; Matthew Amengual & Greg Distelhorst, “Can Sourcing Help Enforce Global Labor Standards? Evidence from the Gap Inc Supply Chain” (4 October 2019), online (pdf): <<https://ora.ox.ac.uk/objects/uuid:e429f09b-0d15-4d63-a7f9-161b94fcfc4e>>.

⁴⁹⁵ See e.g. Larry Catá Backer, “Transnational Corporations’ Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.” (2013) 20:2 *Ind J Global Leg Stud* 805.

⁴⁹⁶ See e.g. Madhura Rao & Nadia Bernaz, “Corporate Responsibility for Human Rights in Assam Tea Plantations: A Business and Human Rights Approach” (2020) 12 *Sustainability* (open access), DOI: <10.3390/su12187409>.

⁴⁹⁷ Sarosh Kuruvilla, Ning Li & J. Lowell Jackson, “Private Regulation of Labour Standards in GSCs: Current Status and Future Directions” in ILO, *Decent Work in a Globalized Economy*, *supra* note 28, 185 at 18.

(b) The Development of Private Labour Governance Initiatives in the Global Cobalt Supply Chain

Regarding global mineral supply chains, most existing in-depth studies on private governance initiatives have focused on large downstream TNCs from the global North.⁴⁹⁸ These companies earn significant profits through selling end-use products to consumers but pay minimal attention to working conditions and other workers' rights in their supply chains. Large TNCs in the global cobalt supply chain are usually lead firms in the industries of electronics, automotive, and ICT industries, which are typically headquartered in developed countries, such as Germany, Japan, South Korea, the United Kingdom, and the United States, as well as a few emerging market economies, such as China and India.⁴⁹⁹

Existing literature has focused on conflict minerals. Only a handful of academic publications have been devoted to empirical investigations of corporate policies and practices and their impacts on the ground. For instance, Steven B. Young et al examined how downstream manufacturers engage with smelters and refiners ("deep suppliers" for the electronics industry) of 3TG minerals. The empirically-based study found that 87 out of 323 smelters and refiners are located in China.⁵⁰⁰ As of late 2017, amongst these 323 facilities, 87% of facilities participated in due diligence programmes, and 78% of them were conformant to due diligence standards.⁵⁰¹

As to the global cobalt supply chain, while only a few states have developed governance initiatives on decent work, many non-state actors have proactively engaged in the development of various private governance initiatives in the global cobalt supply chain. Private governance seems to become the dominant form of labour governance in the global cobalt supply chain. Instruments developed at the international, regional, and national levels are only relevant to labour governance in the global cobalt supply chain in a general way. Specific initiatives that address labour issues in the chain are mostly private initiatives such as those led by individual companies, industry associations, and multi-stakeholders. Due to the refocused attention on the global cobalt supply chain since early 2016, both upstream and downstream companies in the chain have started developing private initiatives to respond to public concerns about the use of child labour and other

⁴⁹⁸ See e.g. Hofmann, Schleper & Blome, *supra* note 373; Young, Fernandes & Wood, *supra* note 38.

⁴⁹⁹ Amnesty International, "This is What We Die for", *supra* note 40.

⁵⁰⁰ Young, Fernandes & Wood, *supra* note 38 at 7.

⁵⁰¹ *Ibid.*

potential abuses in the ASM sector in the DRC. It is worth noting that there are two emerging trends in the development of private labour governance initiatives in the global cobalt supply chain. First, due to the influence of public governance initiatives for “conflict minerals” and recently for cobalt, an HRDD approach is increasingly adopted by individual companies when they develop their private initiatives. Second, private governance initiatives have also emerged upstream of the chain along with the rise of large cobalt smelters and refiners upstream of the chain.

Similar to the critiques and concerns about companies’ symbolic adoption of CSR policies as an image-building or risk-minimization strategy, scholars focusing on the recent development of HRDD policies and mechanisms have raised concerns about companies’ potential “cosmetic compliance” with HRDD requirements in GSCs.⁵⁰² As argued by Landau, “institutionalisation, even legalisation, of the concept [HRDD] may not necessarily bring about widespread, significant improvements in corporate behaviour.”⁵⁰³ Companies may adopt policies and develop an HRDD process that meets HRDD requirements simply in format, but these policy updates may not necessarily lead to substantial improvements in practice.

Since the development of private governance initiatives in the global cobalt supply chain is recent and ongoing, there is little scholarship on the analysis of these emerging private governance initiatives nor research about the effectiveness of such initiatives for labour standards. Seven years after the Amnesty International Report (2016), the details of private governance initiatives led by individual companies and the effectiveness of such initiatives in the global cobalt supply chain remain largely unknown.

Over the past decade, partly due to the development of transnational public governance initiatives for conflict minerals, private governance initiatives in global mineral supply chains have increasingly engaged with HRDD mechanisms as recommended or required through various instruments and responsible sourcing initiatives. In its 2016 report, Amnesty International evaluated the HRDD practices of companies downstream of the global cobalt supply chain. The evaluation indicated that most electronics, automotive, and ICT companies have not yet developed substantive policies and supply chain due diligence mechanisms for their transnational activities

⁵⁰² See e.g. Ingrid Landau, “Human Rights Due Diligence and the Risk of Cosmetic Compliance” (2019) 20:1 *Melb J Int’l L* 221; Gabriela Quijano & Carlos Lopez, “Rise of Mandatory Human Rights Due Diligence” (2021) 6:2 *Business & Human Rights J* 241.

⁵⁰³ Landau, *supra* note 502 at 221.

relevant to cobalt. While there are emerging examples of updated HRDD policies and the change in corporate behaviour, it is still unknown how and to what extent companies have made concrete efforts to update their policies and change their behaviours, and whether and to what extent these updates and changes are effective for improving labour practices and outcomes for workers on the ground.

Influenced by the refocused international attention on child labour in the global cobalt supply chain, the evaluation of company policies has started paying more attention to key issues relevant to the labour dimension of HRDD practices in GSCs. For instance, the assessment report by Investor Advocates for Social Justice closely examines risks of child labour, forced labour, workplace health and safety, working hours and wages, and freedom of associations and collectives bargaining, as well as discrimination and harassment in the automotive sector.⁵⁰⁴ It is also notable that the findings suggest that the companies investigated have been unable to answer implementation-related questions with clarity and certainty. For instance, the companies could not properly address questions such as “How do you know your business is not contributing to forced labor or child labor?”⁵⁰⁵

(3) The Absence of a Worker-centred Approach to Human Rights Due Diligence

Far from challenging the existing power imbalances, the rise of HRDD has enabled powerful actors from the global North to consolidate their influential role in leading the standard-setting processes and determining the GSC governance structure. For instance, over the past decade, both the OECD and the EU have strongly supported the implementation of the UNGPs and the development of HRDD. Member states of these two organizations and TNCs from these states have led the lawmaking processes at each level, including international, regional, national, and corporate levels.

While the concept of HRDD has emerged as a potentially coherent approach to operationalizing the corporate responsibility to respect labour rights in GSCs, the labour dimension of HRDD has not been appropriately conceptualized and constructed. Moreover, ongoing legislative and regulatory initiatives, corporate practices, and academic discussions seem to have progressed slowly in enhancing the labour dimension of HRDD, as evidenced by the emerging call for a worker-centred approach to HRDD by a group of civil society organizations and scholars. In

⁵⁰⁴ Investor Advocates for Social Justice, *supra* note 458 at 24–28.

⁵⁰⁵ *Ibid* at 3.

addition to the action taken by the ILO to develop the labour dimension of HRDD, a call for a “worker-centred approach to human rights due diligence” has been proposed to avoid the risks of marginalizing these key groups of stakeholders in the context of a globalized economy.⁵⁰⁶ As recently highlighted by civil society organization representatives, “workers must be the foundation of any human rights due diligence approach,”⁵⁰⁷ and “Human Rights Due Diligence has to be a workers-centered approach because they [workers] are important right-holders.”⁵⁰⁸

Empirical investigations into general corporate practices on HRDD have indicated the marginalization of workers’ rights in HRDD processes in GSCs.⁵⁰⁹ To a large extent, the evaluation of corporate practices on HRDD has focused on whether companies have established general corporate policies and mechanisms on HRDD according to the provisions set in the UNGPs. The specificity of labour rights and related mechanisms are not considered a key assessment criterion. Furthermore, the implementation of HRDD mechanisms and their effectiveness in improving labour rights in GSCs remain unknown. Conventional social auditing approaches have repeatedly failed to detect severe rights abuses, including forced labour and child labour. For example, the factories of Top Glove, a Malaysian rubber manufacturer, had been audited 28 times by well-known international audit firms before an independent investigation identified forced labour.⁵¹⁰

⁵⁰⁶ Alternative terms used by scholars and various organizations include the following: “worker-centred,” “worker-centric” and “worker-driven” approach to HRDD. See e.g. Juliane Reinecke & Jimmy Donaghey, “Towards Worker-Driven Supply Chain Governance: Developing Decent Work Through Democratic Worker Participation” (2021) 57:2 J Supply Chain Management 14; Higher Institute of Labour Studies (KU Leuven), “Towards Worker-centered Human Rights Due Diligence” (Policy Brief, November 2021), online (pdf): <<https://lirias.kuleuven.be/3638657>>. Furthermore, the ILO has used the term “labour rights due diligence” in some of its conference reports and research reports. See e.g. ILO, *Resolution Concerning Decent work in Global Supply Chains*, *supra* note 424.

⁵⁰⁷ Evie Clarke, “Workers Must be the Foundation of Any Human Rights Due Diligence Approach” (26 July 2021), online: *KnowTheChain, Business & Human Rights Resource Centre* <<https://www.business-humanrights.org/en/blog/workers-must-be-the-foundation-of-any-human-rights-due-diligence-approach/>> [perma.cc/YAQ6-DF3F].

⁵⁰⁸ Clean Clothes Campaign, “Paper on Human Rights Due Diligence” (March 2016) at 3, online (pdf): <<https://archive.cleanclothes.org/resources/publications/position-paper-on-human-rights-due-diligence/view>>.

⁵⁰⁹ See e.g. British Institute of International and Comparative Law, Civic Consulting & LSE Consulting, “Study on Due Diligence Requirements through the Supply Chain” (Research report, January 2020), online (pdf): <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>; Investor Advocates for Social Justice, *supra* note 458.

⁵¹⁰ KnowTheChain, “Addressing Forced Labor Risks in Lower Tiers of Electronics Supply Chains – Examples of Company Practice” (2022), online: <<https://knowthechain.org/addressing-forced-labor-risks-in-lower-tiers>>

Two recent studies have provided future directions for developing a worker-centred approach to HRDD. The first study identifies seven examples of trade union engagement with HRDD processes that actors from the global North can support.⁵¹¹ The study covers two domains of actions taken by lead firms in the global North: the collaborative approach and the confrontational approach to a worker-centred HRDD. The examples showcase two scenarios where trade unions in the global South can engage with HRDD processes at the level of the lead company and/or the suppliers. In scenario one, when lead firm(s) and/or suppliers agree with the initiation of an HRDD process, they may be open to collaborating with trade unions and possibly other civil society organizations, and they may be willing to use their influence in the chain to draw other stakeholders (suppliers, local governments) into the HRDD process.⁵¹² In scenario two, when one or more lead firm(s) and/or suppliers are not open to engagement about the human rights situation in the supply chain, trade unions need to rely on existing HRDD-related legislation and mechanisms to demand attention for labour abuses.⁵¹³ Both scenarios count on actors from the global North to allow the space for workers, trade unions, and other stakeholders to engage with transnational lawmaking and implementation processes in GSCs.

The second study is an ongoing project developed by KnowTheChain, a partnership between four organizations in the field of labour and human rights in GSCs. KnowTheChain has recently identified emerging examples of company practices in the ICT industry in addressing forced labour risks in lower tiers of electronic supply chains. Large TNCs in the ICT industry can manage forced labour risks across supply chain tiers through at least three approaches: (a) supporting suppliers to manage their supply chains, including through responsible purchasing practices; (b) developing worker-centred due diligence; and (c) supporting remediation.⁵¹⁴ The worker-centred due diligence includes at least four key elements: supply chain transparency, freedom of association, grievance mechanisms, and worker-driven monitoring.⁵¹⁵ While the key elements of worker-centred due diligence are still under development, emerging examples of corporate practices in the

of-electronics-supply-chains-examples-of-company-practice/#1615914899823-423168ad-feb0> [perma.cc/A2MC-3YA5].

⁵¹¹ Higher Institute of Labour Studies, *supra* note 506 at 5.

⁵¹² *Ibid* at 6.

⁵¹³ *Ibid*.

⁵¹⁴ KnowTheChain, *supra* note 510.

⁵¹⁵ *Ibid*.

ICT industry indicate that it is necessary and feasible to develop a work-centric due diligence model.

A worker-centred approach to HRDD is yet to be developed in the global cobalt supply chain and more broadly for all GSCs. A worker-centred approach to HRDD is key to a counter-hegemonic future of labour governance in the global cobalt supply chain. While various initiatives have been developed to address governance deficits on decent work in the ASM sector in the DRC, workers seem to have been largely marginalized in the ongoing design and implementation processes of the initiatives. Even in those launched as multi-stakeholder initiatives, the involved actors are mostly a combination of business enterprises, industry associations, governments, civil society organizations, and international organizations. Workers, their representatives and local communities are rarely involved in the dialogues and consultations of multi-stakeholder initiatives in the global cobalt supply chain.

3.4.3 The Counter-hegemonic Potential of the Emerging Multipolarity of Labour Governance in the Global Cobalt Supply Chain: The Rise of Actors from China

Over the past few decades, actors from the global North have led the standard-setting and -implementation processes in global mineral supply chains. Far from challenging the existing power imbalances and social inequalities in the global cobalt supply chain, governance initiatives led by powerful actors in the global North have enabled these existing beneficiaries to consolidate their influential role in determining the GSC governance structure. The proliferation of private governance initiatives in GSCs and the existing research focusing on large TNCs from the global North highlights the need for in-depth investigations into alternative governance initiatives that are emerging from the global South. The notable marginalization of workers and the persistent asymmetries in transnational lawmaking processes highlight the need to explore the counter-hegemonic potential of the emerging multi-level governance framework in the global cobalt supply chain.

The emerging multipolarity in the global cobalt supply chain can potentially allow the development of alternative normative paths and corporate practices that put workers at the centre. The development of the concept of HRDD led by the OHCHR and a group of powerful actors from the global North may provide an alternative direction for a coherent approach toward strengthening human rights protections in a globalized economy. However, a worker-centred approach to HRDD

is still missing in the proliferation of HRDD mechanisms. The ILO is a latecomer in the development of HRDD and has struggled to establish itself as an authority on HRDD or generate broad-based support for related standard-setting activities. The rise of actors from the global South, specifically China and Chinese mining enterprises, may potentially challenge or disrupt the existing GSC governance structure and ongoing lawmaking processes in the global cobalt supply chain. Regulatory arrangements and governance initiatives developed by these actors, despite their limitations, hold significant potential to foster counter-hegemonic transformation in the multi-level governance framework in the global cobalt supply chain.

The rise of actors from China has showcased the potential of a counterforce to the existing dominant role played by lead firms in GSC governance and will likely challenge some unequal patterns of existing labour governance in the global cobalt supply chain. The ILO has only recently made enhanced efforts to develop its policy framework to achieve decent work in the context of GSCs. In the emerging multi-level governance framework in the global cobalt supply chain, the role of the ILO in engaging with GSC governance initiatives for the elimination of child labour has been less visible compared to notable efforts made through the OHCHR's UNGPs and the OECD Due Diligence Guidance for responsible mineral supply chains. Against this backdrop, actors from China, especially the CCCMC and HC, have proactively and explicitly adopted, referenced, and diffused the two ILO fundamental Conventions concerning the elimination of child labour, alongside other international standards, as a key source to establish standards for RBC in GSCs. Furthermore, actors from China have started adding, implementing and promoting "community participation," an additional step to the existing five-step risk management framework that the OECD developed. By doing so, actors from China contribute to reshaping the GSC governance structure toward ensuring the participatory rights of local communities and artisanal miners and addressing the root cause of severe labour issues. This direction notably differs from simply tackling labour issues through a top-down risk-management approach large downstream companies are taking to mitigate their reputational risks.

The rise of actors from China has contributed to shaping the counter-hegemonic potential of the evolving multi-level governance framework in the global cobalt supply chain. First, the emerging Chinese regulatory framework for OFDI may contribute to the production, diffusion, and institutionalization of labour standards in the global cobalt supply chain. Home state regulation for TNCs is an important part of the emerging multi-level governance framework in the global cobalt

supply chain. Given the lack of commonly agreed to instruments and standards in transnational spheres, regulatory arrangements provided by home states of TNCs are critical to urge companies to take labour and human rights seriously during their global operations.

Second, amongst the 10 multi-stakeholder initiatives for responsible cobalt, the RCI, led by the CCCMC, is the only one developed, led, and coordinated by actors from the global South. While the OECD Due Diligence Guidance for responsible mineral supply chains has achieved considerable recognition and uptake amongst various state and non-state actors, the OECD-designed five-step framework has not developed a concrete step or a specific requirement of community participation during HRDD processes. In contrast, the CCCMC added “community participation” as a concrete step to the framework when it took the five-step framework from the OECD Due Diligence Guidance for responsible mineral supply chains. The CCCMC has adopted “community participation” into its understanding of CSR and has started operationalizing it amongst Chinese mining enterprises. The focus on the importance of “community participation” is not an isolated practice promoted by the CCCMC. Instead, it was a lesson that Chinese enterprises learned through their experience from unsuccessful overseas mining investment projects to more successful projects, such as Chinese SOE Wanbao’s Letpadaung Copper Mine in Myanmar⁵¹⁶ and Chinese SOE Chinalco’s Toromocho Mine in Peru.⁵¹⁷ Actors from China have started enhancing “community participation” in overseas operations. This was initiated by reported negative examples of the failure of Chinese overseas projects partly due to miscommunications between Chinese enterprises and local communities.

Third, the rise of Chinese cobalt refiners can challenge the dominant role of lead firms in GSC governance in the global cobalt supply chain. Transnational refiners are amongst the upstream companies of global mineral supply chains, which are less powerful than the downstream lead firms. These refiners purchase raw materials from mining sites in resource-rich countries, process and refine raw materials and then supply the cobalt products (directly or indirectly) to large manufacturing companies in the electronics and automotive industries. Thereafter, manufacturing

⁵¹⁶ See Diane Tang-Lee, “Corporate Social Responsibility and Public Engagement for a Chinese State-Backed Mining Project in Myanmar - Challenges and Prospects” (2016) 47 Resources Policy 28.

⁵¹⁷ See Cynthia Sanborn & Victoria Chonn Ching, “Chinese Investment in Peru’s Mining Industry: Blessing or Curse?” in Rebecca Ray, Kevin Gallagher, Andrés López & Cynthia Sanborn, *China and Sustainable Development in Latin America: The Social and Environmental Dimension*, eds (New York: Anthem Press, 2016) 183.

companies supply batteries that contain critical minerals such as cobalt (directly or indirectly) to large lead firms in the electronics and automotive industries. In these dynamic processes, the rise of transnational refiners in the supply chain can be disruptive to the imbalance of power between upstream companies (artisanal, small-scale, or large-scale mining sites, as well as crude and fine refining companies) and downstream companies (large manufacture companies and consumer brands companies). Cobalt refiners are largely from emerging market economies and are located upstream of the global cobalt supply chain.⁵¹⁸ Cobalt refiners connect upstream and downstream of the global cobalt supply chain. The rise of this group of TNCs disrupts the existing power dynamics in the chain and creates spaces to allow the development of new legal orders that can benefit workers, especially those in the artisanal mining sector in producing countries. The changing power dynamics in GSCs can create both challenges and opportunities for improving labour protections in a globalized economy. The dynamics have already become evident in the global apparel and textile supply chains. On the one hand, earlier studies have indicated that the rise of tier 1 firms in the global garment industry has placed considerable challenges on labour rights advocates.⁵¹⁹ On the other hand, emerging studies have suggested that the rise of first-tier suppliers in apparel supply chains is disrupting the dominant role of lead firms and fundamentally challenging the dominant role of lead firms in buyer-driven and unipolar chains.⁵²⁰

3.5 Preliminary Conclusions

This chapter situates China and Chinese mining enterprises in a dynamically evolving transnational labour regulatory environment in the global cobalt supply chain to contextualize their role in TLL. The chapter provides a comprehensive overview of the changing transnational labour regulatory environment for companies connected to the global cobalt supply chain. It shows how TLL has evolved to address labour challenges in expanded production networks and extended supply chains.

As Blackett underlines, “As law remains central to globalization, thinking about transnational labor law should *avoid overstating the disruptive power of plural sources of law*.”⁵²¹ It is important

⁵¹⁸ See “Table 2 Refined cobalt production per company in 2016” in van den Brink et al, “Identifying Supply Risks by Mapping the Cobalt Supply Chain”, *supra* note 26 at 7.

⁵¹⁹ Jeroen Merk, “The Rise of Tier 1 Firms in the Global Garment Industry: Challenges for Labour Rights Advocates” (2014) 42:2 Oxford Development Studies 259.

⁵²⁰ Kwon *et al*, *supra* note 355.

⁵²¹ Blackett, *Everyday Transgressions*, *supra* note 239 at 174 [emphasis added] [footnotes omitted].

to note that the expansion and diversification of actors, norms and processes do not necessarily enhance labour governance nor naturally improve labour rights in transnational spheres. The legitimacy of the role of non-state actors as standard-setters and norm-makers has already raised heated debates.⁵²² Furthermore, when multiple instruments, mechanisms, and norms emerge, it may be difficult to align them.⁵²³ These concerns are true to the expansion and diversification of actors, norms and processes in the global cobalt supply chain. The ratification of the two fundamental ILO conventions on the elimination of the use of child labour may help to provide a common ground for coordinating fragmentary efforts in eliminating child labour in the context of economic globalization. However, the implementation and institutionalization of international labour standards are much more complicated than the state action of ratifying conventions. Child labour remains a critical issue in the artisanal copper-cobalt mining sector in the DRC. Several research reports released between 2017 and 2021 suggest that issues of child labour are continuously detected in mining sites in the DRC, especially the worst forms of child labour.⁵²⁴

The production and diffusion of labour norms are ongoing across various levels and sites of law in the global cobalt supply chain. This chapter identifies two potential tracks of labour norm diffusion by analyzing key instruments and initiatives listed above (Table 5). The first track is the diffusion of labour norms across various levels of law, especially between instruments developed by international and regional organizations. Over the past decade, various state and non-state actors, especially actors from the global North, have shaped the implementation of the UNGPs and the conceptualization of HRDD. The promotion and implementation of the UNGPs have positively impacted policy coherence in a globalized economy. After ten years of its endorsement by the Human Rights Council, key elements of the UNGPs, especially HRDD, have become a core link for coordinating international soft law instruments for labour and human rights protection in economic development. Furthermore, the UNGPs are also increasingly considered key references for negotiating a BHR treaty at the United Nations (UN)⁵²⁵ and developing hard law instruments

⁵²² See e.g. Anne Peters *et al*, eds, *Non-State Actors as Standard Setters* (Cambridge: Cambridge University Press, 2009).

⁵²³ Blackett, *Everyday Transgressions*, *supra* note 239 at 135.

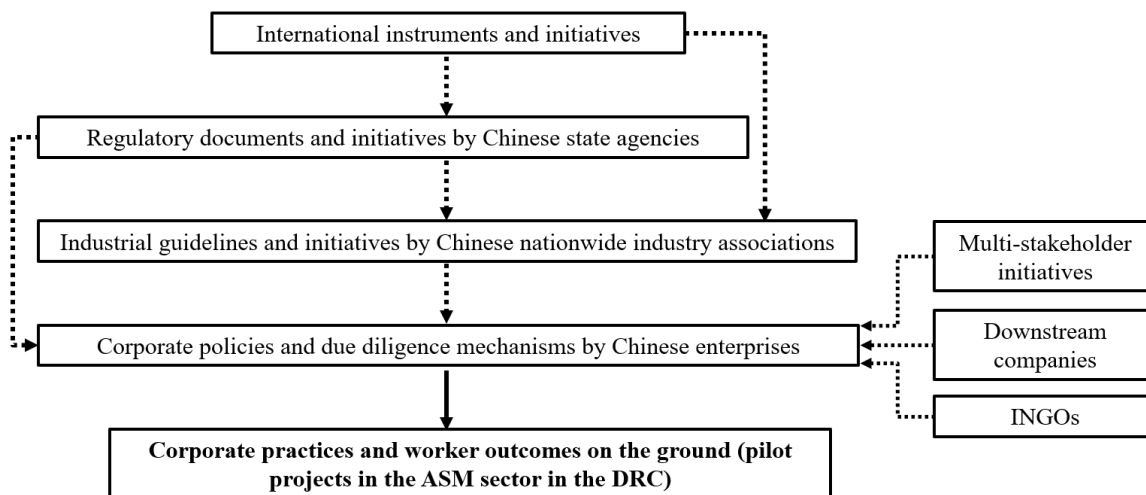
⁵²⁴ See e.g. BGR, *supra* note 30; The U.S. Department of Labor, “2019 Findings on the Worst Forms of Child Labor”, *supra* note 441.

⁵²⁵ See e.g. Human Rights Council, *Text of the Third Revised Draft Legally Binding Instrument*, *supra* note 445.

by the EU and its member states.⁵²⁶ In recent years, the ILO and other actors, including actors from the global South, have started enhancing the labour dimension of HRDD.

The second track is the diffusion of labour norms across various levels and sites of law connected to the global cobalt supply chain. The dynamics of multi-level governance in the global cobalt supply chain reflect a key TLL theme Blackett and Trebilcock have highlighted, “power is multiple, and operationalized across a range of unequal, fluid relations.”⁵²⁷ Underlining the emerging multipolarity of labour governance in the global cobalt supply chain, this chapter showcases how the complexity of GSCs complicates labour governance in a globalized economy and illustrates why the existing governance structure needs to be reformed and improved. The observed norm diffusion examples are not isolated but interconnected examples in a multi-level governance framework and recursive processes. While there are multiple labour norms in the global cobalt supply chain, international labour standards should remain key to diversified initiatives, mechanisms, and practices. Therefore, this thesis pays close attention to the flow of international labour standards concerning the elimination of child labour in the context of Chinese outward mining investment. Figure 4 provides an overview of the observed examples concerning the role of China and Chinese enterprises in the second track.

Figure 4 The Production and Diffusion of Labour Norms in Chinese Outward Mining Investment



Source: Developed by the author⁵²⁸

⁵²⁶ See e.g. European Union, “Conflict Minerals Regulation”, *supra* note 427.

⁵²⁶ *Ibid.*

⁵²⁷ Blackett & Trebilcock, *supra* note 8 at 9.

⁵²⁸ This figure is developed based on the analysis in this thesis, and it will be illustrated in the following chapters of this thesis.

Based on these observations, this thesis then moves on to investigate how China and Chinese mining enterprises have engaged with the existing governance framework and developed regulatory changes and innovations to address governance deficits in the global cobalt supply chains. The following four chapters will focus on the role of Chinese state agencies and nationwide industry associations (chapters 4 and 5) and the role of Chinese mining enterprises (chapters 6 and 7). Chapters 4 and 5 illustrate China's approach to labour governance in the context of Chinese outward mining investment and its implications for the production and diffusion of labour norms in transnational processes. Chapters 6 and 7 showcase Chinese mining enterprises' approach to labour governance in their transnational operations and its implications for the production and diffusion of labour norms concerning eliminating child labour in the global cobalt supply chain. These chapters identify four trends of labour governance in the context of Chinese outward mining investment: (a) the enhancement of public governance at the national level in China, (b) the important role of Chinese nationwide industry associations in the production and diffusion of labour norms, (c) the development of TPLG initiatives (e.g. private CSR initiatives and multi-stakeholder initiatives) led and shaped by Chinese mining enterprises, and (d) the interaction between public and private forms of labour governance that is ongoing across various levels and sites of law in the global cobalt supply chain. The investigation illustrates how the rise of actors from China has contributed to a shift in GSC governance toward multipolarity.

Part II The Role of Chinese State Agencies and Chinese Industry Associations in the Construction of the Social Dimension in Chinese Outward Foreign Direct Investment

Chapter 4 The Rising Role of China in the Dynamics of Multi-level Governance of Labour Rights in a Globalized Economy: Labour Governance through the Chinese Regulatory Framework for Outward Foreign Direct Investment

4.1 Introduction

This chapter critically engages with the evolving Chinese regulatory framework for OFDI to explore how and to what extent China has engaged with the dynamics of multi-level governance of labour rights in a globalized economy. Based on both primary and secondary sources, this chapter examines how China, the home state of Chinese enterprises, has facilitated, guided, and regulated Chinese OFDI toward a socially responsible model. Furthermore, it explores to what extent the development of the social dimension of the Chinese regulatory framework weakens or enhances the spatial and temporal connections between the governance of economics and the upholding of labour rights in a globalized economy.

This chapter investigates two aspects of the Chinese regulatory framework for OFDI: (a) the development of the social dimension of the Chinese regulatory framework for OFDI; (b) regulatory arrangements for labour governance. Based on an extensive review of Chinese regulatory documents relevant to the facilitation and regulation of OFDI, the chapter examines existing regulatory arrangements and emerging trends regarding labour governance in Chinese OFDI. The sources described in this chapter have different normative significance, ranging from “hard” to “soft” law. By focusing on Chinese state agencies and nationwide industry associations, this chapter illustrates how ongoing regulatory changes and innovations in the Chinese regulatory framework can shape the production and diffusion of labour norms in transnational spheres.

This chapter captures ongoing changes in the evolving agenda of the social dimension of the framework and teases out its implications for labour governance in the context of Chinese OFDI. To the best of my knowledge, this chapter is the first to comprehensively compile Chinese regulatory documents that are closely relevant to the social dimension of the framework and critically evaluate their implications for labour governance in such a dynamic transnational context. The chapter contributes to understanding the role of China in TLL through an evaluation of the following three parts. First, an overview of the Chinese regulatory framework for OFDI shows that the framework has been evolving rapidly over the past decade. The overview identifies a state-centric approach to CSR in the Chinese context, which highlights the role of the state in shaping

Chinese OFDI toward a socially responsible model. Second, a mapping review of the social dimension of the Chinese regulatory framework demonstrates that there has been a regulatory shift toward the enhanced social dimension of the framework throughout the past decade. The mapping review helps to narrow down research gaps regarding the development of social responsibility in the context of Chinese OFDI. It identifies 20 documents, five state agencies, and five industry associations as key to the development of the social dimension of the framework. Third, a critical investigation into key regulatory arrangements clarifies the substance, texture, and direction of China's approach to labour governance in the context of Chinese OFDI. The investigation helps to understand China's current approach to transnational labour governance and its implications for TLL in the coming decade.

This chapter develops an in-depth investigation into the incrementally crafted social dimension of the Chinese regulatory framework for OFDI, focusing on the regulatory arrangements for labour governance and the implications for TLL. The chapter maps out Chinese regulatory arrangements relevant to labour governance in the context of China's increasing global economic expansion and illustrates how China has defined its role in transnational labour governance, including the scope of workers, labour rights, and companies. It concludes that, while several governance gaps still need to be addressed, China has been incrementally developing a regulatory framework for transnational labour governance. This preliminary framework consists of various forms of regulatory arrangements that highlight the importance of social responsibility and provide an enabling regulatory environment for further arrangements regarding labour governance. The findings of this chapter suggest that the emerging framework, being developed, driven, and shaped by a wide range of state and non-state actors, has the potential to add texture to challenging issues in TLL.

In addition to this introductory section and concluding remarks, this chapter consists of the following three sections. Section two provides an overview of the Chinese regulatory framework for OFDI. It focuses on the flow of Chinese OFDI between 2000 and 2020 and the regulatory framework for OFDI that emerged along with the increasing flow of Chinese OFDI. Furthermore, it provides an overview of the existing scholarship and research resources concerning the Chinese regulatory framework for OFDI. This section shows that the Chinese regulatory framework for OFDI is rapidly evolving, and it highlights the importance of an in-depth investigation into the social dimension of the framework and its implications for TLL.

Section three examines the development of the social dimension of the Chinese regulatory framework for OFDI. This section helps to identify an enabling regulatory environment that contributes to the development of labour governance. Amongst more than 500 regulatory documents released by various state agencies and affiliated institutions, this chapter identifies a total of 20 key documents that can help to understand the regulatory arrangements and emerging trends of China's approach to socially responsible OFDI. By examining these documents, the section demonstrates that a regulatory shift toward enhanced CSR has been ongoing in the evolving Chinese regulatory framework for OFDI over the past decade (2011-2020).

Section four investigates key regulatory arrangements for labour governance in the Chinese regulatory framework for OFDI. This section critically examines 10 key documents that are closely relevant to the development of labour governance: (a) five regulatory documents that state agencies promulgated, and (b) five CSR guidelines that nationwide industry associations launched. The section helps to capture the incremental evolution of labour governance that has emerged in the framework and understand its implications for labour governance in the context of Chinese OFDI.

4.2 An Overview of the Chinese Regulatory Framework for Outward Foreign Direct Investment

Since China opened the door to the world in the late 1970s, the Chinese central government has issued hundreds of regulatory documents at various levels to facilitate and regulate Chinese OFDI. Over the past two decades, the Chinese regulatory framework for OFDI has rapidly evolved. Since 2021, the framework has been composed of a web of regulatory documents that various state agencies have issued. A recent empirical study identifies that the Chinese central government published a total of 526 policies that are relevant to Chinese OFDI between 1981 and 2015.⁵²⁹ Eighty-two of these 526 policies are directly and closely relevant to Chinese OFDI.⁵³⁰

Along with the global expansion of Chinese OFDI, the negative impacts of Chinese OFDI on the social and environmental conditions of investment destination countries, especially in the developing world, are frequently discussed and debated.⁵³¹ As China has become one of the

⁵²⁹ Yin, De Propris & Jabbour, *supra* note 56 at 5.

⁵³⁰ *Ibid* at 6.

⁵³¹ See e.g. David H. Shinn, "The Environmental Impact of China's Investment in Africa" (2016) 49:1 Cornell Intl LJ 25; Rebecca Ray *et al*, *China and Sustainable Development in Latin America: The Social and Environmental Dimension* (New York: Anthem Press, 2017).

world's largest overseas investors, it is crucial for China to ensure that Chinese enterprises operate overseas responsibly and sustainably. To maintain a responsible international image, reduce the loss of economic interests, and pursue a sustainable investment model, the Chinese central government has issued a series of rules, policies, and guidelines on social and environmental protection to guide the overseas operations of Chinese enterprises.⁵³²

4.2.1 The Flow of Chinese Outward Foreign Direct Investment (2000-2020)

According to the definition by the United Nations Conference on Trade and Development, foreign direct investment is “an investment reflecting a lasting interest and control by a foreign direct investor, resident in one economy, in an enterprise resident in another economy (foreign affiliate).”⁵³³ Chinese OFDI has increased dramatically since 1978 when China opened its door to the world. There are three critical stages in the development of Chinese OFDI: (a) opening the door to the world in the 1970s, (b) going global in the early 2000s, and (c) rising rapidly in the global economy in the 2010s. With the development of the “Going Global” Strategy, Chinese OFDI began to grow. The trend gained further momentum with the development of the BRI and China's enhanced engagement with the OECD over the past decade.⁵³⁴ In 2016, when global OFDI dropped by 2%, China's OFDI soared by 34.7%.⁵³⁵ The year 2016 marks the first year when China became the second-largest source of OFDI in the world.⁵³⁶ In 2020, China became the largest source of foreign direct investment.⁵³⁷

⁵³² See e.g. Inclusive Development International, “Safeguarding People and the Environment in Chinese Investments: A Reference Guide for Advocates (Second edition)” (May 2019), online: (pdf) <<https://www.inclusivedevelopment.net/idi-releases-revised-edition-of-safeguarding-people-and-the-environment-in-chinese-investments/>>.

⁵³³ United Nations Conference on Trade and Development, “2021 Handbook of Statistics: The Impact of the COVID-19 Pandemic” (9 December 2021), DOI: <10.18356/9789210010610> at 52.

⁵³⁴ See e.g. OECD, *Active with The People's Republic of China* (Paris: OECD, 2018) [OECD, *Active with The People's Republic of China*], online (pdf): <<https://www.oecd.org/global-relations/active-with-china.pdf>>.

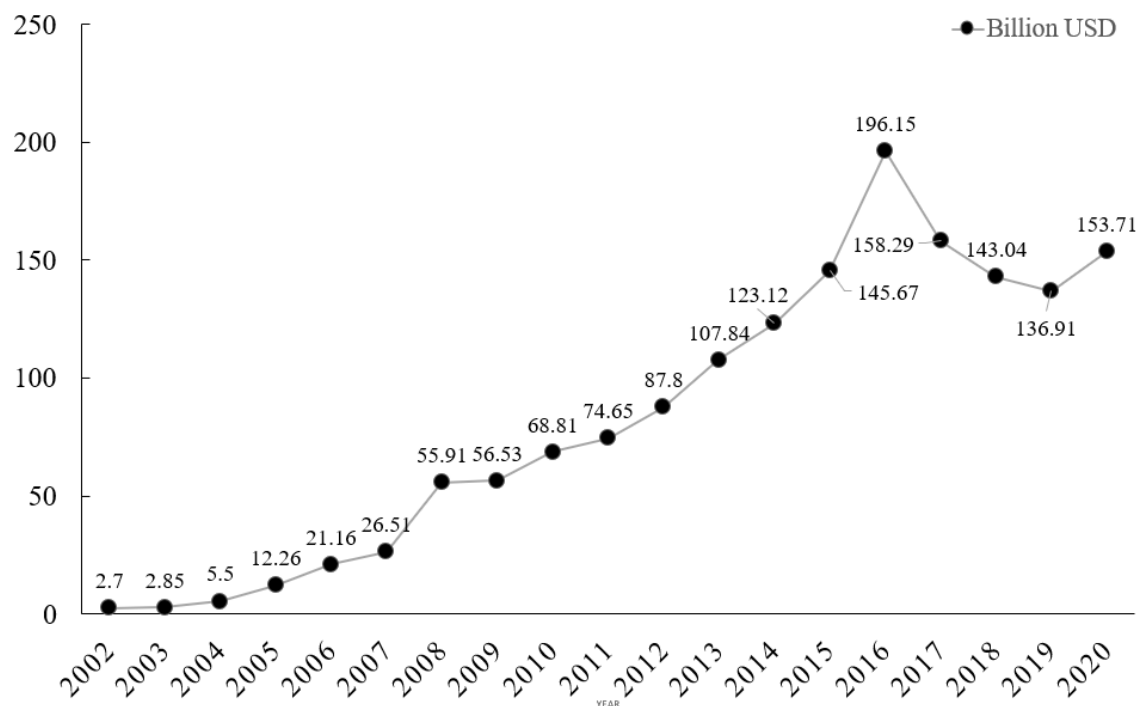
⁵³⁵ Bijun Wang & Kailin Gao, “Forty Years Development of China's Outward Foreign Direct Investment: Retrospect and the Challenges Ahead” (2019) 27:3 *China & World Economy* 1 at 10 [footnotes omitted].

⁵³⁶ See statistics provided in Ministry of Commerce, National Bureau of Statistics & State Administration of Foreign Exchange of the People's Republic of China, *2020 Statistical Bulletin of China's Outward Foreign Direct Investment* (Beijing: MOC, NBS & SAFE, 2021), online: (pdf) <<http://fec.mofcom.gov.cn/article/tjsj/tjgb/>> [translated by author]. The statistical bulletins of China's OFDI are published by the MOC, NBS, and SAFE annually in both Chinese and English. However, at the time of this thesis, the official English version of 2020 was not published. Therefore, the information cited here was translated by the author.

⁵³⁷ *Ibid.*

In 2020, the world economy shrank by 3.3% due to the severe impact of the Covid-19 pandemic, which marked the first negative growth of the world economy since 2009.⁵³⁸ The global trade in goods shrank by 5.3%, and FDI decreased by nearly 40% compared with 2019.⁵³⁹ By contrast, China was the only major global economy that achieved positive economic growth in 2020. Chinese OFDI flows reached \$1537.1 billion, ranking first in the world after eight consecutive years of ranking in the top three (2012-2019).⁵⁴⁰ By the end of 2020, Chinese enterprises have established more than 45,000 overseas enterprises across the world.⁵⁴¹ More than 7.9% of these overseas enterprises (about 3,500) were established in Africa.⁵⁴²

Figure 5 Chinese Non-financial Outward Foreign Direct Investment Flow, 2002–2020



Source: MOC, NBS & SAFE, “2020 Statistical Bulletin of China’s Outward Foreign Direct Investment”⁵⁴³

⁵³⁸ *Ibid* at 3.

⁵³⁹ *Ibid*.

⁵⁴⁰ *Ibid*.

⁵⁴¹ *Ibid*.

⁵⁴² *Ibid*.

⁵⁴³ *Ibid* at 7.

4.2.2 A State-centric Approach to Corporate Social Responsibility Both Domestically and Transnationally

This subsection provides an overview of the term “corporate social responsibility” in the Chinese context and illustrates its relevance for labour governance in the context of Chinese OFDI. The subsection helps to narrow down the knowledge gaps regarding the term in transnational contexts and the Chinese context. It shows that the development of CSR at the corporate level in China was initially influenced by foreign investments in China and largely impacted by China’s state-centric approach to CSR.

In the existing literature, CSR in the Chinese context has been frequently referred to as “corporate social responsibility with Chinese characteristics.”⁵⁴⁴ While there are various interpretations of this opinion, scholars tend to underline that the promotion of CSR in the Chinese context has differed from what was initially conceptualized and established in developed countries.⁵⁴⁵ The concept of CSR is an exogenous norm that was transplanted into the Chinese social system. First, the introduction of CSR initiatives into Chinese enterprises was through the supply chains of foreign TNCs which came to China in the early 21st century. Second, the concept of CSR has been promoted by Chinese state agencies through both laws and policies. Third, Chinese enterprises’ perception of CSR has been shaped in the context of Chinese OFDI. Therefore, the conceptualization of CSR in the Chinese context has been influenced by various state and non-state actors, including TNCs from developed countries as international buyers, and Chinese state agencies as regulators, as well as other actors such as INGOs, media, consumers, and workers. The Chinese State has played an important role in promoting CSR amongst a wide range of actors.

The development of CSR in the Chinese legal and policy systems has provided an explicit example of the important role of the state in shaping the conceptualization and implementation of CSR in business activities. The term “social responsibility” was not introduced when the first Chinese Company Law was drafted in the 1990s. Since the early 21st century, the Chinese government has

⁵⁴⁴ See e.g. Larry Catá Backer, “China’s Corporate Social Responsibility with National Characteristics: Coherence and Dissonance with the Global Business and Human Rights Project” in Jena Martion & Karen Bravo, *The Business and Human Rights Landscape*, eds (Cambridge: Cambridge University Press 2016) 530; May Tan-Mullins, “Smoothing the Silk Road through Successful Chinese Corporate Social Responsibility Practices: Evidence from East Africa” (2020) 29:122 *J Contemporary China* 207 at 209–211; Zou, “China and The Belt and Road Initiative”, *supra* note 23 at 421–422.

⁵⁴⁵ *Ibid.*

started making incremental progress in establishing a regulatory framework for CSR, including facilitating legislative measures to aid in the implementation of CSR in a mandatory manner.⁵⁴⁶ CSR was given explicit recognition in Article 5 of Chinese Company Law as of 1 January 2006. Article 5 of the Chinese Company Law states that “A company shall, when engaging in business activities, abide by laws and administrative regulations, observe *social moralities* and *business ethics*, act in good faith, accept the supervision of the Government and the general public, and undertake *social responsibilities*.”⁵⁴⁷ Between 2006 and 2021, there seemed to be few further legislative efforts to clarify and operationalize the concept of CSR in the Chinese legal system. Amongst other drivers, government policies and legislative measures have been part of the most important incentives for Chinese enterprises to take CSR seriously.⁵⁴⁸ As business law scholar Jingchen Zhao pointed out, “The [Chinese] government plays a triple role in the enforcement of the law, overseeing CSR as a regulator, a supervisor and a promoter.”⁵⁴⁹

The state-centric approach has played an important role in mainstreaming and promoting CSR practices amongst Chinese enterprises, both domestically and transnationally.⁵⁵⁰ A study on CSR development and trends in China shows that the government and industry associations, together with international buyers with CSR requirements and media, are considered key drivers of CSR development.⁵⁵¹ The strengthened recognition and practical examples of CSR practices have also been reflected by CSR reports issued by Chinese enterprises. As of 2006, only a small number of Chinese enterprises published CSR reports. The number of CSR reports published by Chinese enterprises has grown dramatically, from less than 50 in 2006 to nearly 20 thousand by the end of

⁵⁴⁶ Jingchen Zhao, *Corporate Social Responsibility in Contemporary China* (Cheltenham, UK: Edward Elgar, 2014) [Zhao, *Corporate Social Responsibility in Contemporary China*] at 253–254.

⁵⁴⁷ *Company Law of the People’s Republic of China*, 29 December 1993 (entered into force 1 July 1994) [emphasis added]. The Company Law was enacted in 1993, revised in 2005, and amended in 1999, 2004, 2013 and 2018, respectively.

⁵⁴⁸ Zhao, *Corporate Social Responsibility in Contemporary China*, *supra* note 546 at 253.

⁵⁴⁹ *Ibid* at 256.

⁵⁵⁰ Virginia Ho, “Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China” (2013) 46 *Vand J Transnat’l L* 375; Liu, *supra* note 171.

⁵⁵¹ The study is based on interviews and an online survey. The online survey suggests that the top three drivers for CSR development in China ranked by respondents are “government/regulators,” “international buyers with CSR requirements,” and “media.” See Embassy of Sweden in Beijing and CSR Asia, “A Study on Corporate Social Responsibility Development and Trends in China” (May 2015) at 7, online (pdf): <<http://www.csr-asia.com/report/CSR-development-and-trends-in-China-FINAL-hires.pdf>>.

2021.⁵⁵² Furthermore, international initiatives on CSR are increasingly incorporated into local initiatives in China. As will be illustrated in the following sections, state agencies have developed various regulatory documents to add texture to the conceptualization of CSR in the context of Chinese OFDI.

4.3 The Development of the Social Dimension of the Chinese Regulatory Framework for Outward Foreign Direct Investment: An Ongoing Regulatory Shift toward Enhancing Corporate Social Responsibility

As China plays an increasingly important role in global governance, Chinese regulatory arrangements for OFDI are becoming a key part of its influence on both economic development and social justice in the context of OFDI. Along with the growing number of regulatory arrangements for OFDI, the social dimension of these regulatory arrangements has continuously been developed and incorporated into the emerging and rapidly evolving Chinese regulatory framework for OFDI. Regulatory arrangements for labour protections were initially addressed through the concept of CSR and recently addressed through specific safeguards for labour rights.

This section examines Chinese regulatory arrangements for OFDI, focusing on the social dimension of the emerging Chinese regulatory framework and the implications for transnational labour governance. It maps out key state agencies that have the mandate and authority to facilitate and regulate Chinese OFDI and key industry associations that have played an important role in developing industry guidelines for Chinese enterprises' overseas operations. Furthermore, the mapping review highlights an ongoing regulatory shift toward the enhanced social dimension of the Chinese regulatory framework for OFDI.

The section provides an overview of the social dimension of the Chinese regulatory framework for OFDI to address the following knowledge gaps in the existing literature: (a) which state agencies are key to the ongoing development of the social dimension of the Chinese regulatory framework for OFDI, (b) which key regulatory arrangements these state agencies have made to regulate Chinese enterprises toward the socially responsible business model; and (c) how the regulatory structure has changed over time.

⁵⁵² Gefei Yin, Zhihong Yu & Zhusun Guan, eds, *GoldenBee Research on Corporate Social Responsibility Reporting in China (2021)* (Beijing: Social Sciences Academic Press (China), 2021) [translated by author].

4.3.1 The Emerging Chinese Regulatory Framework for Outward Foreign Direct Investment (2001-2020)

Over the past two decades, the Chinese central government has issued hundreds of regulatory documents that promote, facilitate, and regulate Chinese OFDI. Chinese regulatory arrangements for OFDI are made across multiple actors and levels, particularly various state agencies under the State Council. Key state agencies include the State Council, as well as ministries, commissions, and special organizations under the direct supervision of the State Council. More than 20 state agencies are mandated to regulate and supervise Chinese OFDI.⁵⁵³ Many state agencies and affiliated institutions have issued regulatory documents that contain clauses on the social impacts of Chinese OFDI. Furthermore, with the guidance and support of these state agencies, Chinese industry associations have played an important role in providing CSR guidelines for Chinese enterprises' overseas operations.

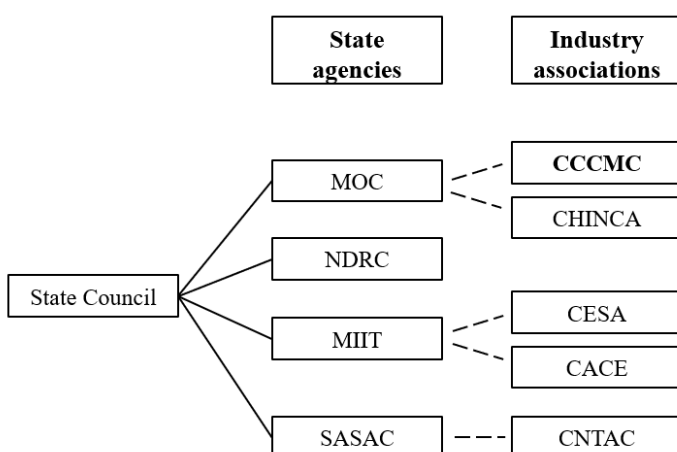
This subsection maps out key actors and forms of regulatory documents that are closely relevant to the facilitation and regulation of Chinese OFDI, focusing on their rising role in addressing the social impacts of Chinese OFDI. This analysis focuses on two groups of actors: (a) ministerial-level state agencies, and (b) nationwide industry associations. The analysis focuses on three forms of regulatory documents: (a) departmental rules [部门规章], (b) administrative regulatory documents [行政规范性文件], and (c) industry guidelines [行业指南]. The interactions between these two groups of actors and amongst various forms of regulatory documents are described throughout this chapter.

This thesis identifies five key state agencies closely relevant to developing the Chinese regulatory framework for OFDI. According to Article 85 of the Constitution of China, the State Council is the highest executive authority in the administrative branch of the Chinese central government. Four key ministerial-level state agencies that are under the direct supervision of the State Council include the MOC, National Development and Reform Commission (NDRC), Ministry of Industry and Information Technology (MIIT), and State-owned Asset Supervision and Administration

⁵⁵³ Yin, De Propriis & Jabbour, *supra* note 56 at 3.

Commission (SASAC).⁵⁵⁴ Five key nationwide industry associations include the CCCMC, China International Contractors Association (CHINCA), Chinese Electronics Standardization Association (CESA), China Association of Communication Enterprises (CACE), and China National Textile and Apparel Council (CNTAC). Before July 2015, these five nationwide industry associations were affiliated with the above-mentioned ministerial-level state agencies. The CHINCA and the CCCMC were affiliated with the MOC. The CESA and the CACE were affiliated with the MIIT. The CNTAC was affiliated with the SASAC. Between 2015 and 2021, the five associations underwent a decoupling process from state agencies. Figure 6 briefly describes the relationships between the above-mentioned five state agencies and five industry associations.

Figure 6 Five Key State Agencies and Five Key Nationwide Industry Associations



Source: Developed by the author

(1) Five Key State Agencies

The five state agencies are listed in Table 7, accompanied by a summary of their specific authorities and responsibilities concerning the facilitation, supervision, and regulation of OFDI. The MOC, MIIT, and NDRC are three of 26 ministerial-level agencies under the State Council, and the SASAC is a special organization directly under the State Council.⁵⁵⁵

⁵⁵⁴ Other important state agencies may include the Ministry of Finance, Ministry of Environmental Protection, Ministry of Foreign Affairs, People's Bank of China, and China Banking Regulatory Commission. For discussions of a broader group of key state agencies in facilitating and regulating Chinese OFDI, see Kelly Sims Gallagher & Qi Qi, "Chinese Overseas Investment Policy: Implications for Climate Change" (2021) 12:3 Global Policy 260.

⁵⁵⁵ For a detailed presentation of various agencies under the State Council and their relevance to regulating Chinese OFDI, see Yin, De Propriis & Jabbour, *supra* note 56 at 3.

Table 7 Key Chinese State Agencies Involved in the Regulatory Structure for Outward Foreign Direct Investment

Agency	Role in Facilitating, Guiding, and Regulating OFDI
State Council	The State Council is the highest executive authority in the administrative branch of the Chinese government. Key state agencies for regulating Chinese OFDI are under the direct supervision of the State Council, including the MOC, MIIT, NDRC, and SASAC.
MOC	The MOC regulates both domestic and foreign trade, works to attract foreign investment, and helps Chinese enterprises invest abroad. It is responsible for administering China's foreign trade, economic cooperation, and foreign investment. It promulgates laws and regulations governing domestic and foreign trade, foreign direct investment in China, and international economic cooperation.
MIIT	The MIIT was established in 2008 as a department under the State Council responsible for the administration of China's industrial branches and information industry. The main responsibilities of the ministry include developing China's industrial planning, policies and standards and monitoring the daily operation of industrial branches.
NDRC	The NDRC is responsible for researching and coordinating national economic and social development strategies. The NDRC formulates key policies and laws related to China's economic development, in addition to managing key infrastructure projects. The NDRC makes medium and long-term plans for China's "going global" strategy, in addition to developing regulations and standards for China's overseas investment and domestic energy sector. It is responsible for examining and approving major overseas investment projects and projects that consume a substantial amount of foreign currency.
SASAC	The SASAC is responsible for managing SOEs, appointing top officials, creating laws governing SOEs, and guiding the reform and restructuring of SOEs. It oversees the performance of SOEs that conduct overseas investments, including the development and issuance of regulations or guidance that require SOEs to report environmental and social performance.

Source: Compiled by the author⁵⁵⁶

(2) Five Key Nationwide Industry Associations

Many Chinese industry associations have developed CSR guidelines for Chinese enterprises. More than 20 Chinese industry associations have developed various voluntary standards, focusing on sustainability, CSR, or supply chain due diligence.⁵⁵⁷ These associations cover the garment, mining, infrastructure, ICT, agriculture, and forestry industries. Several nationwide industry associations have stood out for their advanced CSR guidelines in guiding Chinese enterprises toward RBC during their overseas operations, especially for companies in the industries that are key to Chinese OFDI. Five key nationwide industry associations include the CNTAC for the textile

⁵⁵⁶ The list is representative but non-exhaustive. The information was drawn from the official website of each state agency. The information was translated by the author when an official English version was unavailable.

⁵⁵⁷ Juan Zhang, "Will China Industrial Organizations Succeed in Addressing the "Trust Deficit" Arising from Global Supply Chain Governance?" in Daniel Guttman, Yijia Jing & Oran R. Young, *Non-State Actors in China and Global Environmental Governance*, eds (Basingstoke: Palgrave Macmillan, 2021) 125 at 134.

and apparel industry, the CHINCA for international contractors, the CCCMC for the mining industry, the CESA for the electronic industry, and the CACE for the ICT industry. These associations have provided advanced examples of CSR guidelines for Chinese enterprises. The five associations are listed in Table 8, with a summary of their focus areas and responsibilities.

Table 8 Key Nationwide Industry Associations Involved in the Regulatory Structure for Outward Foreign Direct Investment

Industry Association	Affiliations with state agencies	Role in Facilitating, Guiding, and Regulating OFDI
CNTAC	SASAC, decoupled	The CNTAC is the national federation of all textile-related industries, with the textile industry associations and other economic entities as registered members, and is a non-profit organization formed voluntarily. The CNTAC's main tasks include: (a) developing guidelines and rules to monitor the performance of the industry; and (b) developing, promoting and implementing industry standards. The CNTAC set up an Office of Social Responsibility to develop, promote, and implement guidelines, standards, and initiatives for social responsibility in the textile and apparel industry.
CHINCA	MOC, decoupled	The CHINCA is a national organization formed by Chinese international project investors, contractors, labour service companies and related service providers.
CCCMC	MOC, decoupled	The CCCMC is a nationwide and industrial non-profit social organization formed voluntarily by units in the mining industry. These units encompass companies, institutions, and organizations that are engaged in economic activities relevant to metals & minerals and related products, non-metallic minerals and related products, hardware products, building materials products, petroleum and related products, chemical raw materials, and related products, as well as the upstream and downstream industrial chains in the above fields. With a membership of more than 6,000, the annual total import and export volume of CCCMC's member enterprises accounts for nearly 30% of the industry.
CESA	MIIT, decoupled	The CESA is a nationwide association for the electronics and information industries. The CESA set up a Committee on Social Responsibility to develop, promote, and implement standards and practical tools for social responsibility in the electronics and information industry.
CACE	MIIT, decoupled	The CACE is a national non-profit social organization formed voluntarily by enterprises, institutions, and individuals in the communication industry related to basic installation, information service, equipment manufacturing, engineering construction, network operation and maintenance, and network security. The CACE set up a Committee for Social Responsibility to develop, promote, and implement standards and practical tools for social responsibility in the electronics and information industry.

Source: Compiled by the author⁵⁵⁸

⁵⁵⁸ The list is representative but non-exhaustive. The data was drawn from the official website of each industry association. The information was translated by the author when an official English version was unavailable.

Being part of “social organizations [社会团体],” Chinese nationwide industry associations can hardly find their counterparts in other countries. In the Chinese context, nationwide industry associations held uniquely close relationships with state agencies over the past decades. Institutionalized governance processes blur the distinction between the state and other actors; the “shadow of the state” seems to be a major factor in all regulatory efforts to address environmental and social issues.⁵⁵⁹ This feature and its consequences on governance are pivotal in understanding the role of industry associations in the Chinese regulatory framework for OFDI.

Over the past two decades, Chinese industry associations have continued to maintain a close relationship with the Chinese government. Many Chinese nationwide industry associations were affiliated with central state agencies, such as the State Council, MOC, and SASAC. For instance, the CNTAC, a national federation of textile industry associations, was formerly China’s Ministry of Textile Industry in the late 20th century. Following a reform procedure in 2001, the CNTAC became a social organization.⁵⁶⁰ The CHINCA was once a public service unit of the MOC and was transformed into a social organization. Several state agencies have explicitly listed some industry associations as “relevant social organizations.”

While taking note of the close relationship between industry associations and state agencies over the past two decades, it is important to note that a “decoupling” process between the two groups of actors has been ongoing since the early 2000s.⁵⁶¹ Since 2015, the Chinese central government has accelerated the decoupling processes of industry associations from these state agencies to separate the function of these associations from those of state agencies. In July 2015, the Chinese central government published the *General Plan to Decouple Industry Associations and Chambers*

⁵⁵⁹ See Dan Guttman, Yijia Jing & Oran R. Young, “The State, Nonstate Actors, and China’s Environmental Performance: Setting the Stage” in Guttman, Jing & Young, *supra* note 557, 17; Yixian Sun, “In the Shadow of the State: The Rise and Limits of Transnational Private Certification in China’s Seafood Sector” in Guttman, Jing & Young, *supra* note 557, 249.

⁵⁶⁰ Zhang, *supra* note 557 at 145.

⁵⁶¹ The term in Chinese is “脱钩”. Existing scholarship and research resources have translated the term in various versions, including “decoupling,” “detaching,” “disengaging” and “separating,” amongst others. See e.g. Juanfeng Liu & Jianjun Zhang, “Regional Business Associations in China: Changes and Continuities” in Xiaoke Zhang & Tianbiao Zhu, eds, *Business, Government and Economic Institutions in China* (Cham, Switzerland: Palgrave Macmillan, 2018) 105 at 105, 109, 117, 118 and 120.

of Commerce from Administrative Agencies.⁵⁶² The General Plan requires that industry associations, chambers of commerce, and other organizations that are under the category of “social organizations” should be separated from the administrative agencies or their professional supervisory units. The decoupling processes would be conducted through a pilot testing process at both national and local levels and be implemented gradually after the pilot testing process. The General Plan provides five key measures for the decoupling processes: the separation of management, function, financial assets, human resource management and external relations. In June 2019, the NDRC, jointly with nine agencies at the ministerial level, issued the *Opinions on the Comprehensive Implementation of the Reform to Decouple Industry Associations and Chambers of Commerce from Administrative Agencies*.⁵⁶³ The Opinions confirm the five key measures for the decoupling processes and detail the requirement that the decoupling process is to be completed at both the national and local levels by the end of 2020. In particular, the Opinions list a total of 795 nationwide industry associations and chambers of commerce that are under decoupling processes, 422 of which have completed the processes and 373 of which will complete the processes in a few years. As of June 2019, both the CHINCA and CACE have decoupled from their supervisory state agencies, the MOC and MIIT, respectively; the CNTAC, CCCMC, and CESA are undergoing the decoupling processes. As of July 2021, 729 nationwide industry associations and more than 70,000 local business associations have completed the decoupling process.⁵⁶⁴

During the transitioning time of the decoupling processes, the daily operations of the associations are still closely connected to their supervisory state agencies. The funding status and daily work of industry associations are seemingly further separated from state agencies after the decoupling processes. It is assumed that the close connections will likely dilute upon the completion of the

⁵⁶² General Office of the Central Committee of the Chinese Communist Party & General Office of the State Council of the People’s Republic of China, *General Plan to Decouple Industry Associations and Chambers of Commerce from Administrative Agencies* (Beijing: General Office of the Central Committee of the Chinese Communist Party & General Office of the State Council, 2015), online: <http://www.gov.cn/zhengce/2015-07/08/content_2894118.htm> [translated by author].

⁵⁶³ National Development and Reform Commission of the People’s Republic of China (NDRC) et al, *Opinions on the Comprehensive Implementation of the Reform to Decouple Industry Associations and Chambers of Commerce from Administrative Agencies* (Beijing: NDRC et al, 2019), online: <http://www.gov.cn/xinwen/2019-06/17/content_5400947.htm> [translated by author].

⁵⁶⁴ Information Office of the Ministry of Civil Affairs of the People’s Republic of China, “Press Conference for the Third Quarter of 2021” (28 July 2021), online: <https://www.mca.gov.cn/article/xw/xwfbh/2021/xwfbh_06/zxzb.html> [translated by author].

decoupling processes between the two groups of actors. Furthermore, industry associations are expected to be more independent and “to act as an increasingly important institutional linkage between government and private businesses and exert growing influence over public policy processes.”⁵⁶⁵

Taking note of the unique relationships and the ongoing decoupling processes between industry associations and their supervisory state agencies, this chapter includes industry guidelines in the Chinese regulatory framework for OFDI based on the following considerations. First, at the time of the issuance, those industry associations were affiliated with their supervisory state agencies, and the development of the guidelines has received considerable support and guidance from state agencies. State agencies have played an important role in the production of industry guidelines. Several industry guidelines have explicitly confirmed that they were developed with the supervision and support of their supervisory state agencies. For instance, it is confirmed in the 2014 version of the GSRM that the development of the guidelines received support from eight Chinese state agencies.⁵⁶⁶ It is also confirmed in the 2018 version of the *Corporate Sustainability Compact 9000 for Textile and Apparel Industry* that “the development and revision of this version of CSC9000T is led by CNTAC, and has gained vigorous support from the Ministry of Industry and Information Technology, and Ministry of Commerce of the People’s Republic of China, as well as the All-China Federation of Trade Unions and other stakeholders.”⁵⁶⁷ Second, as will be shown later in this thesis, industry associations play an important role in facilitating and regulating Chinese OFDI. Chinese nationwide industry associations’ extensive industry experience and their unique relationship with Chinese state agencies enable their capability and potential to influence the substance and direction of the Chinese regulatory framework for OFDI. Industry associations play an important role in formulating and implementing regulations, policies, and guidelines for Chinese OFDI that are issued by state agencies, particularly the MOC and the SASAC. The institutional advantage of close government relations provides an opportunity for China industry associations to leverage the China government in the implementation of industry guidelines and initiatives. These industry-specific CSR guidelines and initiatives play an important role in guiding

⁵⁶⁵ Liu & Zhang, *supra* note 562 at 106.

⁵⁶⁶ CCCMC, “GSRM (2014)”, *supra* note 406 at 54.

⁵⁶⁷ China National Textile and Apparel Council, “Corporate Sustainability Compact 9000 for Textile and Apparel Industry” (2018) at 2, online (pdf): <<http://www.csc9000.org.cn/down.php?lm=26>>.

Chinese enterprises' overseas investment in the absence of detailed guidelines and requirements set at the national level. Furthermore, these guidelines and initiatives would also have the potential to form preliminary texts and pilot examples for the development of regulatory documents by state agencies.

(3) The Diversity of Regulatory Documents in the Chinese Regulatory Framework for Outward Foreign Direct Investment

Regulatory documents for Chinese OFDI are issued by different agencies in various forms. According to the scope of application, these regulatory documents can be categorized into the following three types: (a) basic policies which apply to overseas investment in general; (b) guidance for the operations of specific types of enterprises, for instance, SOEs, or POEs; (c) guidelines for specific sectors, such as the mining industry. The regulatory documents touch on issues such as impact assessments, resettlement, public participation, and legal compliance. Many of the standards that apply to Chinese overseas projects are basic. They are a relatively recent creation and will take time to become established, understood and implemented.

The titles of the documents vary, including “Measures,” “Provisional Measures,” “Rules,” “Opinions,” “Provisions,” “Code of Conduct,” “Guidelines,” and “Guide,” amongst others. These documents are of various levels of binding force, normativity, and practical influence, depending on the level of authority of their issuance bodies, the form of the documents, and the implementation and operationalization processes. To provide a concise analysis, this chapter focuses on three key forms of regulatory documents concerning Chinese OFDI: (a) departmental rules, (b) administrative normative documents, and (c) industry guidelines. Departmental rules are part of the Chinese legal framework that consists of laws, administrative regulations, other regulations (local, autonomous, and separate regulations), and rules (departmental and local rules).⁵⁶⁸ Departmental rules are less legally binding than laws and administrative regulations that are key parts of the Chinese legal framework. However, departmental rules are amongst the highest

⁵⁶⁸ *Legislation Law of the People's Republic of China*, 15 March 2000 (entered into force 1 July 2000). Paragraph 1 of Article 65 reads “The State Council shall, in accordance with the Constitution and laws, formulate administrative regulations.” Paragraph 1 of Article 80 reads “The ministries and commissions of the State Council, the People's Bank of China, the State Audit Administration as well as the other organs endowed with administrative functions directly under the State Council may, in accordance with the laws as well as the administrative regulations, decisions and orders of the State Council and within the limits of their power, formulate rules.”

binding forces in the current Chinese regulatory framework for OFDI since China has not promulgated any law or administrative regulation to regulate Chinese OFDI. Departmental rules are issued by ministries and commissions under the State Council, either individually or jointly. Titles of departmental rules vary and may include “Measures,” amongst others. Departmental rules are issued by departments of the State Council through an “Order” that is signed by heads of the departments. Administrative regulatory documents are documents with a general binding force as they are official documents issued to the public by authoritative administrative organs.⁵⁶⁹ Titles of administrative regulatory documents also vary and may include “Provisions,” “Provisional Measures,” and “Guidelines,” amongst others. Industry guidelines are issued by nationwide industry associations. Since state agencies have been involved in the development and implementation processes of these guidelines, these guidelines differ from fully voluntary and self-regulatory industry guidelines.

4.3.2 An Ongoing Regulatory Shift toward Enhancing Corporate Social Responsibility

The past two decades (2000-2020) can be distinguished from previous phases of Chinese OFDI. The “Going Global” policy since the early 21st century and the BRI since 2013 have increased the amount of Chinese OFDI and accordingly brought dramatic changes to the substance, format, and number of policies for OFDI.

Before examining the social dimension of the Chinese regulatory framework for OFDI, it is important to underline that environmental governance is more advanced in the framework. Over the past decade, Chinese state agencies, financial institutions, and stock exchanges have made considerable contributions to enhancing environmental governance in the context of Chinese

⁵⁶⁹ The normativity and categorization of various administrative regulatory documents are under development in the Chinese domestic regulatory framework. In recent years, the State Council has developed guidance for formalizing and supervising the development of administrative regulatory documents at all levels of administration. In May 2018, the General Office of the State Council of China issued the *Notice of the General Office of the State Council on Strengthening the Development and Supervisory Administration of Administrative Regulatory Documents*. According to the Notice, administrative regulatory documents are a form of documents that are issued by administrative organs in addition to administrative regulations, decisions, and orders of the State Council, as well as departmental and local rules. The documents are issued to the public with a general binding force. See General Office of the State Council of the People’s Republic of China, *Notice of the General Office of the State Council on Strengthening the Development and Supervisory Administration of Administrative Regulatory Documents* (Beijing: General Office of the State Council, 2018), online: <http://www.gov.cn/zhengce/content/2018-05/31/content_5295071.htm>.

OFDI.⁵⁷⁰ Between 2015 and early 2022, three documents with high-level authority have been dedicated to environmental protection in the Chinese OFDI. The first document is a departmental regulatory document released by the MOC in 2015, *The Further Enhancement of Environmental Protection Work of Foreign Investment Cooperation Enterprises*. The second document is a departmental regulatory document released jointly by the MOC (lead) and the Ministry of Ecology and Environment in 2021, *Guidelines for Green Development of Outbound Investment and International Cooperation*. The third document is a departmental working document released jointly by the Ministry of Ecology and Environment (lead) and the MOC, *Guidelines for Ecological and Environmental Protection of Foreign Investment Cooperation and Construction Projects*. Furthermore, a comprehensive set of policies have been dedicated to environmental governance in the context of China's BRI.⁵⁷¹ These documents highlight the importance of the environmental responsibilities of Chinese enterprises and provide specific guidance for Chinese enterprises to fulfil the responsibilities.

In contrast to the dedication to environmental protection, only a few regulatory documents have been dedicated to the social responsibility of enterprises, and clarifications on social responsibility are fragmented in clauses throughout the documents. As will be illustrated below, in regulatory documents issued at a high level of authority (such as departmental rules), clauses on CSR have been increasingly prevalent in recent years, but they are often general and abstract; in regulatory documents issued at a low level of authority (such as administrative regulatory documents and

⁵⁷⁰ Environmental protection is a key component of CSR in the Chinese regulatory framework for OFDI. To focus on the social dimension and implications for labour governance, this thesis has made minimal efforts to address topics and issues concerning environmental governance. Chinese financial institutions have played an important role in facilitating and promoting environmental governance in the context of Chinese OFDI. Chinese stock exchanges have also played an important role in the past decade in promoting the environmental, social, and governance of Chinese enterprises. However, the focus has been on environmental governance, and the effort for the social dimension is limited. For recent comprehensive analyses of the development of environmental governance in the context of Chinese OFDI, see Dan Guttman *et al*, "Environmental Governance in China: Interactions between the State and 'Nonstate Actors'" (2018) 220 *J Environmental Management* 126; Johanna Coenen *et al*, "Environmental Governance of China's Belt and Road Initiative" (2020) 31:1 *Environmental Policy and Governance* 3; Yan Dong, Jinhuan Tian & Jingjing Ye, "Environmental Regulation and Foreign Direct Investment: Evidence from China's Outward FDI" (2021) 39 *Finance Research Letters*, DOI: <10.1016/j.frl.2020.101611>; Kelly Sims Gallagher & Qi Qi, "Chinese Overseas Investment Policy: Implications for Climate Change" (2021) 12:3 *Global Policy* 260; Liu, *supra* note 171; Guttman, Jing & Young, *supra* note 557.

⁵⁷¹ For a recent compilation and detailed analysis of environmental governance in the context of BRI, see Coenen *et al*, *supra* note 570.

industry guidelines), clauses on CSR are more detailed and often with specific steps and mechanisms for implementation.

(1) A Compilation of Key Regulatory Documents

This chapter identifies 20 documents as representative examples to capture the development trajectory of the social dimension of the framework. The selection of documents was based on the following three criteria: (a) the documents are closely related to Chinese OFDI rather than to domestic business activities; (b) they are closely related to topics on sustainability, responsible investment, corporate social responsibility, and social impacts; (c) they are known to the public and are promoted by state agencies and other stakeholders. The 20 documents are listed below.

Table 9 A Compilation of 20 Regulatory Documents in the Chinese Regulatory Framework for Outward Foreign Direct Investment (2000-2020)

Year	Agency	Level of authority	Title of the document	Scope of application	Key Clauses
2004	MOC	Administrative regulatory documents	Obstacle Report Rules on the Investment in Different Countries	All outward investment	non-business obstacles and risks, including labour unions, strikes
2005	CNTAC	Industry guidelines	China Social Compliance 9000 for Textile and Apparel Industry (updated in 2018)	The textile and apparel industry	Section V
2006	State Council	Administrative regulatory documents	Opinions on Encouraging and Standardizing Outward Investment and Cooperation of Chinese Enterprises	All outward investment	Principle 5, on the compliance with local laws and regulations, necessary social responsibility to protect the legitimate rights and interests of local employees
2007	State Council	Administrative regulatory documents	Guiding Opinion on Encouraging and Standardizing Enterprises' Cooperation in Outbound Investment	All outward investment	Reaffirming Principle 5 of the Nine Principles
2008	SASAC	Administrative regulatory documents	Guidelines to State-owned Enterprises Directly Under the Central Government on Fulfilling Corporate Social Responsibilities	Central state-owned enterprises	Corporate Social Responsibilities
2008	MOC (Jointly)	Administrative regulatory documents	Circular to Regulate the Overseas Investment and Cooperation of Chinese Companies	All outward investment	Reaffirming Principle 5 of the Nine Principles; penalties for illegal activities
2010	MOC (Jointly)	Administrative regulatory documents	Provisions on the Safety Management of Overseas Chinese-funded Enterprises, Institutions and Personnel	All outward investment	Art. 9
2011	MOC (Jointly)	Administrative regulatory documents	Guidelines for the Management of Employees of Overseas Chinese-funded Enterprises (Institutions)	All outward investment	Art. 1, 2, 3, 7, 8, 9, 10, 11, 13
2012	CHINCA (Under the supervision of the MOC)	Industry guidelines	Guide on Social Responsibility for Chinese International Contractors	Chinese International Contractors	Social responsibility; rights and interests of employees; human rights; references to international standards, including international labour conventions.
2012	NDRC (Jointly)	Administrative regulatory documents	Implementation Opinions on Encouraging and Guiding Private Enterprises to Engage in Investment Overseas	Chinese private enterprises operating overseas	Art. 1(4), 4(14)

2013	MOC	Administrative regulatory documents	Provisions on Standardizing Competition in Foreign Investment and Cooperation	All outward investment	Reaffirming Principle 5 of the Nine Principles; prohibition of unfair competition by paying bribes or reducing worker's wages; establishing a "credit record" of any violation of this regulation
2013	MOC (Jointly)	Administrative regulatory documents	Provisional Measures for Negative Credit Records in the Fields of Outbound Investment and Cooperation and Foreign Trade	All outward investment	The implementation of the "credit record" system; non-compliance with local labour laws
2014	MOC	Departmental rules (Order)	Measures for the Administration of Overseas Investment	All outward investment	Art. 20 on CSR, labour protections.
2014	CCCMC (Under the supervision of the MOC)	Industry guidelines	Chinese Guidelines for Social Responsibility in Outbound Mining Investments (updated in 2017)	Chinese outward mining investment	CSR, human rights, labour rights, international standards
2016	CESA (Under the supervision of the MIIT)	Industry guidelines	Guidance on Social Responsibility of Information and Communication Technology Industry	Chinese ICT industry	Art. 5.3 and Art. 5.4
2016	CACE (Under the supervision of the MIIT)	Industry guidelines	CSR Management System of China Information and Communications Industry	Chinese information and communications industry	Section three, Annex A, and Annex B
2017	SASAC	Departmental rules (Order)	Measures for the Supervision and Administration of Overseas Investments by Central Enterprises	Central state-owned enterprises	Art. 6, compliance with law and regulations in China and the host country; Art. 28, fulfillment of CSR
2017	NDRC	Departmental rules (Order)	Measures for the Administration of Overseas Investment of Enterprises	All outward investment	Art. 41, rights and interests of employees, fulfillment of social responsibility
2017	NDRC (Jointly)	Administrative regulatory documents	Code of Conduct for the Operation of Overseas Investments by Private Enterprises	Outward Investments by Private Enterprises	Section 4, on the fulfillment of CSR, particularly the localization of Chinese private enterprises
2018	NDRC (Jointly)	Administrative regulatory documents	Guidelines for Compliance Management of Enterprises' Overseas Operations	All outward investment	Art. 3, 9, 21, 30

Jointly: Jointly promulgated by a group of state agencies at the ministerial level

Source: Compiled by the author⁵⁷²

These 20 documents constitute a microcosm of the development of the social dimension of the framework. They help to capture the substance, structure, and normativity of Chinese regulatory arrangements for socially responsible business conduct. Based on the overview provided in the table, three preliminary conclusions emerge as follows. First, while the Chinese regulatory framework for OFDI is maturing, regulatory arrangements addressing the social dimension of

⁵⁷² These 20 documents were selected from hundreds of Chinese regulatory arrangements for Chinese OFDI. All these documents were issued in Chinese. Most departmental rules and administrative regulatory documents were not accompanied by an official English version. However, key industry guidelines relevant for Chinese enterprises' transnational business activities were usually issued with an accompanying English version by industry associations.

Chinese OFDI are relatively weak and mostly voluntary. As displayed in the table, only a few relevant documents were issued in the first decade of the 21st century, and most were issued over the past decade. For documents with a higher level of authority, such as departmental rules issued by the MOC and the NDRC, only a few clauses on CSR are integrated into the documents. On many occasions, Chinese enterprises are solely required to adhere to the laws and regulations of the host countries, and there do not appear to be serious enforcement consequences for companies that fail to do so. Specific sanctions and legal accountabilities of corporate wrongdoings do not exist.

Second, two key state agencies, notably the MOC and the NDRC, have played a critical role in developing departmental regulatory documents or leading the processes at the ministerial level, and industry associations have played an important role in developing CSR guidelines for Chinese enterprises. Both these two groups of actors are important for enhancing the social dimension of the framework. The recognition of CSR through departmental rules confirms to the public and Chinese enterprises the importance of social responsibilities and social impacts in the context of Chinese OFDI. The detailed clauses about the conceptualization and operationalization of CSR provide specific guidance for Chinese enterprises to follow in the fulfilment of their responsibilities. For instance, as a large part of Chinese OFDI involves infrastructure contracts, in 2012, the CHINCA issued its industry guidelines, *Guide on Social Responsibility for Chinese International Contractors*.⁵⁷³ Section 4 of the Guide lists seven core topics of Chinese international contractors' social responsibilities, including project quality and safety, employee rights and career development, customer rights, supply chain management, fair competition, environmental protection, and community involvement and development.⁵⁷⁴

Despite the practical difficulty of implementing regulatory documents in contexts such as China's economic engagement in Africa, the promulgation of various types of regulatory documents showcases China's proactive approach to addressing social issues in the context of Chinese OFDI.

⁵⁷³ China International Contractors Association (CHINCA), "*Guide on Social Responsibility for Chinese International Contractors*" (2012) at 1, online (pdf): <<https://www.chinca.org/CICA/info/17111314585411>>. The Guide was published in both Chinese and English.

⁵⁷⁴ *Ibid.*

(2) An Ongoing Regulatory Shift

Over the past two decades, the Chinese regulatory framework for OFDI has moved from restricting to facilitating, supporting, encouraging and regulating outward investment.⁵⁷⁵ The regulatory documents address a variety of issues that are relevant to OFDI, including general policies with a broad scope of application, measures concerning the approval and support of outward investment, sectoral policies such as for the oil and mining industry, as well as measures with concerns about social impacts and environmental impacts.

During the first decade of the 21st century, Chinese state agencies promulgated around 100 regulatory documents concerning Chinese OFDI.⁵⁷⁶ However, only a few documents analyzed have directly addressed issues concerning the social responsibilities and impacts of Chinese OFDI.⁵⁷⁷ Only one document provided compressive guidance for Chinese enterprises to fulfill their social responsibilities, *Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities*, which was promulgated by the SASAC in late 2007. The rest of the relevant documents only provided general guidance on social responsibility and did not provide specific guidance for labour protection. In the first decade of the 21st century, limited regulatory arrangements were specifically dedicated to the regulation of labour relations between Chinese enterprises and local employees in investment destination countries.

The second decade of the 21st century witnessed China's regulatory shift toward the enhanced social dimension of the Chinese regulatory framework for OFDI. Between 2010 and 2020, various state agencies and affiliated institutions promulgated hundreds of regulatory documents. As shown in the table, most regulatory documents that are closely relevant to social responsibilities were issued between 2010 and 2020. As will be illustrated in further detail in the next section, regulatory arrangements for labour protections have become key components of the evolving social dimension over the past decade. Various considerations have been devoted to addressing labour

⁵⁷⁵ For an in-depth analysis of relevant policies, regulations and laws, see Sauvart & Chen, *supra* note 2 at 141–157.

⁵⁷⁶ In 2013, the International Institute for Sustainable Development put together a compilation of primary official sources in relation to Chinese laws, regulations, and policies on OFDI. The compilation identified 88 regulatory documents promulgated between 2001 and 2012. See International Institute for Sustainable Development, *supra* note 58.

⁵⁷⁷ *Ibid* at 174–234.

issues identified in Chinese OFDI, especially responding to issues identified in the context of China's economic engagement in Africa. Considerations and safeguards of labour rights are key to the development of the social dimension of the Chinese regulatory framework, in both high-level regulatory documents and voluntary industry guidelines. The past decade has been important for the development of the labour dimension of CSR in Chinese OFDI. Regulatory arrangements have shifted from the focus on labour service cooperation to workers' rights, from the focus on Chinese employees' rights to broader considerations of rights of both Chinese and non-Chinese workers, and from the focus on local laws and rules in host countries to applicable laws and rules set out at various levels of law, including local, international, and Chinese laws and rules.

A combination of both external pressures and internal motivations has contributed to this ongoing regulatory shift. Xiaohui Liang suggests that China's policy shift toward pillar two of the UNGPs, the corporate responsibility to respect human rights, was stimulated by the combined effects of negative impacts on human rights generated by Chinese enterprises' overseas operations and the proactive policy adjustments made by the Chinese government.⁵⁷⁸ Karin Buhmann understands China's policy adjustments for outward mining investment as part of China's soft power expansion. For instance, Buhmann argues that "the guidelines [Chinese human rights guidance on mineral sourcing] function as components of the external elements of China's soft-power push, as part of a public relations offensive to promote the reputation of China and Chinese businesses operating overseas."⁵⁷⁹ Finally, Bingyu Liu suggests that the following three incentives are key reasons for China to promote sustainable investment in Africa: (a) to reduce conflicts and litigation risks, (b) to reduce economic losses, and (c) to protect China's political reputation.⁵⁸⁰

The year 2011 is an important milestone for promoting responsible OFDI for both China and countries in the global North. In 2011, member states of the Human Rights Council, including China, unanimously adopted the UNGPs. Subsequently, member states of the OECD incorporated a new chapter on human rights that aligns with the UNGPs into the Guidelines for Multinational Enterprises. Despite that China is not a member of the OECD, the voluntary model now prevailing in the global North was also followed to various degrees by China in its approach to regulating

⁵⁷⁸ Liang, *supra* note 57 at 53.

⁵⁷⁹ Karin Buhmann, "Chinese Human Rights Guidance on Minerals Sourcing: Building Soft Power" (2017) 46:2 J Current Chinese Affairs 135 at 150.

⁵⁸⁰ Liu, *supra* note 171 at 68–73.

Chinese OFDI toward a responsible model. China sent a strong signal of its attitude change toward the social dimension of Chinese OFDI by incorporating in the 12th Five-Year Plan (2011–2015) a specific statement on the social responsibility of Chinese enterprises that are “going out.” It states in the Plan that “The formulation of laws and regulations concerning overseas investments will be speeded up and optimised...The enterprises that are ‘going out’ and their overseas cooperation projects should bear corporate social responsibility in mind in order to bring benefits to the local people.”⁵⁸¹ Consequently, between 2011 and 2015, key state agencies and industry associations relevant to OFDI developed several departmental rules, administrative regulatory documents, and industry guidelines on CSR to facilitate and regulate Chinese OFDI toward a socially responsible model. In September 2012, the CHINCA issued a CSR guide, *Guide on Social Responsibility for Chinese International Contractors*. The development of the Guide was entrusted by the MOC of China and supported by the Federal Ministry for Economic Cooperation and Development of Germany.⁵⁸² In September 2014, the MOC issued a departmental rule, *Measures for the Administration of Overseas Investment*, which was an amended version of the old version issued in 2009.⁵⁸³ Article 20 of this departmental rule is completely new, and it marks the first time at the ministerial level to explicitly highlight the importance of fulfilling CSR in the context of Chinese OFDI. Subsequently, in October 2014, the CCCMC issued the GSRM for outward mining investment.

The year 2016 marks another important milestone for China’s regulation of responsible OFDI, partly due to China’s rising role in the global economy, as the year 2015 marks the first year when China became the second-largest source of OFDI in the world.⁵⁸⁴ Between 2016 and 2018, both state agencies and industry associations took one step further to set requirements and provide guidelines to regulate Chinese enterprises toward socially responsible OFDI. In 2016, both the CESA and CACE, with support from the MIIT, issued industry guidelines for the social responsibility of the ICT industry. In 2017, the NDRC issued a departmental rule that contains a specific clause for protecting employees and fulfilling social responsibilities in transnational

⁵⁸¹ The State Council of the People’s Republic of China, *The 12th Five-Year Plan (2011-2015) for National Economic and Social Development* (Beijing: Central Government, 2011), online: <http://www.gov.cn/zhuanli/2011-03/16/content_2623428.htm>.

⁵⁸² CHINCA, *supra* note 573 at 1–2.

⁵⁸³ MOC, “Measures (2014)”, *supra* note 405.

⁵⁸⁴ MOC, NBS & SAFE, *supra* note 536 at 6.

business activities. In the same year, the NDRC, jointly with several ministerial-level state agencies, issued an administrative regulatory document, *Code of Conduct for the Operation of Overseas Investments by Private Enterprises*. The Code highlights that the fulfillment of CSR is necessary and important for Chinese POEs' overseas operations. In 2018, the NDRC, jointly with several ministerial-level agencies, issued an administrative regulatory document, *Guidelines for Compliance Management of Enterprises' Overseas Operations*, highlighting that Chinese enterprises should comply with all relevant laws, regulations, industry standards and corporate policies.

4.4 Chinese Regulatory Arrangements for Labour Governance in the Context of Outward Foreign Direct Investment: An Emerging Regulatory Framework

The mapping review provided in the previous section has shown a rapid development of the social dimension of the Chinese regulatory framework over the past decade. Based on the mapping review, this chapter identifies 10 documents that are key to understanding the relevance and implications of Chinese regulatory arrangements for labour governance in the context of Chinese OFDI. This section provides an in-depth investigation into these 10 documents, including two departmental rules, three administrative regulatory documents, and five industry guidelines. The findings from the analysis will help to understand the emerging regulatory arrangements and innovations in China, as well as the limitations and potential of labour governance in the context of Chinese OFDI. This section helps to capture the incremental evolution of labour governance that has emerged in the Chinese regulatory framework for OFDI and the implications for the future of TLL. The emerging regulatory innovations help to exemplify how the State matters in upgrading social considerations and upholding labour rights in a globalized economy.

Subsection one examines key clauses of the 10 documents to understand the roles of different forms of documents in the current regulatory arrangements for CSR and labour rights. Subsection two articulates the evolving agenda of labour governance in the Chinese regulatory framework, focusing on the scope of rights, workers, and enterprises covered, as well as the implementation mechanisms and accountability mechanisms. Subsection three provides critical commentary on the current regulatory arrangements for labour governance, focusing on the limitations and potential of China's approach to transnational labour governance.

4.4.1 An In-depth Analysis of 10 Chinese Regulatory Arrangements for Labour Governance

Various forms of regulatory documents have helped to narrow down some governance gaps in the social dimension of the Chinese regulatory framework for OFDI. General principles, substantive rules and requirements, as well as operational guidelines on CSR and labour governance, have derived from different sites of law in the context of Chinese OFDI. To capture Chinese regulatory arrangements for labour governance, this subsection provides an in-depth analysis of five documents issued by state agencies and five guidelines launched by Chinese industry associations.

A closer review of key clauses concerning CSR in 10 documents reveals that three forms of documents play different roles in addressing CSR issues in Chinese OFDI. First, two departmental rules have incorporated general clauses that highlight the importance of fulfilling CSR in Chinese OFDI. Second, three administrative regulatory documents have provided specific guidance on CSR for Chinese enterprises to follow. Third, five sets of industry guidelines have been dedicated to further conceptualizing CSR and operationalizing the principles, guidelines, and requirements that have been set in departmental rules and administrative regulatory documents.

(1) Key Regulatory Documents Promulgated by State Agencies with General Principles and Specific Guidance for Corporate Social Responsibility

Table 10 Five Key Documents with Specific Provisions on Social Responsibility

Year	Agency	Level of authority	Title of the document	Key Clauses
2008	SASAC	Departmental regulatory documents	Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities (2008, 2016)	1~20
2014	MOC	Departmental rules (Order)	Measures for the Administration of Overseas Investment (2004, 2009, 2014)	20
2017	NDRC	Departmental rules (Order)	Measures for the Administration of Overseas Investment of Enterprises (2004, 2014, 2017)	41
2017	NDRC et al	Departmental regulatory documents	Code of Conduct for the Operation of Overseas Investments by Private Enterprises	Section 4
2018	NDRC et al	Departmental regulatory documents	Guidelines for Compliance Management of Enterprises' Overseas Operations	3, 8, 9, 21, 30

Compiled by the Author⁵⁸⁵

⁵⁸⁵ The author compiled the information through a literature review and internet search in both Chinese and English through the website of state agencies, think tanks, and libraries.

The two departmental rules promulgated by the MOC and NDRC in 2014 and 2017, respectively, are key to the current Chinese regulatory arrangements for transnational labour governance as they highlight the necessity and importance that Chinese enterprises fulfill CSR requirements during their overseas operations. Departmental rules are of the highest level of authority amongst the 10 documents investigated in this chapter. Compared to the old versions of the departmental rule, Article 20 of the *Measures for the Administration of Overseas Investment* (Order No.3 [2014], MOC) is completely new. Article 20 reads:

[Chinese] Enterprises shall urge their overseas investment recipient enterprises to comply with the laws and regulations of the investment destination countries, respect local culture and customs, fulfill their *social responsibilities*, make good efforts in environmental and *labour protections* as well as the construction of corporate culture, and promote the integration into the local context.⁵⁸⁶

Article 41 of the *Measures for the Administration of Overseas Investment of Enterprises* (Order No. 11 [2017], NDRC) is also new. Article 41 reads that “Investors [Chinese enterprises] are encouraged to innovate in the modes of overseas investment, adhere to the principle of operation in good faith, abstain from acts of unfair competition, *protect the rights and interests of their employees*, respect local public order and good morals, *fulfill necessary social responsibilities*, pay attention to environmental protection, and build a good image of Chinese investors.”⁵⁸⁷ Article 41, which stipulates that Chinese enterprises are *encouraged* to protect the rights and interests of their *employees* and fulfill *necessary* social responsibilities, seems to lose some strength compared to article 20, which uses a stronger voice and covers a broader scope of labour protections and social responsibilities. Despite the differentiation in stipulations, both articles highlight the necessity and importance of CSR in Chinese OFDI with a high level of authority, which send out a clear signal to Chinese enterprises to take CSR seriously.

The three departmental regulatory documents promulgated by the SASAC in 2008 and NDRC et al in 2017 and 2018, respectively, are key to the current Chinese regulatory arrangements for transnational labour governance as they provide both general principles and specific guidance for Chinese enterprises to fulfil CSR. The *Guidelines to the State-owned Enterprises Directly under*

⁵⁸⁶ MOC, “Measures (2014)”, *supra* note 405 [emphasis added].

⁵⁸⁷ National Development and Reform Commission of the People’s Republic of China, *Measures for the Administration of Overseas Investment of Enterprises* (Beijing: NDRC, 2017), online: <https://www.ndrc.gov.cn/fggz/lywzjw/zcfg/201712/t20171226_1047050.html> [translated by author] [NDRC, “Measures (2017)”] [emphasis added].

the Central Government on Fulfilling Corporate Social Responsibilities help to conceptualize CSR in the Chinese context. The Guidelines provided both general principles (paragraphs 5 to 7) and specific guidance for fulfilling CSR (paragraphs 8 to 15) by Chinese central SOEs. Paragraph 7 highlights labour protections as a top priority of CSR. It states that “CSOs [SOEs directly under the central government] ought to give *top priority* to ensuring *work safety*, safeguarding the *legal interests of employees*, promoting *career development of employees*.”⁵⁸⁸ Paragraphs 13 to 15 confirm that labour protections are key to the conceptualization and fulfillment of CSR by central SOEs, stressing the importance of safe and healthy working conditions, safeguarding the rights and interests of employees, and contributing to the social and economic development of communities.⁵⁸⁹ For instance, paragraph 13 reads:

Employment contract with employees should be signed and respected, adhere to the principle equal pay for equal work, build up the mechanism of salary increasing, and buy social insurance regulated by the government. All employees ought to be respected and treated equally. Any discrimination of gender, nationality, religion and age is prohibited.⁵⁹⁰

The other two departmental regulatory documents only provided general principles that highlight the importance of fulfilling CSR. The *Code of Conduct for the Operation of Overseas Investments by Private Enterprises* was promulgated in 2017 by the NDRC jointly with four other ministerial-level state agencies.⁵⁹¹ This Code of Conduct partly responds to the increasing outward investment by Chinese POEs. Section 4 (paragraphs 20 to 23) of the Code of Conduct highlights the importance of fulfilling CSR by Chinese POEs during their overseas operations. The section lists several key measures in fulfilling CSR, including enhancing workforce localization and creating jobs for local communities, enhancing communications with local communities, local trade unions and civil society organizations, and contributing to local communities’ social and economic development.⁵⁹² The *Guidelines for Compliance Management of Enterprises’ Overseas*

⁵⁸⁸ State-owned Assets Supervision and Administration Commission of the People’s Republic of China, *Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities* (Beijing: SASAC, 2008), online: <http://en.sasac.gov.cn/2011/12/06/c_313.htm>. The Guidelines were issued in 2008 and were updated in 2016. The English version was provided by the SASAC.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ *Ibid.*

⁵⁹¹ National Development and Reform Commission of the People’s Republic of China et al, *Code of Conduct for the Operation of Overseas Investments by Private Enterprises* (Beijing: NDRC et al, 2017), online: <https://www.ndrc.gov.cn/fggz/lywzjw/zcfg/201712/t20171218_1047049.html?code=&state=123> [translated by author] [NDRC et al, “Code of Conduct (2017)”].

⁵⁹² *Ibid.*

Operations were promulgated in 2018 by the NDRC jointly with six other ministerial-level state agencies.⁵⁹³ Articles 3, 9, 21, and 30 are important for conceptualizing CSR in the context of Chinese OFDI. Article 3 clarifies the concept of “compliance” and the scope of applicable laws. It states that “compliance” means that “the operation and management activities of an enterprise and its employees satisfy with the requirements of the relevant laws and regulations, international treaties, regulatory provisions, industry standards, commercial practices, code of ethics, bylaws developed by enterprises according to the law, rules and regulations, amongst others.”⁵⁹⁴ Article 9 sets out general compliance requirements for companies’ routine operation activities. It states that companies shall ensure “all-around compliance of the business operation activities throughout the whole process, and comprehensively master the specific requirements for the protection of workers’ rights,” as well as a wide range of specific responsibilities, such as environmental protection, anti-corruption, and other requirements.⁵⁹⁵

(2) Key Industry Guidelines with Comprehensive Industry-specific Guidance and Operational Mechanisms for Social Responsibilities and Labour Protections

Table 11 Five Key Industry Guidelines with Comprehensive Industry-specific Guidance and Operational Mechanisms for Social Responsibilities and Labour Protections

Year	Agency	Type of documents	Social Responsibility Standards and Mechanisms	Key Clauses
2005	CNTAC	Industry guidelines	Corporate Sustainability Compact 9000 for Textile and Apparel Industry (CSC9000T) (2005, 2008, 2018)	Section 4
2012	CHINCA	Industry guidelines	Guide on Social Responsibility for Chinese International Contractors	Section 4
2012	CESA	Industry guidelines	Guidance on Social Responsibility of Information and Communication Technology Industry (2012, 2016)	5.3 and 5.4
2014	CCCMC	Industry guidelines	Chinese Guidelines for Social Responsibility in Outbound Mining Investments (shortened as “GSRM”, 2014, 2017)	Section 2
2016	CACE	Industry guidelines	CSR Management System of China Information and Communications Industry (2016)	Section 3, Annex A, and Annex B

Compiled by the author⁵⁹⁶

⁵⁹³ National Development and Reform Commission of the People’s Republic of China et al, *Guidelines for Compliance Management of Enterprises’ Overseas Operations* (Beijing: NDRC et al, 2018), online: <https://www.ndrc.gov.cn/fggz/lywzjw/zcfg/201812/t20181229_1047064.html?code=&state=123> [translated by author] [NDRC et al, “Guidelines for Compliance Management (2018)”].

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid.*

⁵⁹⁶ The author compiled the information through a literature review and internet search in both Chinese and English through the website of state agencies, thinktanks, and libraries.

The five industry guidelines address CSR issues in the industries of textile, contracting, mining, and ICT. These fields are amongst the preferred destinations of Chinese OFDI and areas prone to environmental and social issues that are connected to transnational business activities. Two of the five guidelines are specifically on the social responsibility of Chinese OFDI: *Guidance on Social Responsibility for Chinese International Contractors* (CHINCA, 2012) and GSRM (CCCCMC, 2014). The Guide for international contractors was launched by the CHINCA in September 2012 “to establish a benchmark of social responsibility for the industry and to encourage enterprises to uphold their global responsibility and operate overseas contracting projects in a more responsible way.”⁵⁹⁷ The development of the Guide was “entrusted by China’s Ministry of Commerce.”⁵⁹⁸ The GSRM for outward mining investment were launched by the CCCC in October 2014 “to regulate Chinese mining investments and operations, and to guide Chinese companies in improving CSR and sustainability strategies, as well as management systems.”⁵⁹⁹ The development of the Guidelines was supported by the MOC, MIIT, SASAC, and NDRC, as well as three other state agencies.⁶⁰⁰ The other three guidelines cover both domestic and outward investment. These guidelines are revised regularly and followed by a set of further guidelines, mechanisms, and initiatives.

The five guidelines cover a wide range of CSR topics and operational mechanisms that can guide Chinese enterprises step by step to fulfill their social responsibilities in their specific focus industry. Follow-up revisions and implementation processes of these standards have contributed to the development of CSR both at the domestic level and in the context of Chinese OFDI. The guidelines make clear references to international instruments, both hard and soft. Industry guidelines operate more as voluntary guidance and are limited by their lack of the general binding force found in departmental rules and administrative regulatory documents. However, it is also notable that these guidelines tend to employ the imperative “should” and “shall” instead of the term “encourage” concerning social and environmental protection actions. The choice of language makes the guidelines stronger in calling for the fulfillment of CSR.

⁵⁹⁷ CHINCA, *supra* note 573 at 1.

⁵⁹⁸ *Ibid* at 1.

⁵⁹⁹ CCCC, “GSRM (2014)”, *supra* note 406 at 26.

⁶⁰⁰ *Ibid* at 54.

All five guidelines have been much more detailed and specific than the departmental rules and regulatory documents analyzed above. These guidelines have helped to further conceptualize CSR in the context of Chinese OFDI and provide comprehensive industry-specific guidance and operational mechanisms for fulfilling CSR in which labour rights are a core consideration. Key clauses of industry guidelines will be presented and analyzed in further detail below.

4.4.2 Regulatory Arrangements and Innovations for Labour Governance in the Context of Chinese Outward Foreign Direct Investment

Over the past two decades, the Chinese State has played a pivotal role in promoting and legitimizing, as well as legalizing the development of CSR in China.⁶⁰¹ This state-centric approach to CSR has deeply influenced the development of the social and environmental dimensions of the Chinese regulatory framework for OFDI.⁶⁰² As shown in this chapter, the enhanced social dimension has been shaping the development of labour governance in the context of Chinese OFDI.

In the early 21st century, limited explicit considerations of CSR were featured in the facilitative and regulatory documents regarding Chinese OFDI. The labour dimension of these considerations was mainly placed on the promotion of labour service cooperation and the security of Chinese personnel. “Complying with local laws and regulations” was established as principal guidance for Chinese enterprises’ transnational business activities. Labour protections were addressed generally through umbrella terms such as “social responsibility” and “social impacts.”

The past decade is remarkable given the evidence of the regulatory shift toward the further regulation of Chinese enterprises concerning CSR. The regulatory shift is reflected in various aspects of the emerging regulatory framework for transnational labour governance, including the strengthened acknowledgement of labour protections at the ministerial level, the specified scope of labour protections, and the broad scope of applicable labour standards for Chinese enterprises, as well as the recent development of compliance management measures in the context of Chinese OFDI.

⁶⁰¹ See e.g. Ho, *supra* note 550; Zhao, *Corporate Social Responsibility in Contemporary China*, *supra* note 546; Yanhong Tang et al, “Evolution of Government Policies on Guiding Corporate Social Responsibility in China” (2018) 10:3 Sustainability 741; Dongyong Zhang, Stephen Morse & Qiaoyun Ma, “Corporate Social Responsibility and Sustainable Development in China: Current Status and Future Perspectives” (2019) 11:16 Sustainability 4392.

⁶⁰² See e.g. Liu, *supra* note 166.

This subsection articulates the regulatory framework for transnational labour governance that is in the making in the evolving Chinese regulatory framework for OFDI. This emerging framework is based on a web of various forms of regulatory arrangements for CSR in which labour rights are a core consideration. The framework has preliminarily recognized the scope of workers, rights, and enterprises, as well as applicable labour standards and operational mechanisms. The framework has made little progress in the implementation and remedy mechanisms; however, regulatory innovations and alternative paths have emerged in industry guidelines, especially guidelines launched by the CCCMC.

(1) An Emerging Framework of Various Forms of Regulatory Arrangements for Labour Governance

China is actively and rapidly developing an institutional architecture for the social responsibility of Chinese enterprises in the context of Chinese OFDI, covering both SOEs and POEs. This architecture of a state-centric approach to CSR is based on aspirational commitments and voluntary instruments at the national level. Labour rights have been a core in the institutional architecture for the social dimension of the Chinese regulatory framework. The rapid development of the social dimension of the Chinese regulatory framework underlines China's commitments and ambitions to seek a more active, responsible, and influential role in transnational labour governance.

Over the past decade, China has taken a soft but active approach to labour governance in the context of Chinese OFDI. This chapter has shown that the role of China in transnational legal processes is not played by a singular actor but through a group of state agencies and affiliated institutions to explore and experiment on the way forward. Chinese state agencies have exercised both public and private authority over labour standards in transnational spheres. State agencies that are mandated to facilitate and regulate Chinese OFDI have played an important role in setting general principles and specific guidance for Chinese enterprises to fulfil CSR during their overseas operations. Notably, the MOC, the NDRC, and the SASAC, which are under the direct supervision of the State Council, have made considerable contributions to enhancing the social responsibilities of Chinese enterprises in the context of Chinese OFDI. These key state agencies have developed a wide range of regulatory documents consisting of departmental rules and administrative regulatory documents with various levels of authority. They have also facilitated and supported the development of industry-specific CSR guidelines for enterprises in different industries, such

as international contractors, the mining industry, as well as the ICT industry. Industry associations, with support from state agencies, have played an important role in developing comprehensive industry-specific guidance and operational mechanisms for CSR and labour protections. These industry guidelines supplement the general principles set by state agencies and further conceptualize CSR and labour governance in the context of Chinese OFDI.

While the current forms of Chinese regulatory arrangements are soft, the recent regulatory changes made by state agencies have allowed the space for other actors to play a role in transnational labour governance. The close relationships between industry associations and state agencies have allowed the space and capability for industry associations to explore regulatory innovations. State agencies have played an important role in supporting the development of such regulatory innovations. Meanwhile, industry associations have also had the opportunity to play a role as “intermediaries” in enhancing the connections between state agencies and enterprises.

(2) The Scope of Workers and Rights and the Scope of Enterprises

Recent Chinese regulatory arrangements have preliminarily addressed the scope of workers, rights, and companies. There are three notable updates in the current framework for transnational labour governance: (a) the scope of workers protected was expanded from the focus on Chinese personnel to broader consideration of workers who are directly or indirectly connected to Chinese OFDI; (b) the scope of rights covered was clarified compared to general commitments to enhancing CSR; (c) the scope of Chinese enterprises regulated was expanded from the focus on SOEs to both SOEs and POEs.

First, the current framework covers both Chinese and non-Chinese workers who are directly or indirectly connected to Chinese OFDI. In the first decade of the 21st century, Chinese regulatory arrangements concerning labour protections have focused on the promotion of labour service cooperation and the security of Chinese personnel in the context of Chinese OFDI.⁶⁰³ Over the past decade, ensuring labour protections for labour service cooperation and the security of Chinese

⁶⁰³ Since the late 1990s, the MOC of China has promulgated several departmental rules for the administration and regulation of foreign labour cooperation. See e.g. Ministry of Commerce & State Administration for Industry and Commerce of the People’s Republic of China, *Measures for the Administration of Operational Qualifications for Labour Service Cooperation with Foreign Parties*, Order No. 3 [2004], invalid as of November 2019 (Beijing: MOC & SAIC, 2004), online: <<http://www.mofcom.gov.cn/article/swfg/swfgbi/200407/20040700256884.shtml>>.

personnel is still key to the Chinese regulatory framework for OFDI.⁶⁰⁴ However, the scope of workers protected has been expanded from the focus on Chinese personnel to broader consideration of both Chinese and non-Chinese workers who are directly or indirectly connected to Chinese OFDI. The five documents by state agencies analyzed above have generally highlighted the importance of labour protections, especially the rights of employees in the context of Chinese OFDI, without distinguishing between Chinese employees and non-Chinese employees. Notably, the key clauses on CSR have indicated that a broad range of workers who are directly or indirectly connected to Chinese OFDI are covered in the current framework. For instance, the 2016 version of the Guidelines by the SASAC have set out that central SOEs should integrate the fulfilment of CSR into their supply chain management, including monitoring and managing their suppliers, distributor, and partners' performance in complying with laws and regulations, safety and environmental protection, and rights of employees.⁶⁰⁵ Furthermore, five industry guidelines have all covered both Chinese and non-Chinese workers as key stakeholders of the social responsibility of Chinese enterprises.

Second, the current framework covers a broad range of labour rights. Over the past decade, the framework has further elaborated on the scope of labour rights covered and the substantive measures for labour protections. Based on the general principles and specific guidance set in departmental rules and departmental regulatory documents, industry guidelines have identified several key issues and topics concerning the fulfilment of CSR. Labour rights are considered a core issue. For instance, the Guide for international contractors launched by the CHINCA in 2012 identifies the following five core issues for the fulfilment of CSR: (a) project quality and safety, (b) employee rights and career development, (c) customer rights, (d) supply chain management,

⁶⁰⁴ See e.g. The State Council of the People's Republic of China, *Regulation on the Administration of Foreign Labour Cooperation*, Order No. 620 [2012], Administrative Regulation (Beijing: State Council, 2012), online: <http://www.gov.cn/zhengce/2012-06/11/content_2602603.htm>. Article 2 of the Regulation defines the term "foreign labour cooperation" as "the operational activities of organizing [Chinese] contract workers to work in other countries or regions for foreign enterprises or institutions."

⁶⁰⁵ State-owned Assets Supervision and Administration Commission of the People's Republic of China, *Guidelines to the State-owned Enterprises Directly under the Central Government on Better Fulfilling Corporate Social Responsibilities* (Beijing: SASAC, 2016), online: <<http://www.sasac.gov.cn/n2588035/n2588320/n2588335/c20234205/content.html>>. Paragraph 10 states that "[The implementation of Corporate Social Responsibility] should be integrated into the supply chain management. Central State-owned Enterprises should insert the concept of corporate social responsibility into the supply chain, implement systematic management of suppliers, distributors, and partners' performance in complying with laws and regulations, safety and environmental protection, rights of employees, and transparent operations, and achieve joint responsibility" [translated by author].

(e) fair competition, environmental protection, (f) community involvement and development.⁶⁰⁶ The Guide highlights that “Employees are a core stakeholder of an enterprise as well as its most creative resource for development.”⁶⁰⁷ Subsequently, it reads that “Enterprises should respect *human rights* and guarantee the rights of *Chinese and foreign employees*, respect and care for their employees, and achieve mutual development with employees.”⁶⁰⁸ Furthermore, clause 4.2 of the Guide gives specific instructions on six key aspects of rights and welfare for both *Chinese and foreign employees*, including the following: (a) equity, non-discrimination, and the use of the workforce according to laws and regulations; (b) remuneration and welfare; (c) occupational health and safety; (d) career development; (e) communication, negotiation, and participation mechanisms between employees and employers; and (f) caring of employees.⁶⁰⁹

A similar example can be drawn from the GSRM for outward mining investment launched by the CCCMC in 2014. The GSRM identify eight thematic issues as key to the social responsibility of Chinese enterprises that are connected to global mineral supply chains. The eight issues are organizational governance, fair operating practices, value chain management, human rights, labour issues, occupational health and safety, environment, community involvement and engagement.⁶¹⁰ All these issues can be critical for ensuring labour rights in the context of Chinese outward mining investment.⁶¹¹ Section 2.5 of the Guidelines highlights that “Responsible labor practices are essential for social justice, societal stability, and a harmonious society. The labor practices of companies include respecting employees’ rights to freely select their jobs and have fair and appropriate working conditions.”⁶¹² Comprehensive guidance for safeguarding labour rights include the following nine key elements: (a) eliminating child labour and forced labour; (b) ensuring equal and fair employment based on labour contracts and legal requirements; (c) eliminating discrimination against workers with respect to access to employment or occupation; (d) upholding legal or industry minimum wage standards, and pay social security benefits; (e) adhering to international standards on working hours, overtime and annual leave; (f) providing

⁶⁰⁶ CHINCA, *supra* note 573 at 5–16.

⁶⁰⁷ *Ibid* at 6.

⁶⁰⁸ *Ibid* [emphasis added].

⁶⁰⁹ *Ibid* at 6–8.

⁶¹⁰ CCCMC, “GSRM (2014)”, *supra* note 406 at 30–45.

⁶¹¹ Chapter 5 of this thesis will illustrate the interrelationships amongst the eight thematic issues and their implications for the future of TLL.

⁶¹² CCCMC, “GSRM (2014)”, *supra* note 406 at 36.

working conditions which are clean, safe, and meet the basic needs; (g) providing vocational training and career development; (h) establishing a collective bargaining mechanism between employers and employees according to local laws and customs, if applicable, and encouraging employees to engage in company management; (i) establishing a mutual communication channel and grievance mechanism between management and employees, and facilitating the dialogue between management and employees, so as to better understand and respond to employees' expectations.⁶¹³

Third, the current framework covers both Chinese SOEs and POEs. As well known in the field of OFDI, a large portion of Chinese OFDI was contributed by Chinese SOEs. Accordingly, the only specific guidance on CSR developed by state agencies in 2008 and 2016, respectively, was dedicated to SOEs directly under the central government. However, over the past decade, and especially in recent years, the rise of Chinese POEs in the context of Chinese OFDI is notable. Consequently, the scope of enterprises covered in the framework is expanded from the focus on SOEs to both SOEs and POEs to respond to the increasing outward investment by POEs. Over the past decade, most regulatory arrangements have applied to all enterprises, regardless of their size (large or small enterprises) or types (SOEs or POEs). Notably, the Code of Conduct promulgated in 2017 by the NDRC, jointly with four other ministerial-level state agencies, is dedicated to guiding Chinese POEs toward responsible outward investment.⁶¹⁴ Through this Code of Conduct, five ministerial-level state agencies acknowledge that, while Chinese POEs have significantly accelerated the pace of OFDI, their inadequate overseas experience and performance on CSR are to be addressed. As illustrated above, section 4 (paragraphs 20 to 23) of the Code of Conduct highlights Chinese POEs' responsibility to fulfil CSR in the context of Chinese OFDI, especially enhancing workforce localization and creating jobs for local communities.⁶¹⁵

(3) The Applicable Labour Standards

At the initial stage of Chinese OFDI, Chinese regulatory arrangements provided vague guidance on applicable labour standards for Chinese enterprises' overseas operations. On many occasions, regulatory documents suggest Chinese enterprises comply with "local laws and regulations" in

⁶¹³ *Ibid* at 36–38.

⁶¹⁴ NDRC et al, "Code of Conduct (2017)", *supra* note 591.

⁶¹⁵ *Ibid*.

investment destinations.” In the early 21st century, Chinese regulatory documents established “complying with local laws and regulations” as principal guidance for Chinese enterprises’ transnational business activities. For instance, in 2006, the State Council promulgated the *Opinions on Encouraging and Standardizing Outward Investment and Cooperation of Chinese Enterprises*. Opinion five highlights that Chinese enterprises shall “comply with local laws and regulations.”⁶¹⁶ The *Opinions* have considerable impacts on the formation of subsequent regulatory documents, the practices of Chinese enterprises, as well as the advocacy work by civil society organizations. Many key standards, policies and guidelines keep highlighting that Chinese enterprises should respect and comply with local laws and regulations.

Over the past decade, “local laws and regulations” are still key to applicable labour standards for Chinese enterprises’ overseas operations. However, the scope of applicable labour standards has been expanded from the focus on “local laws and regulations” to broader references to international instruments, industry guidelines, other relevant rules and practices such as local cultural rules and customs, and commercial rules and practices. For instance, both departmental rules investigated above highlight the importance of local laws and regulations, as well as relevant local rules, but do not exclude any other applicable standards on CSR and labour protections. Article 20 of the Measures (Order No.3 [2014], MOC) directs Chinese enterprises to “laws and regulations of the investment destination countries” and “local culture and customs” to fulfill their social responsibilities.⁶¹⁷ Article 41 of the Measures (Order No. 11 [2017], NDRC) directs Chinese enterprises to “local public order and good morals.”⁶¹⁸ Furthermore, the recently promulgated Guidelines on compliance management (No. 1916 [2018], NDRC) have indicated that Chinese enterprises shall not only comply with local laws and regulations but also consult applicable international instruments and other relevant standards. Article 3 of the Guidelines has helped to clarify the scope of applicable laws and standards concerning Chinese enterprises’ overseas

⁶¹⁶ The State Council of the People’s Republic of China, *Opinions on Encouraging and Standardizing Outward Investment and Cooperation of Chinese Enterprises* (Beijing: State Council, 2006), online: <<http://news.cctv.com/china/20061025/105831.shtml>>. The fifth opinion states that “[Chinese enterprises shall] comply with *local laws and regulations*, ensure that project contracting is open to the public, fair, and transparent, adhere to promises and commitments, fulfill necessary social responsibilities, protect *the rights and interests of local employees*, pay close attention to environmental and resource protection, and care for and support the development of *social and livelihood of local communities* [emphasis added]” [translated by author].

⁶¹⁷ MOC, “Measures (2014)”, *supra* note 405.

⁶¹⁸ NDRC, “Measures (2017)”, *supra* note 587.

operations. Applicable standards cover “relevant laws and regulations, international treaties, regulatory provisions, industry standards, commercial practices, code of ethics, bylaws developed by enterprises according to the law, rules and regulations, amongst others.”⁶¹⁹

In contrast to the general references to international instruments and other relevant standards in regulatory documents, industry guidelines have made references to a wide range of specific international instruments and other relevant standards. Specifically, industry guidelines have referenced several international labour Conventions and other international instruments that address labour rights in the context of transnational business activities. The Guide on international contractors highlights the importance for Chinese enterprises to comply with local labour laws and regulations, as well as relevant local rules, customs, and business practices.⁶²⁰ However, the Guide also lists in the Annex more than 77 relevant Chinese and international instruments as references.⁶²¹ These instruments include the following: (a) 54 Chinese laws, regulations, and rules, (b) six Chinese CSR guidelines, (c) 11 international Conventions and soft instruments that are relevant to labour rights, human rights, and sustainability, (d) relevant ILO Conventions, and (e) five pieces of standards relevant to CSR and occupational health and safety.

Another example can be drawn from the GSRM for outward mining investment. While highlighting the importance of local laws and customs, such as collective bargaining mechanisms, the GSRM stress that enterprises should ensure compliance with all applicable laws and regulations, respect human rights, and protect the rights and interests of employees.⁶²² It reads that “Companies should respect human rights and comply with the eight fundamental Conventions of the International Labor Organization and the host country’s labor laws, regulations, and standards.”⁶²³ Furthermore, the development of the GSRM was based on a careful cross-examination of 28 international instruments and initiatives that are key to responsible mining.⁶²⁴

Notably, all five industry guidelines have been impacted by the UNGPs. While having not explicitly referenced the UNGPs, the Guide on international contractors has reflected pillar two of

⁶¹⁹ NDRC et al, “Guidelines for Compliance Management (2018)”, *supra* note 593.

⁶²⁰ CHINCA, *supra* note 573 at 6, 7, 8, 14, and 17.

⁶²¹ *Ibid* at 18–21.

⁶²² CCCMC, “GSRM (2014)”, *supra* note 406 at 38.

⁶²³ *Ibid* at 29.

⁶²⁴ *Ibid* at 47–52, “Annex 1: List of Standards which have been considered for the development of the Guidelines”.

the UNGPs, highlighting that “Enterprises should respect human rights.”⁶²⁵ The other four guidelines have explicitly listed the UNGPs as one of their referenced instruments. Notably, the GSRM for outward mining investment have closely aligned with the UNGPs in developing specific clauses.

(4) The Implementation Mechanisms

Most regulatory documents issued by state agencies are not accompanied by appropriate operational measures and effective implementation mechanisms. The lack of operational and implementation mechanisms makes it difficult to monitor and evaluate corporate performance and even more difficult for the affected individuals and communities to seek remedies and hold the rights abusers accountable. Only a few regulatory documents have provided specific guidance for operationalizing the guidelines and standards on general CSR or specific labour protections. In contrast to limited considerations in regulatory documents issued by state agencies, industry guidelines have considerably contributed to narrowing down some of the gaps in operationalization and implementation.

Recent regulatory innovations developed by the MOC and the NDRC may have the potential to narrow down the gaps. Provisional Measures (No. 248 [2013], MOC et al) for negative credit records establish the mechanism of collecting and publicizing information about Chinese enterprises’ non-compliance with laws and regulations in transnational business activities. Section four of the Provisional Measures stipulates various types of corporate misbehaviour that administrative agencies and industry associations shall publicize at national and local levels. These misbehaviours include severe labour disputes that result from the non-compliance with local labour laws in investment destination countries and safety accidents that result from the non-compliance with standards for manufacturing, technical, and health conditions. However, as of April 2022, the negative credit records online system of the MOC has only listed 10 records.⁶²⁶

Developments surrounding the Guidelines (No. 1916 [2018], NDRC et al) on compliance management have indicated a potential to narrow down gaps in operationalization and implementation. Article 11 of the Guidelines suggests that Chinese enterprises establish a

⁶²⁵ CHINCA, *supra* note 573 at 6.

⁶²⁶ Seven negative credit records are related to the failure of labour protections for Chinese dispatched workers. See Ministry of Commerce of the People’s Republic of China, “Negative Credit Records” (2022), online: <<http://zsmthz.mofcom.gov.cn/gsapp/pages/zsmwp/gov/BadRecordListShow.html>> [translated by author].

“compliance management institution” to implement and operationalize compliance management in overseas operations.⁶²⁷ The compliance management institute consists of a committee, a chairperson, and a department. The committee is in charge of monitoring and evaluating the implementation of compliance management. The chairperson is responsible for promoting and monitoring daily compliance management practices. The department is the executive body of specific measures and actions concerning compliance management. The compliance management department should fulfill a set of compliance responsibilities, including “actively identifying and evaluating compliance risks related to the company’s overseas operations, and monitoring compliance risks relevant to third parties such as *suppliers, agents, distributors, consultants, and contractors*.”⁶²⁸ The acknowledgement of suppliers and other actors as relevant for compliance management is crucial for operationalizing labour standards and safeguards in the context of multi-tier supply chains. Chapter five (clauses 16-21) of the Guide stipulates the operational mechanism of compliance management. This chapter highlights six measures for Chinese enterprises to operationalize compliance management in the context of overseas operations: (a) to integrate compliance management into staff training, (b) to ensure regulatory reporting activities of the compliance management department to the senior management team of the company, (c) to incorporate compliance management as a key performance indicator for staff, (d) to seek consultancy or audit service support for compliance management when necessary, (e) to establish a mechanism for reporting, complaining, and investigating about non-compliance, and (f) to establish a comprehensive and effective compliance accountability system.⁶²⁹ Notably, Article 21 of the Guidelines sets out the accountability mechanism for non-compliance. It states that “Enterprises should establish a comprehensive and effective compliance accountability system, clarify the scope of compliance responsibilities, detail punishment standards for non-compliance, and strictly identify and hold non-compliance accountable.”⁶³⁰

In contrast to the limited guidance provided in regulatory documents, industry guidelines have developed a variety of mechanisms, measures, and tools to operationalize and implement CSR and labour protection requirements. Over the past decade, industry guidelines have provided several

⁶²⁷ NDRC et al, “Guidelines for Compliance Management (2018)”, *supra* note 593 at 5.

⁶²⁸ *Ibid* [emphasis added].

⁶²⁹ *Ibid* at 8–10.

⁶³⁰ *Ibid* at 10.

directions for operationalizing CSR and labour protection requirements.⁶³¹ Since all five industry guidelines have consulted the UNGPs as a critical international instrument, the guidelines have applied key clauses and elements of the UNGPs to provide industry-specific guidance for operating CSR and labour protection requirements. All five industry guidelines have taken a stakeholder and risk-based approach to guide Chinese enterprises in identifying, mitigating, preventing, and addressing risks related to social responsibilities. The guidelines take labour rights as key for the fulfilment of CSR. The guidelines identify both employees and workers in supply chains as key stakeholders in business activities. Notably, they have advanced the labour dimension of supply chain management in the context of Chinese OFDI. Three guidelines have explicitly taken an HRDD approach to identify, prevent, mitigate, and address adverse impacts on human rights, including the CCCMC's guidelines for the outward mining industry, the CACE's CSR Management System for the information and communications industry, and the CNTAC's CSC9000T for the textile and apparel industry. These guidelines have provided detailed guidance for Chinese enterprises to establish and implement an HRDD process. The development of an HRDD approach in these guidelines initially recognized labour protections as core components of HRDD.

An advanced example can be drawn from the Guidelines for outward mining investment.⁶³² The Guidelines stipulated the scope of labour rights that Chinese enterprises should respect during their transnational business activities. Furthermore, the Guidelines provided specific guidance for Chinese enterprises regarding how to implement applicable labour standards through responsible and sustainable supply chain management, highlighting the labour dimension of HRDD in mineral supply chains. It is stipulated that Chinese enterprises should “require and support first-tier suppliers to adhere to the principles and requirements set out in these Guidelines and leverage first-tier suppliers to enforce these Guidelines in their supply chains respectively.”⁶³³ Specifically, it is stipulated that “Companies that are engaged in upstream activities of mineral development – e.g. processing, trading or sourcing from artisanal miners or cooperatives – should adopt *a due*

⁶³¹ For instance, the Guide for Chinese international contractors has provided specific guidance on social responsibility management, including the following seven key elements: organizational structure, system management, capacity building, continuous improvement, stakeholders, social responsibility information disclosure, and social responsibility crisis management. See CHINCA, *supra* note 573 at 2–4.

⁶³² Chapter 5 of this thesis will provide an in-depth investigation into guidelines, initiatives and mechanisms that the CCCMC has developed.

⁶³³ CCCMC, “GSRM (2014)”, *supra* note 406 at 33.

diligence and internal control system to assess risks in their supply chain.”⁶³⁴ For instance, according to the Guidelines, companies that source from artisanal and small-scale miners shall regularly assess risks of forced labour, child labour, unsafe working conditions, uncontrolled use of hazardous substances and other significant environmental impacts.⁶³⁵ Notably, the Guidelines are equipped with an implementation mechanism, chapter 3, “Implementation of the Guidelines.” This chapter on implementation is an innovative and advanced example since it includes the operational, monitoring, and implementation mechanism for the ongoing supervision of outward mining investment concerning social responsibility. According to this section, the CCCMC is responsible for facilitating, supervising, and monitoring the implementation of the Guidelines. The CCCMC is responsible for the following six measures: first, widely disseminating the Guidelines to the public and promoting the Guidelines in international exchange activities; second, actively assisting companies with capacity-building measures and activities; third, encouraging companies to assess their social responsibility according to the principles and social responsibility issues set in the Guidelines; fourth, conducting an evaluation of the CSR performance of Chinese companies engaged in outbound mining investments according to the Guidelines and disseminating best practice to the outward mining industry and more broadly to the public; fifth, regularly reporting to the public on its outreach activities and findings from the monitoring; sixth, reviewing and updating the Guidelines every three years in cooperation with a wide range of stakeholders and with public consultation.⁶³⁶ Accordingly, between 2015 and 2022, the CCCMC has launched several follow-up guidelines, mechanisms, and tools to operationalize and implement the social responsibility of Chinese companies to respect labour and human rights during their global operations.

4.4.3 The Limitations and Potential of Chinese Regulatory Arrangements for Labour Governance

A Chinese regulatory framework for labour governance is emerging in the context of Chinese OFDI. The release of numerous regulatory documents and various industry guidelines is a promising start for China to regulate the extraterritorial behaviours of Chinese enterprises. Over the past two decades, these regulatory arrangements have preliminarily addressed the scope of

⁶³⁴ *Ibid* [emphasis added].

⁶³⁵ *Ibid*.

⁶³⁶ “3. Implementation of the Guidelines” in CCCMC, “GSRM (2014)”, *supra* note 406 at 46.

workers, rights, and enterprises, applicable labour standards, and operational mechanisms of the standards. However, there are notable limitations to the current framework and foreseeable challenges to ensuring socially responsible investment. This subsection provides commentary on the limitations and potential of Chinese regulatory arrangements for labour governance in Chinese OFDI.

(1) The Limitations of Chinese Regulatory Arrangements for Labour Governance

Based on the in-depth analysis of Chinese regulatory arrangements, this chapter has identified two critical limitations of the emerging regulatory framework for transnational labour governance. The first limitation is the lack of accountability for potential non-compliance with labour standards and abuses of labour rights that may occur in the context of Chinese OFDI. The second limitation is the lack of an explicit conceptual framework for labour governance.

The two limitations indicate two potential directions for the development of an effective regulatory framework to ensure socially responsible Chinese OFDI. As shown in the previous subsection, several advanced examples of industry guidelines have made considerable contributions to narrowing down governance gaps. However, these guidelines have limited applicable scope as they focus on specific industries and have limited influence due to the lack of a general binding force. Therefore, the governance gaps remain to be addressed through a set of comprehensive regulatory arrangements made by state agencies, either through an individual state agency such as the MOC, which is key for regulating Chinese OFDI, or ideally through arrangements jointly made at the ministerial level with the MOC as the lead agency.

(a) The Lack of Accountability Mechanisms for Non-compliant Corporate Behaviours

The development of Chinese regulatory arrangements and their growing influence in shaping Chinese enterprises' labour performance has not been accompanied by a corresponding development of formal accountability mechanisms that directly link non-compliance of private actors to clear negative consequences set by public actors.

The current regulatory framework poses several challenges for ensuring socially responsible OFDI. The generalization of guidance, the ambiguity of applicable labour standards, and the insufficiency of operationalization and implementation mechanisms have all created challenges for ensuring the effectiveness and accountability of the framework. First, the generalization of guidance makes it

difficult for enterprises of different sizes (large or small enterprises) or ownerships (SOEs or POEs) to follow in their overseas operations. The challenges related to implementation show that general guidance and soft guidelines released by the Chinese government are not sufficient. More action is required, and more stakeholders ought to be included to make effective changes in practice.

Second, the ambiguity of applicable labour standards makes it difficult to evaluate and account for non-compliant corporate behaviours. For instance, many regulatory documents emphasize that Chinese enterprises should comply with local laws and regulations in the host countries of their investment. These documents are written in general terms, with little specification for types or risk levels of investments. They suggest that enterprises should find specific laws and regulations in their host countries and decide their behaviours correspondingly. However, this general orientation has proven problematic in contexts such as Chinese enterprises operating in Africa. Enterprises may make use of loopholes in legislation and administration to lower labour standards.

Third, the insufficiency of operationalization and implementation mechanisms makes it difficult to monitor the processes of enterprises' behaviours in a consistent way. As illustrated in the previous subsection, a few measures concerning accountability for both enterprises and staff of enterprises for failures regarding compliance management have emerged from the Guidelines on compliance management released in December 2018. However, these recent developments have only recently emerged, and the measures remain to be detailed and established. It remains to be seen in the coming decades how these recent developments can address the accountability gaps in the current framework.

The accountability gaps identified in the context of Chinese OFDI are not new to the general conditions of accountability in transnational labour governance over the past three decades. Since the 1990s, the accountability gaps identified in GSCs have prompted the development of new forms of accountability, which ranges from corporate COCs to multi-stakeholder initiatives and, in recent years, to legal accountability through national legislation in several countries in the global North.⁶³⁷ It is foreseeable that there will be a co-evolution and potential competition of various

⁶³⁷ For a detailed analysis of alternatives to address accountability gaps of transnational labour governance in GSCs, see Ingrid Landau & Tess Hardy, "Transnational Labour Governance in Global Supply Chains: Asking Questions and Seeking Answers on Accountability" in ILO, *Decent Work in a Globalized Economy*, *supra* note 28, 43 at 51–64.

forms of accountability. The measures taken by Chinese state agencies and industry associations will be part of the processes to address accountability gaps in labour governance in GSCs.

(b) The Absence of an Explicit Conceptual Framework for Labour Governance

The current framework has tended to address labour issues through broad themes such as “social responsibility,” “social impacts,” and “sustainability.” This way of integrating labour protections into the regulatory framework has helped to mainstream labour rights and add one more layer of protection for labour rights in Chinese OFDI. The development of regulatory arrangements for labour governance has to a large extent benefited from the acknowledgement, promotion, and implementation of requirements and guidelines on these broad concepts. However, this tendency will also risk overlooking the specificity of labour governance. The ambiguity of these concepts has caused barriers to the accountability for adverse abuses of labour rights in transnational spheres. As articulated by Karl P. Sauvant et al, regarding concrete measures to facilitate the flow of sustainable FDI, investment facilitation measures should encourage social responsibility.⁶³⁸ CSR-related requirements and guidelines could be helpful for the mainstreaming of the protection of labour and human rights. However, they should not replace legal instruments specifically addressing labour issues in transnational business activities.

Furthermore, the lack of a complete and explicit conceptual framework for transnational labour governance has resulted in regulatory documents with high-level authority remaining symbols for enhancing labour governance. Fragmented regulatory arrangements made so far are not sufficiently comprehensive to have effectively internalized the substantial guidance of labour protections in Chinese OFDI. Over the past decade, policy convergence around CSR across relevant supervisory authorities has improved. The regulatory documents released jointly at the ministerial level are examples of such convergence. However, many regulatory documents may repeatedly confirm the importance of CSR without substantive guidance on how to implement and enhance CSR in the context of OFDI. For instance, there is still no full and timely information-sharing regarding the effectiveness or influence of guidelines for CSR. The lack of top-level design of transnational labour governance has also resulted in further explorations made through industry

⁶³⁸ Karl P. Sauvant, Matthew Stephenson & Yardenne Kagan, “An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?” (Third edition, June 2022) at 61–67, online (pdf): <<https://ssrn.com/abstract=3739179>>; Karl P. Sauvant & Howard Mann, “Making FDI More Sustainable: Toward an Indicative List of FDI Sustainability Characteristics” (2019) 20 J of World Investment & Trade 916.

guidelines mainly focusing on severe labour abuses. These deficiencies pointed to the need for a comprehensive top-level design to deepen the understanding of social safeguards amongst state agencies at all levels and to mobilize public and private investment toward a responsible model of OFDI.

Moreover, the current regulatory arrangements have not yet been developed into a “smart mix” consisting of both hard law instruments and soft regulatory arrangements. The Chinese regulatory framework for OFDI has long been critiqued for its limited legally binding effect on Chinese corporate behaviours. Without hard law instruments with specified requirements and accountability for the negative social impacts of OFDI, the uptake for social responsibility has been slow. Over the past decade, several departmental rules and departmental regulatory documents have been issued at the ministerial level. These developments have strengthened the binding force of arrangements regarding social responsibility and responsible outward investment. A more comprehensive regulatory arrangement with a high level of authority will substantively enhance the influence and effectiveness of labour governance in Chinese OFDI. The form of the arrangement should be a departmental regulatory document, or ideally, a departmental rule, and the key elements of the arrangement should address the gaps concerning operationalization, implementation, and accountability.

(2) The Potential of Chinese Regulatory Arrangements for Labour Governance

Despite the above-analyzed limitations, recent regulatory updates in the emerging Chinese regulatory framework have laid a preliminary foundation for the further enhancement of labour governance in the context of Chinese OFDI. On the one hand, the lack of accountability mechanisms and the absence of an explicit conceptual framework have created challenges for ensuring effective labour governance; on the other hand, the current framework does not exclude any possibilities and directions for the further enhancement of transnational labour governance.

The broad scope and ongoing regulatory design of the current framework have allowed the space for regulatory changes and innovations. The MOC has made considerable contributions to highlighting the importance of CSR and, more specifically, labour protections. Furthermore, it has closely supported the development of industry guidelines for international contractors and outward mining investment.

(a) A Pragmatic Experimentation Approach to Labour Governance in the Context of Chinese Outward Foreign Direct Investment

China has been taking a pragmatic, experimental, and gradualist approach to its role in the emerging multi-level governance of labour rights in transnational spheres. China is incrementally developing a pragmatic approach to constructing and shaping TLL through a web of various forms of regulatory arrangements for labour governance in the context of Chinese OFDI. This increasingly multifaceted web consists of regulations and administrative regulatory documents promulgated by state agencies and other forms of CSR guidance such as industry guidelines and initiatives. The regulatory innovations and pragmatic experimentation are ongoing. These regulatory innovations are important in that they provide alternative directions to challenge the existing unequal laws that govern the workplace in the context of economic globalization and construct new TLOs on decent work that take into consideration the persistent power asymmetries and the inequitable distribution of wealth in the context of GSCs.

Similar to its approach to economic development,⁶³⁹ China's approach to labour governance, both domestically and transnationally, seems to have followed a path that Sean Cooney termed "pragmatic experimentation."⁶⁴⁰ This pragmatic experimentation approach is also reflected in the development, implementation, and revision of both regulatory documents by state agencies and industry guidelines by industry associations. The approach entails reforming an area if existing regulatory practices turn out to be or become ineffective. Furthermore, it entails that once a regulatory change seems feasible, then the regulatory change would be introduced to a higher level of law and a broader scope of application.

This dynamic experimental process has been evident at various sites of laws in and beyond the field of Chinese domestic labour law reform. For instance, in November 2018, the SASAC issued a trial version of the Guidance on Compliance Management for Central Stated-Owned Enterprises. This trial version is applicable until a formal version of the guidance is issued by the SASAC to guide compliance management for central SOEs. The development of industry guidelines is also

⁶³⁹ See Tang, *supra* note 183.

⁶⁴⁰ Cooney, *supra* note 23 at 163. Similar characterizations of China's approach to foreign policies and investment policies as "pragmatic" by scholars in the fields of international relations and international law, see e.g. Liang, *supra* note 57 at 72; Suisheng Zhao, "China's Foreign Policy Making Process: Players and Institutions" in David Shambaugh, *China and the World*, ed (Oxford: Oxford University Press, 2020) at 106.

conducted through a trial version to a formal version, supplemented by regulatory revisions according to the need of practical circumstances. Furthermore, the implementation and revision of each set of industry guidelines usually start with pilot projects.⁶⁴¹ The role of pilot projects is to test whether the guidelines are feasible and to identify weak parts for improvements and good practices for dissemination amongst Chinese enterprises. The pilot projects are conducted through a multi-stakeholder approach, with the participation of a wide range of actors that include industry associations, Chinese enterprises, governmental bodies, workers' representatives, and other organizations. For instance, the implementation of industry guidelines for the mining industry started from a pilot project that was developed through the combined efforts of the CCCMC and a Chinese mining company.

(b) Toward a Coherent Approach to Labour Governance in a Globalized Economy

China has incrementally constructed a regulatory framework that integrates an increasingly clear social dimension. In the face of global problems encountered in the context of OFDI, such as transnational labour challenges, China did not attempt to address the problems through a unilateral approach. Rather, it has closely engaged with international organizations and international standards to seek alternative solutions. China's state-centric approach to CSR has helped to seek, develop, and coordinate a coherent approach to labour governance in the context of Chinese OFDI.

A state-centric approach to CSR has helped to mainstream labour and human rights amongst key actors from China, including Chinese state agencies, industry associations, and Chinese enterprises. Several key state agencies have highlighted the importance of social responsibility, particularly labour protections, for Chinese OFDI. Several industry associations, with the support of their supervisory state agencies, have provided industry-specific CSR guidelines for companies. These guidelines take the rights of employees as the key to Chinese enterprises' CSR performance, and they also cover a broad scope of key stakeholder rights, including general consideration of human rights, rights of workers in supply chains, and the development of local communities. These

⁶⁴¹ The CNTAC, CCCMC, CESA, and CACE have all conducted pilot projects for their implementation and revision of CSR guidelines. See e.g. China Association of Communication Enterprises, "The Announcement of Conducting Pilot Projects for the CSR Management System of China Information and Communications Industry" (22 December 2016), online (pdf): <<http://www.csr-cace.org.cn/index.php/notice/info/id/248>> [translated by author].

guidelines have introduced fundamental principles and rights at work and operationalized labour and human rights through HRDD management at both the corporate level and supply chain level.

The state-centric approach to CSR has also helped to legitimize the role of Chinese industry associations and Chinese enterprises in the promotion and implementation of CSR in the context of Chinese OFDI. For instance, while departmental rules have provided an encouraging environment but vague principles, guidelines developed by Chinese industry associations have further opened representational spaces for social dialogue. Recent regulatory changes, as well as the advocacy and practices they have generated, have shown the potential to open spaces for discussion -- spaces that can be used to spotlight regulatory deficits and to promote democratic participation by representative stakeholders in the labour context.

These possibilities exist at many sites of the Chinese regulatory framework for OFDI. These possibilities allow space for multiple actors to develop a coherent approach to labour governance in the context of Chinese OFDI. The adoption of an HRDD approach to operationalizing labour and human rights contributes to aligning Chinese instruments with international instruments. This approach also brings various actors together in developing standards, mechanisms, and initiatives for transnational labour challenges. Relevant actors may include Chinese state agencies, Chinese industry associations, international organizations, as well as Chinese enterprises, their employees, and local communities that are impacted by business activities.

The development of HRDD in the Chinese regulatory framework has initially addressed labour protections as essential and core components. Advanced examples have emerged in guidelines launched by industry associations, specifically the mining, information and communications, and textile and apparel industries. The development of the labour dimension of HRDD in GSCs through the Chinese regulatory framework has started even earlier than the ILO's dedicated efforts for the labour dimension of HRDD, which started in 2016. As will be illustrated in the following chapters of this thesis, the ongoing experimentation in the context of Chinese outward mining investment may provide a starting point for coherently and collaboratively addressing labour issues in transnational spheres.

Several ministries and commissioners that are responsible for regulating Chinese OFDI have taken concrete steps to integrate a social dimension into the Chinese regulatory framework for OFDI. These regulatory changes have only provided the public regulatory environment and guiding

principles for companies' social responsibilities during their overseas operations. While the protection of workers' rights is frequently highlighted, specific requirements regarding implementation, assessment, and accountability have not been clarified. Some of these governance gaps have been narrowed down innovatively through the rising role of a unique group of institutions in the Chinese context: nationwide industry associations. CSR guidelines launched by industry associations have covered the textile and apparel, international contractors, ICT, and mining industries. These guidelines provided detailed requirements and step-by-step guidance for companies to follow. China has allowed space and time for the development of these industry-specific guidelines. What is needed for the next step is to take a coherent approach to RBC that can be developed from various industry-specific guidelines and practices. The development of an official recognition can be done through a state agency (presumably the MOC) to upgrade these industry guidelines to a national guideline for responsible OFDI.

A worker-centred approach has so far not been obvious in the standard-setting, implementation, and revision processes. The participation of workers and their representatives has not yet been set as a requirement for the pilot projects and the policy revision processes at the ministerial level. However, there is a possibility for future development in this direction, as evidenced by regulatory innovations and company examples emerging from Chinese outward mining investment.⁶⁴²

(c) The Way Forward in the Next Decade: From a “Norm Taker” to a “Norm Maker”?

Increasingly, academic publications and research reports suggest that China is becoming a “global norm entrepreneur” or a new “norm maker” in global governance and international law.⁶⁴³ However, while China is increasingly a proactive participant in constructing and reshaping TLL, this chapter suggests that China has made minimal attempts at norm production. In contrast, Chinese state agencies have generally directed Chinese enterprises to follow local labour standards in host countries and international labour standards. Furthermore, Chinese industry associations have started engaging deeply with international instruments relevant to CSR, RBC, and sustainable development.

⁶⁴² Chapters 5, 6, and 7 of this thesis will provide further details.

⁶⁴³ See e.g. Chris Alden & Daniel Large, “On Becoming a Norms Maker: Chinese Foreign Policy, Norms Evolution and the Challenges of Security in Africa” (2015) 221 *China Quarterly* 123; Marc Lanteigne, “‘Have You Entered the Storehouses of the Snow?’ China as a Norm Entrepreneur in the Arctic” (2017) 53:2 *Polar Record* 117.

This chapter suggests that conceptualizing China as a “norm-taker” or “norm-maker” is an oversimplified understanding of the dynamic and recursive norm-production and -diffusion in transnational legal processes. The emphasis on local laws and regulations has helped exemplify how Chinese agencies perceive and establish applicable labour standards for Chinese OFDI, rather than suppressing or replacing international and local laws and regulations. Furthermore, emerging examples in the context of Chinese OFDI suggest that diffusion is not necessarily a unidirectional process. China’s dynamic engagement with the production and diffusion of labour norms does not suggest a unidirectional “uploading” of “Chinese labour standards” to transnational spheres. Rather, the engagement entails dynamic and recursive interactive processes in which China has sought to “download” international labour standards in the context of Chinese OFDI and to “upload” labour norms to transnational spheres. The transnational processes could be multidirectional and recursive, and they are likely to be ongoing. In these interactive processes, labour norms might be settled, unsettled, or refined before they are diffused across levels and sites of law. Actors involved in these transnational processes are likely to be multipolar.

This chapter showcases that labour governance in the context of Chinese OFDI is *developed, driven, and shaped by a wide range of state and non-state actors with vastly different power*. Over the past decade, China’s regulatory changes and innovations have been dynamically shaped by a variety of state and non-state actors that are from China and other parts of the world. This chapter has unfolded the overlooked processes of the diffusion of labour norms from the international level to the national level in China and showcased the ongoing normative (un)settling processes in which international norms and mechanisms are gradually being settled in the Chinese regulatory framework for OFDI, notably through industry guidelines and initiatives on CSR. Companies are explicitly expected to play a key role in fulfilling social responsibility, including ensuring labour and human rights, during their transnational business activities. The applicable labour standards for Chinese enterprises’ transnational business activities encompass a broad range of hard and soft law instruments, which are developed by host states, the ILO, and China, as well as other state and non-state actors in TLL.

4.5 Concluding Remarks

Regulatory gaps in labour governance are challenging not only for China and Chinese enterprises but for all countries and TNCs in a globalized economy. The development of Chinese regulatory

arrangements for CSR showcases the incremental processes through which the social dimension is integrated into the economic development in Chinese OFDI. Regulatory changes and innovations in the context of Chinese OFDI provide regulatory designs that may help to facilitate and regulate OFDI toward a responsible and sustainable model. As shown in the sampled regulatory arrangements, both state agencies and industry associations have played an important role in establishing an incrementally crafted regulatory framework for labour governance. Lessons and gains from pragmatic experimentation are important resources for other emerging market economies and developing countries that are facing similar challenges in developing comprehensive regulatory frameworks for responsible OFDI and struggling to challenge the unequal law that governs the workplace in the globalized economy.

(1) The Enhanced Social Dimension of the Chinese Regulatory Framework for Outward Foreign Direct Investment

From hundreds of Chinese regulatory arrangements relevant to OFDI, this chapter identifies 20 documents as key to understanding the evolving social dimension of Chinese OFDI. These documents were issued by five state agencies and five industry associations. The documents are issued in the form of departmental rules, administrative regulatory documents, and industry guidelines.

Based on a mapping review of the social dimension of the framework, this chapter identifies an ongoing regulatory shift toward enhanced social responsibility of Chinese OFDI. The mapping review underlines a notable regulatory shift over the past decade, that is, from protecting Chinese investment and Chinese personnel to ensuring social responsibility, especially the protection of both Chinese and non-Chinese personnel. It is premature to assess whether the regulatory arrangements developed in the context of Chinese OFDI will lead to an advanced model of socially responsible, responsive, and accountable investment. It is clear, however, that CSR has become a key component of Chinese regulatory arrangements for OFDI and that labour governance is at the centre of this trend.

The regulatory shift in the Chinese regulatory framework echoes the changing transnational labour regulatory environment that has been shaped by the global promotion and implementation of the UNGPs over the past decade, particularly the endorsement of the UNGPs by the OECD and the EU. While regulatory documents issued by Chinese state agencies have not yet explicitly

referenced the UNGPs as an international guiding instrument for RBC, several industry guidelines issued by Chinese industry associations have explicitly referenced the UNGPs as a key instrument. These industry guidelines have followed the HRDD approach to guide Chinese enterprises in operationalizing labour protections in their transnational business activities. As will be illustrated in the following chapters, this enhanced labour dimension of HRDD has contributed to policy updates and behaviour changes regarding labour governance in GSCs.

(2) An Emerging Regulatory Framework for Labour Governance in the Context of Chinese Outward Foreign Direct Investment

This chapter finds that both state agencies and industry associations have played an important role in enhancing the social responsibility of Chinese enterprises in the context of Chinese OFDI. While existing literature tends to discuss various types of Chinese regulatory arrangements without clarifying their differences in normativity and implication, this review distinguishes the CSR instruments developed by state agencies and industry associations. The investigation showcases several differences between the two sets of CSR guidance instruments set out by state agencies and industry associations, respectively. The investigation suggests that regulatory documents issued by state agencies helped to provide guiding provisions for reiterating that Chinese enterprises should undertake CSR requirements during overseas operations and that CSR guidelines launched by industry associations helped to provide detailed provisions regarding the conceptualization, key elements, and operationalization mechanisms for CSR, in which labour protections are taken as core components since the initial development.

Amongst 20 key documents that address the social dimension of Chinese OFDI, this chapter identifies 10 key documents as representative examples for understanding the relevance and implications for labour governance in Chinese OFDI. By analyzing the five regulatory documents issued by state agencies, the investigation shows that these regulatory documents have helped to enhance the requirement of CSR and highlight labour protections as core components of the state-centric approach to CSR. The investigation shows that regulatory arrangements by state agencies to influence Chinese enterprises' overseas operations are increasing both by quantity and quality. It finds that these regulatory documents tend to provide guiding provisions for CSR of Chinese enterprises. Furthermore, it finds that these regulatory documents recommend local laws and regulations as key legal instruments for Chinese enterprises to follow and that recently developed

instruments seem to extend the scope of applicable standards to international instruments and other relevant CSR instruments.

By analyzing five CSR guidelines issued by nationwide industry associations, the investigation shows that these industry guidelines have helped to clarify the conceptualization, key elements, and operationalization mechanisms for CSR. CSR guidelines developed by industry associations are comprehensive and detailed, and they tend to explicitly reference and implement international labour standards and other international instruments as applicable standards. Labour protections are key components enshrined in the CSR provisions and mechanisms that are launched and promoted by industry associations of mining, international contractors, ICT, as well as textile and apparel industries. Notably, the labour dimension of HRDD has been promoted and enhanced through several industry guidelines.

The investigation showcases that state agencies and industry associations have developed a selective balance between convergence and resistance toward international norms, such as CSR, as well as labour and human rights. State agencies showcase a higher degree of resistance grounded in power relations and exceptionalism. Industry associations, which stand between the government and enterprises, have been influenced by both the government and the market. Therefore, the associations have been seeking a selective balance in the engagement. However, while being affiliated with state agencies for a long time, industry associations retain considerable latitude in determining and innovating their engagement with labour governance in transnational spheres. Industry guidelines have increasingly engaged with both hard and soft international instruments that address transnational labour challenges.

This chapter shows that China has become closely engaged with the dynamic processes of the production, diffusion, and institutionalization of transnational labour norms. In the multidirectional and interactive processes, the role of actors in developing, driving, and shaping norms is dynamic rather than fixed. The next chapter will further detail these ongoing processes and unfold the dynamic, recursive process of exchange and negotiation between international, national, and subnational sites of law.

(3) Ongoing Regulatory Innovations and Future Directions: The Important Role of the State in the Dynamics of Multi-level Governance of Labour Rights in a Globalized Economy

As architects of the global system, states retain significant power and have an important role to play in GSC governance for the pursuit of more inclusive, equitable and sustainable development.⁶⁴⁴ International political economists Frederick W. Mayer and Nicola Phillips have contended that states have for decades outsourced regulatory governance of GVC by driving the public deregulatory agenda and actively promoting private regulatory regimes.⁶⁴⁵ They have further argued that the outsourced governance practices that were observed would not produce an inclusive and sustainable global economy.⁶⁴⁶

Existing literature has made several calls for greater attention to the role of the state in GSC governance, including the role of the state as facilitator, and regulator, as well as redistributor for addressing the inequitable distribution of wealth and the consequences of that inequality.⁶⁴⁷ Emerging literature in TLL has also proposed that we rethink the role of the state in the exercise of transnational public and private authority over labour standards.⁶⁴⁸

In contrast to the global deregulation practices and persistent trends, regulatory experimentation and activism have been underway in some countries in the global South, especially the growth of state regulatory capacity in emerging market economies.⁶⁴⁹ China has retained a lot of latitude in experimenting and developing its way of economic development and labour law reform. In the domestic context, for example, legislative measures such as the Labour Contract Law of 2008 enhanced the state's enforcement of labour regulation.⁶⁵⁰ In the context of Chinese OFDI, regulatory innovations for the social dimension of transnational business activities have been spurred by a combination of enhanced transnational public labour regulatory environment and

⁶⁴⁴ Mayer & Philips, *supra* note 338 at 148.

⁶⁴⁵ *Ibid* at 136.

⁶⁴⁶ *Ibid*

⁶⁴⁷ See Mayer & Philips, *supra* note 338.

⁶⁴⁸ Janelle M. Diller, "The Role of the State in the Exercise of Transnational Public and Private Authority over Labour Standards" (2020) 17 Intl Organizations L Rev 41.

⁶⁴⁹ See e.g. Nicola Phillips & Leonardo Sakamoto, "Global Production Networks, Chronic Poverty and 'Slave Labour' in Brazil" (2012) 47:3 Studies in Comparative International Development 287; Cooney *et al*, *supra* note 23.

⁶⁵⁰ Tu Lan & John Pickles, "China's New Labour Contract Law: State Regulation and Worker Rights in Global Production Networks" (Working Paper 5, October 2011), online (pdf): <<https://assets.publishing.service.gov.uk/media/57a08aced915d3cfd000944/ctg-wp-2011-05.pdf>>.

increasing governance necessities of inequalities in GSCs. Several innovative regulatory designs in the Chinese regulatory framework for OFDI can contribute to improving the effectiveness of labour governance initiatives emerging from various levels and sites of law. The findings from the Chinese regulatory framework for OFDI resonate with observations of China's labour law development by Cooney, where he suggests that China may help to forge the direction of transnational labour regulation, in part by providing "a counterweight to 'deregulatory' trends and/or policy stagnation in other parts of the world."⁶⁵¹

This thesis does not mean to suggest that the current regulatory arrangements in the Chinese regulatory framework for OFDI are sufficient or effective in regulating Chinese enterprises concerning labour rights and other social impacts in their overseas operations. Rather, it attempts to capture the ongoing regulatory dynamics, the limitations and innovations, and the directions for future improvements. Moving from the current regulatory fragmentation to a more integrated regulatory framework for labour governance is crucial to address remaining gaps in implementation and accountability and provide greater clarity for Chinese enterprises' overseas operations.

The role of the state in standard-setting and regulatory governance initiatives is pivotal for safeguarding labour rights in the era of economic globalization. The development of regulatory arrangements for labour governance in the Chinese regulatory framework underlines the importance of the role of the state in formulating a smart mix of labour regulatory initiatives to address transnational labour challenges. States like China have wide latitude in innovating on their engagement with the dynamics of multi-level governance of labour rights in a globalized economy. Its painful experience as a host country with many labour-intensive industries since it opened its doors to the world has enabled its understanding of the tension between workers at the low-value-added part and large companies at the high-value-added part of GSCs. China is now also exploring a way to move from the lowest-cost tiers of GSCs to higher value-added production. This will motivate China to seek solutions for problems through a counter-hegemonic approach, that is, to challenge, rather than maintain or uphold, the unequal law of labour governance in GSCs.

Recent updates indicate that the concept of CSR is likely to achieve further legality in the Chinese domestic legal framework. In late December 2021, a new draft of Chinese Company Law with a

⁶⁵¹ Cooney, *supra* note 23 at 161.

detailed article on CSR was submitted to the session of the Standing Committee of the National People's Congress for deliberation.⁶⁵² This revised article provides detailed guidance and stronger requirements for companies to fulfill social responsibility. Instead of briefly and generally introducing the concept into law in 2006, the revised draft of Article 19 states that “a company shall, based on abiding by its obligations prescribed by laws and regulations, *fully consider public interests, including the interests of its employees, consumers and other stakeholders, and ecological and environmental protection, and undertake social responsibilities.*”⁶⁵³ Furthermore, the draft article states that “The state encourages companies *to participate in public welfare activities and publish social responsibility reports.*”⁶⁵⁴ If adopted, it will mark the first time Chinese legislation expressly encourages companies to publish social responsibility reports.

This new article contributes to the legitimization and legalization of CSR in the Chinese domestic legal framework. Notably, the revised draft article indicates a significant shift away from shareholder primacy to some form of stakeholder governance, which aligns with key elements of the UNGPs. These requirements endorse a stakeholder approach that has already been adopted in several industry guidelines, notably the GSRM. The next chapter will provide a detailed investigation into the guidelines and their relevance to labour governance in the global cobalt supply chain.

⁶⁵² *Draft Revision of Company Law of the People's Republic of China*, 24 December 2021 [translated by author].

⁶⁵³ *Ibid* [emphasis added].

⁶⁵⁴ *Ibid* [emphasis added].

Chapter 5 The Rising Role of the CCCMC in the Dynamics of Multi-level Governance of Labour Rights in a Globalized Economy: Regulatory Innovations and Norm Diffusion through Industry Guidelines and Initiatives

5.1 Introduction

This chapter moves past the overarching and evolving Chinese regulatory framework for OFDI to tell the story of how those regulatory arrangements have been detailed and shaped in the context of Chinese outward mining investment. By studying the ongoing regulatory developments in Chinese outward mining investment, this chapter provides a deep dive into regulatory innovations and the diffusion of labour norms through industry guidelines on CSR to explore their impacts and implications for the development of new legal orders in TLL. Guidelines and initiatives developed by the CCCMC (CCCMC guidelines and initiatives) are advanced examples of Chinese industry guidelines. They provide opportunities to understand China's approach to and practice of labour governance in the context of Chinese outward mining investment.

This chapter argues that CCCMC guidelines and initiatives have to some extent addressed regulatory gaps in labour governance in Chinese outward mining investment. Furthermore, the chapter notes that these guidelines need to be upgraded, particularly regarding the scope of application and substantive content, to serve as a solid foundation for developing the Chinese regulatory framework for OFDI toward a socially responsible regulatory framework. Furthermore, the chapter finds that regulatory innovations developed through these guidelines and initiatives have generated considerable positive impacts on labour governance in the global cobalt supply chain. While having identified the limitations of these guidelines, the chapter suggests that these regulatory innovations can presumably generate broader impacts in global mineral supply chains in the coming decade.

In addition to this introductory section and concluding remarks, this chapter consists of the following three sections. Section two provides a close examination of the incremental processes in which the CCCMC developed a set of comprehensive industry guidelines and initiatives. It shows that the CCCMC has launched several follow-up guidelines and initiatives to facilitate and guide Chinese mining enterprises in transnational business activities after launching the GSRM in 2014. The examination contributes to telling the backstory that can only be understood through capturing the processual development of CCCMC guidelines and initiatives. Section three situates

the development of CCCMC guidelines and initiatives in the context of Chinese outward mining investment and its connection to global mineral supply chains. The analysis shows that, while the CCCMC has played a crucial role in initiating, developing, and implementing the guidelines and initiatives, these regulatory changes may not be possible without the support of several key state and non-state actors in the transnational processes. The analysis suggests that the transnational processes are ongoing and are dynamically shaped by actors with different priorities and interests, as well as various levels of power. Section four critically investigates several regulatory innovations in CCCMC guidelines and initiatives to capture their relevance and implications for the dynamics of multi-level governance of labour rights in a globalized economy. Pronouncing the consequences of these recent regulatory arrangements for rights-holders or their ultimate effectiveness as drivers of behaviour changes seems premature. However, a close examination can unfold the essential elements, normative implications, preliminary outcomes, and future directions of the ongoing transnational processes.

This chapter builds on both primary and secondary sources. Primary sources encompass industry guidelines developed by the CCCMC and international instruments developed by international organizations such as the ILO, OHCHR, and OECD. Secondary sources are primarily existing literature on CCCMC guidelines. This chapter contributes to the ongoing scholarly discussion about CCCMC guidelines and initiatives regarding their impacts and implications for RBC and labour governance in Chinese outward mining investment and global mineral supply chains.

5.2 A Processual Approach to the Development and Implementation of CCCMC Guidelines and Initiatives

This section presents a process-tracing analysis of the development and implementation of industry guidelines and initiatives led by the CCCMC, a Chinese nationwide industry association for the mining industry. Subsection one summarizes the key elements of the guidelines and initiatives. Subsection two unfolds the backstory of the ongoing development and implementation processes toward responsible outward mining investment. As illustrated in detail in this section, the guidelines and initiatives were not developed unilaterally by the CCCMC but were shaped jointly by several actors, including state agencies, international organizations, Chinese enterprises, and civil society organizations.

Since 2014, the CCCMC has launched a set of comprehensive CSR guidelines and initiatives to facilitate and guide Chinese enterprises toward responsible outward mining investment. Four milestones are notable. In October 2014, the CCCMC released the GSRM, the first document that provided comprehensive guidance for Chinese enterprises to conduct socially responsible outward mining investment.⁶⁵⁵ In December 2015, the CCCMC released the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* to operationalize clause 2.4.6 of the GSRM.⁶⁵⁶ In November 2016, the CCCMC launched the *Sustainable Mining Action Plan* to ensure the effective implementation of the GSRM.⁶⁵⁷ In the same month, the CCCMC launched the RCI to facilitate and guide Chinese enterprises in responsible investment and sourcing of cobalt.⁶⁵⁸ Furthermore, the CCCMC has regularly updated the guidelines and initiatives according to the implementation processes stipulated in the guidelines and the practical outcomes of such implementation processes. The follow-up guidelines and initiatives contribute to ensuring that the requirements set in the GSRM can be diffused to and implemented by Chinese enterprises.

Table 12 An Overview of CCCMC Guidelines and Initiatives (2014-2021)

Timeline	Regulatory documents
10/2014	Chinese Guidelines for Social Responsibility in Outbound Mining Investments (shortened as “GSRM”) (2014, 2017)
11/2015	Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (2015)
11/2016	Sustainable Mining Action Plan Tools for Responsible Business Conduct in Outbound Mining Investments (179 pages) The Manual for Social Responsibilities in Chinese Mining Investment (127 pages) Evaluation Toolkit for Social Responsibilities in Chinese Mining Investment (175 pages)
11/2016	Responsible Cobalt Initiative (2016) Cobalt Refiner Supply Chain Due Diligence Standard (2018, 2019, 2021) (CCCMC, RCI, RMI)

Source: Compiled by the author⁶⁵⁹

⁶⁵⁵ CCCMC, “GSRM (2014)”, *supra* note 406.

⁶⁵⁶ CCCMC, “Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains” (2015) [CCCMC, “Chinese Due Diligence Guidelines (2015)”], online (pdf): <<http://www.cccmc.org.cn/docs/2016-05/20160503161408153738.pdf>>.

⁶⁵⁷ CCCMC, “Sustainable Mining Action Plan Officially Launched in Beijing” (22 November 2016) [CCCMC, “Sustainable Mining Action Plan”], online: <<http://en.cccmc.org.cn/news/cccmcinformation/58817.htm>>.

⁶⁵⁸ CCCMC, “Responsible Cobalt Initiative: Facing Challenges, Sharing Responsibility, Joining Hands and Achieving Win-win” (2016), online (pdf): <<http://www.cccmc.org.cn/docs/2016-11/20161121141502674021.pdf>> [CCCMC, “Responsible Cobalt Initiative (2016)”].

⁶⁵⁹ The author compiled the information through a literature review and internet search in both Chinese and English through the website of industry associations, thinktanks, and libraries. The Guidelines and Standard were published in both Chinese and English. The Cobalt Refiner Supply Chain Due Diligence Standard was developed through collaboration between the RCI and RMI. The Tools, Manual, and Evaluation Toolkit were developed by the CCCMC through a multi-stakeholder approach. The documents were published in Chinese and

5.2.1 The Chinese Guidelines for Social Responsibility in Outbound Mining Investments (2014, 2017)

The Guidelines, shortened as “GSRM,” mark the first set of industry guidelines for Chinese outward mining investment. They also mark the first set of industry guidelines concerning responsible minerals sourcing developed by actors from the global South. The GSRM provide industry-specific CSR guidance and set supply chain due diligence requirements for Chinese outward mining investment. The GSRM require Chinese mining enterprises to integrate social and environmental considerations into their investment decision-making, supply chain management, and engagement with local communities, workers, and other stakeholders during their global operations. The development of the GSRM was shaped by a wide range of state and non-state actors and was informed by a large body of internationally recognized social and environmental standards. Notably, while a few industry guidelines that emerged in other industries have already introduced the UNGPs for Chinese enterprises, the GSRM mark the first set of industry guidelines in China that have fully aligned with the UNGPs and have provided comprehensive guidance for Chinese enterprises to act in full accordance with the UNGPs.

(1) The Initial Version (2014)

The CCCMC developed the GSRM with the support of the bilateral Sino-German Corporate Social Responsibility Project and the Emerging Market Multinationals Network for Sustainability Project the Chinese and German governments jointly initiated. The purpose of the GSRM was to regulate Chinese mining investments and operations and to guide Chinese enterprises in improving CSR strategies and management systems.⁶⁶⁰

The Guidelines were developed through dynamic multi-stakeholder processes, where stakeholders were involved in organizing preparatory conceptual meetings, drafting main clauses, revising the full draft, as well as organizing target-group consultations and public consultations.⁶⁶¹ During these processes, the CCCMC visited a group of Chinese mining enterprises and consulted the representatives of those enterprises for comments, and revised the draft guidelines accordingly.

were accessible for researchers by request. These documents have been disseminated to representatives of Chinese mining enterprises.

⁶⁶⁰ CCCMC, “GSRM (2014)”, *supra* note 406 at 26.

⁶⁶¹ See “Annex 2: Process of Guidelines Development” in CCCMC, “GSRM (2014)”, *supra* note 406 at 53.

The three annexes of the GSRM showcase how the guidelines were developed through a multi-stakeholder approach and a cross-examination of international instruments.⁶⁶² The GSRM were based on a careful cross-examination of 28 international instruments and initiatives that are key to responsible mining. Annex 1 shows the nature of the interrelationships between the clauses in the GSRM and those in the 28 instruments and initiatives. Each clause is the result of inputs from various mandatory and voluntary instruments and initiatives, notably from international organizations such as the ILO, OHCHR, and OECD, as well as responsible mining initiatives such as the ICMM.

The GSRM cover all Chinese enterprises that are connected to global mineral supply chains and tackle a wide range of social and environmental issues in the context of Chinese mining outward investment. The GSRM provide specific guidance for Chinese mining enterprises on establishing social responsibility management systems, disclosing social responsibility information, and integrating social and environmental factors into investment decisions and overseas operations. The guidelines apply to all outbound Chinese investments in the fields of mineral exploration, extraction, and processing, regardless of their sizes and types. Mining-related activities, such as infrastructure development, are also covered in the GSRM.

The GSRM set seven guiding principles for enterprises to follow and identified eight thematic issues as key to the social responsibility of Chinese mining enterprises in their transnational business activities. The seven guiding principles are: (a) ensuring compliance with all applicable laws and regulations, (b) adhering to ethical business practices, (c) respecting human rights and protecting the rights and interests of employees, (d) respecting nature and protecting the environment, (e) respecting stakeholders (f) strengthening responsibility throughout the extractive industries value chain, and (g) enhancing transparency.⁶⁶³ As introduced in the previous chapter, all eight thematic issues can be critical for ensuring labour rights in Chinese outward mining investment.⁶⁶⁴

⁶⁶² See “Annex 1: List of Standards which have been considered for the development of the Guidelines”, “Annex 2: Process of Guidelines Development”, and “Annex 3: List of Supported Organizations” in CCCMC, “GSRM (2014)”, *supra* note 406 at 47–55.

⁶⁶³ CCCMC, “GSRM (2014)”, *supra* note 406 at 28–29.

⁶⁶⁴ CCCMC, “GSRM (2014)”, *supra* note 406.

(2) The Revised Version (2017)

The revised GSRM take note of the 17 Sustainable Development Goals that were adopted by all UN member states in September 2015.⁶⁶⁵ Both the seven guiding principles and the eight thematic issues of CSR are updated to be more specific and comprehensive. Furthermore, there are two notable differences between the revised version and the initial version. First, the word “shall” is more frequently used than “should.” While the two versions address similar issues, the revised GSRM use 12 times the word “should” and 29 times the word “shall” in contrast to the initial version, which uses 17 times the word “should” and 21 times the word “shall.” For instance, the revised GSRM use the word “shall” before stipulating the seven principles instead of using the word “should” for each principle in the initial version. Another example can be drawn from clauses under “labour issues.” The revised GSRM stipulate that “The Company *shall* respect employees’ rights to freely select their jobs and have fair and appropriate working conditions,” in contrast to the initial version that only mentioned that the labour practices of companies include the said performance.⁶⁶⁶ Second, the two ILO fundamental Conventions concerning the elimination of child labour are explicitly referenced in the main text of the revised GSRM as opposed to the initial version that only listed the eight ILO fundamental Conventions in the Annex.⁶⁶⁷ As will be illustrated in further detail below, by highlighting these two ILO fundamental Conventions, the CCCMC plays a crucial role in upholding and diffusing labour norms concerning eliminating child labour in global mineral supply chains.

5.2.2 The Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (2015, 2022)

The initial version of the Chinese Due Diligence Guidelines was released in December 2015. The updated version is now being discussed through public consultations with multiple stakeholders, including Chinese mining enterprises.⁶⁶⁸

⁶⁶⁵ CCCMC, “Chinese Guidelines for Social Responsibility in Outbound Mining Investments” (2nd edition, 2017) [CCCMC, “GSRM (2017)”] at 6, online (pdf): <<http://www.cccmc.org.cn/kcxfzxx/zyzx/bz/ff8080817ffc9cca017ffd95f87c0085.html>>.

⁶⁶⁶ CCCMC, “GSRM (2014)”, *supra* note 406 at 36; CCCMC, “GSRM (2017)”, *supra* note 665 at 23 [emphasis added].

⁶⁶⁷ *Ibid.*

⁶⁶⁸ CCCMC, “Chinese Due Diligence Guidelines for Responsible Mineral Supply Chain (2.0) (Public Consultation Version, April 2021)” (28 April 2021) [CCCMC, “Chinese Due Diligence Guidelines (Public Consultation Version, April 2021)”], online (pdf): <<http://www.cccmc.org.cn/ywgg/tzgg/ff8080817bdeda5c017bed4ed96c0291.html>>.

The Guidelines were an outcome of the close cooperation between the CCCMC and the OECD. When launching the GSRM in 2014, the CCCMC signed a Memorandum of Understanding with the OECD to collaborate in areas such as RBC, due diligence, and responsible mineral supply chains.⁶⁶⁹ After that, the CCCMC has closely engaged and collaborated with the OECD to develop the Chinese Due Diligence Guidelines and relevant tools for promoting responsible mineral supply chains.⁶⁷⁰

The Chinese Due Diligence Guidelines use the UNGPs and the OECD Due Diligence Guidance for responsible mineral supply chains (2nd edition, 2013) as their foundation, and they are designed to align Chinese risk-based supply chain due diligence standards with international standards and allow for recognition by international stakeholders. Despite China not being an OECD member, the Guidelines describe the OECD Due Diligence Guidance as “the recognized international framework” for supply chain due diligence in the mining sector.⁶⁷¹ Aligning with the OECD Due Diligence Guidance, the Guidelines understand due diligence as “an *on-going* process along supply chains whereby companies take reasonable steps and make good faith efforts to identify and respond to potential risks of contributing to conflict, serious human rights abuses and to serious misconduct.”⁶⁷²

The primary objective of the Guidelines is to specify and operationalize Clause 2.4.6 of the GSRM.⁶⁷³ Similar to the broad scope of application and the inclusive approach of the GSRM, the

⁶⁶⁹ See CCCMC & OECD, “Memorandum of Understanding for Co-operative Activities between the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC) and the Organisation for Economic Co-operation and Development (OECD)” (October 2014), online (pdf): <<https://www.oecd.org/daf/inv/mne/MoU-CCCMC-OECD.pdf>>.

⁶⁷⁰ OECD, *Active with The People’s Republic of China*, *supra* note 534 at 5, 21 and 22.

⁶⁷¹ CCCMC, “Chinese Due Diligence Guidelines (2015)”, *supra* note 656 at 7.

⁶⁷² *Ibid* at 12-13 [emphasis added].

⁶⁷³ See “IV. Introduction to Basic Steps of Risk-based Due Diligence” in CCCMC, “GSRM (2014)”, *supra* note 406. Clause 2.4.6 of the GSRM reads as follows.

2.4 Human Rights: Admitting and respecting human rights is very important for the rule of law, social justice, stability, and a harmonious society. The companies shoulder the responsibility to respect human rights within their sphere of influence. The companies shall take active measures to avoid the passive acceptance or active involvement in human rights violations

...

2.4.6 Conduct risk-based supply chain due diligence in order to prevent engagement with materials that may have funded or fueled conflict. Conduct an assessment to define whether the mining project from which traded minerals originate or the mineral trading routes used are located in a conflict-affected and/or high-risk area. Adapt existing due diligence measures to the specific needs of conflict-affected

Chinese Due Diligence Guidelines stress that companies should comply with “all applicable laws and regulations.”⁶⁷⁴ It is underlined that “Implementation of these Guidelines cannot act as a substitute for such legal or regulatory compliance.”⁶⁷⁵

Consistent with the wording in the GSRM, it reads that the Guidelines require companies to “observe the Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project.”⁶⁷⁶ The wording in the Guidelines, particularly the three requirements to “identify, prevent and mitigate” is closely aligned with the UNGPs, as well as the OECD Guidelines for Multinational Enterprises (2011) and the OECD Due Diligence Guidance for responsible mineral supply chains (2nd edition, 2013).⁶⁷⁷

Similar to the broad scope of application of the GSRM, the Guidelines target a broad range of Chinese enterprises. The Guidelines are applicable to “*all Chinese companies* which are extracting and/or are using mineral resources and their related products and are engaged at any point in the supply chain of minerals to *identify, prevent and mitigate* their risks of contributing to conflict, serious human rights abuses and risks of serious misconduct.”⁶⁷⁸ This broad scope of application targets Chinese companies engaged in both upstream and downstream global mineral supply chains, including processes such as resource extraction, smelting and refining, as well as manufacturing of components and end-use products.⁶⁷⁹

The Guidelines require that all companies that fall within the scope of application establish and implement a five-step risk-based supply chain due diligence framework. The five steps include: step 1, establishing strong company risk management systems; step 2, identifying and assessing risks in the supply chain; step 3, designing and implementing a strategy to respond to identified risks; step 4, carrying out an independent third-party audit at identified choke points in the supply chain (as indicated in the Audit Protocols); and step 5, reporting on the process and results of

and high-risk areas Measures should be third-party audited and publically reported on. When operating in a conflict-affected and/or high-risk area, take steps to monitor the business relations, transactions, and flows of funds and resources and avoid the trade of conflict minerals.

⁶⁷⁴ *Ibid* at 3.

⁶⁷⁵ *Ibid*.

⁶⁷⁶ *Ibid* at 8.

⁶⁷⁷ *Ibid* at 3 and 8.

⁶⁷⁸ *Ibid* [emphasis added].

⁶⁷⁹ *Ibid* at 10, “III. Scope of Application”.

supply chain risk management.⁶⁸⁰ The Guidelines provide a step-by-step guide for establishing and implementing the five-step risk-based supply chain due diligence framework.⁶⁸¹ Furthermore, the Guidelines specify steps and requirements through resource-specific Audit Protocols and a Model Supply Chain Policy.⁶⁸²

The Guidelines cover all mineral resources and their related products (i.e. ores, mineral concentrates, metals, derivatives, and by-products). However, the CCCMC plans to prioritize releasing audit protocols and supplementary materials for the 3TG minerals, namely, tin, tungsten, tantalum, and gold.⁶⁸³ The Guidelines are “to be duly revised along with the development of practices in the industry.”⁶⁸⁴

5.2.3 Sustainable Mining Action Plan (2016)

The CCCMC has made considerable efforts to disseminate the GSRM to Chinese mining enterprises and promote the effective implementation of the guidelines. The SMAP is a key example of such efforts.

In November 2016, the SMAP was officially launched in Beijing.⁶⁸⁵ Representatives of four agencies jointly launched the SMAP: (a) the MOC of China; (b) the United Kingdom’s Department for International Development (DFID) in Beijing; (c) Germany’s development agency GIZ in Beijing; and (d) the CCCMC. One hundred and ten representatives from governmental bodies, industry associations, mining enterprises, and international organizations attended the launch ceremony. A strategic oversight committee was formed by representatives from the above-mentioned four agencies to ensure the effectiveness of the implementation of SMAP.⁶⁸⁶ A high-level expert advisory committee consisting of top Chinese and international experts was set to promote communication and mutual learning between Chinese experience and foreign experience in socially responsible mining activities.

⁶⁸⁰ *Ibid* at 13.

⁶⁸¹ *Ibid* at 26–31, “Section VII Framework and Processes for Due Diligence”.

⁶⁸² *Ibid* at 32, “Section VIII Audit, Certification and Oversight”, and 33–40, “Annex Model Supply Chain Policy”.

⁶⁸³ *Ibid* at 10, “III. Scope of Application”.

⁶⁸⁴ CCCMC, “Chinese Due Diligence Guidelines (2015)”, *supra* note 656 at 4.

⁶⁸⁵ CCCMC, “Sustainable Mining Action Plan”, *supra* note 657.

⁶⁸⁶ *Ibid*.

The SMAP was funded by the DFID and implemented jointly by the CCCMC and GIZ. It was the first Sino-UK cooperation project under the framework of the Sustainable Development Cooperation Memorandum of Understanding signed by the Chinese government and the UK government.⁶⁸⁷ The SMAP had 25 specific actions, and it developed eight work modules, for instance, building networks, enhancing mutual recognition of standards, strengthening capabilities, developing instruments and tools, assessing the fulfillment of responsibilities, as well as developing best practices. The SMAP was developed with a quantitative goal “that 100 outbound mining investment projects will recognize the Guidelines in the next three years, and 20 of which can improve in a thorough and quantifiable way in regard to corporate social responsibility.”⁶⁸⁸

5.2.4 Responsible Cobalt Initiative (2016)

Between 2016 and 2021, the CCCMC launched several guidelines, initiatives, and tools to facilitate and guide Chinese mining enterprises to fulfill social responsibility in the global cobalt supply chain. The detailed guidance helps Chinese mining enterprises to identify, prevent, and mitigate adverse impacts on labour and human rights. First, in November 2016, the CCCMC, with strong support from the OECD, launched the RCI to facilitate and coordinate collective action in addressing social and environmental risks in the cobalt supply chain.⁶⁸⁹ Second, in August 2018, the RCI, together with the Responsible Minerals Initiative (RMI), launched the pilot version of the Cobalt Refiner Supply Chain Due Diligence Standard (Cobalt Refiner Standard), which aims to build a responsible, inclusive, and sustainable cobalt supply chain. In July 2019 and August 2021, respectively, the CCCMC and RCI launched versions 1.0 and 2.0 of the Standard. These initiatives and guidelines prioritize addressing the worst forms of child labour.⁶⁹⁰ Furthermore, the CCCMC has started collaborating with international partners to develop transparent, verifiable, and responsible ASM cobalt supply chains, including drafting the *Artisanal and Small-Scale Mining Cobalt ESG Management Framework*.⁶⁹¹

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*

⁶⁸⁹ CCCMC, “Responsible Cobalt Initiative (2016)”, *supra* note 658.

⁶⁹⁰ *Ibid.*

⁶⁹¹ RCI, Global Battery Alliance’s Cobalt Action Partnership & Fair Cobalt Alliance, “Artisanal and Small-Scale Mining (ASM) Cobalt ESG Management Framework Vision” (2021), online (pdf): <<https://www.asm-cobalt.org/>>. ESG is an acronym for “environmental, social, and governance.”

(1) The Initiation of the Responsible Cobalt Initiative

The CCCMC's focus on the global cobalt supply chain was initiated by the Amnesty International Report (2016). Shortly after the release of the report, the CCCMC released a public statement in response to the allegations in the report.⁶⁹² In the statement, the CCCMC highlighted its awareness of the reported issues and its commitment to addressing labour and human rights challenges in transnational spheres. The launch of the RCI in November 2016 is timely in responding to allegations and controversies raised by the report. Since the report identifies the worst forms of child labour in artisanal mines in the DRC, the RCI has intended to prioritize issues relevant to the worst forms of child labour.

The above-mentioned statement was titled *Suggestions and Explanations on Due Management of Cobalt Supply Chain*.⁶⁹³ Taking note of the situation described in the report, the CCCMC acquired information from relevant Chinese enterprises and consulted experts in the field of supply chain management. The CCCMC expressed its concern about labour and human rights challenges in global mineral supply chains and strongly condemned the use of child labour and other forms of labour and human rights abuses. The CCCMC highlighted its understanding of addressing human rights challenges in the context of extended supply chains, that is, an important responsibility of cobalt refiners and a shared priority of multiple actors both upstream and downstream of the chain. Furthermore, the CCCMC highlighted the importance of collaboration amongst different actors and the potential adverse human rights impacts of simply cutting off supply chains. The statement reads as follows:

We believe that resolving these challenges is *an important responsibility of cobalt smelting and processing enterprises, and the shared priority of the upstream and downstream participants of the supply chain as well as related governments*. Artisanal mining not only involves issues of human rights, but is closely connected with social development in DRC, and the problem of how to eradicate extreme poverty. Confronting the challenges requires *not only appropriate coordinated action by the DRC government, artisanal miners, traders, cobalt smelting and processing enterprises, and electronic enterprises with international brands, but also caution, as simply terminating trade relations may worsen local poverty and human rights conditions*.⁶⁹⁴

⁶⁹² CCCMC, "Suggestions and Explanations on Due Management of Cobalt Supply Chain" (2016), online (pdf): <http://theory.gmw.cn/2016-03/03/content_19153547_2.htm>.

⁶⁹³ *Ibid.*

⁶⁹⁴ *Ibid* [emphasis added].

The CCCMC then stressed the importance of the UNGPs and the collaborative efforts amongst stakeholders in the global cobalt supply chain, to undertake actions such as information sharing, joint investigation, and capacity building, and to promote due diligence along the global cobalt supply chain, including the mitigation and elimination of human rights risks.

At the end of the statement, the CCCMC committed to further cooperating with stakeholders, both domestically and internationally, to establish a responsible global cobalt supply chain. The statement reads as follows:

CCCMC will maintain its highly responsible attitude, *closely cooperate with both domestic and foreign parties* on behalf of the industry, carry out investigation and research, identify key links in the cobalt supply chain and existing responsibility risks, develop *a system of due management of the supply chain of minerals including cobalt and other mineral resources* on the basis of the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains, and make efforts to establish *a responsible global supply chain of cobalt with all stakeholders*.⁶⁹⁵

(2) The Responsible Cobalt Initiative in the Multi-level Governance Framework in the Global Cobalt Supply Chain

In November 2016, with strong support from the OECD, the CCCMC launched the RCI to develop an alliance and platform dedicated to a responsible cobalt supply chain and address the issues of the worst forms of child labour “as a priority.”⁶⁹⁶ The CCCMC currently manages the RCI. The OECD has actively engaged with the RCI through its work with a broad coalition of stakeholders in the OECD responsible minerals implementation program.⁶⁹⁷

The RCI is a multi-stakeholder initiative joined by a group of upstream and downstream companies in global mineral supply chains. The RCI aims to connect both Chinese and non-Chinese companies and both upstream and downstream companies.⁶⁹⁸ Member companies of the RCI commit to undertaking collective action to address social and environmental risks in the global cobalt supply chain.

The three major goals of the RCI are: (a) to promote the OECD Due Diligence Guidance and the Chinese Due Diligence Guidelines as recognized guidelines in the global cobalt supply chain to

⁶⁹⁵ *Ibid* [emphasis added].

⁶⁹⁶ CCCMC, “Responsible Cobalt Initiative (2016)”, *supra* note 658 at 1.

⁶⁹⁷ *Ibid*.

⁶⁹⁸ *Ibid*.

increase transparency and improve GSC governance; (b) to promote cooperation amongst relevant actors in addressing risks and challenges in the global cobalt supply chain, including the government of the DRC, civil society organizations and affected local communities; and (c) to develop a common communication strategy to communicate progress and results effectively to impacted communities, miners and the public.⁶⁹⁹

As introduced in chapter 3, since 2016, more than 10 multi-stakeholder voluntary initiatives of varying significance have emerged, and these new initiatives have focused on responsible cobalt sourcing. The RCI is the first industry-led multi-stakeholder initiative focusing on responsible cobalt sourcing. Furthermore, amongst the 10 multi-stakeholder initiatives discussed in chapter 3, the RCI is the only multi-stakeholder initiative led by actors from the global South.

The plan for connecting and bridging upstream and downstream companies is a significant breakthrough because upstream and downstream companies can work together to tackle the deep problems in the cobalt supply chain.⁷⁰⁰ However, the number of member companies of the RCI has varied from year to year. This variation is partly due to the divergence between the global North and the global South and the difficulty in bringing upstream and downstream companies to the same platform. It is also partly due to the tendency of companies from the global North to join initiatives that are led by actors from the global North. In November 2016, nine companies became initial members of the RCI. These companies from different segments of the global cobalt supply chain and from different countries committed to working together, in coordination with the government of the DRC, to develop and begin the implementation of an action plan.⁷⁰¹ In July 2018, American Manganese Inc. (AMY), which focused on lithium-ion battery recycling, was accepted as the 33rd full-time member of the RCI.⁷⁰² However, as of June 2022, there are only 23 member companies, and most of these companies are Chinese enterprises. The decrease in member companies is partly due to the divergence between upstream and downstream companies.⁷⁰³

⁶⁹⁹ *Ibid* at 1–2.

⁷⁰⁰ See Zhang, *supra* note 557 at 143.

⁷⁰¹ CCCMC, “Responsible Cobalt Initiative (2016)”, *supra* note 658.

⁷⁰² American Manganese, “American Manganese Joins the Responsible Cobalt Initiative” (15 June 2018), online: <<https://americanmanganeseinc.com/american-manganese-joins-the-responsible-cobalt-initiative/>> [perma.cc/8ZNS-S94N].

⁷⁰³ See Zhang, *supra* note 557 at 143.

(3) Cobalt Refiner Supply Chain Due Diligence Standard (2018, 2019, 2021)

Since 2018, the CCCMC has worked jointly with the RMI to develop a Standard for cobalt refiners to establish a risk-based supply chain due diligence framework. This Standard is designed for facilitating and guiding both upstream and downstream companies of the global cobalt supply chain to effectively address the issue of child labour in mining sites at the bottom of the chain.

The development of the Standard has gone through several consultations and revision processes. In August 2018, the CCCMC launched the pilot version of the Standard. In July 2019, the CCCMC launched a slightly revised version of the Standard, version 1.0. In August 2021, the CCCMC, jointly with the RMI, launched a comprehensively revised version of the Standard, Cobalt Refiner Supply Chain Due Diligence Standard (Version 2.0).⁷⁰⁴ This newest version was effective as of January 1, 2022.

The Standard has three notable features that may contribute to eliminating the worst forms of child labour in the global cobalt supply chain. First, the Standard provides a six-step risk-based supply chain due diligence framework for cobalt refiners to follow. The Standard is the first supply chain due diligence guidance specifically tailored for cobalt refiners. It carves out a detailed supply chain due diligence framework for cobalt crude and fine refiners following the Chinese Due Diligence Guidelines (2015) and OECD Due Diligence Guidance for responsible mineral supply chains (3rd edition, 2016). Cobalt refiners can follow either of these guidelines in developing their due diligence mechanisms. The reference to the two guidelines is to enhance the recognition of both guidelines and to promote the implementation by more companies. Notably, the Standard adds “community participation” as an additional step to the five-step framework that is provided in the OECD Due Diligence Guidance. The CCCMC has considered and developed this innovative sixth step since the initial development of the GSRM in 2014 and the Chinese Due Diligence Guidance in 2015.

Second, the Standard enhances engagement with the two fundamental ILO Conventions concerning the elimination of child labour, as well as ILO Recommendation No. 190 concerning the worst forms of child labour. When referring to applicable standards to eliminate child labour,

⁷⁰⁴ Responsible Cobalt Initiative (RCI) & Responsible Minerals Initiative (RMI), “Cobalt Refiner Supply Chain Due Diligence Standard” (2021), online (pdf): <<http://www.responsiblemineralsinitiative.org/minerals-due-diligence/standards/>> [RCI & RMI].

the Standard directs companies to consult detailed standards provided in the ILO Conventions and Recommendations.

Third, the Standard has made considerable efforts to provide applicable definitions for terms that are frequently used in the development of supply chain due diligence frameworks.⁷⁰⁵ Such terms include “artisanal and small-scale mining,” “child labor,” “worst forms of child labor,” “cobalt refiners,” and “conflict-affected and high-risk areas,” amongst others. Furthermore, the Standard also clarifies that the auxiliary verbs such as “shall” and “should” indicate requirements and that “may” and “can” indicate possibility or ability.⁷⁰⁶

5.3 The Reconfiguration of Actors, Norms and Processes in Transnational Labour Law: The Rising Role of the CCCMC in the Multi-level Governance Framework in the Global Cobalt Supply Chain

This section situates the development of CCCMC guidelines and initiatives in constructing the multi-level governance framework in the global cobalt supply chain. It shows that, while the CCCMC has played a crucial role in initiating, developing, and implementing the guidelines and initiatives, these regulatory changes may not be possible without the support of several key state and non-state actors in the transnational processes. These key actors include state agencies such as those of China, Germany, and the United Kingdom, international organizations such as the OECD, as well as Chinese mining enterprises such as HC. A close examination shows that, while aligning with international standards, the CCCMC does not passively adopt international standards, nor does it apply Chinese standards. Instead, the CCCMC has adapted international standards into the context of Chinese outward mining investment, and on some occasions, has contributed its own design of specific steps to operationalize these international standards. The findings suggest that the interactions in transnational processes will continue, dynamically shaped by actors with different priorities and interests, as well as various levels of power.

State agencies include Chinese, German, and British agencies. International organizations include the OECD as a key international organization in the processes, as well as the OHCHR and the ILO. In 2017 and 2021, respectively, the CCCMC organized public consultations and revised the GSRM and the Chinese Due Diligence Guidelines. Furthermore, the CCCMC coordinated training programs, multi-stakeholder dialogues, as well as expert consultations to facilitate the

⁷⁰⁵ *Ibid* at 28–33.

⁷⁰⁶ *Ibid* at 28.

implementation of these guidelines by Chinese mining enterprises. A timeline of the CCCMC's engagement with the ongoing development of transnational initiatives surrounding responsible mineral sourcing exemplifies some of the dynamics.

Table 13 A Timeline of the Engagement between the CCCMC and other Actors in Global Mineral Supply Chains (2014-2021)

Time (mm/yy)	Initiatives, dialogues, and platforms	The role of the CCCMC
12/2014	The 3rd UN Forum on Business and Human Rights (OHCHR)	One of the panellists of the session “The role of the State in creating an accountable marketplace – addressing key policy areas”
12/2014	The 3rd UN Forum on Business and Human Rights (OHCHR)	One of the panellists of the session “Responsible behaviour by Chinese companies: changes at home and abroad
01/2016	The Amnesty International Report (2016)	A Chinese industry association identified by Amnesty International as relevant to the global cobalt supply chain
11/2016	Responsible Cobalt Initiative	The secretariat of the initiative
11/2016	Workshop on “Promoting Decent Work in Global Supply Chains” (ILO & CCCMC)	The co-organizer of the workshop
02/2017	On-site visit to the headquarters of HC and training about responsible cobalt due diligence management	Visitor and trainer
11/2017	The 6th UN Forum on Business and Human Rights (OHCHR)	One of the panellists of the session “Improving access to remedy in collaborative approaches: collaborative investor engagement on child labor in the cobalt supply chain”
11/2017	The 6th UN Forum on Business and Human Rights (OHCHR)	Co-organizer of the session “Operationalizing the UNGPs – regional experiences: human rights due diligence in investment and supply chains of Chinese business”
03/2018	A nine-day training on the “Sustainable Mining Action Plan”	Organizer and trainer
11/2019	On-site visit to the DRC	Organizer and visitor
10/2020	The Responsible Minerals Initiative Annual Conference 2020	One of the panellists of the session “Progressive Improvement of Refiners in the Cobalt Supply Chain”
12/2020	2020 International Forum on Sustainable Mineral Supply Chains	The organizer of the forum
01/2021	Public Consultation for the UNGPs 10+ (China)	Co-organizer of the public consultation
04/2021	Webinar “Response to the Safety and Security Risks in the Complex Environment”	Co-organizer of the webinar, together with the Geneva Centre for Security Sector Governance and International Committee of the Red Cross
04/2021	2021 Forum on Responsible Mineral Supply Chains (OECD)	One of the panellists of the session “A needed paradigm shift: moving from de-risking to risk mitigation”
04/2021	2021 Forum on Responsible Mineral Supply Chains (OECD)	One of the panellists of the session “Progressing OECD-based due diligence in base metal supply chains”

Source: Compiled by the author⁷⁰⁷

⁷⁰⁷ This table is nonexclusive but inclusive and explanatory, aiming to provide an overview of the CCCMC's engagement with various actors. Since 2014, the CCCMC has actively engaged with a wide range of state and

The development, diffusion, and implementation of CCCMC guidelines and initiatives have been conducted through a multi-stakeholder approach. The CCCMC has been leading these transnational processes, alongside its active engagement of a wide range of state and non-state actors. This process-tracing examination showcases how the CCCMC has engaged with state and non-state actors and how this dynamic engagement influences the development of labour governance in global mineral supply chains.

In 2014, the CCCMC developed the GSRM through a multi-stakeholder approach. Annex 2 of the Guidelines showed the dynamic drafting processes of the Guidelines. There were four phases running through a two-year time frame before the official launch of the Guidelines on October 24, 2014: (a) preparing for the drafting process, such as defining the scope, mapping stakeholders, and determining terms of references; (b) developing the structure and main clauses through stakeholder workshops; (c) developing the full draft through three rounds of expert review; and (d) revising the draft through consultations with targeted groups of stakeholders, including Chinese mining enterprises.⁷⁰⁸ A wide range of state and non-state actors played a role in these interactive processes. Annex 3 of the Guidelines lists a group of key actors that supported the development of the Guidelines, namely, eight state agencies of China, five foreign embassies in China, five Chinese industry associations, 16 IGOs and INGOs, and four think tanks and consultancies, as well as eight Chinese mining enterprises.⁷⁰⁹ Notably, these diverse actors include the MOC, NDRC, SASAC and Ministry of Human Resources and Social Security of China, as well as the ILO and UNDP of the UN system.

5.3.1 The Rising Role of the CCCMC in Engaging with State Actors

The CCCMC has closely engaged with state agencies in the development and implementation of guidelines and initiatives. Several state agencies have played an important role in initiating the

non-state actors in developing, implementing, and updating guidelines and initiatives concerning the social responsibilities of Chinese outward mining investment. The data was compiled from and cross-checked through a group of reliable public records, including 25 research reports and 10 multi-stakeholder online conferences concerning responsible mineral supply chains listed in Annexes A and B of this thesis. Furthermore, supplementary information was compiled from the website of relevant organizations, including the OHCHR, OECD, CCCMC, and HC.

⁷⁰⁸ CCCMC, “GSRM (2014)”, *supra* note 406 at 53.

⁷⁰⁹ *Ibid* at 54–55.

development of such guidelines and initiatives. These include China's MOC, the United Kingdom's DFID, and Germany's GIZ.

China's MOC has provided financial support, policy guidance, and institutional support to the CCCMC's general operation. Specifically, the MOC has financially supported and practically supervised the CCCMC on the development and implementation of CSR guidelines and initiatives. Representatives of the CCCMC have been invited to international forums hosted by the UN and the OECD to exchange experience and good practices regarding RBC (Table 13). Representatives of the CCCMC have also provided several times of training and site visits in China, Zambia and the DRC.⁷¹⁰

The United Kingdom's DFID has financially supported the development process, and Germany's GIZ has assisted in the implementation process of the guidelines. When drafting the GSRM, the CCCMC, together with GIZ, defined the scope of the Guidelines at the preparation phase and visited mining enterprises for comments at the conclusion phase. Furthermore, during March 5-15, 2018, the CCCMC, together with GIZ, conducted a series of training workshops and field visits on responsible mining investment in the DRC, Zambia, and South Africa.⁷¹¹ Key topics of the training workshops included practices of CSR, social responsibility crises and solutions, sustainable development of mineral supply chains, challenges of outward mining investment, as well as stakeholder engagement and community development. Field visits were conducted at Chinese enterprises such as Jinchuan Group and Huayou Cobalt in the DRC, and NFC Africa Mining PLC in Zambia.

5.3.2 The Rising Role of the CCCMC in Engaging with International Organizations

The CCCMC has closely engaged with international organizations in the development and implementation of guidelines and initiatives. International organizations play an important role in setting standards and guidelines for labour rights in the context of transnational business activities. Both the OHCHR and the OECD have played an important role in shaping the development and implementation of CCCMC guidelines and initiatives. The development of CCCMC guidelines has been deeply influenced by the UNGPs and the OECD Due Diligence Guidance for responsible

⁷¹⁰ China Radio International, "Sustainable Mining Action Plan (SMAP) Workshops in Africa Organized by the CCCMC and GIZ" (28 March 2018), online: <<http://ce.cri.cn/chinanews/20180328/2878e209-1e8a-9ee5-aab7-c2b6e52a3e75.html>> [perma.cc/MQW2-EVRY] [translated by author].

⁷¹¹ *Ibid.*

mineral supply chains. Comparatively, the role of the ILO has been less visible. Upon the ongoing development of a coherent approach to RBC amongst the ILO, OHCHR, and OECD in recent years, it is assumed that the role of the ILO in the future development and implementation of CCCMC guidelines would likely be more visible.

While the membership of the OECD remains largely comprised of developed countries, it has extended to developing countries and emerging market economies. For instance, Mexico and Chile joined the OECD in 1994 and 2010, respectively.⁷¹² Furthermore, the OECD has been actively working to enhance its engagement with emerging market economies, taking Brazil, China, India, Indonesia and South Africa as “OECD Key Partners.”⁷¹³ As of 2022, 13 non-OECD states have adhered to the OECD Guidelines for Multinational Enterprises, including key mining jurisdictions such as Brazil and Peru.⁷¹⁴ China has neither been a member of the OECD nor adhered to the OECD Guidelines for Multinational Enterprises. However, the engagement between China and the OECD has been enhanced since 2007 and further strengthened in 2015.⁷¹⁵ The cooperation has been strong in various areas, including macroeconomic management, trade, investment, green growth, corporate governance, and RBC.⁷¹⁶

Compared to the OHCHR and the OECD, the ILO seems to have been less visible during the development processes of CCCMC guidelines. While there was a limited engagement between the CCCMC and the ILO, the CCCMC has made dedicated efforts to advance the labour dimension of HRDD. In the initial version, the direct reference to ILO conventions is minimal.⁷¹⁷ The eight fundamental ILO conventions have only been explicitly referenced in the Annex in the initial

⁷¹² OECD, “Our Global Reach” (2022), online: <<https://www.oecd.org/about/members-and-partners/>> [<https://perma.cc/YMB8-XH7S>].

⁷¹³ *Ibid.*

⁷¹⁴ OECD, “OECD Declaration and Decision on International Investment and Multinational Enterprises” (2022), online: <<https://www.oecd.org/corporate/mne/oecddeclarationanddecisions.htm>> [<https://perma.cc/GG4Q-YMMF>].

⁷¹⁵ In October 1995, the OECD Council agreed on a program of dialogue and cooperation with China. Since then, the OECD has actively engaged with China by sharing its member countries’ experiences in various areas. In response, China puts its own policy experience on the table for discussion by OECD member countries. In 2007, the OECD Council at the Ministerial level adopted a resolution to strengthen cooperation with China through a program of enhanced engagement. In July 2015, the Premier of the State Council of the People’s Republic of China, Mr. Li Keqiang, paid a historic visit to the OECD and signed the “Vision for Medium Term and a Programme of Work for 2015-16” between China and the OECD. See OECD, *Active with The People’s Republic of China*, *supra* note 534 at 4 and 60.

⁷¹⁶ *Ibid* at 5.

⁷¹⁷ CCCMC, “GSRM (2014)”, *supra* note 406 at 51–52.

version of the GSRM launched in 2014. The initial version only included eight ILO fundamental Conventions as part of a long list of international Conventions and guidelines in the Annex. In contrast, the revised version explicitly references ILO Convention No. 138 on minimum age and ILO Convention No. 182 on the worst forms of child labour under Clause 3.5 “Labour Issues.”⁷¹⁸

5.3.3 The Rising Role of the CCCMC in Engaging with Civil Society Organizations

The CCCMC has closely engaged with civil society organizations through organizing public consultations, responding to voices raised by these organizations, and participating in panel discussions with relevant stakeholders. Civil society organizations have contributed to the development and revision of the guidelines and initiatives. Both international and Chinese civil society organizations have been involved in drafting processes of the guidelines and initiatives. For instance, key organizations include International Business Leaders Forum, Global Witness, World Wild Fund for Nature, and China Business Council for Sustainable Development.⁷¹⁹

Global Witness has worked closely with the CCCMC. Global Witness is an international NGO with nearly 30 years of experience in investigating and combating human rights abuses in the mining industry. Global Witness was one of the civil society organizations which were involved in the drafting processes of the GSRM. Two months after the official launch of the Guidelines, Global Witness organized a panel discussion at the third Annual UN Forum on Business and Human Rights in December 2014 and invited representatives of the CCCMC to discuss RBC by Chinese mining enterprises.⁷²⁰ After the official launch of the Chinese Due Diligence Guidance in 2015, Global Witness stated that “New Chinese industry guidelines for carrying out mineral supply chain checks can play a vital part in efforts to address resource-linked conflict and human rights abuses around the world.”⁷²¹ Lizzie Parsons, China Programme Leader for Global Witness, states that “The guidelines send a promising message that Chinese companies have individual

⁷¹⁸ “3.5 Labour Issues - 3.5.1 Do not use child labor, especially the worst form of child labor, forced or compulsory labor, and protect the rights of minor employees.” See CCCMC, “GSRM (2017)”, *supra* note 665 at 13.

⁷¹⁹ CCCMC, “GSRM (2014)”, *supra* note 406 at 54–55.

⁷²⁰ OHCHR, “3rd UN Forum on Business and Human Rights: Programme” (2 December 2014) at 13, online (pdf): <<https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2014ForumonBusinessandHumanRights.aspx>>.

⁷²¹ Global Witness, “Global Witness Welcomes Progressive New Chinese Mineral Supply Chain Guidelines” (2 December 2015), online: *Press Release* <<https://www.globalwitness.org/en/press-releases/global-witness-welcomes-progressive-new-chinese-mineral-supply-chain-guidelines/>> [perma.cc/F8AJ-VM2V].

responsibility to reduce harmful impacts along their supply chains and demonstrate the intention of the Chinese mineral trading sector to act responsibly on the international stage.”⁷²²

Furthermore, Amnesty International has played an important role in monitoring the implementation of the guidelines and prompting developments in new initiatives. As illustrated in the previous section, the CCCMC’s focus on the global cobalt supply chain was initiated by the Amnesty International Report (2016). While the two guidelines launched in 2014 and 2015 aim to cover all types of minerals without specific priorities, the CCCMC’s activities have turned to the global cobalt supply chain since 2016. As a result, cobalt has become a pilot mineral for the CCCMC to implement the guidelines and initiatives. Meanwhile, HC, the company targeted in the report, became the first pilot company guided and facilitated by the CCCMC toward socially responsible investment and supply chain due diligence management.⁷²³

5.3.4 The Rising Role of the CCCMC in Engaging with Chinese Enterprises and Non-Chinese Enterprises: Through and Beyond the Responsible Cobalt Initiative

In developing and implementing CSR guidelines and initiatives, the CCCMC has closely engaged with companies in both upstream and downstream global mineral supply chains. Since launching the RCI in 2016, the CCCMC has engaged closely with Chinese cobalt refiners upstream of the cobalt supply chain and international brands downstream of the chain. As will be illustrated in chapter 6, HC, the Chinese cobalt refiner targeted in the Amnesty International Report (2016), became a pilot company for the RCI. Subsequently, in recent years, an increasing number of Chinese enterprises have joined the RCI and have started changing corporate policies and behaviours in accordance with CCCMC guidelines and initiatives.

The RCI operates through a membership mechanism. At the initial stage of the initiative, the RCI membership scheme covered six downstream companies, including Daimler AG, BMW, Contemporary Amperex Technology Co Ltd., LG Chem Ltd., Samsung SDI, Renault Group, and Volvo.⁷²⁴ However, because of the lack of consensus between downstream brand companies and the CCCMC, the CCCMC decided to end the membership of some of the downstream brand

⁷²² *Ibid.*

⁷²³ Chapter 6 of this thesis provides an in-depth case study of Huayou Cobalt.

⁷²⁴ Zhang, *supra* note 557 at 143.

companies.⁷²⁵ As an expert in the field noted, “it is still challenging for China [Chinese] industrial organizations to develop an innovative membership arrangement for both upstream actors and downstream actors working within one unbiased framework.”⁷²⁶ Representatives from the CCCMC have raised concerns about the divergence between upstream and downstream actors in several multi-stakeholder conferences and platforms.⁷²⁷

In addition to governance gaps for social issues in GSCs, there have been “trust deficits” in GSCs that encompass both upstream and downstream, as well as both developing countries and developed countries. It has been challenging for actors in different supply chain positions to gain consensus on GSC governance. While there is a recently developed coherent approach toward RBC aligning with the UNGPs, it seems that little consensus has been reached amongst diversified instruments and initiatives for responsible cobalt sourcing. The divergence seems even notable between initiatives led by actors from the global North (with many companies downstream of the cobalt supply chain) and initiatives led by actors from the global South (with many companies upstream of the chain).

The CCCMC has enhanced its collaboration with the RMI, an experienced and influential industry association which focuses on responsible mineral sourcing issues in GSCs.⁷²⁸ The work consists of activities that include capacity building, smelter audits, awareness training and policy-related issues. The RMI was founded in 2008 by members of the Responsible Business Alliance and the Global e-Sustainability Initiative. It is now one of the most utilized and respected resources for companies from a range of industries, with more than 400 member companies. Most of these member companies are operating downstream of mineral supply chains, and they are primarily from developed countries. For upstream companies, the RMI currently recognizes only two different organizations that can support ASM and entities exporting ASM material in the African Great Lakes region: the Innovative Tin Supply Chain Initiative and the RCS Global Group’s Better Mining project.⁷²⁹ Both recognized initiatives are led and funded by companies and industry

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*

⁷²⁸ RMI, “What Type of Work does RMI Conduct in China?” (2022), online: <<http://www.responsiblemineralsinitiative.org/about/faq/general-questions/what-type-of-work-does-cfsi-conduct-in-china/>> [perma.cc/ZP7Q-97ZP].

⁷²⁹ RMI, “FAQ” online” (2022), <<http://www.responsiblemineralsinitiative.org/about/faq/>> [perma.cc/LMA2-YQZN].

associations from the global North. The CCCMC and the RMI are committed to engaging external stakeholders in the development and oversight of the assurance process.

5.4 A Critical Investigation into CCCMC Guidelines and Initiatives: A New Wave of Labour Governance in the Global Cobalt Supply Chain?

The development of CCCMC guidelines and initiatives exemplifies the production and diffusion of labour norms across various levels and sites of law in the context of Chinese outward mining investment. Furthermore, it illustrates the rising role of the CCCMC in navigating labour norms along global mineral supply chains.

This section critically investigates CCCMC guidelines and initiatives, focusing on their relevance and implications for the dynamics of multi-level governance of labour rights in the global cobalt supply chain. The analysis focuses on the following three essential aspects: (a) the role of CCCMC guidelines and initiatives in the diffusion of labour norms in transnational spheres, (b) regulatory innovations of these guidelines and initiatives for improving workers' rights in the global cobalt supply chain, and (c) the limitations and potential of these guidelines and initiatives in enhancing the multi-level governance in a globalized economy.

5.4.1 The Diffusion of Labour Norms across Levels and Sites of Law in Chinese Outward Mining Investment

The ongoing development of CCCMC guidelines and initiatives provides an opportunity to consider the interactive dynamics between domestically refined norms and internationally set norms, as well as between emerging legal orders that are being developed with the participation of actors from China and existing legal orders that might be produced by actors largely from the global North: the dynamics of multi-level governance of labour rights in the global cobalt supply chain. The emerging multi-level governance contributes to the potential of multidirectional diffusion and settling of labour norms instead of a predefined unidirectional diffusion such as from the global North to the global South or from the centre to other parts.

Examples of cross-references and acknowledgements across standards and initiatives are increasing. More examples of norm diffusion can be found in the following two directions: first, references to international public standards by soft and voluntary guidelines; and second,

references to voluntary initiatives by other forms of voluntary initiatives. The development and implementation of CCCMC guidelines showcase norm diffusion in both directions.

This chapter develops three key findings regarding the past, present, and future of CCCMC guidelines and initiatives in the multi-level governance framework in the global cobalt supply chain: (a) the diffusion of labour norms from international instruments to CCCMC guidelines, (b) the ongoing diffusion of labour norms to other sites and levels of law through the dissemination and implementation of CCCMC guidelines and initiatives, and (c) implications for the development of new legal orders regarding labour governance in the global cobalt supply chain. First, a diverse set of labour norms has been diffused from the international level to the national level in China and has been incorporated into the CCCMC's industry guidelines while being refined to adapt to the context of Chinese outward mining investment. Second, the ongoing norm diffusion processes are not unidirectional but dynamic and recursive (between the CCCMC and other levels and sites of law). The processes are likely to be ongoing. Third, the implementation of CCCMC guidelines is likely to generate considerable influence on policy updates and behaviour changes regarding labour governance, both within and beyond the global cobalt supply chain.

(1) The Diffusion of Labour Norms from the International Level to the National Level of Law in China

There are increasing examples of cross-references and cross-acknowledgement of labour standards across various levels and sites of law. Referencing international standards is not new in voluntary guidelines and corporate policy commitments in the mining industry. For instance, the OECD Due Diligence Guidance for responsible mineral supply chains seems to have achieved much recognition and many cross-references by voluntary initiatives on responsible mineral sourcing and companies that are connected to the mining, electronics, automotive, and ICT industries. More than 11 voluntary initiatives on responsible mineral sourcing have partly aligned with the OECD Due Diligence Guidance.⁷³⁰

It is important to note that the increasing amount of cross-references does not necessarily mean the actual integration of different standards and initiatives, nor does it necessarily improve corporate behaviours with respect to labour rights. However, cross-references can turn into a

⁷³⁰ See “Table 13: Voluntary due diligence schemes (partly) aligned with the OECD Due Diligence Guidance” in RE-SOURCING, “State of Play and Roadmap Concepts”, *supra* note 488 at 42–43.

positive trend that can help to streamline international labour standards in transnational spheres and increase the possibility of aligning various initiatives and mechanisms toward a coherent approach to RBC. For instance, in addition to cross-references between standards, emerging efforts have been devoted to developing collaborative initiatives and platforms that could involve a broader range of actors. For instance, a recent collaboration involving Responsible Steel and three other voluntary initiatives aims to create an interoperability platform for responsible mining. This collaboration seeks to develop a functional program for coordination and increasing interoperability between standards and initiatives, build an ongoing platform to engage collectively with all stakeholders, and apply an Integrated Assessment Protocol for assessing compliance.⁷³¹

A list of the cross-references of key international instruments in CCCMC guidelines is provided below for a preliminary overview. Since the GSRM is the key, the references in the other two documents are not repeated. However, a closer examination shows that the references are gradually strengthened through revised versions of the guidelines, as well as through the further focus on the issue of child labour in the global cobalt supply chain.

Table 14 The Cross-references of International Instruments in CCCMC Guidelines

Year	CCCMC Guidelines	ILO C138	ILO R146	ILO C182	ILO R190	Other ILO instruments	UN GPs	OECD guidelines	Other international instruments
2014	GSRM	√	×	√	×	√ (all the eight fundamental conventions and ILO C169)	√	Guidelines for Multinational Enterprises and Due Diligence Guidance	A total of 28 international instruments and initiatives
2015	Chinese Due Diligence Guidelines	×	×	×	×	×	√	Due Diligence Guidance	×
2017	GSRM (revised)	√	×	√	×	Yes (all the eight fundamental conventions and ILO C169)	√	Guidelines for Multinational Enterprises and Due Diligence Guidance	A total of 28 international instruments and initiatives
2018	Cobalt Refiner Standard (pilot)	√	×	√	√	×	√	Due Diligence Guidance and other OECD guidelines	×

⁷³¹ Responsible Steel, Responsible Jewellery Council, Initiative for Responsible Mining Assurance & Towards Sustainable Mining, “Mining, Minerals and Metals (M3) Standards Partnership: Project Description” (2022), online: <<https://www.m3standardspartnership.org/about>> [perma.cc/XGK8-V6CV].

2019	Cobalt Refiner Standard (version 1.0)	√	×	√	√	×	√	Due Diligence Guidance and other OECD guidelines	×
2021	Cobalt Refiner Standard (version 1.0)	√	×	√	√	×	√	Due Diligence Guidance and other OECD guidelines	×
2021	Chinese Due Diligence Guidelines (2.0, Public Consultation Version)	×	×	√	√	√ (ILO C169)	√	Due Diligence Guidance and other OECD guidelines	A wide range of international instruments and initiatives

Source: Compiled by the author⁷³²

First, the revised version of the GSRM published in 2017 referenced the two ILO fundamental Conventions concerning the elimination of child labour and strengthened requirements for the elimination of child labour, especially the worst forms of child labour. In the initial version, Clause 2.5.1 highlighted the prohibition of both child labour and forced or compulsory labour, as well as the protection of the rights of young workers (any workers over the legally prescribed minimum working age and under the age of 18). It stated that “If there is no relevant host country law or regulation, the minimum working age shall be 16 years.”⁷³³ In the revised version, relevant clauses explicitly referenced the two ILO fundamental Conventions instead of only including them as part of a list of international instruments provided at the end of the guidelines. Clause 3.5 of the revised version addresses labour issues. In the revised version, Clause 3.5.1 specifies applicable standards on the minimum age for admission to employment and the prohibition of the worst forms of child labour. It states “Do not use child labor, especially the worst form of child labor; do not employ children under the minimum working age which is legally prescribed by the host country laws and regulations, or the clauses of International Labor Organization Convention No.138 on minimum

⁷³² The key document is the *Chinese Guidelines for Social Responsibility in Outbound Mining Investments*, shortened as “GSRM,” and other documents are follow-up measures to detail and operationalize the GSRM. This table provides a general overview of the cross-references between CCCMC guidelines and relevant international instruments. The table counts only an explicit reference directly to the title of a specific instrument. The engagement has deepened in recent years. For instance, while the initial versions already referenced relevant international instruments, the revised versions have further engaged with the two ILO fundamental Conventions on the effective elimination of child labour.

⁷³³ CCCMC, “GSRM (2014)”, *supra* note 406 at 36.

age for admission to employment, whichever is the higher.”⁷³⁴ Furthermore, it is required that “relevant measures for remediation should be established, in particular, measures should be taken immediately to eliminate the worst forms of child labour as set out in the Labor Organization Convention No.182.”⁷³⁵

Second, the revised version of the Cobalt Refiner Standard published in 2021 also referenced the above-mentioned two ILO fundamental Conventions and the ILO Recommendation 190 concerning the definition of the worst forms of child labour. The Standard explicitly adopts the definition of “child labour” and the “worst forms of child labour” that are provided in the two Conventions. Notably, the Standard highlights to cobalt refiners that several types of work in mining sites can constitute the worst forms of child labour, especially work *underground*, work that involves the manual handling or *transport of heavy loads*, and work in an unhealthy environment which may *expose children to hazardous substances*.⁷³⁶

(2) The Ongoing Diffusion of Labour Norms from the National Level of Law in China to Other Levels and Sites of Law

The labour norms compiled in CCCMC guidelines continue to be diffused to other levels and sites of law in transnational spheres through CCCMC initiatives, mechanisms, and tools that are designed to operationalize the norms. These dynamic processes of norm diffusion are likely to generate considerable influence on norm development and implementation at other sites and levels of law in the context of Chinese outward mining investment. Therefore, CCCMC guidelines and initiatives can significantly influence the evolving multi-level governance framework in the global cobalt supply chain, particularly in the development of labour governance initiatives by actors from the global South.

Emerging examples have indicated potential channels of such influence. First, CCCMC guidelines can directly impact policy updates and corporate behaviours of Chinese mining enterprises. Between 2016 and 2021, the CCCMC enhanced its engagement with other actors in the global cobalt supply chain. Accordingly, some Chinese mining enterprises have started following CCCMC guidelines when they develop their CSR policies and supply chain due diligence

⁷³⁴ CCCMC, “GSRM (2017)”, *supra* note 665 at 23.

⁷³⁵ *Ibid.*

⁷³⁶ RCI & RMI, *supra* note 704 at 33.

mechanisms. HC, one of the largest cobalt refiners in the world, has closely engaged with the development and implementation of CCCMC guidelines and initiatives.⁷³⁷ Furthermore, an increasing number of Chinese mining enterprises have closely engaged in the implementation of CCCMC guidelines and initiatives.⁷³⁸ Several examples have recently emerged at the corporate level in China, such as the recent development of corporate CSR policies, the increasing practices in developing supply chain due diligence mechanisms, and the enhanced engagement between Chinese mining enterprises with voluntary responsible cobalt initiatives.

Second, CCCMC guidelines can shape the development of labour governance at other sites and levels of law. While the development of CCCMC guidelines was deeply influenced by the three pillars of the UNGPs and the five-step risk management due diligence framework of the OECD Due Diligence Guidance, CCCMC guidelines were constructed with their own features that may differ from the OECD approach. In general, CCCMC guidelines are more inclusive than the OECD Guidance regarding the scope of rights that are supported, the scope of applicable minerals that are covered, and the measures that are suggested. Two notable features that distinguish the CCCMC approach and the OECD approach are the CCCMC's broad coverage of labour rights, relevant social, environmental and economic issues, as well as its development of the sixth step of the due diligence framework: "community participation."

The CCCMC's broad coverage of labour rights and relevant social, environmental, and economic issues informs Chinese mining enterprises to consider and address a wide range of labour rights and relevant impacts rather than focus on a narrow set of risks of severe rights abuses. According to the requirements outlined in the GSRM, the Chinese Due Diligence Guidance has defined two types of risks: "Type 1 Risks" and "Type 2 Risks". Type 1 risks refer to "risks of contributing to conflict and serious abuse of human rights associated with extracting, trading, handling and exporting minerals from conflict-affected and high-risk areas."⁷³⁹ The OECD Due Diligence Guidance for responsible mineral supply chains focuses on these risks. Type 2 Risks refer to risks that are additional to Type 1 risks, including "[risks of] widely concerned social, environmental

⁷³⁷ Chapter 6 of this thesis provides an in-depth case study of Huayou Cobalt.

⁷³⁸ Chapter 7 of this thesis provides a critical investigation into 10 Chinese mining enterprises.

⁷³⁹ CCCMC, "Chinese Due Diligence Guidelines (2015)", *supra* note 656 at 14; CCCMC, "Chinese Due Diligence Guidelines (Public Consultation Version, April 2021)", *supra* note 668 at 32.

and economic risks associated with mineral supply chain[s].”⁷⁴⁰ Clause 3.3.1 of the GSRM requires Chinese mining enterprises to “Develop and issue a code of conduct which requires suppliers to fulfill the relevant requirements of the Guidelines and encourage suppliers to sign this document.”⁷⁴¹ The broad scope of environmental, social, and ethical issues that are covered in the above-mentioned CCCMC guidelines generate broader impacts on labour rights rather than the narrowed scope of rights that are addressed through serious rights abuses. The revised version of the Chinese Due Diligence Guidance also indicates a focus on “adverse impacts on human rights, labor rights, communities and society” in the Type 2 risks. The Guidance sets out detailed examples of misconduct regarding labour rights. The examples include: (a) the violation of laws, regulations, and industry guidelines of China and the host country; (b) the use of child labour, the failure to establish a standardized labour relationship with employees; (c) discrimination; (d) the failure to pay regular working hour wages and overtime wages, or payment standards lower than the legal minimum standard, or deduction of wages illegally or without authorization; (e) the failure to protect employees’ right to freedom of association, prohibit or hinder employees from electing employee representatives, establishing or joining workers’ unions, and conducting negotiations between employers and employees; (f) the failure to ensure the safety of drinking water in the work area, the safety of food consumption and storage facilities, and clean and sanitary toilet facilities; (g) the failure to ensure healthy and safe working conditions, etc.⁷⁴² The broad scope of rights covered and the detailed examples direct Chinese mining enterprises to develop substantive policy commitments and practical measures in designing TPLG initiatives.

The CCCMC’s emphasis on “community participation” as a key element of due diligence management is closely relevant for addressing the root causes of child labour and other serious abuses of labour and human rights. Simply cutting off the supply chain can easily mitigate companies’ risks of being involved in business activities that cause or contribute to serious abuses of labour and human rights. However, it can also easily withdraw employment opportunities for local communities which rely heavily on the ASM industry and exacerbate poverty in local contexts. While the OECD Due Diligence Guidance proposes to cut off supply chains when there

⁷⁴⁰ *Ibid.*

⁷⁴¹ CCCMC, “GSRM (2017)”, *supra* note 665 at 17.

⁷⁴² See “6.2 Risks relating to misconduct in environmental, social and economic issues are referred to as ‘Type 2 Risks’” in CCCMC, “Chinese Due Diligence Guidelines (Public Consultation Version, April 2021)”, *supra* note 668 at 34–37.

are risks of conflicts and high-risk situations, CCCMC guidelines propose to address the root issues of risks such as poverty. CCCMC guidelines and initiatives have made efforts, from implicitly encouraging “community participation” to explicitly adding it as the sixth step to the OECD-designed *Five-step Framework for Risk-based Due Diligence in the Mineral Supply Chain*. For decades, communication with local communities and contributions to local economic development has been deemed an essential part of CSR by Chinese enterprises. Practices through transnational business activities and specific guidance through CCCMC guidelines have contributed to guiding Chinese mining enterprises to develop a concrete step of “community participation” in the construction and implementation of their HRDD systems.

This sixth step has generated impacts on the ongoing development of due diligence guidelines at the OECD. In May 2018, the OECD Due Diligence Guidance for Responsible Business Conduct was adopted during the annual OECD Ministerial Meeting at the Council level.⁷⁴³ In this document, community development and access to remedy have been explicitly integrated as the sixth step after the five-step framework. This important update at the OECD shows that norm diffusion and impact processes between the CCCMC and the OECD are not necessarily unidirectional (from the OECD to the CCCMC) but can be mutual and recursive and likely to be ongoing. The interactions and mutual influences between the CCCMC approach and the OECD approach are expected to be enhanced gradually during the coming decade.

Third, the CCCMC approach may provide an alternative example for regulatory arrangements in China and other countries. CCCMC guidelines have provided helpful examples and good models for the development and implementation of CSR guidelines by other Chinese industry associations, as well as provided helpful inputs for Chinese state agencies’ regulatory arrangements for responsible outward investment. Furthermore, the CCCMC approach is also helpful for other emerging market economies in developing their regulatory arrangements for responsible outward investment. For instance, when seeking alternative directions for developing a sustainable CSR instrument for the Brazilian mining sector, a recent study chose CCCMC guidelines and approaches as feasible, highlighting that “China stands out as a key partner.”⁷⁴⁴ While having

⁷⁴³ OECD, *Due Diligence Guidance for Responsible Business Conduct* (Paris: OECD, 2018), online (pdf): <<https://www.oecd.org/corporate/mne/due-diligence-guidance-for-responsible-business-conduct.htm>>.

⁷⁴⁴ Renato G. Flôres Jr, “A Sustainable CSR Instrument for the Brazilian Mining Sector” in Christopher Stehr, Nina Dziatzko & Franziska Struve, *Corporate Social Responsibility in Brazil: The Future is Now*, eds (Cham: Springer, 2019) 347–366 at 365.

identified that countries such as Australia, Canada and China have provided several regulatory models, the study suggests that “by its comprehensive and more up to date character, and the fact of counting with the approval of the important Chinese operators, the CCCMC proposal could be chosen, without losing sight of, at least, the Australian code.”⁷⁴⁵

(3) Implications for the Multi-level Governance Framework in the Global Cobalt Supply Chain: Toward a Coherent Approach to Responsible Business Conduct and the Enhanced Labour Dimension of Human Rights Due Diligence

The above-mentioned examples indicate that the development and implementation of CCCMC guidelines and initiatives will likely generate considerable influence on policy updates and behaviour changes regarding labour governance, both within and beyond the global cobalt supply chain. The rising role of the CCCMC in the multi-level governance framework in the global cobalt supply chain implies three positive trends for the future of TLL. First, the example of the CCCMC showcases that the actors from the global South have the potential and ability to shape the direction of the diffusion of legal orders and continue to add texture to the pivotal but infinitely challenging topic of decent work in GSCs. The rise of the CCCMC helps to create a counterbalance for the dominant role occupied by companies and states that are from the global North and are reluctant to take action to address persistent asymmetries between upstream and downstream of the chain. Furthermore, the emerging influence that CCCMC guidelines can have on labour governance in the global cobalt supply chain provides a new example of multidirectional diffusion of labour norms in contrast to traditional understandings of legal transplantation that imagine law reform to migrate from the global North to the global South.

Second, the CCCMC approach indicates that it supports the development of commonly acknowledged standards and mechanisms in transnational spheres, which can contribute to developing a coherent approach to RBC. A recent study found that there are 158 standards and related initiatives in the extractive industry.⁷⁴⁶ CCCMC guidelines and initiatives are part of these voluntary efforts to promote responsible mining. A future development toward a single internationally recognized framework would be desirable yet is not likely to happen in a short time,

⁷⁴⁵ *Ibid.*

⁷⁴⁶ International Institute for Sustainable Development, “State of Sustainability Initiatives Review: Standards and the Extractive Economy” (10 September 2018) at 111, online (pdf): <<https://www.iisd.org/publications/state-sustainability-initiatives-review-standards-and-extractive-economy>>.

considering the diversity of actors, norms and initiatives. The CCCMC's adoption of key elements of the OECD approach and the UNGPs, notably HRDD, indicates that the CCCMC upholds the development of a coherent approach to RBC. The CCCMC's enhanced engagement with key actors in the global cobalt supply chain has showcased its efforts in connecting both upstream and downstream of the chain and developing a coherent approach to responsible cobalt sourcing.

Third, the CCCMC's focus on labour rights, especially the situation and condition at the bottom of global mineral supply chains, highlights its role in enhancing the labour dimension of HRDD. Workers at the bottom of GSCs are socially and economically marginalized, which contributes to the inequality of bargaining power in their relationships with their employers. Meanwhile, employers of these workers, which are mostly upstream companies, are also marginalized in GSCs in that they mostly produce low value-added products, and downstream lead firms earn billions through high value-added products. CCCMC guidelines have detailed a set of specific labour standards for socially responsible mining and sourcing activities and developed comprehensive guidance for Chinese mining enterprises to develop an HRDD system to operationalize specific labour standards. Furthermore, from the very beginning of the processes, Chinese guidelines and initiatives have taken access to remedy as a key part of corporate practices in HRDD. The sixth step, "community participation," was added to the five-step risk-based supply chain due diligence framework developed by the OECD. It is crucial to pay attention to the initiatives, mechanisms, and tools that the CCCMC has developed to operationalize the guiding principles and specific standards in its guidelines because they could be part of transformative alternatives that can help to address governance deficits and challenge the unequal law of decent work in GSCs. The next subsection will illustrate these regulatory innovations in detail.

5.4.2 Regulatory Innovations of CCCMC Guidelines and Initiatives: A Human Rights Due Diligence System with the Elimination of Child Labour at the Centre

CCCMC guidelines contribute to achieving decent work in GSCs through two regulatory innovations in the context of Chinese outward mining investment: (a) providing specific labour standards for socially responsible mining activities, and (b) providing comprehensive guidance for companies to establish an HRDD system. By providing specific labour standards for socially responsible mining activities, the guidelines contribute to increasing compliance with key labour standards in GSCs and mainstreaming labour and human rights in the context of a globalized

economy. Furthermore, by providing comprehensive guidance for establishing an HRDD system for transnational mining activities, the guidelines contribute to fostering a coherent approach to RBC which aligns with key international instruments. Notably, the specific standards and comprehensive guidance put the elimination of child labour at the centre. CCCMC guidelines form a key part of the emerging multi-level governance framework that was initiated by the elimination of child labour in the global cobalt supply chain.

(1) Specific Labour Standards for Socially Responsible Mining Activities

The two CCCMC guidelines help to provide specific labour standards for socially responsible mining. Both guidelines take an inclusive approach to rights, acknowledging the interrelationship of rights, such as labour rights, human rights, environmental rights, and the rights of Indigenous peoples. The standards have focused on the social impacts of transnational mining activities and, at the same time, have taken broad consideration of other key impacts such as environmental impacts and impacts on local communities and Indigenous peoples. Furthermore, compared to the narrow scope of regulations for conflict minerals, these Chinese guidelines are more comprehensive since they cover a broad range of minerals, mining activities, and mining site locations.

The GSRM considered a wide range of international standards during the development and implementation of the guidelines.⁷⁴⁷ The clauses built on and referenced many clauses of key international instruments and voluntary initiatives on CSR, including the UNGPs, OECD Due Diligence Guidance for responsible mineral supply chains, Global Compact Guidance on Responsible Business in Conflict-Affected & High-Risk Areas, Responsible Jewelry Council Code of Practices, ISO 26000 on Social Responsibility, and Bettercoal Code. It is stressed in the Foreword that “These Guidelines do not provide an exhaustive list of all possible requirements relating to social responsibility, nor do they exclude [the] concurrent or supplementary application of other social responsibility standards, systems, or initiatives.”⁷⁴⁸

The GSRM explicitly refer to the UNGPs as a key guide for the development and implementation of the guidelines. It is stressed that companies shall “ensure that all operations shall be in line with

⁷⁴⁷ CCCMC, “GSRM (2014)”, *supra* note 406 at 47–49; CCCMC, “GSRM (2017)”, *supra* note 665 at 26.

⁷⁴⁸ CCCMC, “GSRM (2014)”, *supra* note 406 at 28; CCCMC, “GSRM (2017)”, *supra* note 665 at 7.

the UNGPs during the entire life-cycle of the mining project.”⁷⁴⁹ The UNGPs, adopted by the UN Human Rights Council in 2011, refer to the International Bill of Human Rights and the ILO’s core labour standards as the minimum baseline of human rights that companies should respect.⁷⁵⁰ Furthermore, all eight ILO fundamental Conventions, while not fully ratified by China, are listed explicitly in the Annex. More importantly, ILO Convention No. 138 on minimum age and ILO Convention No. 182 on the worst forms of child labour are referenced as applicable standards for the prohibition of child labour. It directs companies: “Do not use child labor, especially the worst form of child labor; do not employ children under the minimum working age which is legally prescribed by the host country laws and regulations, or the clauses of International Labor Organization Convention No.138 on the minimum age for admission to employment, whichever is the higher.”⁷⁵¹ Furthermore, with respect to the use of child labour, it is required that “relevant measures for remediation should be established, in particular, measures should be taken immediately to eliminate the worst forms of child labor as set out in the Labor Organization Convention No.182.”⁷⁵²

Clauses 3.4 on human rights, 3.5 on labour issues, and 3.6 on occupational health and safety have helped to set specific labour standards for social responsibility in Chinese outward mining investment. Clause 3.4 on “human rights” in social responsibility requires companies to take active measures to avoid causing or exacerbating adverse impacts on human rights, as well as to prevent or mitigate negative human rights impacts that are directly linked to the product or service associated with its business relations, and to eliminate impacts that have been caused. Clause 3.5 on “labour issues” requires companies to ensure responsible labour practices, for instance, providing job opportunities and appropriate working conditions. Clause 3.6 on “occupational health and safety” refers to maintaining the physical and mental health of employees, contractors and other relevant parties, preventing health issues caused by unacceptable working conditions,

⁷⁴⁹ CCCMC, “GSRM (2017)”, *supra* note 665 at 18.

⁷⁵⁰ “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.” See Human Rights Council, *Report of the Special Representative of the Secretary-General*, *supra* note 48, “The state duty to protect human rights”, Guiding Principle 12.

⁷⁵¹ CCCMC, “GSRM (2017)”, *supra* note 665 at 23.

⁷⁵² *Ibid* at 23.

including protecting employees from health and occupational risks, improving the working environment, and satisfying the basic needs of the employees.

Clause 3.3 on supply chain management, 3.7 on environment, and 3.8 on community development have stressed the importance of addressing issues related to artisanal and small-scale miners. Item 3.3.4 requires that companies that source from artisanal and small-scale miners shall regularly assess risks of forced labour, child labour, unsafe working conditions, uncontrolled use of hazardous substances and other significant environmental impacts.⁷⁵³ Item 3.7.4 requires that companies “engage in a multi-stakeholder process, including involving indigenous peoples, communities, artisanal and small-scale miners, and local authorities, to plan and update site rehabilitation and closure plans.”⁷⁵⁴ Item 3.8.5 requires that companies should provide skills development training for citizens from local communities, especially artisanal and small-scale miners.⁷⁵⁵

The Chinese Due Diligence Guidelines operationalize Clause 2.4.6 of the GSRM. The Guidelines provide guidance to Chinese companies “to observe the UN Guiding Principles during the entire life-cycle of the mining project.” The Guidelines support companies to achieve legal and regulatory compliance required to do business with jurisdictions “that have enacted or are in the process of enacting legislation requiring *due diligence* for responsible supply chains of mineral resources and/or achieve conformance with industry initiatives that improve market access.”⁷⁵⁶ The Guidelines stress the importance of companies’ compliance with legal and regulatory requirements from both upstream⁷⁵⁷ and downstream⁷⁵⁸ of global mineral supply chains.⁷⁵⁹ The Cobalt Refiner Standard carves out a detailed due diligence system for cobalt refiners.

(2) Comprehensive Guidance in Establishing a Human Rights Due Diligence System

In accordance with the UNGPs and the OECD Due Diligence for responsible mineral supply chains, the CCCMC developed comprehensive guidance for Chinese enterprises to establish an

⁷⁵³ *Ibid* at 18.

⁷⁵⁴ *Ibid* at 30.

⁷⁵⁵ *Ibid* at 36.

⁷⁵⁶ CCCMC, “Chinese Due Diligence Guidelines (2015)”, *supra* note 656 at 8–9 [emphasis added].

⁷⁵⁷ *Ibid* (referring to domestic laws of the DRC, Rwanda and Burundi).

⁷⁵⁸ *Ibid* (referring to legal requirements for responsible mineral supply chains set in Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* in the United States).

⁷⁵⁹ *Ibid* (referring to a wide range of initiatives relevant to global mineral supply chains).

HRDD system. This guidance is both comprehensive and unique for the development of HRDD in law and in practice. The guidance is comprehensive in that it was developed in accordance with key elements of HRDD set out in international instruments and was detailed in accordance with the complexities of supply chains and risks of rights abuses in the context of transnational mining activities. This guidance is unique in that it puts the elimination of child labour and other key categories of labour rights at the centre. Furthermore, the guidance is regularly updated according to the implementation processes and the feedback from stakeholders.

The guidance addresses the three key elements of HRDD that were illustrated in detail in the UNGPs: (a) a policy commitment to meet the corporate responsibility to respect human rights; (b) an HRDD process to identify, prevent, mitigate, and account for how they address their impacts on human rights; and (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.⁷⁶⁰ In 2014, the GSRM explicitly referenced the UNGPs and adopted the three key elements for the context of mining activities, highlighting the importance of cooperating with local communities to effectively provide the remedy to those affected by adverse human rights impacts.⁷⁶¹

(a) A Model Supply Chain Policy

In accordance with the requirement of a corporate policy commitment to human rights, the GSRM require that companies “develop a policy commitment to meet the responsibility to respect human rights” and “issue a code of conduct which requires suppliers to fulfill the relevant requirements of the Guidelines and encourage suppliers to sign this document.”⁷⁶² Accordingly, building on the model policy provided in the OECD Due Diligence Guidance for responsible mineral supply chains, the Chinese Due Diligence Guidelines provide a Model Supply Chain Policy for companies to follow in developing their corporate due diligence policies and supplier COCs. This Model Policy serves as a template for priority issues contained in the required code of conduct. The Model Policy suggests that companies make the following commitment:

[...] we commit to adopt, widely disseminate and incorporate in contracts and/or agreements with suppliers a policy on responsible sourcing of mineral resources based on

⁷⁶⁰ Human Rights Council, *Report of the Special Representative of the Secretary-General*, *supra* note 48, “II. The corporate responsibility to respect human rights”, Guiding Principle 15.

⁷⁶¹ CCCMC, “GSRM (2014)”, *supra* note 406 at 34.

⁷⁶² *Ibid* at 33–34.

these Guidelines, as representing a common reference for conflict-sensitive sourcing practices and suppliers' risk awareness from the point of extraction until the end user.⁷⁶³

The Model Policy suggests corporate commitments and risk mitigation measures to address four groups of key issues: (a) serious human rights abuses, (b) direct or indirect support to non-state armed groups and public or private security forces, (c) corruption, money laundering and payments to governments, and (d) land rights, emissions, and artisanal operators.⁷⁶⁴ Both “(a) serious human rights abuses” and “(d) land rights, emissions, and artisanal operators” highlight the exclusion of any forms of forced or compulsory labour and the worst forms of child labour.

Where the company identifies a reasonable risk that it is sourcing from, or linked to, any party committing serious human rights abuses, the suggested risk mitigation measures are to “immediately suspend or discontinue engagement with upstream suppliers.”⁷⁶⁵ Where the company identifies the reasonable risk that it is sourcing from, or linked to, forced labour, child labour, and unsafe working conditions in artisanal and small-scale operators, the suggested risk mitigation measure are to “immediately devise, adopt and implement a risk management plan with suppliers and other stakeholders to prevent or mitigate the risk” in accordance with the specific position of the company in the supply chain.⁷⁶⁶

The Cobalt Refiner Standard highlights several key elements of the model policy for cobalt refiners, including setting out a clear and coherent process for risk management, committing the company to due diligence steps, and communicating with suppliers and the public, amongst others.⁷⁶⁷

(b) A Six-step Framework for Risk-based Due Diligence in Mineral Supply Chains

In accordance with the requirement of conducting HRDD, the GSRM require that companies conduct “risk-based supply chain due diligence.”⁷⁶⁸ The Guidelines also highlighted the importance of community involvement and engagement for the sustainability and social responsibility management of companies. The Guidelines provide a list of 10 key points for companies' engagement with local communities, ranging from job creation and skills development

⁷⁶³ CCCMC, “Chinese Due Diligence Guidelines (2015)”, *supra* note 656 at 33.

⁷⁶⁴ *Ibid* at 34–40.

⁷⁶⁵ *Ibid* at 34.

⁷⁶⁶ *Ibid* at 39–40.

⁷⁶⁷ RCI & RMI, *supra* note 704 at 10–11.

⁷⁶⁸ CCCMC, “GSRM (2014)”, *supra* note 406 at 35.

for local people, as well as philanthropy initiatives such as health care, education, infrastructure, and other vital public services.⁷⁶⁹ Notably, the Guidelines highlight that companies should “carry out social impact assessments and engage at the earliest practical stage with likely affected parties and establish regular communication mechanisms.”⁷⁷⁰

To operationalize the requirement of a risk-based supply chain due diligence process, the Chinese Due Diligence Guidance provides detailed illustrations and step-by-step guidance for Chinese enterprises to develop a risk-based due diligence framework in mineral supply chains. While the CCCMC’s framework for risk-based due diligence builds on the OECD’s five-step framework, two major differences distinguish the CCCMC’s framework from the OECD’s framework. First, the CCCMC’s framework addresses both Type 1 risks (risks of contributing to conflict and serious human rights abuses) and Type 2 risks (risks relating to serious misconduct in environmental, social, and ethical issues), while the OECD’s framework focuses on Type 1 risks. Second, in addition to the five steps that are promoted by the OECD, the CCCMC’s framework contains the sixth step that highlights the importance of community participation. This sixth step does not necessarily mean a last step in the framework but means that companies should engage at the earliest practical stage on the occasions of identifying potential risks of negative impacts.

Aligning with the OECD Due Diligence Guidance, the Chinese Due Diligence Guidelines stipulate that companies shall carry out the following five-step risk-based due diligence framework: (a) step 1, establish strong company risk management systems; (b) step 2, identify and assess risk in the supply chain, (c) step 3, design and implement a strategy to respond to identified risks, (d) step 4, carry out independent third-party audits at identified choke points in the supply chain, and (e) step 5, report on the process and results of supply chain risk management.⁷⁷¹ In the implementation of this five-step framework, the CCCMC has suggested to Chinese enterprises the sixth step of “community participation,” and this additional step has been adopted by the pilot company of CCCMC guidelines and initiative, HC.⁷⁷²

In June 2019, the Cobalt Refiner Standard (Version 1.0) started listing “community participation” as an additional step and carved out a six-step risk-based due diligence framework specifically for

⁷⁶⁹ *Ibid* at 44–45.

⁷⁷⁰ *Ibid* at 44.

⁷⁷¹ CCCMC, “Chinese Due Diligence Guidelines (2015)”, *supra* note 656 at 13.

⁷⁷² Huayou Cobalt, online: <<http://en.huayou.com/social111.html?introId=59>>.

cobalt refiners. In August 2021, the Standard (Version 2.0) was updated according to the implementation process and feedback from stakeholders.⁷⁷³ Endorsing the OECD Due Diligence Guidance, the Standard (Version 2.0) understands “due diligence” as “an on-going, proactive and reactive process, and therefore information may be collected and progressively built with the quality progressively improved.”⁷⁷⁴ In particular, in the context of the ASM sector, the sixth step encourages companies to consider ways to effectively engage with local communities to establish partnerships with stakeholders at the local level, including artisanal miners, local communities, and governmental and non-governmental organizations. Practices of “community participation” include developing and implementing a community development plan with local stakeholders to promote community development, ensuring that the company’s grievance mechanism considers local community issues, and providing employment and training opportunities for local communities.⁷⁷⁵

(c) A Company-Level Grievance Mechanism

In accordance with the requirement of processes to enable remediation, the GSRM require that companies “develop a remedy mechanism, to provide an effective remedy for those affected by adverse human rights impacts.”⁷⁷⁶ The Guidelines highlight the importance of remediation for cases of child labour. Where child labour is identified in a mining site, companies should establish relevant measures for remediation; in particular, companies should take measures *immediately* to eliminate the worst forms of child labour.⁷⁷⁷ Accordingly, the Chinese Due Diligence Guidance, in prescribing detailed guidance for step 1 regarding strong risk management systems, requires companies to establish a company-level, or industry-wide, grievance mechanism as part of an early-warning risk-awareness system.⁷⁷⁸

The Cobalt Refiner Standard further details the requirements of the company-level grievance mechanism. Under step 1 regarding strong risk management systems, the Standard stipulates that “The Company shall develop or refer to an effective mechanism allowing any interested party

⁷⁷³ RCI & RMI, *supra* note 704.

⁷⁷⁴ *Ibid* at 10.

⁷⁷⁵ *Ibid* at 26–27.

⁷⁷⁶ CCCMC, “GSRM (2014)”, *supra* note 406 at 34; CCCMC, “GSRM (2017)”, *supra* note 665 at 19.

⁷⁷⁷ CCCMC, “GSRM (2014)”, *supra* note 406 at 36; CCCMC, “GSRM (2017)”, *supra* note 665 at 23.

⁷⁷⁸ CCCMC, “Chinese Due Diligence Guidelines (2015)”, *supra* note 656 at 27.

(affected persons or whistle-blowers internal or external to the Company) to voice concerns regarding the circumstances of mineral extraction, trade, handling, and export, without fear of retaliation.”⁷⁷⁹ As a minimum requirement for the grievance mechanism, the Standard highlights that the mechanism shall include a formalized process to investigate the concern or grievance received and provide appropriate corrective and preventive actions.⁷⁸⁰

5.4.3 The Limitations and Potential of CCCMC Guidelines and Initiatives: Leveraging Regulatory Innovations

After examining the key elements and regulatory innovations of the CCCMC’s approach to HRDD, this subsection underlines that CCCMC guidelines and initiatives have several limitations that are similar to other instruments in the multi-level governance framework in the global cobalt supply chain. It is too early to evaluate the limitations and potential of CCCMC guidelines since they were recently launched and are being shaped through ongoing processes. However, it is important to develop a preliminary understanding to better shape the development and implementation of CCCMC guidelines and initiatives.

On the one hand, CCCMC guidelines are confronted with their limitations, including: (a) the limited inclusion of representatives of workers and local communities in the design and implementation of the guidelines; (b) the limited normativity as industry-specific, voluntary and soft instruments; and (c) the foreseeable limited and slow uptake by Chinese mining enterprises. On the other hand, despite the limitations, CCCMC guidelines have the potential to serve as a solid foundation for further development of the Chinese regulatory framework for OFDI toward a socially responsible regulatory framework if these limitations are appropriately addressed in the next decade through action by both the state and the CCCMC.

(1) Enhancing the Labour Dimension of Human Rights Due Diligence: The Need to Further Engage with Workers and Local Communities in Mineral Supply Chains

The first notable limitation lies in the limited inclusion of representatives of workers and local communities in the design and implementation of CCCMC guidelines and initiatives. The three guidelines have all recognized the importance of the participatory rights of workers and local

⁷⁷⁹ RCI & RMI, *supra* note 704 at 12.

⁷⁸⁰ *Ibid.*

communities, as well as the importance of engaging with local communities, artisanal workers, and other local stakeholders during the entire life cycle of the mining project. However, despite the innovative sixth step of community participation, there seems limited evidence regarding how the CCCMC can effectively implement relevant clauses, standards, and mechanisms. While public consultations and other forms of engagement with stakeholders have managed to include a wide range of actors such as representatives from international organizations, state agencies, and Chinese enterprises, there seems to be limited evidence on how the CCCMC has engaged directly with people and local communities potentially affected by Chinese mining enterprises.

The Covid-19 pandemic may be part of the reason why the CCCMC has had limited site visits in the DRC since 2020. It is also part of the obstacles for the CCCMC to overcome in the coming decade if the industry association plans to implement the guidelines and initiatives sufficiently and effectively.

(2) Hardening Soft Law: The Need to Upgrade CCCMC Guidelines to a Broader Scope of Application and a Higher Level of Normativity

The second notable limitation is the nature of CCCMC guidelines as industry-specific, voluntary, and soft instruments. The industry-specific feature limits the scope of application to Chinese enterprises that are closely connected to mineral supply chains. The voluntary and soft feature implies that the effectiveness and impacts of the guidelines will largely depend on the willingness and choice of Chinese enterprises. Despite the limitations, these features also give CCCMC guidelines the potential to address shortcomings of the social dimension of the current Chinese regulatory framework for OFDI.

In contrast to the mandatory HRDD approach taken by a limited but increasing number of countries from the global North, China tends to align itself with the UNGPs and OECD guidelines and regulate Chinese enterprises through soft instruments such as regulatory documents and industry guidelines. A key critique of the social dimension of the current framework is that Chinese state agencies seem to set out social safeguards and CSR guidance without the intention and willingness to implement and operationalize them.⁷⁸¹ This critique is partly due to the abstraction of the articles regarding social responsibility and labour protection which were set out in regulatory documents

⁷⁸¹ Radavoi & Bian, *supra* note 57, 247.

issued by Chinese state agencies, as well as the lack of operationalization and implementation mechanisms.

Chinese state agencies' current regulatory arrangements for socially responsible OFDI are important but not sufficient. There is much work to do before the policy commitments and social safeguards set out by Chinese state agencies are effectively implemented. Amongst other differences, a major difference between CCCMC guidelines and current regulatory arrangements by Chinese state agencies is that CCCMC guidelines provide specific standards and practical mechanisms which can be operationalized, monitored, and evaluated at the corporate level and along supply chains. In addition to general commitments and principles, the CCCMC has developed specific labour standards and comprehensive guidance in establishing an HRDD system that aligns with international instruments. Furthermore, between 2014 and 2021, emerging examples of uptake of the guidelines by Chinese enterprises and other actors have demonstrated that CCCMC guidelines do not only mean policy commitments on paper but also indicate practical measures to operationalize the regulatory arrangements. As will be further illustrated in the next two chapters, policy updates and behaviour changes regarding labour governance made by HC have showcased the positive impacts that CCCMC guidelines can generate on Chinese mining enterprises.

In this context, CCCMC guidelines have the potential to serve as a solid foundation for the further development of the Chinese regulatory framework for OFDI toward a socially responsible regulatory framework. To address transnational challenges, a comprehensive state regulation on HRDD, broadly covering labour and human rights, as well as other relevant concerns such as environmental rights, will be ideal for constructing the “smart mix” of both hard law and soft initiatives to ensure social justice in economic development. This kind of state regulation can build on existing international instruments and good practices developed through CCCMC guidelines. Any such regulation would depend on a strong industry-specific initiative and increasing corporate willingness to ensure effective implementation. Chinese state agencies, the CCCMC, and Chinese mining enterprises are at a good starting point in this regard.

A possible option to bridge the gap between regulatory documents by Chinese state agencies and industry guidelines by Chinese industry associations is to upgrade CCCMC guidelines to a broader scope of application and a higher level of normativity. Possible directions may include the

following alternatives. The first alternative of such upgrading that is likely to happen in the following years is nationwide “Guidelines” issued by the most relevant state agency, the MOC. This upgrading will help to diffuse specific standards, comprehensive guidance in establishing an HRDD system, and practices and lessons from implementing CCCMC guidelines to a broader range of industries. This model is likely to happen considering that Chinese state agencies have issued similar guidelines in the past, such as guidelines to SOEs concerning CSR in 2008 and the code of conduct concerning POE’s overseas operations in 2017. Recent in-depth studies on the role of non-state actors in China’s environmental governance have shown that non-state actors, including industry associations, play an important role in national standard-setting and policy-drafting processes.⁷⁸² Furthermore, China has started preparing Chinese enterprises for the increasing number of mandatory HRDD laws being developed at the international, regional, and national levels, notably at the UN and the EU. For instance, in September 2021, in the fourth National Human Rights Action Plan of China (2021-2025), China committed that it would encourage Chinese enterprises to abide by the UNGPs, including the requirement of conducting HRDD and fulfilling CSR, which marks the first time the UNGPs have been introduced in an official document at the national level.⁷⁸³ It is also notable that Canada and India issued similar guidelines for companies at the national level in 2009 and at the ministerial level in 2011, respectively. In 2014, Canada revised the guidelines concerning CSR in the extractive sector.⁷⁸⁴ In 2018, India revised the guidelines concerning RBC in all industries.⁷⁸⁵

The second alternative that is preferable, but may take more time, is a regulatory document, ideally in the form of an “Order” to regulate Chinese OFDI promulgated by the MOC or jointly at the ministerial level by several key state agencies. As analyzed in the previous chapter, the form “Order” retains the highest-level normativity in the current Chinese regulatory framework for

⁷⁸² Ruoyu Chen & Xingjian Zhang, “The Landscape of Non-state Actors and China Environmental Governance: Illustrative Roadmaps to Processes and Institutions” in Guttman, Jing & Young, *supra* note 557 at 85.

⁷⁸³ State Council Information Office of the People’s Republic of China, *Human Rights Action Plan of China (2021-2025)* (Beijing: State Council Information Office, 2021), online: <http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a111c6d0df57f98dfec.html>.

⁷⁸⁴ The Government of Canada, *supra* note 403.

⁷⁸⁵ Ministry of Corporate Affairs of the Government of India, *The National Guidelines on Responsible Business Conduct* (New Delhi: Ministry of Corporate Affairs, 2018), online (pdf): <https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf>.

OFDI. An “Order” concerning CSR and HRDD for Chinese enterprises’ overseas operations will have more weight in guiding and regulating corporate behaviours and social performance.

(3) Assessing the Effectiveness and Preliminary Impacts: The Need to Scale up the Concrete Implementation of CCCMC Guidelines and Initiatives

The limit of CCCMC guidelines as voluntary industry guidelines indicates the third limitation of the guidelines: the limited and slow uptake by Chinese mining enterprises. Since 2014, the development and implementation of CCCMC Guidelines have contributed to increasing awareness and acknowledgement of the corporate responsibility to respect labour and human rights, specifically eliminating child labour and forced labour in global mineral supply chains. Various actors, including Amnesty International⁷⁸⁶ and OHCHR,⁷⁸⁷ have acknowledged the importance and impact of CCCMC guidelines. However, the guidelines’ actual and potential impact and effectiveness in changing corporate behaviours and fostering socially responsible business conduct are to be carefully monitored and evaluated since it will largely depend on the willingness and choice of Chinese enterprises.

As presented in detail in the next two chapters, policy updates and behaviour changes regarding labour governance are now emerging amongst Chinese mining enterprises. These updates and changes can generate broader impacts throughout supply chains and commercial networks of Chinese mining enterprises. The development and implementation of CCCMC guidelines and initiatives have demonstrated positive impacts for both fostering and addressing governance gaps in the Chinese regulatory framework for OFDI and fostering practical behavioural changes in the context of Chinese outward mining investment. The development of CCCMC guidelines has fostered the production of substantive guidelines and the establishment of practical mechanisms which can facilitate the institutionalization of labour and human rights in Chinese outward mining investment. However, as it will also be shown, these developments are recent examples which are connected to the global cobalt supply chain, and they amount to a small portion of Chinese mining enterprises, considering that there are thousands of member companies of the CCCMC. Furthermore, there are variations in the uptake of CCCMC guidelines amongst Chinese mining

⁷⁸⁶ Amnesty International, “Time to Recharge”, *supra* note 167.

⁷⁸⁷ Human Rights Council, *Guiding Principles on Business and Human Rights at 10*, *supra* note 470 at 7 [footnotes omitted].

enterprises, with large gaps between a few advanced examples, such as the pilot example of HC, and other companies that are only at the starting point of updates and changes regarding RBC.

Therefore, despite the positive examples identified between 2014 and 2021, there is a need to scale up the concrete implementation of CCCMC guidelines amongst Chinese mining enterprises. The concrete application of CCCMC guidelines can help to narrow down governance gaps in Chinese socially responsible outward mining investment.

5.5 Preliminary Conclusions

This chapter focuses on the development, implementation, and implication of CSR guidelines and initiatives developed by the CCCMC. The guidelines and initiatives are part of China's ongoing experimentation toward socially responsible and sustainable OFDI. Since 2014, the CCCMC has closely engaged with a wide range of state and non-state actors in the context of Chinese outward mining investment and has developed a set of comprehensive guidelines and initiatives to guide Chinese enterprises toward a socially responsible model. The development of CCCMC guidelines and initiatives has showcased the ongoing regulatory changes in Chinese outward mining investment.

China's state-centric approach to CSR since the early 21st century has highlighted to Chinese industry associations and enterprises the importance of CSR in economic development. Notably, labour rights are key components of the conceptualization of CSR in the Chinese context, including the context of Chinese OFDI. Taking workers as key stakeholders in global mineral supply chains, the CCCMC has provided specific labour standards and comprehensive guidance for Chinese enterprises to establish an HRDD system that puts the elimination of child labour at the centre. This chapter suggests that the CCCMC's ongoing regulatory innovations will likely influence labour governance in the global cobalt supply chain.

(1) The Rising Role of the CCCMC in the Dynamics of Multi-level Governance of Labour Rights in a Globalized Economy

The process-tracing examination of the development of CCCMC guidelines and initiatives showcases the multidirectional and recursive diffusion of labour norms in the context of Chinese outward mining investment. The interactive transnational legal processes concerning labour governance have been *developed and shaped by a wide range of state and non-state actors with*

vastly different power. The CCCMC's approach to labour governance in global mineral supply chains has been shaped by various state and non-state actors, including international organizations, state agencies, civil society organizations, and Chinese enterprises.

CCCMC guidelines and initiatives have served as bridges and platforms of labour norm diffusion in Chinese outward mining investment. As illustrated in the previous section, labour norms have been diffused from the international level to CCCMC guidelines, and after adapting to the Chinese context, the selected and refined norms continue to be diffused to other sites and levels of law within and beyond global mineral supply chains. These processes are not necessarily unidirectional. Rather, they are multidirectional across multiple governance levels.

The rise of the CCCMC can help to create a counterbalance for the dominant role occupied by companies and states from the global North that may be reluctant to take action to address the persistent asymmetries between upstream and downstream of the chain. Moreover, this emerging multipolarity in the global cobalt supply chain can challenge the unequal patterns in existing legal orders and allow new legal orders on decent work to be developed and established as appropriate regulatory frameworks in the chain.

(2) The CCCMC's Ongoing Regulatory Innovations in the Global Cobalt Supply Chain

CCCMC guidelines contribute to achieving decent work in GSCs through two regulatory innovations in Chinese outward mining investment: (a) providing specific labour standards for socially responsible mining activities, and (b) providing comprehensive guidance for companies to establish an HRDD system. Both innovations contribute to enhancing the labour dimension of HRDD in global mineral supply chains. Notably, the specific standards and comprehensive guidance put the elimination of child labour at the centre. On the one hand, CCCMC guidelines have to some extent addressed regulatory gaps in labour governance in Chinese outward mining investment; on the other hand, they need to be upgraded, particularly regarding the scope of application and the level of normativity, to serve as a solid foundation for the Chinese regulatory framework for OFDI to become a socially responsible regulatory framework.

The CCCMC's regulatory innovations have enabled the guidelines to form part of an effective regulatory framework for HRDD in Chinese outward mining investment. Recent studies have started paying attention to the risks of companies performing HRDD cosmetically and how regulatory initiatives can be designed to minimize these risks of cosmetic compliance. Ingrid

Landau has suggested five alternative criteria that could help craft regulatory approaches to minimize the risks of cosmetic compliance. The five criteria of an effective regulatory framework for HRDD include the following: (a) to anchor HRDD in the corporate responsibility to respect human rights; (b) to detail disclosure requirements and standards for companies; (c) to ensure other stakeholders' rights to consultation and participation in corporate HRDD; (d) to provide regulatory consequences for both the establishment and implementation of HRDD processes by companies; and (e) to designate "an engaged regulator" that is responsible for promoting, and securing compliance with, the regulatory requirements.⁷⁸⁸ The CCCMC guidelines have provided good practices for the first three criteria. For instance, the CCCMC guidelines have aligned with the UNGPs, provided specific provisions on labour rights and a comprehensive guide for companies to establish an HRDD system, and provided practical toolkits to evaluate companies' implementation of the guidelines. Furthermore, CCCMC guidelines have also set increasing transparency as one of seven guiding principles and added community participation as an important step in the risk-based due diligence framework to ensure other stakeholders' rights to consultation and participation. Nonetheless, the design of regulatory consequences and the designation of an engaged regulator seem beyond the ability of the CCCMC as an industry association. Accordingly, this chapter suggests that a better regulatory design is needed at the national level. The industry-specific guidelines developed by the CCCMC can serve as a solid foundation for such design.

The enhanced labour dimension provides four unique elements that are likely to positively influence the development of TPLG initiatives by Chinese mining enterprises. The first element is the increase of transparency regarding CSR policies, measures, and practices. CCCMC guidelines have highlighted to Chinese mining enterprises the importance of increasing transparency and ensuring the authenticity and accuracy of the information disclosed. The second element is the enhanced intertextual networks between the CCCMC guidelines and international instruments, notably ILO Conventions No. 138 and No. 182 concerning the elimination of child labour. CCCMC guidelines have closely engaged with international instruments that are relevant for safeguarding labour and human rights in the context of transnational business activities. Notably, in developing guidelines and initiatives in the global cobalt supply chain, the CCCMC has played

⁷⁸⁸ See Landau, *supra* note 502.

an important role in upholding the two ILO fundamental Conventions for the effective elimination of child labour in the global cobalt supply chain. CCCMC guidelines have also endorsed all eight fundamental ILO Conventions. The third element is the broad coverage of labour rights in the development of comprehensive guidance in establishing an HRDD system in mineral supply chains. CCCMC guidelines highlight the corporate responsibility to ensure a wide range of labour rights in transnational business activities, including effectively eliminating child labour and forced labour, ensuring safe working conditions and wages, working hours, and other employment conditions, as well as protecting employees from health and occupational risks, amongst others. In contrast to the OECD's focus on risks of contributing to conflict and serious human rights abuses, the CCCMC addresses these risks and the risks relating to serious misconduct in environmental, social, and ethical issues. The broad coverage of labour rights and the detailed examples can help to direct Chinese mining enterprises to design TPLG initiatives with substantive policy commitments and practical measures for implementation. The fourth element is the emphasis on "community participation" for the risk-based due diligence framework. This key element is closely relevant for ensuring other stakeholders' rights to consultation and participation in the establishment and implementation of an HRDD system. It is also important to address the root causes of child labour and other serious abuses of labour and human rights on the ground. While the OECD guidelines propose to cut off supply chains when there are risks of contributing to conflict and serious human rights abuses, CCCMC guidelines highlight the importance of acting in accordance with local contexts such as economic development and the livelihoods of local communities. For instance, risks of child labour or unsafe working conditions could be effectively prevented or mitigated through appropriate measures.

The CCCMC's ongoing regulatory innovations have started influencing standard-setting and behaviour-change at other sites of law, both within and beyond the global cobalt supply chain. It seems foreseeable that regulatory innovations will be ongoing through industry-specific guidelines and initiatives. Furthermore, these innovations will likely be diffused to other levels and sites of law through multidirectional and recursive interactive processes. For instance, an increasing number of Chinese mining enterprises have started publishing CSR policies on their websites and developing supply chain due diligence mechanisms for cobalt sourcing to show that they are making efforts to address labour and human rights issues in their supply chains.

(3) The Development of Transnational Private Labour Governance Initiatives by Chinese Mining Enterprises

CCCMC guidelines and initiatives are part of emerging governance initiatives in global mineral supply chains to address governance deficits regarding socially responsible mining activities. Notably, they are an important part of a handful of instruments that are dedicated to addressing the issues of child labour and unsafe working conditions in artisanal mineral supply chains.⁷⁸⁹ As illustrated earlier, the CCCMC's approach to labour governance in the global cobalt supply chain is partly driven by the refocused international attention since 2016 on issues concerning child labour in the artisanal mining sector in the DRC. Therefore, implementing CCCMC guidelines will be critical to developing better regulatory designs and innovations to address key challenges of labour governance in the global cobalt supply chain.

The enhanced labour dimension of CCCMC guidelines can help Chinese enterprises to better understand their responsibility to respect labour rights in transnational business activities. It can also contribute to guiding Chinese enterprises in developing TPLG initiatives to respond to the refocused international attention since 2016 and address governance deficits on the issue of child labour in the artisanal mining sector in the DRC. For instance, it can enhance the labour dimension of companies' CSR policies and due diligence mechanisms and improve companies' daily labour practices.

Responding to the refocused international attention and the changing transnational labour regulatory environment for responsible cobalt sourcing, some Chinese mining enterprises have started actively engaging with CCCMC guidelines and initiatives and other transnational initiatives. The next two chapters will investigate how Chinese mining enterprises have responded to the refocused international attention since 2016 on issues concerning child labour in ASMs in the DRC and the changing transnational labour regulatory environment in the global cobalt supply chain. The investigation will explore three aspects of the role of Chinese mining enterprises in the multi-level governance framework in the global cobalt supply chain: (a) how and to what extent Chinese mining enterprises have responded to the identified serious issues of child labour in ASMs in the DRC, (b) whether measures taken by Chinese mining enterprises contribute to the effective elimination of child labour on the ground, and (c) what are the implications for the dynamics of multi-level governance of labour rights in the global cobalt supply chain.

⁷⁸⁹ See ILO, *Child Labour and Working Conditions in Artisanal Mineral Supply Chains*, *supra* note 449 at 17.

Part III The Role of Chinese Mining Enterprises in the Construction of the Social Dimension in the Global Cobalt Supply Chain

Chapter 6 The Rising Role of Chinese Enterprises in the Dynamics of Multi-level Governance of Labour Rights in a Globalized Economy: An In-depth Case Study of Huayou Cobalt in the Global Cobalt Supply Chain

6.1 Introduction

To understand the role of Chinese mining enterprises in the emerging multi-level governance framework in the global cobalt supply chain, this chapter conducts an in-depth case study on Huayou Cobalt, a transnational cobalt refiner headquartered in China.⁷⁹⁰ In addition to this introductory section and concluding remarks, this chapter consists of the following three sections. Section two maps out the context surrounding the development of HC to illustrate how the company has developed from a small domestic Chinese enterprise to a large transnational cobalt refiner in the global cobalt supply chain. Section three investigates the company's dynamic engagement with both state and non-state actors in the global cobalt supply chain and its development of a comprehensive set of CSR policies and HRDD mechanisms at the corporate level since 2016. Section four critically assesses these recent updates to explore the role of HC in shaping the dynamics of multi-level governance of labour rights in the global cobalt supply chain. This chapter showcases that HC has proactively engaged with the changing dynamics of multi-level governance in the global cobalt supply chain since 2016. It shows how labour norms set at the international, national, and industry levels are incorporated and reflected in CSR policies and mechanisms at the corporate level. Furthermore, the case study suggests that policy updates made by HC will create both challenges and opportunities for developing a responsible global cobalt supply chain that puts workers at the centre.

6.2 Chinese Enterprises in a Time of Global Economic Shifts: The Rise of Huayou Cobalt in the Global Cobalt Supply Chain in the 21st Century

This section situates HC in the context of China's economic engagement in Africa. In this contested transnational sphere, state and non-state actors compete, negotiate, disrupt, and consistently create and recreate labour norms in rapidly changing regulatory environments. The

⁷⁹⁰ The author published an earlier version of this chapter in the *Journal of Asian Sociology* in May 2021. See Si Chen, "The Emerging Role of Chinese Transnational Corporations as Non-state Actors in Transnational Labour Law: A Case Study of Huayou Cobalt in the Global Cobalt Supply Chain" (2021) 50:1 *J Asian Sociology* 143.

section articulates the rise of HC in the global cobalt supply chain and the rising role of HC as a non-state actor in TLL. First, it introduces the development of HC as a cobalt refiner in the context of China's economic engagement in Africa in the 21st century. Second, it illustrates the contentious labour issues in the artisanal mines in the DRC that can be traced back to the 1990s. Third, it provides an overview of actions taken by HC after the company was spotlighted by the Amnesty International Report (2016). The development process of HC, the historical context of mining in the DRC, and the company's responses to the report help us identify and understand the updates to corporate policies and mechanisms made by HC. This also helps us evaluate the capability and potential of HC in shaping the production and diffusion of labour norms in the global cobalt supply chain.

6.2.1 The Rise of Huayou Cobalt in the Global Cobalt Supply Chain: From Small Chinese Domestic Corporation to Leading Transnational Refiner (2002-2022)

HC started its transnational business activities in the DRC as a newcomer to the global cobalt supply chain. However, due to its critical role as a refiner, HC has been identified as a “choke point” connecting upstream and downstream of the chain. In recent years, HC has become one of the major players in the cobalt refining sector in the DRC.

HC is a Chinese private-owned and listed company headquartered in Tongxiang, Zhejiang Province, China. HC is a new high-tech enterprise specializing in the manufacturing of lithium-ion battery materials and new cobalt materials. Its corporate slogan reads “Rooted in China, Making Friends All over the World.”⁷⁹¹ A close investigation into the company's history shows that HC has developed from a small domestic corporation into a leading transnational refiner over the past two decades.

In May 2002, HC was registered in Tongxiang as “Zhejiang Huayou Cobalt-Nickel Material Co., Ltd” with registered capital of USD 3.19 million. During the past two decades, HC has undergone several mergers and acquisitions. On April 14, 2008, through shareholding system reform, HC became “Zhejiang Huayou Cobalt Co., Ltd” with registered capital of CNY 360 million (about USD 54 million).⁷⁹² Since then, the controlling shareholders of HC have been two Chinese POEs,

⁷⁹¹ Huayou Cobalt, “The Website of Huayou Cobalt” online: <<http://en.huayou.com/>> [Huayou Cobalt, “The Website of Huayou Cobalt”].

⁷⁹² Huayou Cobalt, “Letter of Intent for Initial Public Offering of Shares” (7 January 2015), online (pdf): <<https://company.cnstock.com/f10/ggqw/sh603799.html>> [translated by author].

Dashan (controlled by Mr. Weitong Xie) and Huayou Investment (controlled by Mr. Xuehua Chen). Through Dashan and Huayou Investment, Weitong Xie and Xuehua Chen have been joint controllers of HC. On January 29, 2015, HC became a listed company on the Shanghai Stock Exchange. HC is becoming a leading cobalt refiner in China and one of the world's largest manufacturers of cobalt products. Between 2013 and 2019, HC's total assets have quadrupled, from CNY 5,931,037,014.10 (about USD 0.9 billion) in 2013 to CNY 23,266,984,327.79 (about USD 3.5 billion) in 2019.

Domestically, HC has been an award-winning company as a result of its rapid development as well as its increasing contributions to the economic, social, and cultural development of China at municipal, provincial, and national levels.⁷⁹³ Internationally, HC has been expanding its transnational business activities, especially in resource-rich countries in Africa. In June 2006, HC established Congo Dongfang International Mining SARL (CDM) in the DRC. CDM (a crude refiner) is a wholly-owned subsidiary of HC (a fine refiner). Due to the critical position of CDM in connecting upstream and downstream of the supply chain, HC was identified by Amnesty International as a “choke point” in the global cobalt supply chain.

CDM is located in Lubumbashi in the DRC. Like its parent company, CDM has also experienced rapid development since its establishment. The registered capital of CDM grew from USD 6 million in 2006 to USD 26.1 million in 2019.⁷⁹⁴ Furthermore, CDM's total assets grew from CNY 1,582,381,918.04 (about USD 236 million) in 2013 to CNY 3,773,679,828.74 (about USD 563 million) in 2019.⁷⁹⁵ CDM is now one of the largest companies at the centre of cobalt trade markets in Lubumbashi and one of the largest crude refiners in the global cobalt supply chain.

6.2.2 Recent Updates by Huayou Cobalt: Opportunities to Understand the Changing Dynamics of Multi-level Governance of Labour Rights in the Global Cobalt Supply Chain?

In early 2015, when HC became a listed company on the Shanghai Stock Exchange, the company provided little information about labour and human rights in its outreach materials and

⁷⁹³ For instance, in 2013, Huayou Cobalt was awarded the “Model Enterprise of Harmonious Employment Relationship” at the municipal level. In December 2019, Huayou Cobalt was awarded “Top 500 Chinese Listed Companies”. In both 2018 and 2019, Huayou Cobalt was awarded “Top 500 China Private Enterprises in Manufacturing Industry”, with the rank of 425th and 359th, respectively.

⁷⁹⁴ Huayou Cobalt, “Annual Report 2019” (March 2020), online (pdf): <<https://company.cnstock.com/f10/ggqw/sh603799.html>> [translated by author].

⁷⁹⁵ *Ibid.*

communications. On July 9, 2015, HC received a letter from Amnesty International that questioned its efforts to address labour and human rights issues in the global cobalt supply chain. Amongst other issues relevant to artisanal mining in the DRC, Amnesty International questioned HC about its investigations and follow-up measures in response to the claims made in a 2008 Bloomberg news report regarding CDM's purchasing of cobalt mined by children.⁷⁹⁶ On August 19, 2015, HC provided a response letter signed by its President, Mr. Xuehua Chen.⁷⁹⁷ In the letter, HC provided the following response to Amnesty International:

Our Company has taken positive actions since we became aware of the 2008 Bloomberg report regarding CDM's purchase of cobalt mined by children in artisanal mines in the DRC. For example, we have gradually closed down the procurement sites and all of them have been closed by now. Currently the ores for CDM are mainly from mining rights holders and traders.⁷⁹⁸

Since being targeted by Amnesty International, updates to CSR policies and mechanisms have emerged at HC. First, HC established a CSR department, which focuses on policies, mechanisms, and other issues related to CSR. Second, HC started developing and publishing its annual CSR reports. Third, HC started publicizing CSR information through various channels, for instance, the CSR section of its website, annual CSR reports, and annual reports on the Shanghai Stock Exchange. Fourth, HC joined and co-founded several multi-stakeholder initiatives, for instance, the RCI (2016), the Global Battery Alliance (2019), and the Fair Cobalt Alliance (FCA) (2020). These updates were initiated primarily in response to the Amnesty International Report (2016) and increased attention from the international community.

An overview of the updates at HC has revealed important trends in the global cobalt supply chain. Furthermore, it has identified examples and signs of labour norms from other levels and sites of law, including the international, national, and industry levels, being introduced, incorporated, and internalized at the corporate level through CSR policies and mechanisms. The following section investigates HC's CSR policies and other corporate measures to articulate the dynamics of norm diffusion across multiple levels and sites of law.

⁷⁹⁶ Amnesty International, "This is What We Die for", *supra* note 40 at 53–54.

⁷⁹⁷ *Ibid* at 71–74.

⁷⁹⁸ *Ibid* at 71.

6.3 The Reconfiguration of Actors, Norms and Processes in Transnational Labour Law: The Rising Role of Huayou Cobalt in the Multi-level Governance of Labour Rights in the Global Cobalt Supply Chain

As being regulated by various forms of labour governance, HC has started actively engaging with both state and non-state actors in the global cobalt supply chain. This enhanced engagement has contributed to the production of updated CSR policies at the corporate level. Furthermore, as an emerging source of TPLG, HC has started developing a set of comprehensive CSR policies and HRDD mechanisms, with a focus on labour rights. In light of HC's multifaceted role in the dynamics of multi-level governance, this section identifies and analyzes the following two major changes at HC since 2016: (a) the enhanced engagement with labour regulatory initiatives at both the international and national level, and (b) the rapid improvement of CSR policies and HRDD mechanisms at the corporate level, including a labour and human rights policy which is regularly updated and a comprehensive HRDD system with innovative supply chain due diligence management measures.

This section situates the development of HC's CSR policies and supply chain mechanisms in the emerging and evolving multi-level and multidirectional governance of labour rights in the global cobalt supply chain. The analysis shows that public labour norms that are promoted through labour regulatory initiatives at the international level and national level in China have been incorporated into policies, mechanisms, and measures developed by HC. It also shows that a wide range of state and non-state actors have played a role in driving and shaping the diffusion of labour norms and the development of TPLG initiatives at the corporate level, notably the Amnesty International and CCCMC, as well as the MOC and OECD. The findings suggest that these transnational processes will continue, dynamically shaped by actors with different priorities, interests, and power.

6.3.1 The Enhanced Engagement between Huayou Cobalt and other Actors in the Global Cobalt Supply Chain

As illustrated in previous chapters, the transnational labour regulatory environment has been notably enhanced over the past decade. Motivated by the Amnesty International Report (2016) and the refocused international attention, HC actively engaged with various transnational initiatives and platforms. In contrast to its relative silence and low profile in the international community prior to 2016, representatives of HC have actively participated in international forums and

conferences as panel speakers since 2016 (Table 15). For instance, between April 2016 and October 2017, HC participated in more than 20 meetings and workshops in which various actors discussed issues related to sustainable and responsible mineral supply chains.⁷⁹⁹

Notably, at the international level, HC's participation in the sixth UN Forum on Business and Human Rights in November 2017 marks the first example of formal participation by a company headquartered in mainland China.⁸⁰⁰ For the first time, on November 27, 2017, a panel dedicated to human rights and due diligence requirements in the supply chains of Chinese enterprises was organized at the forum.⁸⁰¹ This panel was the first of its kind in the six-year history of the most important international forum on BHR. The panel was organized by two Chinese nationwide industry associations analyzed in chapter 4: the CNTAC for the textile and apparel industry and the CCCMC for the mining industry. Participants in the panel included representatives of these two industry associations, and representatives from HC, the UN Working Group on Business and Human Rights, OECD, Handa (Yangon) Garment Co., Ltd., and Beijing Rongzhi CSR Institute.⁸⁰² The panel discussed policy updates at the national and industry levels and updates on due diligence practices of Chinese enterprises in both garment and mining industries.

Furthermore, at the national level in China, HC has strengthened its engagement with Chinese state agencies and industry associations, notably the MOC and the CCCMC. Since 2016, HC has started developing labour and human rights policies at the corporate level and throughout its supply chains. In 2017, HC was selected as a pilot due diligence program of the CCCMC-led RCI. HC has also contributed to the pilot test for developing the Cobalt Refiner Standard. On 4 July 2019, representatives of the MOC's Department of Outward Investment and Economic Cooperation visited the headquarters of HC in Zhejiang Province.⁸⁰³ In the site visit meeting, representatives of

⁷⁹⁹ Amnesty International, "Time to Recharge", *supra* note 167.

⁸⁰⁰ The UN Forum on Business and Human Rights is the global platform for yearly stock-taking and lesson-sharing on efforts to move the UNGPs from paper to practice. Held annually since 2012, the Forum has been the most famous and reputable international platform dedicated to addressing human rights issues in relation to business activities. The central theme of the 6th Forum (27-29 November 2017, Geneva) was "Realizing Access to Effective Remedy."

⁸⁰¹ OHCHR, "6th UN Forum on Business and Human Rights: Programme" (27 November 2017) at 2, online: <<https://www.ohchr.org/en/events/forums/2017/6th-un-forum-business-and-human-rights>>.

⁸⁰² *Ibid.*

⁸⁰³ Huayou Cobalt, "Representatives of the Department of Cooperation of the Ministry of Commerce of China Visited the Headquarter of Huayou Cobalt" (4 July 2019), online: *News Release* <<https://www.huayou.com/news/398.html>>.

HC introduced its recent practices regarding social responsibility performance and the development of due diligence system for the cobalt supply chain.

A timeline of HC's engagement with the ongoing development of transnational initiatives surrounding responsible mineral sourcing exemplifies some dynamics.

Table 15 A Timeline of the Engagement between Huayou Cobalt and Transnational Initiatives (2016-2020)

Date (mm/yy)	Initiatives, dialogues, and platforms	The role of Huayou Cobalt
01/2016	The Amnesty International Report (2016)	One of 26 companies identified by Amnesty International as relevant to the global cobalt supply chain
06/2016	An on-site visit to HC's CDM in the DRC, by a group of representatives from the CCCMC, World Wildlife Fund, and Congo Representative Office	The recipient company of the on-site visit
11/2016	The Responsible Cobalt Initiative	One of the nine initial company members and a pilot project of the initiative
02/2017	An on-site visit and training about responsible cobalt due diligence management, conducted by the CCCMC	The recipient of the on-site visit and participant in the training
06/2017	The 12 th International CSR Forum organized by GoldenBee	A recipient of the "GoldenBee Enterprise Award"
10/2017	The Responsible Minerals Initiative Annual Conference 2017	Keynote speaker on "Application of due diligence in emerging areas: Cobalt"
11/2017	The Amnesty International Report (2017)	One of 28 companies identified by Amnesty International as relevant to the global cobalt supply chain
11/2017	The sixth United Nations Forum on Business and Human Rights	One of the speakers on the panel "Operationalizing the UNGPs – regional experiences: human rights due diligence in investment and supply chains of Chinese business"
03/2018	A nine-day training conducted by the CCCMC	One of the participants in the training "Sustainable Mining Action Plan"
04/2018	The OECD 12 th Forum on Responsible Mineral Supply Chains	One of the speakers on the panel "Cobalt – Establishing effective links between upstream and downstream due diligence"
10/2018	The Responsible Minerals Initiative Annual Conference 2018	One of the speakers of the panel "Cobalt Refiner Due Diligence"
06/2019	The Global Battery Alliance	One of the members of the Alliance
07/2019	An on-site visit to the headquarter of HC by the MOC's Department of Outward Investment and Economic Cooperation	The recipient of the on-site visit
10/2019	The Responsible Minerals Initiative Annual Conference 2019	One of the speakers in the workshop "How to expand and deepen your minerals due diligence program?"

10/2019	A third-party due diligence audit on HC's supply chain, organized by the Responsible Cobalt Initiative and the Responsible Minerals Initiative	The recipient of the third-party audit (document review and on-site assessment at both Huayou Tongxiang factory and Quzhou factory in China)
11/2019	An on-site visit to the DRC, organized by the CCCMC	One of the participants in the on-site visit
08/2020	The Fair Cobalt Alliance	One of the three founding members of the Alliance
08/2020	An agreement on Better Mining's partnership with HC, to continue monitoring the Kasulo and Kamilombe mine sites for a further two years.	The first cobalt refiner of the partnership with Better Mining of the RCS Global Group) since 2018
12/2020	The International Forum on Sustainable Mining Supply Chains, hosted by the CCCMC	Keynote speech on "Responsible supply chain governance practices of Huayou Cobalt"

Source: Compiled by the author⁸⁰⁴

6.3.2 Chinese Mining Enterprises as Emerging Sources of Transnational Labour Law: The Rising Role of Huayou Cobalt in Labour Governance in the Global Cobalt Supply Chain

While TPLG initiatives developed by some lead firms have proliferated in GSCs over the past three decades, such initiatives are only emerging in recent years in the HC case. When developing its CSR policies and mechanisms, HC has tended to engage closely with existing and emerging transnational public regulatory initiatives, specifically those developed by the OECD, OHCHR, ILO, as well as the CCCMC. Since the release of the Amnesty International Report (2016), HC has taken several substantive steps to establish labour and human rights policies and HRDD mechanisms in line with international standards to investigate and mitigate labour and human rights risks associated with artisanal mining. For instance, HC has selected the following four public guidelines as its sources of corporate policies and mechanisms: (a) UNGPs (2011), (b) OECD Due Diligence Guidance for responsible mineral supply chains (3rd edition, 2016), (c) Chinese Due Diligence Guidelines (2015), and (d) OECD Practical Actions for Companies to address the worst forms of child labour (2017).⁸⁰⁵ Furthermore, HC has developed policies and mechanisms that are consistent with the model supply chain mechanisms set out in the OECD Due

⁸⁰⁴ This table is nonexclusive but inclusive and explanatory, aiming to provide an overview of HC's engagement with various actors. Since early 2016, Huayou Cobalt has strengthened its engagement with labor regulatory initiatives generated from different sites and levels of law in the global cobalt supply chain. The data was compiled from and cross-checked through a group of reliable public records, including 25 research reports and 10 multi-stakeholder online conferences concerning responsible mineral supply chains listed in Annexes A and B of this thesis. Furthermore, supplementary information was compiled from the website of relevant organizations, including the OHCHR, OECD, CCCMC, and HC.

⁸⁰⁵ Huayou Cobalt, "The Website of Huayou Cobalt", *supra* note 791.

Diligence Guidance and the Chinese Due Diligence Guidelines. The updates done by HC to its corporate policies and mechanisms have shown an example of the development of private governance initiatives aligning with the requirements set in public governance initiatives in the global cobalt supply chain.

(1) Updates to Labour and Human Rights Policies

In recent years, HC has demonstrated its improvement from merely *knowing* the importance of labour rights to *showing* what has been done throughout its transnational business activities. According to my investigation using public records and resources, most of its labour and human rights policies were produced between 2016 and 2021, following the issuance of the GSRM in 2014 and the Chinese Due Diligence Guidelines in 2015, as well as the release of the Amnesty International Report (2016) in 2016.

At the corporate level, HC has started publicizing its commitments to labour and human rights. Since late 2016, HC has regularly updated its corporate policies on its website, focusing on labour and human rights. In December 2019, HC released a revised version titled “Labor Practices and Human Rights Policy.” While this 2019 version is brief at only three pages in length, it highlights the company’s commitments to labour and human rights, as well as its intentions to operationalize the commitments through both its subsidiaries and suppliers. Through this corporate policy document, HC commits to the labour rights of all its employees as well as labour rights in the global cobalt supply chain. The document states that HC undertakes “to respect all employees’ labor rights and human rights.”⁸⁰⁶ Furthermore, it reads that HC requires its suppliers “to respect the labor rights and human rights of all their employees.”⁸⁰⁷ Notably, this document acknowledges both substantive rights and procedural rights. For instance, it underlines a group of substantive rights, including working time, salary, and welfare, as well as various communication and complaint channels to ensure these rights. Furthermore, it underscores a set of organizational rights, including freedom of association and collective bargaining. The document states as follows:

The employees shall be entitled to make a choice on applying to join the labour union and the party and league organizations or not. We shall, according to relevant provisions, support and take part in the labour union collective negotiations involving the collective

⁸⁰⁶ Huayou Cobalt, “Labor Practices and Human Rights Policy” (31 December 2019) at 1, online (pdf): <<https://en.huayou.com/social12.html>>.

⁸⁰⁷ *Ibid* at 1.

labour agreement, the special subject of salary, the protection of female employees and other matters.⁸⁰⁸

In addition to substantive and procedural rights, this document also provides a general commitment to continuous efforts in constructing, promoting, and implementing labour rights and other social rights. For instance, the document states that the company “shall continue to promote the protection of the employees’ rights and interests according to the national laws and regulations, labor policies, industrial codes, the customers’ requirements, etc.”⁸⁰⁹ Furthermore, to ensure the implementation of the document, the last section of the document requires that the social responsibility office and the human resources department of HC conduct an annual review and update of the document.⁸¹⁰

Besides its stated dedication to labour and human rights, HC has publicly announced its commitments to a broader range of social and environmental rights as well. HC issued corporate policy documents for several key aspects of CSR, including the environment, business ethics, community participation, and a management system.⁸¹¹ These documents have to some extent addressed labour rights considerations. For instance, a subsection of its “Business Ethics Code of Conduct” highlights the importance of abiding by applicable employment and labour laws. In this document, HC commits to making sure not to use any forced labour, contractual labour or debt-paying labour.”⁸¹²

(2) The Improvements of Supply Chain Due Diligence Policies

During the period from 2016 to 2021, HC publicized three interrelated policy documents to operationalize its commitments to a responsible cobalt supply chain: (a) Supplier Code of Conduct, (b) Supplier Standard for Responsible Cobalt Sourcing (Supplier Standard), and (c) Supply Chain Policy for a Responsible Global Supply Chain of Cobalt from High-Risk Areas (Supply Chain Policy). These supply chain policies were based on the Chinese Due Diligence Guidelines and the

⁸⁰⁸ *Ibid* at 3.

⁸⁰⁹ *Ibid*.

⁸¹⁰ *Ibid*.

⁸¹¹ Huayou Cobalt, “The Website of Huayou Cobalt”, *supra* note 791.

⁸¹² Huayou Cobalt, “Business Ethics Code of Conduct” (2020), online (pdf): <<https://en.huayou.com/social12.html>>.

OECD Due Diligence Guidance but have gone beyond the two Guidelines in adopting international instruments applicable to the company's transnational business activities.

The Supplier Code of Conduct provides guidance for addressing social issues in supply chains, including labour and human rights, environment, business ethics, and other aspects of corporate governance. It references several internationally recognized labour and human rights standards, covering both international Conventions and international soft law instruments.⁸¹³ The referenced international Conventions include the UN Convention on the Rights of the Child, the ILO Convention No. 138 on minimum age, International Labour Standards, and the UN Convention against Corruption. The referenced international soft law instruments include the UN Global Compact and the ILO Guidelines for Safety and Health.

The development of these corporate policy documents is consistent with the due diligence guidelines of the OECD and the CCCMC. Furthermore, it is consistent with the Cobalt Refiner Standard that was jointly developed by the RCI and RMI between 2018 and 2021. Furthermore, HC has consistently disclosed its practices and achievements in responsible cobalt supply chain management, including publishing annual reports on due diligence practices of responsible supply chain management for 2020 and 2021, respectively.⁸¹⁴

(3) The Establishment and Implementation of a Six-step Supply Chain Due Diligence Management System

The concept of due diligence relevant to this chapter is to “identify, prevent, mitigate and account for” adverse corporate impacts on human rights as introduced in the UNGPs.⁸¹⁵ Frequently used due diligence measures include contractual clauses, corporate COCs, and third-party audits.

The concept of due diligence has been increasingly incorporated into international and national regulatory initiatives, such as the OECD Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance, the ILO MNE Declaration, and the French Duty of Vigilance Law, as well as the two Chinese guidelines for social responsibility in outward mining investment. Drawing

⁸¹³ Huayou Cobalt, “Supplier Code of Conduct” (2020) at 2, online (pdf): <<https://en.huayou.com/social12.html>>.

⁸¹⁴ Huayou Cobalt, “Report of Due Diligence of Responsible Cobalt Supply Chain” (2022), online (pdf): <<https://www.huayou.com/social12.html>>.

⁸¹⁵ Human Rights Council, *Report of the Special Representative of the Secretary-General*, *supra* note 48, “II. The corporate responsibility to respect human rights”, Guiding Principle 15.

insights from the OECD Due Diligence Guidance, the Chinese Due Diligence Guidelines understands due diligence as “an on-going process along supply chains whereby companies take reasonable steps and make good faith efforts to identify and respond to potential risks of contributing to conflict, serious human rights abuses and to serious misconduct.”⁸¹⁶

Prior to 2016, HC was new to due diligence regarding labour and human rights in supply chains. Taking note of the worldwide focus on labour and human rights in the global cobalt supply chain brought on by the Amnesty International Report (2016), HC realized that “we cannot just focus on the governance of internal CSR, but also need[s] to engage actively in the due diligence management of entire supply chain.”⁸¹⁷ Since early 2016, HC has been actively exploring practical ways to address risks in its supply chains.⁸¹⁸ Within only two years, HC has managed to make substantive improvements in responding to social risks in supply chains. HC has established a due diligence management system to address labour and human rights issues in the cobalt supply chain. In 2017, HC became the first to run a responsible due diligence management system for the cobalt supply chain; it also became the first cobalt refiner to complete a third-party audit of its due diligence management system for the cobalt supply chain.⁸¹⁹

Amongst other practical mechanisms, HC has developed a six-step Supply Chain Due Diligence Management System for a responsible cobalt supply chain. Steps one through five are developed according to the five-step due diligence framework provided in the Chinese Due Diligence Guidelines, which was informed by the OECD Due Diligence Guidance. The five-step due diligence framework developed by the OECD focuses on key points in the supply chain. However, Aligns with the CCCMC, HC suggests that the five-step approach does not adequately address the root cause of risks, namely poverty. HC argues that attention should be paid not only to supply chain management but also to specific local conditions in investment destination countries and the root causes of risks facing those countries, to address the fundamental vulnerabilities in supply

⁸¹⁶ CCCMC, “Chinese Due Diligence Guidelines (2015)”, *supra* note 656 at 12-13.

⁸¹⁷ Huayou Cobalt, “Due Diligence Practices of Responsible Cobalt Supply Chain & DRC’s Community Intervention” (PowerPoint Presentation, 6th UN Forum on Business and Human Rights, Geneva, Switzerland) (27 November 2017) at 3, online (pdf): <http://stradeproject.eu/fileadmin/user_upload/pdf/LEE_Due_Diligence_Practices_of_Responsible_Cobalt_Supply_Chain.pdf>.

⁸¹⁸ Huayou Cobalt, “Corporate Social Responsibility Report 2018” (March 2019) [Huayou Cobalt, “Corporate Social Responsibility Report 2018”] at 57, online (pdf): <<https://en.huayou.com/social12.html>>.

⁸¹⁹ *Ibid* at 58.

chains.⁸²⁰ HC suggests that companies should not only comb the supply chain map to avoid risks but also work with stakeholders to address the root causes of such risks. Beyond the widely known five-step due diligence framework promoted by the OECD, HC has developed a further step according to the guidelines provided by the CCCMC. Through the sixth step, HC aims to make contributions to both the economic and social development of local communities in the DRC. For instance, HC has provided occupational training, personnel protection equipment, and medical services for local staff. It has also offered charity donations to bolster infrastructure, essential public services, and agricultural development in local communities.

Notably, HC has taken a series of measures for the sixth step of the due diligence mechanism, “community engagement.” HC has proactively engaged with local communities and stakeholders to address the root causes of child labour in the ASM sector in the DRC, such as poverty and limited access to public education. These measures include enhancing the inspection of mining areas, rescuing exploited children from mining sites and helping children to go back to school, building new classrooms and restoring old school buildings, as well as developing alternatives for local communities to increase family income.⁸²¹ First, HC initiated and assisted the local government in the DRC in setting up a joint inspection team for artisanal cobalt mining. The joint inspection team is composed of representatives from the local government and various stakeholders. The team is to set for inspections of all artisanal mining areas and trade markets. Second, HC collaborated with the international NGO Good Shepherd International Foundation and funded its aid program to rescue exploited children in the mining area of the DRC. The aid program works to help exploited children to return to schools or attend vocational and technical schools. Between 2016 and 2017, the aid program helped around 800-1000 children.⁸²² Third, HC funded the building of new classrooms, toilets, office rooms, and other school facilities at the public school Kimbanguiste in Kasulo. Kasulo hosts a large artisanal mining area, and the Kasulo community is closely connected to artisanal mining activities. The six recently built classrooms supported by HC can help to accommodate more than 300 students. Fourth, at the end of 2017, HC helped to restore the school building of a vocational and technical school in Kolwezi to

⁸²⁰ Huayou Cobalt, “Corporate Social Responsibility Report 2018”, *supra* note 818 at 59.

⁸²¹ Huayou Cobalt, “2020 Report for Due Diligence of Responsible Cobalt Supply Chain” (2021) [Huayou Cobalt, “2020 Report for Due Diligence”], online (pdf): <<https://en.huayou.com/social12.html>>.

⁸²² *Ibid.*

improve the studying environment and condition of local students. Fifth, HC made efforts to develop alternative livelihoods for mining communities. HC developed a collaborative agricultural project through university cooperation between China and the DRC. In April 2016, the agricultural project was listed by the UN Food and Agriculture Organization as a demonstration project of China's aid to Africa. Various crop seeds and technologies are now being disseminated through INGOs and local institutions in artisanal communities free of charge.

6.4 The Rising Role of Chinese Enterprises as Non-state Actors in Transnational Labour Law: Implications of Transnational Private Labour Governance Initiatives Developed by Chinese Mining Enterprises

This section provides a preliminary analysis of the rising role of HC as a non-state actor in TLL and its implications for the dynamics of multi-level governance in the global cobalt supply chain. The case example of HC provides an opportunity to consider the dynamics of multi-level governance: the interactive dynamics between standards established at the international level, norms set at the national and industry levels, and norms set at the corporate level. The case exemplifies the integration of the social into the economic, specifically the policies and practices at the corporate level and the ongoing “norm diffusion” and “normative leveraging” beyond the corporate level. It reflects the dynamic role of HC in the multi-level governance framework in the global cobalt supply chain, as being governed by existing initiatives and becoming an emerging source of transnational private labour norms. The case study develops important findings on the following: (a) the diffusion of labour norms and the development of TPLG initiatives at the corporate level, and (b) the implications for the multi-level governance of labour rights in the global cobalt supply chain.

6.4.1 The Development of Transnational Private Labour Governance Initiatives and the Dynamics of Multi-level Governance in the Global Cobalt Supply Chain

The case study demonstrates that HC has proactively engaged with the changing dynamics of multi-level governance in the global cobalt supply chain since 2016. HC's TPLG initiatives are characterized as an active and strong engagement with, and adoption of, labour norms established in public labour governance initiatives, notably the two ILO fundamental Conventions concerning the elimination of child labour. As can be observed between 2016 and 2021, HC does not seem to

change or interpret public labour norms. Seen at this initial stage, HC seems more like a “norm-taker” and “norm-adapter” rather than a new “norm-maker” in the global cobalt supply chain.

The development of TPLG initiatives has proceeded rapidly following the release of the Amnesty International Report (2016). Between 2016 and 2021, HC developed a set of comprehensive CSR policies and mechanisms, highlighting the importance of labour and human rights during its transnational business activities. First, HC has improved labour and human rights policies as key components of its CSR framework. Since 2016, HC has released and regularly updated its labour and human rights policies, which apply to the parent company, its subsidiaries, as well as suppliers. Compared to the previous versions, the current version, titled “Labor Practices and Human Rights Policy” (2021), is a more concrete version with specific labour and human rights requirements at both the corporate and supply chain levels. HC has also developed a set of policy documents to operationalize these requirements. For instance, the “Supplier Code of Conduct” expressly references internationally recognized standards relevant to labour and human rights, covering both international conventions and soft standards. Second, HC has developed a concrete six-step supply chain due diligence management system to operationalize its corporate policies. This due diligence management system goes one step further than the widely known five-step framework developed by the OECD. The sixth step underscores the importance of on-site projects such as community construction and education training to improve local livelihoods. Third, HC has increased its transparency through publicizing CSR policies, mechanisms, as well as practical challenges and achievements. The updated CSR information is accessible through a variety of channels, including the company’s website, its annual CSR reports, as well as the annual reports of HC as a listed company on the Shanghai Stock Exchange.

At this initial stage, the observed developments are characterized by the incorporation of public labour norms into CSR corporate policies and mechanisms. During the past five years, HC has to a considerable extent applied public labour norms when developing its CSR policies and mechanisms. These norms are mostly learned and adopted from transnational public labour regulatory initiatives led by international organizations, particularly UN agencies such as the ILO and the OHCHR, and inter-governmental organizations such as the OECD.

Furthermore, some features of the TPLG initiatives of HC are notable: (a) the mixture of different groups of rights under the umbrella term of “corporate social responsibility,” (b) the prioritization

of norms relevant to the worst forms of child labour, and (c) the preference of soft law over hard law. First, on its website, HC has presented a mixed set of CSR policies under the umbrella section of “corporate social responsibility,” including labour rights, human rights, environmental rights, and business ethics. The mixture of rights has led to a broad generalization of norms relevant to labour and human rights, as well as other CSR norms. Second, in its CSR policies and mechanisms, HC has initially prioritized norms relevant to the worst forms of child labour. Since the Amnesty International Report (2016) highlighted the severity of the worst forms of child labour at the bottom of the global cobalt supply chain, policy updates by HC have provided particular responses for regulatory issues relevant to those most serious forms of abuse. It is also worth noting that the evolving labour and human rights policies at HC have taken steps beyond the initial focus on the worst forms of child labour. While largely characterized by generalization, policy considerations have been extended to include broader labour and human rights concerns. Third, when introducing public labour norms into CSR policies and mechanisms, HC has preferred soft law rather than hard law. Multiple forms of public labour governance have been incorporated into HC’s corporate policies and mechanisms, including conventions, principles, and guidelines. Amongst these regulatory instruments, HC has chosen four guidelines as the guiding instruments in developing its own CSR policies and mechanisms.⁸²³ In particular, HC has taken the OECD Due Diligence Guidance and Chinese Due Diligence Guidelines as the main guidance. Only two of six CSR policies have expressly referenced ILO legal instruments. For instance, the three-page “Labor Practices and Human Rights Policy” (2019) is general and does not expressly reference any ILO conventions or human rights treaties. The “Supply Chain Policy” references ILO Convention No. 182 on the worst forms of child labour and its accompanying Recommendation No. 190. The “Supplier Code of Conduct” references several ILO legal instruments, including using the general term “International Labour Standards” and specifying ILO Convention No. 138 on minimum age and ILO Guidelines for Safety and Health. Notably, while a broader range of ILO Conventions is explicitly referenced as resource documents in the Chinese Due Diligence Guidelines, they have not been explicitly acknowledged and referenced in HC’s CSR policies.

⁸²³ As outlined in previous sections, the four guidelines are as follows: (a) UNGPs (2011), (b) OECD Due Diligence Guidance for responsible mineral supply chains (3rd edition, 2016), (c) Chinese Due Diligence Guidelines (2015), and (d) OECD Practical Actions for Companies to address the worst forms of child labour (2017).

The diffusion of labour norms and the development of TPLG initiatives were neither the result of a top-down regulatory approach that is assumed in traditional international law, nor the product of HC's unilateral intervention in the governance of labour rights in transnational spheres. Instead, they are the result of a combination of external pressures and internal motivations. The release of the Amnesty International Report (2016), which targeted HC as a "choke point" of the global cobalt supply chain, is a source of direct external pressure for HC to take action and develop applicable labour policies at the corporate level.⁸²⁴ Meanwhile, the enhanced external transnational labour regulatory environment, which highlights the need to further regulate TNCs with respect to labour rights, has informed HC's response to the changing regulatory environment. Furthermore, the role of HC as a newcomer to the global cobalt supply chain has internally motivated the emerging TNC to seek socialization and legitimacy during its internationalization.⁸²⁵ The consistent engagement between HC and the dynamics of multi-level governance in the next decade will probably depend on consistent incentives that come from the above-mentioned institutional contexts that have conditioned the development of private governance.

6.4.2 The Implications for the Dynamics of Multi-level Governance of Labour Rights in the Global Cobalt Supply Chain

Through various interactive processes, public labour norms have been diffused from the international level to the national and industry levels; then, they have been incorporated into CSR-related policies and mechanisms at the corporate level and have been continuously diffused to other sites of law through various channels of HC's engagement with other actors in the global cobalt supply chain.

Furthermore, the case study implies that the development of TPLG initiatives at HC could generate considerable influence, affecting its suppliers, partners, and networks, which could create both challenges and opportunities for developing a responsible global cobalt supply chain. Emerging examples have indicated the capability and potential of HC in driving and shaping the diffusion of labour norms in the global cobalt supply chain. The capability and potential of HC not only depend

⁸²⁴ Huayou Cobalt, "Corporate Social Responsibility Report 2018", *supra* note 818 at 57.

⁸²⁵ For a recent illustration of the development of CSR and the internationalization of TNCs, see Aguilera-Caracuel, Javier, Jaime Guerrero-Villegas & Encarnación García-Sánchez, "Reputation of Multinational Companies: Corporate Social Responsibility and Internationalization" (2017) 26:3 European J Management & Business Economics 329.

on its ambition to set new labour standards through its subsidiaries, suppliers, and partners, but also depends on the counterbalancing force power from other actors in the global cobalt supply chain. In recent years, actions taken by HC have been recognized by both upstream and downstream companies in the global cobalt supply chain, such as Fairphone, Signify, and BMW, as well as Chinese Guizhou Zhenhua E-chem Inc. (hereafter referred to as “ZEC”). On some occasions, HC’s practices of policy updates have been replicated and followed by its Chinese peers, such as CMOC Group Limited (formerly known as “China Molybdenum Co., Ltd.”, hereafter referred to as “CMOC”) and Nanjing Hanrui Cobalt Co., Ltd. (hereafter referred to as “Hanrui Cobalt”).

This chapter has identified at least three channels through which HC can shape the development of labour norms and the change of corporate behaviours by both Chinese and non-Chinese enterprises. As a large transnational refiner connecting upstream and downstream segments of the global cobalt supply chain, HC has disseminated CSR policies and supply chain due diligence practices to its suppliers and clients, as well as its partners in multi-stakeholder responsible sourcing initiatives. These examples show the means HC has at its disposal to promote progress in relation to its CSR policies and HRDD mechanisms, albeit subject to follow-up observations and investigations.

The first notable channel is through suppliers. To disseminate and operationalize its updated policies and due diligence mechanisms through supply chains, the Procurement Management Department of HC communicates with suppliers through a variety of means, including annual meetings, daily mail communications, telephone communications, and on-site visits. For instance, in February and April 2017, various CSR policies (such as Due Diligence Policy, Supplier Code of Conduct, and Supplier Standard for Responsible Sourcing of Cobalt) were communicated by e-mail to HC’s first-tier suppliers such as large-scale mines and traders.⁸²⁶ The purpose and importance of responsible sourcing were described in the e-mail, with attachments providing additional information. Suppliers were requested to review the documents and email an acknowledgement of receipt and compliance declaration by signing the following two documents developed by HC: the Supplier Code of Conduct and the Supplier Standard for Responsible Cobalt

⁸²⁶ DNV GL, “Audit Report on Huayou Cobalt (prepared for LG Chem): Due Diligence on Responsible Cobalt Supply Chain” (26 July 2017) at 7, online (pdf): <https://www.lgchem.com/asset/doc/Audit_Report_on_Huayou_Cobalt.pdf>.

Sourcing.⁸²⁷ In April 2017, CDM, which is a subsidiary of Huayou, also provided Due Diligence training to its suppliers to help the suppliers build capacity in this area of responsible sourcing of cobalt. In 2018, HC invited a total of 25 suppliers to participate in its annual meeting with suppliers and managed to arrange in-depth communications with six core suppliers.⁸²⁸

The second channel is through its clients. An increasing number of downstream companies in the global cobalt supply chain have learned from HC's practices and have started joining responsible cobalt practices and initiatives at various levels. For instance, ZEC, a client of HC and a downstream company in the global cobalt supply chain, made notable improvements to its supply chain management.⁸²⁹ Between 2017 and 2021, ZEC made developments that are similar to those at HC, such as updating the website section on CSR, issuing annual CSR reports, improving labour policies, and developing supply chain due diligence management schemes, as well as establishing grievance mechanisms at the corporate level.⁸³⁰ HC is one of ZEC's key suppliers. According to ZEC's progress report on responsible mineral supply chains, 10 of the 12 suppliers of ZEC established their own cobalt supply chain due diligence management system as of May 2019.⁸³¹ In the report, ZEC highlighted:

Huayou Cobalt, our supplier, has established the first demonstration area for responsible cobalt mining in the Democratic Republic of Congo the Kasulo Artisanal Mining Demonstration Area. This act is also feasible in fully standardizing and demonstrating responsible cobalt mining to the world in terms of legality, risk control and traceability.⁸³²

The policy updates at HC have also generated positive influences on other downstream companies in the global cobalt supply chain, such as Fairphone,⁸³³ Signify (formerly known as Philips Lighting),⁸³⁴ and BMW. Since June 2018, two downstream companies in the industry, Fairphone

⁸²⁷ *Ibid* at 7.

⁸²⁸ Huayou Cobalt, "Corporate Social Responsibility Report 2018", *supra* note 818 at 57.

⁸²⁹ See e.g. ZEC, "Report on Responsible Mineral Supply Chain Due Diligence Management in 2021" (14 March 2022), online (pdf): <<http://en.zh-echem.com/responsibility/>>.

⁸³⁰ *Ibid*.

⁸³¹ ZEC, "Progress Report on Responsible Mineral Supply Chain of Zhenhua E-chem in 2018" (24 July 2019) at 19, online (pdf): <<http://en.zh-echem.com/responsibility/shehuizeren.html>>.

⁸³² *Ibid*.

⁸³³ Fairphone, "Cobalt Mining: It's Time to Face the Facts and Invest in Making Improvements" (20 December 2019), online: *Fairphone* <<https://www.fairphone.com/en/2019/12/20/cobalt-mining-its-time-to-face-the-facts-and-invest-in-making-improvements/>> [perma.cc/2J9A-SJ6N].

⁸³⁴ Signify, "Responsible Minerals" (2022), online: <<https://www.signify.com/global/contact/suppliers/sustainability/our-programs/responsible-minerals>> [perma.cc/YGF7-GRYY].

and Signify, have formally cooperated to join HC's supply chain due diligence management project to create a more responsible and sustainable cobalt supply chain through more DRC ASM demonstration projects and community livelihood projects.⁸³⁵ In October 2018, BMW, a traditional European automobile company, signed a cobalt supply chain social responsibility contract with HC and introduced cobalt products under the HC due diligence management project into the BMW supply chain through the DRC ASM projects.⁸³⁶

Notably, through a post on its website dated 20 December 2019, Fairphone reaffirmed its commitment to addressing labour issues at the bottom of the global cobalt supply chain.⁸³⁷ Fairphone pointed out:

Some of the players in our sector are already stepping up. For example, Huayou has heavily invested in ASM improvements in recent years, and has just committed – in partnership with us – to three more years of ASM investments. From our side, we have agreed to use these materials, as long as we see continuous improvements taking place.⁸³⁸

The third channel is through multi-stakeholder responsible cobalt initiatives. This channel benefits from the role of HC as a pioneer that has taken measures to make positive changes in the global cobalt supply chain. HC has actively sought cooperation with other actors. HC has actively engaged with existing responsible cobalt initiatives, including the RMI and Global Battery Alliance. HC has also played an essential role in developing and promoting new responsible cobalt initiatives, including the RCI, Better Mining (formerly known as “Better Cobalt”), and FCA.

HC is one of the founding members or partners for each new initiative. HC's development of responsible cobalt mining and sourcing is a pilot project of the CCCMC-led RCI, and the good practices have been disseminated and promoted amongst Chinese mining enterprises. HC has also engaged closely with RCS Global's Better Mining programme, a mineral assurance and impact program that continuously monitors and supports the improvement of conditions on and around ASM sites.⁸³⁹ HC is one of the three founding members of the FCA. The FCA calls for “a multi-year effort to systemically address environmental, social and governance-related challenges

⁸³⁵ Huayou Cobalt, “Corporate Social Responsibility Report 2019” (2020) at 31, online (pdf): <<http://en.huayou.com/social12.html>>.

⁸³⁶ *Ibid.*

⁸³⁷ Fairphone, *supra* note 833.

⁸³⁸ *Ibid.*

⁸³⁹ RCS Global Group, “Better Mining Impact Report 2022: Better System. Better Approach. Better Lives.” (July 2022), online (pdf): <<https://www.rcsglobal.com/better-mining-impact-report-2022/>>.

associated with artisanal cobalt production, as well as community-wide efforts to support child labour remediation and mitigation.”⁸⁴⁰

(1) Responsible Cobalt Initiative (2016)

Launched in 2016 as a multi-stakeholder initiative, the RCI aims to identify and respond to the social and environmental risks along the supply chain in a systematic way. It has been led and managed by the CCCMC. The RCI prioritizes addressing the worst forms of child labour in the global cobalt supply chain. HC is one of the nine initial company members of the RCI, and it is a pioneer amongst Chinese mining enterprises in issuing corporate COCs and taking practical measures for a more responsible cobalt supply chain. Since 2016, HC has proactively interacted with the activities and progress of the RCI. For instance, HC has been a pilot due diligence project of the RCI. Furthermore, HC has contributed to the pilot test for developing the Cobalt Refiner Standard (2018, 2019, 2021). Therefore, beyond the vertical impacts through the global cobalt supply chain, HC’s CSR policies and mechanisms have a better chance of being diffused to and adopted by Chinese enterprises and the broader international mineral community.

(2) Better Mining (Cobalt) (2018)

The Better Mining programme was launched and managed by RCS Global Group, a large responsible battery supply chain mapping, auditing, and consulting company. Better Mining initially focused on 3T minerals in Rwanda in 2016 and recently on gold in the DRC.⁸⁴¹ Better Mining is a site monitoring solution that collects site information, generates monthly incident reports, and issues recommended corrective action plans for implementers. Furthermore, Better Mining also helps mining operators and exporters to establish a system of controls and transparency over mineral supply chains.

In June 2018, when Better Mining expanded to cover cobalt in the DRC, HC was one of the key partners. HC has actively participated in the programme in the pilot phase in the Kasulo artisanal mining area. Between 2018 and 2020, HC partnered with Better Mining to monitor the Kasulo mining area. In 2020, HC extended the partnership for a further two years. As highlighted by a representative of RCS Global Group, “Two years on, we are delighted that the company [Huayou

⁸⁴⁰ The Impact Facility, “Digging for Change: Towards a Responsible Cobalt Supply Chain” (June 2020) [The Impact Facility, “Digging for Change”] at 4, online (pdf): <<https://www.theimpactfacility.com/>>.

⁸⁴¹ RCS Global Group, “Better Mining Impact Report 2022”, *supra* note 839 at 26.

Cobalt] will continue to support our work in improving the ASM cobalt sector...We are grateful for the support of key supply chain actors to continue on this journey.”⁸⁴²

As of early 2022, Better Mining has been implemented at 10 copper-cobalt ASM sites in Lualaba and Haut Katanga provinces in the DRC, including HC’s Kasulo artisanal mining area.⁸⁴³ Following the action of HC, three more Chinese enterprises have joined Better Mining as supporters, including battery manufacturer Contemporary Amperex Technology Co., Ltd., and cobalt refiners Hanrui Cobalt and CMOC. Four supporting companies from China count for more than one-fifth of Better Mining’s 19 corporate program partners.⁸⁴⁴

(3) Fair Cobalt Alliance (2020)

HC is one of the founding members of the FCA. The FCA was founded by Fairphone, Signify and HC and managed by the Impact Facility.⁸⁴⁵ It is a collaborative effort between HC and downstream companies to address the complex negative social and environmental impacts of corporations involved in the global cobalt supply chain. The FCA aims to further scale up its membership across the global cobalt supply chain to increase its potential for positive impacts. In recent years, the FCA has welcomed a growing number of members, including world-famous TNCs and industry associations.

6.5 Preliminary Conclusions

This chapter presents a comprehensive investigation into the rise of HC in the global cobalt supply chain, focusing on its role in labour norm production and diffusion and implications for labour governance in the chain. It develops two major findings according to the dynamic role of HC as not only being regulated but also becoming an emerging source of TLL. First, this case study demonstrates that HC has proactively engaged with the changing dynamics of multi-level governance in the global cobalt supply chain since 2016. Second, the case study suggests that HC’s development of TPLG initiatives is likely to influence the diffusion of labour norms and the change

⁸⁴² RCS Global Group, “Better Mining ASM Monitoring Program Successfully Scales, Announces Partnerships” (August 2020), online: <<https://www.rcsglobal.com/better-mining-asm-monitoring-program-successfully-scales-announces-partnerships/>>.

⁸⁴³ RCS Global Group, “Better Mining Impact Report 2022”, *supra* note 839 at 10.

⁸⁴⁴ *Ibid* at 5 and 10.

⁸⁴⁵ The Impact Facility, “Fair Cobalt Alliance (FCA): Our Ambitions” (2022), online: <<https://www.theimpactfacility.com/commodities/cobalt/fair-cobalt-alliance/>> [perma.cc/2PCW-4GR6].

of corporate behaviours in the global cobalt supply chain. Emerging examples have indicated the capability and potential of HC in influencing its upstream suppliers, downstream clients, partners, and networks across the global cobalt supply chain.

Although to be further traced and assessed, the HC case showcases the rising role of Chinese mining enterprises in diffusing labour norms in global mineral supply chains and allowing the development of new TLOs on decent work in GSCs. This chapter suggests that the role of HC in the multi-level governance framework in the global cobalt supply chain depends not only on HC's capability in shaping labour norm diffusion but also on the counterbalancing power of other actors in the chain. Follow-up investigations will deepen our understanding of the rising role of HC in navigating labour norms along the global cobalt supply chain.

(1) Inputs for Ongoing Debates on Labour Governance in Global Supply Chains

The HC case sheds new light on ongoing debates on labour governance in GSCs. First, the case provides a new angle on the proliferation of private labour governance initiatives in GSCs.⁸⁴⁶ The case suggests that TPLG initiatives have only started emerging in recent years amongst emerging TNCs. An in-depth investigation into HC helps us identify the development of TPLG initiatives amongst Chinese enterprises and its potential implications on debates regarding labour governance in GSCs. Second, the case enlightens us to rethink the complex interactions between public and private forms of governance initiatives, which often encompass tensions, displacement, complementarity, and synergy.⁸⁴⁷ The case helps us better understand the production and diffusion of labour norms across various levels and sites of law in transnational spheres. During a short timeframe since 2016, public labour norms developed at the international level and the national level in China have been incorporated into CSR policies and mechanisms at HC. Third, the case highlights the changing dynamics of multi-level governance of labour rights in the context of

⁸⁴⁶ For analyses of private labour governance initiatives that large TNCs from the global North have developed in GSCs, see e.g. Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation", *supra* note 43; Richard M. Locke, "Does Private Compliance Improve Labor Standards? Lessons from Nike" in Locke, *supra* note 189, 46. Richard M. Locke, Ben A. Rissing & Timea Pal, "Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains" (2013) 51:3 *British J Industrial Relations* 519.

⁸⁴⁷ For an analysis of complex interactions between public and private forms of governance initiatives, see e.g. Gereffi & Lee, *supra* note 307.

global economic shifts, notably participated and shaped by the rise of emerging TNCs in GSCs.⁸⁴⁸ Updates at HC signal new trends in the dynamics of multi-level governance of labour rights in GSCs. A concrete case study of HC helps us understand these changing dynamics and evaluate how policy updates made by emerging TNCs might influence labour governance in GSCs.

(2) Toward a Responsible Cobalt Supply Chain for Improved Workers Outcomes?

The case study shows that recent policy updates by HC can create both challenges and opportunities for developing a responsible global cobalt supply chain. Labour norms are increasingly incorporated into HC's CSR policies and mechanisms. Compared to its limited consideration of labour policies and mechanisms prior to 2016, policy updates at HC could be considered positive signs toward responsible cobalt sourcing. Furthermore, the development of TPLG initiatives at HC seems to have had a positive influence on the global cobalt supply chain.

However, while having identified these positive changes at the corporate level, questions around the legitimacy and effectiveness of private labour governance initiatives in GSCs remain: (a) would policies and mechanisms at HC undermine the role of public labour norms in the global cobalt supply chain? (b) how and to what extent has HC operationalized its commitments to labour and human rights? (c) how and to what extent would policies and mechanisms at HC generate positive outcomes for workers and local communities at the local mine level?

The legitimacy, effectiveness, and potential of private governance initiatives derived from Chinese mining enterprises are to be carefully observed, investigated, and evaluated. Further questions include the following. First, whether they would displace more thorough government and union intervention and are designed not to protect labour rights or improve working conditions but rather to limit their legal liability and prevent damage to their reputations? Second, whether they would provide safeguards for a sufficient set of key labour rights and proper monitoring and implementation mechanisms? Third, whether they would lead to effective compliance in GSCs? In the context of Chinese outward mining investment, the answers would depend on the following specific concerns: (a) how and to what extent Chinese mining enterprises can operationalize their commitments expressively displayed in the CSR section of their websites; (b) how and to what extent their labour policies and mechanisms will be taken up by suppliers along global mineral

⁸⁴⁸ For an analysis of the increasing influence of emerging TNCs on social upgrading in global value chains, see e.g. Lee & Gereffi, *supra* note 19.

supply chains; (c) and how and to what extent labour norms and mechanisms at the corporate level in China may generate positive impacts on practices at the local mine level.

Updates to policies and mechanisms at the corporate level do not necessarily lead to the implementation of labour norms in practice nor the positive outcomes for labour rights in the workplace. When CSR policies and HRDD mechanisms are in place, the effectiveness of these policies and mechanisms are to be monitored, investigated, and evaluated. Therefore, this thesis takes a critical approach to the development of TPLG initiatives at the corporate level in China. The next chapter critically investigates the effectiveness of private labour governance initiatives in improving labour standards and their consequences in the global cobalt supply chain.

Chapter 7 The Rising Role of Chinese Enterprises in the Dynamics of Multi-level Governance of Labour Rights in a Globalized Economy: A Critical Investigation into Private Labour Governance Initiatives Developed by Chinese Mining Enterprises in the Global Cobalt Supply Chain

7.1 Introduction

There are growing debates about the effectiveness of private governance initiatives in addressing social and environmental problems in GSCs, especially their effectiveness in improving labour standards and labour rights.⁸⁴⁹ Most existing scholarship takes private governance initiatives at face value, investigating the circumstances under which they are effective or lacking and how effectiveness could be incrementally improved. However, as Genevieve LeBaron and Jane Lister highlighted, the existing literature often loses sight of broader and more fundamental questions about whether private governance initiatives are actually working to solve the problems they've been established to address, such as pollution, child labour, and modern slavery, as well as global North and South inequalities in GSCs.⁸⁵⁰ LeBaron and Lister suggest that not only are private governance initiatives falling short when it comes to many of the indicators that matter most, but they come with "hidden costs"—including unintended consequences, perverse effects, and unacknowledged impacts.⁸⁵¹

Noticing and acknowledging the questionable effectiveness and hidden costs of private governance initiatives for improving labour standards in GSCs, this chapter evaluates the legitimacy, effectiveness, and potential of private labour governance initiatives developed by Chinese mining enterprises for labour standards and labour practices in the global cobalt supply chain. This chapter situates the development of TPLG initiatives by Chinese mining enterprises in the proliferation of TPLG initiatives in GSCs and the emerging multi-level governance framework in the global cobalt supply chain. It not only evaluates contemporary developments made by Chinese mining enterprises but also outlines pathways by which private governance developed by Chinese mining

⁸⁴⁹ See e.g. Kuruvilla, *supra* note 28; Locke, *supra* note 189; Marx et al, *supra* note 224; Genevieve LeBaron et al, "The Ineffectiveness of CSR: Understanding Garment Company Commitments to Living Wages in Global Supply Chains" (2022) 27:1 New Political Economy 99.

⁸⁵⁰ Genevieve LeBaron & Jane Lister, "The Hidden Costs of Global Supply Chain Solutions" (2022) 29:3 Rev Intl Political Economy 669 at 678.

⁸⁵¹ *Ibid* at 682.

enterprises could better meet the goal of improving the lives of workers in global mineral supply chains, especially those struggling at the bottom of the global cobalt supply chain.

While this chapter has put a heavy emphasis on the emergence of TPLG initiatives at the corporate level amongst Chinese mining enterprises, it does not suggest that private governance is the best way to improve labour conditions in the global cobalt supply chain. Rather, this chapter aims to highlight the important changes that have emerged at the corporate level and to understand their impacts and implications for labour governance along the chain. By critically investigating the ongoing changes at the corporate level in China, this chapter provides an in-depth case example for further investigations into how the emergence of TPLG initiatives in the Chinese context and the global cobalt supply chain may add texture to the ongoing debates in TLL.

In addition to this introductory section and concluding remarks, this chapter consists of the following three sections. Section two explains the potential problems and prospects of TPLG initiatives that Chinese mining enterprises are developing. Section three examines CSR policies and HRDD mechanisms recently developed by a group of 10 Chinese mining enterprises closely connected to the global cobalt supply chain to identify the labour dimension of these private governance initiatives and the state of play at the corporate level in China. Section four critically investigates the limitations, value, and effectiveness of these company-led private labour governance initiatives for workers and associated communities in the global cobalt supply chain.

One of the challenges of this chapter is the limited access to comprehensive and reliable data on the most up-to-date labour policies and mechanisms developed by TNCs, as well as their effectiveness in improving compliance with labour standards in GSCs. It is always challenging to investigate private governance initiatives developed by individual companies since many companies do not share relevant data publicly, nor do they provide access for researchers. This chapter is based on consistent efforts to draw insights from scholarly contributions and obtain novel data from various public channels, including the internet, research database, and international conferences.⁸⁵² To ensure the neutrality and accuracy of data, this chapter benefits

⁸⁵² In addition to drawing information from the 25 research reports listed in Annex A of this thesis, this chapter has drawn insights from the following academic publications and research reports. See “Table 2 Overview of sustainability schemes for minerals with their sustainability requirements marked with an x” in van den Brink et al, “Approaches to Responsible Sourcing in Mineral Supply Chains” (2019) 145 Resources, Conservation and Recycling 389 at 394; “Table 1. Main characteristics of supply chain ‘solutions’” in Philippe Le Billon & Samuel

from data triangulation, where data from multiple sources are collected and applied. This investigation attempts to shed new light on fundamental questions that have remained elusive to policymakers, companies, and researchers who are interested in the development and effectiveness of private governance initiatives in the global cobalt supply chain. This data represents an early example of whether and how private governance initiatives can improve worker outcomes in the global cobalt supply chain.

7.2 The Proliferation of Private Governance Initiatives in Improving Labour Standards in Global Supply Chains

This section relies on existing scholarship on private governance initiatives for improving labour standards in GSCs to better understand the problems and prospects of TPLG initiatives that Chinese mining enterprises are developing. The section maps out the current state of play of the effectiveness of private governance initiatives in GSCs. Existing studies suggest that it is important to understand both the limitations and potential of such initiatives, especially their impacts on worker outcomes.

7.2.1 The Questionable Effectiveness and Hidden Costs of Private Governance Initiatives in Global Supply Chains

Private governance initiatives have proliferated in GSCs in recent decades in response to concerns about the social and environmental impacts of expanded production networks and extended supply chains. In the context of governance deficits in GSCs, private governance initiatives may help to facilitate and engineer profound changes in the globalized economy. However, during the past three decades, the proliferation of private governance initiatives in GSCs has generated heated debates on the legitimacy, effectiveness, and capacity, as well as the potential of such governance. Since the initial stage of the development of private governance initiatives, their legitimacy has

Spiegel, “Cleaning Mineral Supply Chains? Political Economies of Exploitation and Hidden Costs of Technical Fixes” (2021) Review of International Political Economy, DOI: <10.1080/09692290.2021.1899959> at 5; “Table 1 Categories of global supply chain solutions” in LeBaron & Lister, *supra* note 850 at 677; “Table 1 List of minerals covered in the selected studies” in Deberdt & Le Billon, “A Mapping Review of Responsible Sourcing Initiatives”, *supra* note 467 at 5; “Table 13: Voluntary due diligence schemes (partly) aligned with the OECD Due Diligence Guidance” in RE-SOURCING, “State of Play and Roadmap Concepts”, *supra* note 488 at 42–43.

been heavily debated.⁸⁵³ Furthermore, the effectiveness of voluntary private governance initiatives and the capacity of such initiatives to influence practices on the ground have been persistently questioned.⁸⁵⁴

After decades of debates, these questions have not been resolved. The proliferation of private governance initiatives is ongoing, expanding to more sectors and deeper tiers of various supply chains. More than 290 academic journal articles and research contributions have addressed the effectiveness of private governance initiatives in GSCs in relation to social and environmental criteria.⁸⁵⁵ Based on the categorization, coding, and analysis of these articles and contributions, LeBaron and Lister suggest that “the *prevailing optimism* surrounding global supply chain solutions [private governance initiatives in global supply chains] is demonstrably *unwarranted*.”⁸⁵⁶ They developed the following five observations that are especially relevant to the largely overlooked hidden costs of private governance initiatives in GSCs.⁸⁵⁷ First, the evidence for the effectiveness of such initiatives in addressing social and environmental problems in GSCs is “sparse and highly uneven.”⁸⁵⁸ Second, the highest levels of effectiveness tend to be observed in relation to metrics and indicators that are low stakes rather than high stakes for social and environmental standards in GSCs. Third, private governance initiatives are expanding the role, scope, and power of private actors within the governance of global production, with unknown consequences. Fourth, private governance initiatives come with hidden costs to workers, communities, and the environment, including unintended consequences, perverse effects, and unacknowledged impacts on societal protection and well-being. Fifth, research on private

⁸⁵³ See e.g. Blackett, “Global Governance, Legal Pluralism and the Decentered State”, *supra* note 239; Kolben, “Transnational Labor Regulation and the Limits of Governance”, *supra* note 222; Trebilcock, “Why the Shift”, *supra* note 11.

⁸⁵⁴ For a recent extensive literature review and in-depth case examples, see Kuruvilla, *supra* note 28; Genevieve LeBaron & Jane Lister, *supra* note 850.

⁸⁵⁵ LeBaron & Lister, *supra* note 850 at 678–684.

⁸⁵⁶ *Ibid* at 670 [emphasis added].

⁸⁵⁷ *Ibid* at 679–680.

⁸⁵⁸ *Ibid* at 670. Studies of specific examples, e.g. showing the ineffectiveness of garment company commitments to living wages, see Genevieve LeBaron, Remi Edwards, Tom Hunt, Charline Sempéré & Penelope Kyritsis, “The Ineffectiveness of CSR: Understanding Garment Company Commitments to Living Wages in Global Supply Chains” (2022) 27:1 *New Political Economy* 99; showing the ineffectiveness of private governance initiatives for freedom of association, see Mark Anner, “Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains” (2012) 40:4 *Politics & Society* 609; Mark Anner, “Monitoring Workers’ Rights: The Limits of Voluntary Social Compliance Initiatives in Labor Repressive Regimes” (2017) 8 *Global Policy* 56.

governance initiatives has to a large extent focused on the effectiveness of supply chain management measures rather than on-the-ground effectiveness.

According to the observations and findings developed by LeBaron and Lister, private governance initiatives will not only have their own limitations regarding the effectiveness in improving labour standards and working conditions in GSCs but can also bring hidden costs for workers in the chain, including unintended consequences, perverse effects, and unacknowledged impacts.⁸⁵⁹ The hidden costs may originate from the micro-, meso-, and macro- levels. For instance, social audits and other supply chain requirements may bring the unintended consequence of pushing child labour deeper into sub-tiers of GSCs; the operation of symbolic private governance initiatives may crowd out or displace potentially stronger direct regulatory enforcement; the design of private governance initiatives by powerful private actors may consolidate rather than challenge the inequalities in GSCs.⁸⁶⁰

Generally, for private governance initiatives concerning specific labour issues, researchers increasingly believe that the growth in the private governance networks has not been accompanied by a steady improvement in labour standards in GSCs.⁸⁶¹ A recent empirical examination of private governance and corporate practices in GSCs confirms that private governance has had a limited impact on improving compliance with labour standards in GSCs.⁸⁶² Emerging empirical studies of the effectiveness of private governance initiatives in GSCs have suggested that private governance initiatives are neither overall effective nor entirely ineffective in improving labour governance in GSCs.

The questionable effectiveness and the potential hidden costs of private governance initiatives in GSCs suggest that research inquiries about private labour governance initiatives in GSCs be grounded in both the on-the-ground effectiveness and the largely overlooked hidden costs for workers in GSCs.

⁸⁵⁹ LeBaron & Lister, *supra* note 850 at 670–674.

⁸⁶⁰ *Ibid.*

⁸⁶¹ Sarosh Kuruvilla et al, “Field Opacity and Practice-Outcome Decoupling: Private Regulation of Labor Standards in Global Supply Chains” (2020) 73:4 ILR Review 841 [Kuruvilla et al, “Field Opacity and Practice-Outcome Decoupling”] at 844.

⁸⁶² Sarosh Kuruvilla & Jinsun Bae, “Has Private Regulation Improved Labor Practices in Global Supply Chains? An Empirical Examination” in Kuruvilla, *supra* note 28.

7.2.2 The Prevalent Decoupling of Private Policies and Corporate Practices from Worker Outcomes

Based on both theoretical analysis and empirical data focusing on the apparel industry, Sarosh Sarosh Kuruvilla has explained in detail why private governance initiatives might not be having the intended impact on labour standards in GSCs; that is, the persistent and complex decoupling of private governance policies and corporate practices from outcomes for workers.⁸⁶³ Kuruvilla termed these two processes as *policy-practice decoupling* and *practice-outcomes decoupling*.⁸⁶⁴ First, since decades ago, research on corporations' strategic responses to regulative and normative rules has identified the gaps between formal policies and actual corporate practices to implement these policies, which is referred to as "policy-practice decoupling."⁸⁶⁵ For instance, companies may symbolically adopt externally induced rules to gain legitimacy, avoid legal sanction, or respond to external pressures, that is, "symbolic adoption" without implementation.⁸⁶⁶ These symbolically adopted policies can sometimes become internalized, especially in the context of an enhanced regulatory environment. Second, recent scholarship has identified the gaps between actual corporate practices and outcomes for workers, which is referred to as "practice-outcome decoupling."⁸⁶⁷ For instance, even if companies adopt policies, change behaviours and improve practices, these compliance activities may not necessarily lead to achievements in worker outcomes.⁸⁶⁸

7.3 The Development of Corporate Social Responsibility Policies by Chinese Mining Enterprises between 2016 and 2021: An Institutional Emergence of Transnational Private Labour Governance Initiatives at the Corporate Level in China

This chapter identifies that the development of TPLG initiatives goes beyond HC. In addition to HC, a group of Chinese mining enterprises, including both SOEs and POEs, have demonstrated their capability and influence in developing and shaping CSR policies and mechanisms in the

⁸⁶³ See Kuruvilla et al, "Field Opacity and Practice-Outcome Decoupling", *supra* note 861; Sarosh Kuruvilla, "From Opacity to Transparency: Pathways to Improvement of Private Regulation" in Kuruvilla, *supra* note 28, 240.

⁸⁶⁴ Kuruvilla, *supra* note 28 at 15.

⁸⁶⁵ *Ibid* at 12.

⁸⁶⁶ *Ibid* [footnotes omitted].

⁸⁶⁷ *Ibid*.

⁸⁶⁸ *Ibid* [footnotes omitted].

global cobalt supply chain. Advanced examples could be drawn from CMOC (a Chinese SOE) and Jiana Energy (a Chinese POE). Findings from their influence on both Chinese and non-Chinese enterprises suggest that Chinese mining enterprises are capable of generating considerable influence along the global cobalt supply chain, which creates both challenges and opportunities on the road to responsible mineral sourcing. The rise of Chinese enterprises challenges the existing power structures in global mineral supply chains. Prior to the rise of Chinese enterprises, powerful non-state actors in global mineral supply chains were primarily lead firms in the electronics, automotive, and ICT industries from the global North that play a dominant role in developing private labour governance initiatives and standards in GSC governance. The emergence of TPLG initiatives at Chinese mining enterprises indicates the rising role of Chinese enterprises in producing, diffusing, and institutionalizing labour norms in GSCs.

This section investigates CSR policies and HRDD mechanisms recently developed by a group of 10 Chinese mining enterprises closely related to the global cobalt supply chain to identify the labour dimension of these policies and mechanisms and understand the consequences for labour governance in the global cobalt supply chain. This investigation suggests that an institutional emergence of TPLG initiatives is ongoing at the corporate level amongst Chinese mining enterprises. The increasing number of companies joining the development of CSR policies indicates that the development of TPLG initiatives will likely go beyond companies focusing on cobalt products and expand to the entire community of Chinese mining enterprises. This also shows the potential of Chinese enterprises in initiating policy updates and behaviour changes regarding labour governance along with different segments of the global cobalt supply chain, both upstream and downstream.

This investigation shows what overall progress has been made despite the limitations of the private governance of labour standards in GSCs set out above.⁸⁶⁹ The investigation, limited as it is, shows considerable variation in the development of the private governance of labour standards amongst Chinese mining enterprises. It also reveals a substantial uptake of international instruments, notably the two ILO fundamental Conventions on the elimination of child labour, ILO Conventions No. 138 and 182.

⁸⁶⁹ Limitations of private governance of labor standards in GSCs, see e.g. Locke, *supra* note 189.

7.3.1 The Rise of Chinese Mining Enterprises in Global Mineral Supply Chains

Drawing insights from the in-depth case study of HC, this chapter has managed to identify and compile a broader set of policy updates and behaviour changes amongst a group of more than 10 Chinese mining enterprises which are closely connected to the global cobalt supply chain. The increase in CSR policies and mechanisms developed by Chinese mining enterprises has signalled an institutional emergence of TPLG initiatives at the corporate level in China. The investigation shows that Chinese mining enterprises have started actively engaging with the rapidly changing transnational labour regulatory environment in China's economic engagement in Africa. Policy updates and behaviour changes regarding labour governance seemed relatively modest at Chinese SOEs investigated. In contrast, comprehensive and rapid updates and changes initially emerged at HC, a Chinese POE. Following the model of HC, an institutional emergence of TPLG initiatives is ongoing amongst Chinese mining enterprises, influencing both SOEs and POEs.

This chapter compiles a list of 10 Chinese mining enterprises for an in-depth investigation.⁸⁷⁰ This chapter contains an in-depth investigation into a group of 10 Chinese mining enterprises which consists of five SOEs and five POEs, following considerations concerning the size and type of companies (Table 16). The five SOEs are well-known to the public due to their increasing economic power in the global economy. The five POEs are less well-known and less powerful compared to the giant SOEs. However, they are playing an increasingly important role in the global cobalt supply chain due to their critical positions as transnational smelters and refiners, as well as their rapid growth regarding cobalt products.

⁸⁷⁰ The list is compiled based on a literature review and internet search in both Chinese and English through the website of research databases, industry-led initiatives, and a supply chain tracing exercise. Key resources are listed as follows. For academic publications, see Magnus Ericsson, Olof Löf & Anton Löf, "Chinese Control over African and Global Mining—Past, Present and Future" (2020) 33 *Miner Econ* 153; van den Brink et al, "Identifying Supply Risks by Mapping the Cobalt Supply Chain", *supra* note 26. For research reports, see Development International e.V., *supra* note 435.

Table 16 A list of 10 Chinese Mining Enterprises Connected to the Global Cobalt Supply Chain

	Company	Type	Year of establishment	Year of Listing	Year of the first CSR report	Year of the first supply chain due diligence management policy
SOEs	China Minmetals	SOE	1950	N/A	2008	N/A
	CMOC	SOE	1969	2007 (HKEX) 2012 (SSE)	2013	2020
	CNMC	SOE	1983	N/A	2012	N/A
	Jinchuan Group	SOE	1959	N/A	2012	N/A
	Zijin Mining	SOE	1986	2003 (HKEX) 2008 (SSE)	2009	2020
POEs						
	Hanrui Cobalt	POE	1997	2017 (SZSE)	2021	2019
	Huayou Cobalt	POE	2002	2015 (SSE)	2016	2017
	Jiana Energy	POE	2003	N/A	2019	2018
	Shengtun Mining	POE	1992	1996 (SSE)	2012	2020
	Tengyuan Cobalt	POE	2004	2022 (SZSE)	2020	2019

Year of establishment: Initial establishment of the company (according to information from the website of the company)

Year of listing: Shanghai Stock Exchange (SSE), Shenzhen Stock Exchange (SZSE), and Hong Kong Exchanges and Clearing Limited (HKEX)

Year of the publication of the first CSR report: the first CSR report, including alternatively ESG, sustainability, or supply chain due diligence management report

SOE (state-owned enterprises)

POE (private-owned enterprises)

Source: Compiled by the author⁸⁷¹

7.3.2 An Institutional Emergence of Transnational Private Labour Governance Initiatives at Chinese Mining Enterprises

This subsection maps out the emergence of TPLG initiatives in the form of CSR statements, policies, and mechanisms. These instruments and mechanisms include, but are not limited to, CSR sections in companies' annual reports, annual CSR reports, general corporate COCs and specific labour and human rights policies, supplier COCs and HRDD mechanisms, as well as auditing reports and operational-level grievance mechanisms.

⁸⁷¹ The categorization of SOEs and POEs is for a comparative perspective to understand the hypothetical variation of the update of corporate policies and the change of corporate behaviours between these two types of companies. Since most companies are listed companies, their shareholders may include both private and state investors. The CMOC is listed under the SOE group for discussion since it has a history as an SOE and its two largest shareholders were SOEs as of 2021. In 1969, CMOC was created as an SOE. In 2004, CMOC went through the first mixed ownership reform and became a company with state capital as controllers and private capital as participants. In 2014, CMOC went through the second mixed ownership reform and became "a private holding company with state-owned capital participation." The company was listed on Hong Kong Exchanges and Clearing Limited and Shanghai Stock Exchange in 2007 and 2012, respectively. See CMOC, "The Website of CMOC" (2022), online: <<https://en.cmoc.com/html>>.

Since 2016, Chinese mining enterprises that are involved in the global cobalt supply chain have started making comprehensive efforts to develop the labour dimension of CSR policies and mechanisms. As illustrated in the previous chapter, HC demonstrates an advanced example of the development of TPLG initiatives starting in 2016. In addition to HC, many Chinese mining enterprises have started developing CSR policies and mechanisms, emphasizing labour and human rights, especially efforts to eliminate child labour. All 10 companies investigated in this chapter have shown some recent policy updates and behaviour changes regarding labour governance. These updates and changes include a variety of approaches and practices: (a) increase in transparency of CSR policies, mechanisms, and practices; (b) development of CSR policies and mechanisms for both the corporate and supply chain levels; (c) participation in the third-party evaluations of their responsible supply chain management practices; and (d) engagement with a wide range of multi-stakeholder initiatives on labour governance in GSCs.

First, these companies have recently increased their transparency on CSR policies, mechanisms, and practices. Compared to the little public information that was available before 2016, Chinese mining enterprises have increased their transparency through various channels. First and foremost, all 10 companies have recently developed a substantive section on CSR on their company websites. The section on CSR has been regularly updated in recent years. For instance, HC has disclosed considerable amount of information on CSR policies and mechanisms through a section of its website titled “Corporate Social Responsibility.” The information includes annual CSR reports, policy commitments, HRDD mechanisms, grievance mechanisms, and international instruments that HC takes as guidance. Since 2016, HC’s CSR policies and mechanisms have been updated regularly, and the CSR section has been enriched gradually in both Chinese and English. The increased transparency has enabled the public monitoring of companies’ labour practices, access to remedy provided at the corporate level, and research work conducted by scholars and researchers. Furthermore, most companies have developed CSR reports and published them annually through their websites. For instance, since early 2016, HC has published its annual CSR reports. Since early 2018, Zijin Mining has published its annual CSR reports, focusing on environmental, social, and governance aspects. In recent years, the companies have also started reporting annually about their progress and practices on supply chain due diligence management for responsible sourcing of cobalt. For instance, since 2019, Jiana Energy has published its annual Progress Report on Responsible Cobalt Supply Chain. The companies have provided information

about their CSR performance, including substantive information and figures on social impacts. Increased transparency plays an important role in introducing the companies' most recent policies, mechanisms, and practices on CSR. It also helps to disseminate CSR information to the public, as well as their suppliers, partners, and networks.

Second, these companies have recently developed and updated CSR policies and mechanisms for both the corporate level and supply chain level. While the requirements for CSR have been established at the Chinese policy level since 2008, these requirements target SOEs and focus on the issuance of annual CSR reports. Prior to 2016, the five SOEs of the 10 companies investigated in this chapter had already started publishing their annual CSR reports. However, those CSR reports provided limited information on the labour and human rights impacts of their transnational business activities. Corporate policy updates since 2016 present a new journey for Chinese mining enterprises in developing CSR policies and mechanisms, explicitly focusing on labour and human rights. Most companies have started developing concrete systems of CSR policies and mechanisms to address labour and human rights issues at both the corporate and supply chain levels. Most of these changes emerged over the past three years (2019-2021), following the policy updates and behaviour changes regarding labour governance at HC. For instance, Hanrui Cobalt published four corporate policies on supply chain management; CMOCC published its commitments to international instruments on labour and human rights through a set of COCs and human rights policies. These policy updates are characterized by the incorporation of international and national public standards, guidelines, and mechanisms into CSR policies and mechanisms at the corporate level.

Third, some companies have started participating in third-party evaluations of their responsible supply chain management practices. Formalized HRDD mechanisms and third-party audits on these mechanisms are recent developments in the global cobalt supply chain. A small group of cobalt refiners in GSCs have started developing HRDD mechanisms and engaging with voluntary evaluation initiatives on responsible minerals, such as the Responsible Minerals Assurance Process of the RMI, a recognized third-party evaluation initiative in the field of responsible mining. HC, Jiana Energy, Tengyuan Cobalt, and Lanzhou Jinchuan Advanced Materials Technology Co., Ltd.

have been granted “Cobalt Refiner Conformance Status” after completing the Responsible Minerals Assurance Process of the RMI.⁸⁷²

Fourth, some of these companies have actively engaged in multi-stakeholder platforms. For instance, similar to HC, CMOC, Jiana Energy, and Hanrui Cobalt have actively engaged in international conferences and dialogues. This enhanced engagement with other actors has increased the transparency of their CSR policies, mechanisms, and practices. Chinese mining enterprises have shown strong engagement with both state and non-state actors in the global cobalt supply chain to develop and improve CSR policies and HRDD mechanisms. These policies and mechanisms have been disseminated and operationalized through their supply chains, partnerships, and networks. During these interactive processes, Chinese mining enterprises have progressed toward *knowing and showing* the corporate responsibility to respect labour and human rights.⁸⁷³ In a short time frame, Chinese mining enterprises have demonstrated an improvement in not only *knowing* the importance of the labour dimension of HRDD but also *showing* what has been done through their CSR policies, HRDD mechanisms, and daily business activities.

7.3.3 Private Governance of Labour Standards in the Global Cobalt Supply Chain: Chinese Mining Enterprises’ Policies for the Elimination of Child Labour in the Artisanal Mining Sector in the Democratic Republic of the Congo

The development of CSR policies and mechanisms amongst Chinese mining enterprises has signalled an institutional emergence of TPLG initiatives at the corporate level. The observed development of TPLG initiatives is characterized by the incorporation of public labour standards and guidelines into CSR corporate policies and mechanisms. This group of TNCs has, to a large extent, adopted public labour standards in developing their CSR policies and mechanisms. These public standards and mechanisms are mostly adopted from conventions and guidelines developed by international organizations, particularly the ILO, the OHCHR, and the OECD, as well as Chinese agencies, such as the CCCMC. Recent academic workshop findings have underlined that

⁸⁷² RMI, “Cobalt Refiners List: Conformant Cobalt Refiners” (2022), online: <<https://www.responsiblemineralsinitiative.org/cobalt-refiners-list/>> [perma.cc/GAD8-W4HL].

⁸⁷³ Human rights are being incorporated and translated into corporate policy programs, which allows TNCs to disarm most fundamental strands of criticism. Christian Scheper argues that today TNCs “know and show” responsibility and make human rights a subject of management strategies and tools. See Christian Scheper, “‘From Naming and Shaming to Knowing and Showing’: Human Rights and the Power of Corporate Practice” (2015) 19:6 Intl JHR 737.

changes to legislation and subsidiary regulation are deemed the factor with the greatest impact on the behaviour of mining companies and other value chain actors.⁸⁷⁴

(1) Variations of the Development of Corporate Policies, Mechanisms, and Practices

There are considerable variations in the development of private labour governance initiatives amongst the 10 Chinese mining enterprises. First, the development of TPLG initiatives shows the rapid development of private governance amongst the five POEs and a relatively slower expansion amongst the five SOEs. The five investigated POEs have actively engaged with both public and private governance initiatives in the global cobalt supply chain, particularly CCCMC guidelines and initiatives. These five POEs have closely followed CCCMC guidelines, and HC has developed CSR policies and mechanisms according to the guidance on responsible cobalt sourcing. In addition to the advanced example of HC, Hanrui Cobalt, Jiana Energy, Shengtun Mining, and Tengyuan Cobalt have started developing concrete and substantive systems of CSR policies and mechanisms in recent years. They have also started publishing updates of policies and practices regularly. In contrast, while gradually engaging with transnational processes, the five SOEs are slower and less transparent in developing policies and mechanisms and communicating with the public about the updates. CMOC is amongst the first few SOEs to have responded quickly to the refocused international attention on labour and human rights abuses in artisanal mines in the DRC. It is also an advanced example amongst the five investigated SOEs in engaging widely with transnational governance initiatives and other actors in the processes.

Second, while the development of TPLG initiatives focuses on policies and mechanisms to eliminate child labour in cobalt mining and sourcing, it steps further to combat various forms of labour rights abuses in GSCs to various degrees. Since eliminating child labour is one of the incentives for developing TPLG initiatives, Chinese mining enterprises have started consulting, referencing, and following relevant international instruments and mechanisms in developing and implementing CSR policies. Chinese mining enterprises have listed labour issues as priorities in developing CSR policies. For instance, Tengyuan Cobalt stated in its Cobalt Supply Chain Due Diligence Management Policy (Version 2.0), “Do not use child labour, especially the worst forms

⁸⁷⁴ Nic T. Bilham, “Responsible Mining and Responsible Sourcing of Minerals: Opportunities and Challenges for Cooperation across Value Chains” in G. Di Capua et al, eds, *Geoethics: Status and Future Perspectives* (London: Geological Society, 2021) 161 at 173.

of child labour.”⁸⁷⁵ Moreover, in addition to eliminating child labour, the company explicitly commits to combatting severe labour and human rights abuses such as forced labour and torture.

Third, different companies have developed operational mechanisms for implementing CSR policies and remedying potential rights abuses in varying depth. While most of the 10 companies have recently established concrete policies and mechanisms for CSR topics, their publication of relevant information, reporting of detailed CSR performance, and operationalization of grievance mechanisms vary. Amongst the five POEs, HC has provided an advanced example compared to the preliminary developments emerging at the other four POEs in recent years. Amongst the five SOEs, CMOC and Zijin Mining have provided advanced examples compared to the preliminary developments emerging at the other three SOEs in recent years.

(2) Intertextual Networks between Corporate Policies and International Labour Law

The investigation in this chapter shows the rapid development of the intertextual networks between CSR policy commitments released by Chinese mining enterprises and international labour law, particularly standards regarding the prohibition of child labour. Over the past two decades, there has been a relative increase in the privatization of international labour standards through TPLG initiatives developed by individual companies and multi-stakeholder initiatives. A snapshot of the intertextual networks between CSR policies and international law reveals growing references to international labour law by COCs, as well as the growing complexity of these intertextual networks.

More than two decades ago, scholars started investigating how the development of COCs interacts with international labour law. Janelle M. Diller reviewed 215 codes and 12 social labelling initiatives that were publicly available and commented on their effectiveness as of 1999.⁸⁷⁶ More than 80 percent of these codes and initiatives belonged to TNCs that were primarily from developed and newly industrialized countries. Diller uncovered considerable variation as to how companies defined the desired improvements in labour practices and how COCs referred to different types of instruments as applicable labour standards. Diller found that most COCs tended to define desired labour practices according to companies’ own understanding and preference rather than citing existing standards set in national law, industry standards, and international labour

⁸⁷⁵ Tengyuan Cobalt, “Cobalt Supply Chain Due Diligence Management Policy (Version 2.0)” (1 March 2019) at 1, online (pdf): <<http://www.tycogz.com/a/shehuizeren/>>.

⁸⁷⁶ Janelle M. Diller, “A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives” (1999) 138:2 Intl Labour Rev 99 at 109–110.

standards.⁸⁷⁷ Furthermore, she identified national law as seemingly the most frequently cited reference source, followed by international labour standards and industry standards.⁸⁷⁸ Notably, Diller found that fewer than one-third of the COCs reviewed at the time referred to international labour standards.⁸⁷⁹ More recently, Phillip Paiement and Sophie Melchers reviewed the intertextual networks between COCs by 27 of the 100 largest fashion companies and provided updates to the observations by Diller.⁸⁸⁰ The authors found that “COCs still demonstrate the same level of engagement (33 percent) [as identified two decades ago].”⁸⁸¹ Furthermore, the authors identified two trends of the intertextual networks that generally aligned with Diller’s observations: (a) the COCs tended to either reference domestic “home state” legislation or international instruments, and less often both; and (b) the COCs were considerably more likely to refer to domestic law than international law.⁸⁸² These findings confirm the variation and divergence of COCs and their implications for labour governance in transnational spheres.

Over the past two decades, the concern about selective and watered-down standards has been frequently raised in international legal scholarship.⁸⁸³ Another concern constantly highlighted is that the uptake of international public law by COCs and other CSR initiatives may crowd out the space for public regulation.⁸⁸⁴ However, recent studies have also emphasized the improvement in international legal references found in COCs.⁸⁸⁵ These studies suggest a positive understanding of

⁸⁷⁷ *Ibid* at 115.

⁸⁷⁸ *Ibid*.

⁸⁷⁹ *Ibid* [footnotes omitted].

⁸⁸⁰ Phillip Paiement & Sophie Melchers, “Finding International Law in Private Governance: How Codes of Conduct in the Apparel Industry Refer to International Instruments” (2020) 27:2 *Ind J Global Legal Stud* 303 at 318–333.

⁸⁸¹ *Ibid* at 327.

⁸⁸² *Ibid* at 327–328.

⁸⁸³ See e.g. Hepple, *supra* note 229 at 9–10; Tim Bartley, *Rules Without Rights: Land, Labor, and Private Authority in the Global Economy* (Oxford: Oxford University Press, 2018).

⁸⁸⁴ See generally Tim Bartley, “Corporate Accountability and the Privatization of Labour Standards: Struggles over Codes of Conduct in the Apparel Industry” (2005) 14 *Research in Political Sociology* 211; Kolben, “Transnational Labor Regulation and the Limits of Governance”, *supra* note 222; Gereffi & Lee, *supra* note 307.

⁸⁸⁵ See e.g. Ruben Zandvliet & Paul Van Der Heijden, “The Rapprochement of ILO Standards and CSR Mechanisms: Towards a Positive Understanding of the ‘Privitization’ of International Labour Standards” in Marx et al, *supra* note 224, 170 at 188–189; Kasey McCall-Smith & Andreas Rühmkorf, “From International Law to National Law: The Opportunities and Limits of Contractual CSR Supply Chain Governance” in Vibe Ulfbeck, Alexandra Andhov & Kateřina Mitkidis, *Law and Responsible Supply Chain Management: Contract and Tort Interplay and Overlap*, eds (Abingdon, Oxon UK: Routledge, 2019) 15; Paiement & Melchers, *supra* note 880.

the “privatization” of international labour standards. For instance, COCs and other CSR mechanisms may positively affect the implementation of international labour standards.

These existing studies have contributed to a diversified discussion and findings about the interaction between CSR and international labour law. However, a notable common ground of these studies is that they have focused on TNCs from developed countries. These large TNCs are usually lead firms and large buyers in industries such as apparel and electronics. A notable research gap to be filled is how and to what extent COCs developed by non-lead firms have interacted with international law. The examination of CSR policies and mechanisms developed by the 10 Chinese mining enterprises investigated in this chapter helps to address this gap. The investigation shows that the intertextual networks between CSR policies and international law reveals growing references to international labour law by COCs, as well as the growing complexity of these intertextual networks. Two key sets of corporate policies have been developed by Chinese mining enterprises: (a) corporate COCs, including general COCs, and COCs that concern specific topics such as labour rights and human rights; and (b) supplier COCs, including general supplier COCs, and supplier COCs that concern specific topics such as HRDD in supply chain management.

Companies commit to combatting child labour in transnational business activities through these policies and mechanisms. For instance, in its corporate COC, CMOC states that

When operating in, transporting from or trading with conflict-affected and high-risk areas, we will not tolerate, contribute to, assist with, facilitate the commission by any party to, or by any means profit from the abuse of people, including any forms of forced or compulsory labour, child labour, human rights violations or any other serious violations of international humanitarian law.⁸⁸⁶

Furthermore, in its supplier COC, in addition to making the above-mentioned commitment, the company commits to adopting and incorporating the OECD “Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas” in its supplier contracts.⁸⁸⁷

⁸⁸⁶ CMOC, “Code of Business Conduct” (2020) at 19–20, online (pdf): <https://en.cmoc.com/html/SustainableDevelopment/PolicyReports/>.

⁸⁸⁷ CMOC, “Supplier Code of Conduct” (2020) at 5, online (pdf): <https://en.cmoc.com/html/SustainableDevelopment/PolicyReports/>. The OECD Model Supply Chain Policy is provided in the OECD Due Diligence Guidance.

Instead of defining the standards and measures to eliminate child labour, CMOC references a wide range of international instruments, including both conventions and soft guidelines. Specifically, the company commits to the following international instruments: (a) the International Bill of Human Rights, namely, the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*; (b) the *ILO Declaration on Fundamental Principles and Rights at Work* and the eight fundamental ILO Conventions; (c) the UNGPs; (d) the *Voluntary Principles on Security and Human Rights*; and (e) the OECD Due Diligence Guidance for responsible mineral supply chains.⁸⁸⁸

7.4 A Critical Investigation into Transnational Private Labour Governance Initiatives Developed by Chinese Mining Enterprises: Problems and Prospects of Private Governance of Labour Standards in the Global Cobalt Supply Chain

The emergence of TPLG initiatives at Chinese mining enterprises further complicates existing debates on the legitimacy and effectiveness of TPLG initiatives, as well as emerging discussions of the largely overlooked hidden costs for workers in GSCs. After identifying the institutional emergence of TPLG initiatives, the following sections provide a critical investigation into the rising role of Chinese mining enterprises in developing and shaping TPLG initiatives in the global cobalt supply chain. This section critically investigates the labour dimension of CSR policies and mechanisms developed by Chinese mining enterprises to evaluate its consequences for labour governance and worker outcomes in the global cobalt supply chain.

Since private governance initiatives that focus on responsible cobalt sourcing are emerging and rapidly evolving in the global cobalt supply chain, an in-depth evaluation of their effectiveness for workers and local communities would be premature. However, a preliminary assessment of the direction and outcome of these initiatives can be helpful for policymakers and other actors in the transnational processes to drive and shape the ongoing developments. The findings of the assessment will inform Chinese mining enterprises and the CCCMC, as well as Chinese state agencies and international organizations, to better play their role in the exercise of transnational public and private authority over labour standards in global mineral supply chains. The findings will also offer valuable lessons for other companies in the global cobalt supply chain that need to

⁸⁸⁸ CMOC, “Human Rights Policy” (2020) at 3, online (pdf): <https://en.cmoc.com/html/SustainableDevelopment/PolicyReports/>.

do the same, especially those companies from emerging market economies that are learning and exploring the way to responsible mineral sourcing and supply chain due diligence management.

A fundamental tension exists in the research on private labour governance initiatives in GSCs. That is, while identifying the developments of such private governance initiatives, we need to avoid ignoring developments in other institutional arenas, such as the enhancement of labour law enforcement and other public regulatory arenas, and refrain from idealizing the effectiveness of private labour governance initiatives in solving the problems in GSCs.⁸⁸⁹ Aiming to address this tension, this chapter places TPLG initiatives in the institutional context of the multi-level governance framework in the global cobalt supply chain. Furthermore, it considers both hidden costs of TPLG initiatives and positive outcomes for workers and other stakeholders in the global cobalt supply chain. While TPLG initiatives alone may not be an adequate answer for the complex labour issues in the global cobalt supply chain, these initiatives have contributed to constructing a multi-level governance framework that continues to expand and evolve in the chain. Further research efforts could help to shape debates on how these ongoing TPLG initiatives should be reformed so that such initiatives would not bring unintended consequences and they can be an effective part of a multi-level governance framework with a smart mix of both public and private governance solutions.

Having identified positive trends toward responsible sourcing, this chapter takes a critical approach to TPLG initiatives that Chinese mining enterprises are developing. This critical investigation draws insights from the following contributions: (a) the recent theoretical- and empirical-based analysis of the policy-practice decoupling and practice-outcome decoupling in private governance of labour standards in GSCs,⁸⁹⁰ (b) a practical list of indicators that investors compiled to assess companies on their responsible cobalt sourcing practices,⁸⁹¹ (c) the analytical framework presented

⁸⁸⁹ Matthew Amengual & Sarosh Kuruvilla, “Editorial Essay: Introduction to a Special Issue on Improving Private Regulation of Labor in Global Supply Chains: Theory and Evidence” (2020) 73:4 ILR Review 809 at 815.

⁸⁹⁰ Kuruvilla, *supra* note 28.

⁸⁹¹ Between 2018 and 2020, Principles for Responsible Investment supported a total of 46 investors’ collaborative engagement with 16 companies in the electronics and automotive industry on their responsible cobalt sourcing practices. These 46 institutional investors represent approximately US\$6.4trn in assets under management. In August 2021, Principles for Responsible Investment provided an informative report on the engagement results and outlined a list of indicators that investors used to assess companies on their cobalt sourcing practices. See “Appendix 4: Indicators Used to Assess Company Performance” in Principles for

in chapter 2 of this thesis, and (d) the data collected through 25 research reports listed in the Annex of this thesis.

The first subsection discusses the legitimacy of TPLG initiatives that Chinese mining enterprises are developing. The second subsection maps out the limitations and hidden costs of these private initiatives. The third subsection provides an evaluation of the added value and potential of these private initiatives for improving outcomes for workers. The fourth subsection provides a preliminary assessment of impacts on the ground to understand whether Chinese mining enterprises have made efforts to implement their CSR policies and HRDD mechanisms and whether these corporate practices contribute to positive outcomes for workers in the ASM sector in the DRC.

7.4.1 The Debatable Legitimacy of Transnational Private Labour Governance Initiatives

TPLG initiatives have long suffered from legitimacy deficits. Existing literature focused on the examples of TNCs from developed countries has provided several arguments about the debatable legitimacy of TPLG initiatives. First, TPLG initiatives are “a top-down, managerialist and privatized form of governance in which the regulated subjects, i.e., workers, have little input into its content or application.”⁸⁹² Second, since TPLG initiatives are mainly driven by international consumers and civil society, the enforcement of workers’ rights in GSCs would be dependent on and subordinated to consumer preferences and business practices.⁸⁹³ Third, the quality of various TPLG initiatives is highly variable, and in many cases, TPLG initiatives prioritize the protection of certain labour standards such as wage and hour and health and safety standards over others such as freedom of association and collective bargaining.⁸⁹⁴

These critiques of TPLG initiatives have mostly resulted from the understanding of TPLG initiatives as a market response of TNCs to pressure from consumers and other stakeholders that

Responsible Investment, “Responsible Cobalt Sourcing: Engagement Results” (13 August 2021) at 20–22, online (pdf): <<https://www.unpri.org/collaborative-engagements/responsible-cobalt-sourcing-engagement-results/8208.article>>.

⁸⁹² Kolben, “Transnational Labor Regulation and the Limits of Governance”, *supra* note 222 at 408.

⁸⁹³ *Ibid.*

⁸⁹⁴ *Ibid* at 408–409.

have interests in production and labour processes that conform to their consumption preferences.⁸⁹⁵ Indeed, the development of TPLG initiatives was firstly initiated by large TNCs in the apparel industry in response to international civil society organizations and consumers. It has firstly proliferated in the apparel industry and then expanded in many other industries, such as mining, electronics, automotive, and ICT industries.⁸⁹⁶ The rise of TPLG initiatives has thus been taken as “a market driven, supply-side response by business, civil society, and even governments” to the “governance deficits” described by Gary Gereffi and Frederick W. Mayer.⁸⁹⁷

However, as underlined by Kevin Kolben, TPLG initiatives and the specific forms that it takes are neither only the result of market demand for governance in weak regulatory environments nor a natural or necessary solution to the governance deficit.⁸⁹⁸ Rather, as Kolben suggested, the emergence of TPLG initiatives is due to “choices and actions not only of businesses, or of NGOs and other civil society actors, but also of governments.”⁸⁹⁹ States have been and continue to be important agents in a number of cases in developing private regulatory regimes as alternatives or sometimes complements to state action. TPLG initiatives are “politically and socially embedded,” and they are “the result of multiple forces, both political and market-generated.”⁹⁰⁰

The development of TPLG initiatives by Chinese mining enterprises has provided a recent empirical example of the above-mentioned theoretical propositions underlined by Kolben. The development of TPLG initiatives by Chinese mining enterprises has been driven and shaped by multiple key actors in the global cobalt supply chain. First, INGOs, such as Amnesty International, have refocused international attention on responsible cobalt sourcing, especially eliminating child labour in the ASM sector in the DRC. Second, consumers of brand products and demand from global buyers of cobalt products have provided market-driven incentives since Chinese mining enterprises hope to maintain their business activities and positions in the global cobalt supply chain.

⁸⁹⁵ For a discussion of the market-based account of the rise of transnational private labor regulation, see Gary Gereffi & Frederick W. Mayer, “Globalization and the Demand for Governance” in Gary Gereffi (ed), *The New Offshoring of Jobs and Global Development* (Geneva: International Labour Organization, 2006) 39–58; Tim Bartley, “Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions” (2007) 113:2 *American J Sociology* 297.

⁸⁹⁶ See e.g. Blackett, “Global Governance, Legal Pluralism and the Decentered State”, *supra* note 239; Kuruvilla, *supra* note 28.

⁸⁹⁷ Kolben, “Transnational Labor Regulation and the Limits of Governance”, *supra* note 222 at 409.

⁸⁹⁸ *Ibid* at 409–410.

⁸⁹⁹ *Ibid* at 410.

⁹⁰⁰ *Ibid*.

Third, promoting a state-centric approach to CSR, Chinese state agencies such as the MOC and industry associations such as the CCCMC have strengthened the transnational public labour regulatory environment by enhancing the labour dimension of the Chinese regulatory framework for OFDI. Finally, INGOs such as the OHCHR, OECD, and ILO have strengthened the international regulatory environment through international instruments and mechanisms that regulate TNCs' labour and human rights practices in a globalized economy.

Benefitting from the development of transnational public labour governance initiatives, the TPLG initiatives that Chinese mining enterprises are developing have engaged closely with international instruments that address labour issues in GSCs. Notably, Chinese regulatory arrangements promoted by Chinese state agencies and industry associations have played an important role in guiding and shaping the development of private labour governance initiatives in the global cobalt supply chain. The critical investigation into CSR policies and mechanisms developed by Chinese enterprises shows that the policies and commitments are not merely responses to external criticisms but practical measures to address reported social issues in the global cobalt supply chain. The emergence of TPLG initiatives in Chinese enterprises is characterized by the incorporation of public labour norms developed at the international level and the national level to CSR policies and mechanisms at the corporate level. In contrast to the selective incorporation of public labour norms like the common practices of established TNCs over the past two decades,⁹⁰¹ TPLG initiatives that Chinese mining enterprises are developing show the tendency of a close engagement with public labour norms and a substantiated commitment to implementing CSR policies and mechanisms.

Therefore, this chapter suggests that the TPLG initiatives that Chinese mining enterprises are developing have partly resulted from the enhanced public labour regulatory arrangements at both the international and national levels. These private initiatives will continuously be shaped by public labour regulatory arrangements rather than displacing or undermining public labour standards.

⁹⁰¹ See Hepple, *supra* note 229; Kuruvilla, *supra* note 28.

7.4.2 Limitations and Hidden Costs of Transnational Private Labour Governance Initiatives

Private governance initiatives in the global cobalt supply chain not only have their own limitations in improving labour standards and working conditions but can also bring hidden costs for workers in the chain, including unintended consequences, perverse effects, and unacknowledged impacts.⁹⁰² The institutional emergence of TPLG initiatives at the corporate level in China does not necessarily lead to an institutional change in corporate practices nor automatically improve outcomes for workers in GSCs. When CSR policies and HRDD mechanisms are in place, limitations and hidden costs of TPLG initiatives have negative impacts on the implementation and institutionalization of labour norms in GSCs.

The limitations and hidden costs of TPLG initiatives at the corporate level can be minimized by shaping the construction of the initiatives and improving the effectiveness of the initiatives in China's economic engagement in Africa. During the initial phase of the emergence of TPLG initiatives, Chinese mining enterprises have made notable achievements in developing and updating CSR corporate policies and mechanisms regarding labour rights. In the next phases toward responsible mineral supply chains, Chinese mining enterprises could consider the following directions for improvement. The first is to specify labour standards at the corporate level. The second is to operationalize CSR corporate policies and mechanisms through suppliers, partners, and networks. The third is to introduce and ensure participatory monitoring of the effectiveness of such policies, mechanisms, and practices.

7.4.3 The Value and Potential of Transnational Private Labour Governance Initiatives: Opportunities for Enhancing Labour Protections in Global Mineral Supply Chains

TPLG initiatives that Chinese mining enterprises are developing contribute to the dynamics of multi-level governance in the global cobalt supply chain. First, these initiatives form an important part of the emerging multi-level governance framework in the global cobalt supply chain. The continuing policy updates and behaviour changes at Chinese mining enterprises, as well as their influence beyond the corporate level, contribute to a more structured multi-level governance framework. TPLG initiatives should not replace the primary responsibility of states in developing

⁹⁰² LeBaron & Lister, *supra* note 850.

and implementing public regulatory measures. Nonetheless, the compliance of labour standards in GSCs lies with companies and related corporate practices. Therefore, companies play a significant role in ensuring and advancing labour protections in GSCs. Developments at the corporate level suggest the possibility of a new and generally more optimistic perspective on the future of labour rights in the global cobalt supply chain. The developments also provide opportunities and platforms for other actors to monitor, track and evaluate the labour performance of Chinese mining enterprises in global mineral supply chains. For example, in response to reported labour issues in its supply chains, HC has increased its transparency in developing and implementing CSR policies and mechanisms concerning labour protection. Since early 2016, HC has started making relevant information available to the public through various channels, including its website, annual CSR reports, and annual reports for the Shanghai Stock Exchange.

Second, TPLG initiatives developed by Chinese enterprises contribute to mainstreaming labour and human rights in global mineral supply chains. Despite the limitations of company CSR strategies, TNCs can promote greater commitment to labour and human rights and take concrete action to guarantee fundamental labour rights in global terms.⁹⁰³ The increasing uptake of CSR policies and mechanisms by Chinese mining enterprises has promoted greater commitment and concrete action of Chinese enterprises to guarantee labour rights in the global cobalt supply chain. Advanced examples of policies and mechanisms, such as those provided by HC, CMOC and Jiana Energy, have generated increased awareness of labour rights in the global cobalt supply chain, at and beyond the corporate level in China. By the end of 2021, all of the investigated 10 Chinese mining enterprises have published their corporate policies and mechanisms that aim to address labour issues at the corporate and supply chain levels. Upon the emergence of TPLG initiatives in the Chinese context, all Chinese enterprises have been informed of the importance of labour and human rights considerations during their overseas operations. This awareness and acknowledgement of the legitimacy and importance of labour and human rights standards help to increase the acceptance of labour and human rights standards as well as the implementation of relevant policies and mechanisms.

⁹⁰³ Ulla Liukkunen, “ILO and Child Labour Regulation in China – Prospects and Complexities” in Ulla Liukkunen & Yifeng Chen, eds (2016) 139–167 at 158.

Third, TPLG initiatives developed by Chinese mining enterprises contribute to developing and disseminating good practices of social compliance in global mineral supply chains. Chinese mining enterprises could provide many good practices for other emerging TNCs to learn from. Several advanced examples have provided good practices for Chinese enterprises and other emerging TNCs to learn from and build on. These emerging good practices contribute to the effectiveness of TPLG initiatives developed at the corporate level. This emerging trend could also inform all Chinese enterprises about the necessity of establishing CSR policies and mechanisms to address labour issues in their supply chains. The rapid policy changes happening amongst Chinese mining enterprises have also demonstrated the possibility and capability of emerging TNCs to adapt to the changing transnational labour regulatory environment.

7.4.4 A Preliminary Assessment of the Impacts of Transnational Private Labour Governance Initiatives: Outcomes for Workers and the Effective Elimination of Child Labour in the Artisanal Mining Sector in the Democratic Republic of the Congo

A significant problem of the private governance of labour standards in GSCs is the decoupling of policies and practices and the decoupling of practices and outcomes.⁹⁰⁴ Decoupling refers to “adopting formal organizational structures required by external stakeholders but divorcing those structures from informal work activities.”⁹⁰⁵ Tracking, monitoring and assessing the effectiveness of TPLG initiatives have been challenging tasks throughout the development of TLL.⁹⁰⁶ Existing investigations into the effectiveness of TPLG initiatives in established TNCs have led to varying results.⁹⁰⁷ It is even more complicated in the context of China’s economic engagement in Africa since access to extensive data is limited. Despite these difficulties and challenges, preliminary clues can be drawn from emerging academic publications and research resources on governance responses in the global cobalt supply chain and their effectiveness in addressing social issues in

⁹⁰⁴ Kuruvilla, *supra* note 28 at 12.

⁹⁰⁵ Michael Behnam and Tammy L. MacLean, “Where is the Accountability in International Accountability Standards?: A Decoupling Perspective” (2011) 21:1 *Bus Ethics Quarterly* 45 at 48.

⁹⁰⁶ See Mark Barenberg, “International Labour Indicators: Conceptual and Normative Snares” in Blackett & Trebilcock, *Research Handbook on Transnational Labour Law*, *supra* note 8, 76. See also the discussion of business and human rights indicators, Damiano de Felice, “Business and Human Rights Indicators to Measure the Corporate, Responsibility to Respect Challenges and Opportunities” (2015) 37:2 *Hum Rts Q* 511.

⁹⁰⁷ See e.g. Richard M. Locke, “Does Private Compliance Improve Labor Standards? Lessons from Nike” in Locke, *supra* note 189, 46 at 46–77; Richard M. Locke & Hiram Samel, “Beyond the Workplace: ‘Upstream’ Business Practices and Labor Standards in the Global Electronics Industry” (2018) 53 *St Comp Int Dev* 1.

the ASM sector in the DRC. Between 2016 and 2021, a diverse group of IGOs and INGOs provided research reports concerning the developments and remaining issues regarding environmental, social and economic conditions in artisanal mining sites in the DRC.⁹⁰⁸ These reports focused on the issue of child labour in the ASM sector. Furthermore, academic publications have increasingly discussed social and environmental issues surrounding the ASM sector in the DRC.⁹⁰⁹ Building on these empirical studies, this subsection provides a preliminary assessment of the impacts on the ground, focusing on HC's engagement in collaborative efforts to eliminate child labour in artisanal mines in Kasulo. The preliminary assessment provides a microcosm of how and to what extent the TPLG initiatives that Chinese mining enterprises are developing have influenced corporate practices and worker outcomes in the ASM sector in the DRC.

Amnesty International put three mining sites in the spotlight: Kasulo, Tshipuki and Mutoshi, all located in and around Kolwezi city in the Lualaba province in the DRC. Recent research reports have showcased changes and improvements in each site. An estimated number of artisanal mines in Kasulo was approximately 1,254.⁹¹⁰ In recent years, a wide range of actors has participated in formalizing, standardizing, and monitoring the Kasulo site. These actors include companies such as Huayou Cobalt and Entreprise Générale du Cobalt, local governmental bodies, artisanal miners, civil society organizations, and voluntary multi-stakeholder initiatives. The Provincial Government of Lualaba granted CDM, HC's subsidiary in the DRC, an exclusive right to purchase minerals from the Kasulo Artisanal Mining Zone (Zones d'exploitation artisanale, referred to as "ZEA").⁹¹¹ This preliminary assessment focuses on Kasulo, a pilot project of HC and other actors' efforts to address issues related to and beyond child labour in ASMs.

⁹⁰⁸ See Annex A of this thesis, "List of 25 Research Reports Concerning Labour and Human Rights in the Artisanal and Small-scale Mining Sector in the Democratic Republic of the Congo."

⁹⁰⁹ See e.g. Deberdt & Le Billon, "Cobalt Responsible Sourcing", *supra* note 37; Mancini et al, *supra* note 455; Deberdt & Le Billon, "A Mapping Review of Responsible Sourcing Initiatives", *supra* note 467.

⁹¹⁰ Pole Institute (Commissioned by Entreprise Générale du Cobalt SA's Technical Committee), "Socio-economic Baseline Study of Kasulo, Kolwezi, Democratic Republic of the Congo" (July 2021) at 8, online (pdf): <<https://www.pactworld.org/library/socio-economic-baseline-study-kasulo-kolwezi-democratic-republic-congo>>.

⁹¹¹ Joint Research Centre of the European Commission, "Responsible and Sustainable Sourcing of Battery Raw Materials: Insights from Hotspot Analysis, Company Disclosures and Field Research" (June 2020) at 59, online (pdf): <<https://publications.jrc.ec.europa.eu/repository/handle/JRC120422>>.

(1) Mixed Results from Research Reports and Audit Reports

As illustrated in the previous chapter, HC has released a set of CSR policies and has set up a comprehensive HRDD system in a short time frame since early 2016. The HRDD system for responsible cobalt sourcing includes, but is not limited to, publicly accessible CSR policies, a supply chain due diligence management mechanism, and a risk mitigation plan for supply chain management. In 2017, HC became the first company to have completed third-party auditing of its due diligence management system of the cobalt supply chain.⁹¹² Furthermore, HC also applied auditing requirements to its suppliers to ensure that suppliers followed its CSR policies and mechanisms. HC conducted on-site audits of major suppliers regarding labour, health and safety, environment, and business ethics. For instance, in 2018, it conducted on-site audits of seven suppliers.⁹¹³ HC also received third-party audits of its due diligence management practices. For instance, in 2020, it received six due diligence management audits.⁹¹⁴ In April 2020, HC had to suspend the use of artisanally mined cobalt, partly due to the lack of commonly agreed standards for artisanally mined cobalt to enter the global cobalt supply chain.⁹¹⁵ However, in the meantime, the company continued working with other actors in the global cobalt supply chain to standardize responsible cobalt in the ASM sector in the DRC and reduce risks to children, workers and other stakeholders of mining sites.⁹¹⁶

Both state and non-state actors in the global cobalt supply chain have acknowledged and evaluated the policy updates and behaviour changes at HC. For instance, in February 2018, the Minister of Mines of the DRC sent a Letter to CDM to express appreciation and gratitude for CDM's efforts to improve the supply chain of artisanal cobalt mines and the remarkable achievements of responsible cobalt supply chain management.⁹¹⁷ Furthermore, the Minister encouraged CDM to take more measures to eliminate child labour and cooperate with local NGOs and government bodies to improve child protection.

⁹¹² *Ibid* at 58.

⁹¹³ Huayou Cobalt, "Corporate Social Responsibility Report 2018", *supra* note 818 at 57.

⁹¹⁴ Huayou Cobalt, "2020 Corporate Social Responsibility Report" (2021) [Huayou Cobalt, "2020 Corporate Social Responsibility Report"] at 43, online (pdf): <<https://en.huayou.com/social12.html>>.

⁹¹⁵ *Ibid*.

⁹¹⁶ *Ibid*.

⁹¹⁷ Huayou Cobalt, "Letter of Appreciation from the Minister of Mining of the Democratic Republic of the Congo" (22 February 2018), online (pdf): <<https://www.huayou.com/news/337.html>>.

In November 2017, Amnesty International published a follow-up report to provide updates and preliminary assessments of corporate (in)action to tackle abuses in the global cobalt supply chain.⁹¹⁸ In March 2017, Amnesty International, in collaboration with Afreewatch, revisited the artisanal mining sites at Kasulo, Tshipuki and Mutoshi. The report documented that adults and children engaged in mining activities in unsafe conditions and investigated shifts in trading activities in response to the emergence of new mining sites. Furthermore, the report provided a mapping review of actions taken by HC, including its initial steps in response to the Amnesty International Report (2016), development of due diligence policies, supply chain mapping and risk mitigation strategies, disclosure, remediation, and other actions on the ground.⁹¹⁹ Based on the review, Amnesty International provided both acknowledgements for HC's efforts and recommendations for future improvements. It noted that "Since January 2016, Huayou Cobalt has taken steps to establish a cobalt supply chain due diligence policy and management system in line with international standards, to investigate and map its supply chain and to start to mitigate risks associated with artisanal mining."⁹²⁰ According to the mapping review, HC has sought to have the provincial government of Lualaba province impose a new ban on artisanal mining in the Kasulo and Tshipuki mining areas.⁹²¹ On 19 April 2017, the government of Lualaba province formally announced a ban on mining at Kasulo and Tshipuki.⁹²² The government of Kolwezi has also formed a new committee to coordinate regular checks for the presence of children at artisanal mining sites.⁹²³ However, Amnesty International also highlighted that "much more concrete detail is needed about potential and actual risks the company has identified in the DRC, as well as results of HC's risk assessment activity."⁹²⁴ For example, Amnesty International pointed out that "while generally acknowledging the risk of child labour, the names and locations of buying houses, ASM traders and mining sites or specific findings regarding child labour or health and safety issues are unreported."⁹²⁵ Without this information, it is difficult to assess the quality and effectiveness of HC's corporate policies, risk assessment and mitigation work.

⁹¹⁸ Amnesty International, "Time to Recharge", *supra* note 167.

⁹¹⁹ *Ibid* at 36–46.

⁹²⁰ *Ibid* at 44–45.

⁹²¹ *Ibid* at 22.

⁹²² *Ibid*.

⁹²³ Amnesty International, "Time to Recharge", *supra* note 167 at 22.

⁹²⁴ *Ibid* at 45.

⁹²⁵ *Ibid* at 46.

In May 2018, DNV GL provided a third-party Audit Report for LG Chem, which is a client and partner of HC. The report suggests that HC's establishment of a supply chain due diligence system is "significant but not sufficient" to address labour issues in the global cobalt supply chain.⁹²⁶ Based on a three-day audit, the report finds that the due diligence system for sustainable sourcing of CDM is established and implemented "to a somewhat extent."⁹²⁷ The report underlines that "However, high risks of child labour still exist in the country, provincial and community level."⁹²⁸ There is still room for improvement on the existing due diligence system, especially on environmental and health issues, as well as safe working conditions. The report suggests that "continuous improvement" is important for ensuring that CDM sources cobalt from child labour-free suppliers, for instance, reinforced monitoring through announced and unannounced visits and strong corrective actions.⁹²⁹

In June 2020, the Impact Facility published a research report on the state of ASM cobalt mining sites in Lualaba Province in the DRC, titled *Digging for Change: Towards a Responsible Cobalt Supply Chain*.⁹³⁰ The report was commissioned by smartphone brand Fairphone, lighting company Signify and transnational cobalt refiner HC, and it was supported by a grant from the Dutch government agency Netherlands Enterprise Agency. Based on research in March 2019 in the mining zones of Lualaba Province in the DRC, the report reviews and assesses the working conditions at the Kasulo and Kamilombe artisanal cobalt mining sites, the state of children's rights in the associated mining communities, and the livelihood activities and opportunities in the local economy. The report highlights that it is important "to independently review Huayou's actions and responses related to some of the concerns repeatedly raised by international media and NGOs — concerns which often draw on now outdated accounts from 2016."⁹³¹ The report suggests that "Huayou Cobalt has already invested substantial amounts and has committed to allocate more funds if others in the supply chain are willing to share the responsibility and contribute

⁹²⁶ DNV GL, "Audit Report on Congo Dongfang International Mining SARL. (prepared for LG Chem): Audit on Responsible Cobalt Supply Chain Management" (23 May 2018) at 28, online (pdf): <https://www.lgchem.com/asset/doc/Audit_Report_CDM_2018.pdf>.

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid.*

⁹²⁹ *Ibid.*

⁹³⁰ The Impact Facility, "Digging for Change", *supra* note 840.

⁹³¹ *Ibid* at 48.

financially.”⁹³² Furthermore, it finds that HC has implemented the following three responsible sourcing principles at the Kasulo mine site: (a) sourcing from mining sites that the provincial government legally designated, (b) ensuring the transparency and traceability of responsible sourcing through “a credible chain of custody system ensuring full batch-traceability from the mine sites to its crude refinery in Lubumbashi,” and (c) investing in the construction of physical access barriers using trenches and walls to restrict unauthorized entry to eliminate the use of child labour in the mining site.⁹³³ Based on independent monitoring data and various interviews with community members and workers in and around the Kasulo mine site, the report concludes that “this measure [the construction of physical access barriers] appears to have proven successful.”⁹³⁴

(2) Emerging Evidence of Changes in Corporate Practices and Incremental Improvements in Worker Outcomes

HC has been working at the Kasulo site in collaboration with responsible mineral initiatives, such as the Better Mining of RCS Global and the FCA, with the stated intention to drive the development of fair cobalt by “supporting the professionalisation of ASM site management, ensuring an uptake of responsible mining practices and channelling financial investment into mine improvements, with the goal of making mines safer, minimising environmental impact and creating decent working conditions for men and women working at the mines.”⁹³⁵ The emerging examples of changes on the ground suggest that gaps identified in the Amnesty International Report (2017) have been narrowed down in recent years.

(a) The Notable Progress for the Elimination of Child Labour

HC has actively engaged with actors and projects on the ground to operationalize its commitments to labour and human rights in the ASM sector in the DRC. These practices demonstrate that HC’s policy commitments are substantiated through practices to operationalize and implement the policies. While there are complicated processes and mixed results for outcomes on the ground, emerging examples suggest that the ongoing measures and practices have made considerable contributions to the effective elimination of child labour in ASM areas. First, HC has closely supported three key responsible cobalt initiatives, including the RCI, Better Mining, and FCA.

⁹³² *Ibid* at 8.

⁹³³ *Ibid* at 48–49.

⁹³⁴ *Ibid* at 49.

⁹³⁵ The Impact Facility, “Fair Cobalt Alliance”, *supra* note 845.

While some of these initiatives take a sustainability scheme approach,⁹³⁶ most cobalt-focused initiatives have tended to align with a due diligence approach that is being promoted through international instruments such as the UNGPs and the OECD Due Diligence Guidance.

Second, HC has taken practical measures to exclude children from the ASMs. As presented by a research report in June 2020, “Investing millions of dollars, Huayou Cobalt has since [2016] supported the professionalisation of the independently operated ASM site, *putting in place a wall and management measures to exclude children from the operations.*”⁹³⁷ According to an on-site study, “no cases of child labour or of young adolescents working on sites has been either directly observed or reported by the CSOs [civil society organizations] or miners consulted.”⁹³⁸ The study suggests that the Kasulo site seems to have rigorously enforced age control systems to eliminate child labour on site.⁹³⁹ Most on-site studies suggest that no cases of child labour have been found on the Kasulo site, with only one contradictory result submitted by a baseline study published in July 2021. This socio-economic baseline study of the Kasulo area confirmed that “[the wall with entrance control] reportedly had *a positive impact on the elimination of child labor on the site.*”⁹⁴⁰ However, the study submits that two artisanal miners surveyed were reportedly under 18.⁹⁴¹ The contradictory findings underline the complexities and difficulties in effectively eliminating child labour in the ASM sector and the importance of consistent monitoring of ASMs sites.

Third, through in-depth engagement with the local community, HC has made considerable efforts to address the root causes of child labour, such as poverty, and relevant issues, such as poor quality and limited access to free education. Complying with the six-step “community participation” framework, HC has taken a series of measures to engage with local communities and stakeholders to address the root causes of child labour in ASMs, including poverty and limited access to public education.⁹⁴² These measures include enhancing the inspection of mining areas, rescuing exploited children from mining sites and helping children to go back to school, building new classrooms and

⁹³⁶ For instance, the IFC Performance Standards and the Social Life-cycle Assessment.

⁹³⁷ The Impact Facility, “Digging for Change”, *supra* note 840 at 5 [emphasis added].

⁹³⁸ Mancini et al, *supra* note 455 at 7.

⁹³⁹ *Ibid.*

⁹⁴⁰ Pole Institute, *supra* note 910 at 16 [emphasis added].

⁹⁴¹ *Ibid.*

⁹⁴² Huayou Cobalt, “2020 Report for Due Diligence”, *supra* note 821.

restoring old school buildings, and developing alternatives for local communities to increase family income.

(b) Directions for Further Improvements of Worker Outcomes

The Kasulo mine site in the Kolwezi area is one of a few pilot projects where industry players, government officials, and workers have worked together to make the project free from child exploitation and improve the safety of artisanal mining.⁹⁴³ Challenges, however, remain. Despite notable progress in eliminating child labour in ASM areas, various stakeholders have raised considerable concerns surrounding outcomes for children, workers, and local communities. For instance, artisanal miners, local aggregators/traders, and agents of the local government's ASM support agency have all raised concerns about "the willingness of depot traders to fairly determine their price based on accurate purity calculations."⁹⁴⁴ Other concerns raised include risks to safe working conditions at the artisanal mining sites, especially the instability and illegal depth of pits.⁹⁴⁵ Recent studies have revealed the risks of the imposition of a monopoly and the accusation of price manipulation, as well as the lack of gender considerations.⁹⁴⁶ Former residents of the Kasulo mining area reported that they were not fairly compensated for their losses.⁹⁴⁷ These concerns were drawn from several reports, and the claims need further investigation and analysis.

One of the shortcomings of the Kasulo pilot is that it is voluntarily and commercially funded without dependence on public funding. The future of the pilot depends heavily on cobalt prices and profits, as well as the incentives and willingness that companies like HC will have in the coming years to continue implementation. Downturns in the price of cobalt in the global market will affect the profitability of the operations and may lead to either downsizing or freeze of the responsible operation and implementation of the pilot on the ground.⁹⁴⁸

⁹⁴³ Centre for Research on Multinational Corporations (SOMO), "China's Global Mineral Rush: Learning from Experiences around Controversial Chinese Mining Investments" (June 2021) at 37, online (pdf): <<https://www.somo.nl/nl/wp-content/uploads/sites/2/2021/06/Chinas-global-mineral-rush.pdf>>.

⁹⁴⁴ The Impact Facility, "Digging for Change", *supra* note 840 at 45.

⁹⁴⁵ *Ibid* at 41.

⁹⁴⁶ See e.g. Mancini et al, *supra* note 455 at 11; Deberdt, "The Entreprise Générale du Cobalt (EGC)", *supra* note 428 at 5.

⁹⁴⁷ SOMO, *supra* note 943 at 37.

⁹⁴⁸ Joint Research Centre of the European Commission, *supra* note 911 at 73.

The Kasulo pilot example also mirrors the hidden costs of focusing on the issue of the elimination of child labour. The goal of the elimination of child labour has dominated the multi-level governance framework that is emerging in the global cobalt supply chain. While the attention on child labour helps to coordinate and focus efforts to effectively eliminate child labour in the ASM sector in the DRC, it may limit efforts to seek solutions for other abuses of labour and human rights in mining sites and along the supply chain. The example also indicates that attention to child labour might result from companies' strategic considerations for their reputation risks and compliance responsibilities. Responsible cobalt sourcing initiatives and international media outlets largely focus on the artisanal cobalt mining sites and the issue of child labour in particular. As a result, the prioritized attention to child labour in ASMs has simultaneously led to a lack of attention to serious issues in large-scale industrial mining sites, including corruption and severe mining pollution.⁹⁴⁹

(3) Pathways for the Deep Coupling of Private Initiatives, Corporate Practices, and Worker Outcomes: A Worker-centred Approach to Human Rights Due Diligence in the Global Cobalt Supply Chain

Over the past three decades, scholars have investigated the effectiveness and potential of private governance initiatives in improving labour and human rights in GSCs. The proposals suggest various pathways for improving private governance initiatives for labour standards in GSCs, through both institutional contexts and internal processes of the operation of private governance initiatives. Pathways through institutional contexts include the enhancement of supply chain transparency regulations and supply chain due diligence regulations.⁹⁵⁰ Pathways through internal processes include that the buyers should create incentives for suppliers to improve compliance by rewarding more compliant suppliers with more orders.⁹⁵¹ Based on observations from the global apparel supply chain, recent studies highlight the need for consistent incentives, the importance of

⁹⁴⁹ Resource Matters, "See No Evil, Speak No Evil – Poorly Managed Corruption Risks in the Cobalt Supply Chain" (April 2019), online (pdf): <<https://resourcematters.org/wp-content/uploads/2019/04/ResourceMatters-SeeNoEvil-CobaltCorruptionRisks-Apr-2019.pdf>>.

⁹⁵⁰ Sarosh Kuruvilla argues that transforming the current opaque institutional field into a more transparent one will help to improve the effectiveness of private governance of labour standards in GSCs. See Sarosh Kuruvilla, "From Opacity to Transparency: Pathways to Improvement of Private Regulation" in Kuruvilla, *supra* note 28, 240.

⁹⁵¹ Amengual & Kuruvilla, *supra* note 889 at 810–811.

learning and knowledge transfer through the diffusion of best practices, and the significance of institutional change to sustain the improvement of labour standards at various levels.⁹⁵²

This chapter suggests an alternative pathway to better couple private governance initiatives with outcomes for workers in the global cobalt supply chain: the development and implementation of a concrete and comprehensive HRDD system that puts workers at the centre.⁹⁵³ HC provides an early but advanced company example developed in the global South. While it is too early to define whether HC will soon become one of the advanced examples of a worker-centred approach to HRDD, four sets of good practices have emerged. These corporate practices can be directive and enlightening to many other companies in the global cobalt supply that are struggling to find their way. These practices have all paid close attention to eliminating child labour, as highlighted in the CCCMC guidelines and the refocused international attention on the global cobalt supply chain. The first element is the increase of transparency on CSR policies, measures, and practices. Transparency is key to a comprehensive HRDD system and critical for monitoring the effectiveness of the system. Measures to improve supply chain transparency can help to identify, prevent, and mitigate labour rights risks in GSCs. For instance, disclosing supplier lists, notably lower tiers, making results of due diligence conducted public and verifiable, and making quality data on the use of grievance mechanisms public.

The second element is the enhanced engagement with ILO instruments and international human rights instruments. CSR policies and commitments published by HC have explicitly referenced and upheld ILO standards on the minimum age of child labour and the elimination of the worst forms of child labour in supply chains. These policies also made implicit references (such as without attribution) to a wide range of ILO instruments and international human rights instruments. The commitments entail promises for global operations, not only for cobalt sourcing from the DRC but also for a broader scope of sourcing activities and supply chain management mechanisms.

⁹⁵² *Ibid* at 814–815.

⁹⁵³ For analyses on the limitations and potential of HRDD in upholding labour standards in GSCs, see e.g. Trebilcock, “Due Diligence on Labour Issues”, *supra* note 239; Justine Nolan & Gregory Bott, “Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices” (2018) 24:1 *Austl J H R* 44; Jolyon Ford & Justine Nolan, *Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the Social Audit* (2020) 26:1 *Austl J H R* 27; Claire Bright, “Mapping Human Rights Due Diligence Regulations and Evaluating Their Contribution in Upholding Labour Standards in Global Supply Chains” in ILO, *Decent Work in a Globalized Economy*, *supra* note 28, 75.

The third element is the emphasis on “community participation” in transnational processes of HRDD management. A concrete step of “community participation” for a risk-based due diligence framework in mineral supply chains will allow space for workers and local communities to be part of the development and implementation processes of the HRDD system. This key element is closely relevant for addressing the root causes of child labour and other serious abuses of labour and human rights. Simply cutting off the supply chain can easily mitigate companies’ risks of being involved in business activities that cause or contribute to serious abuses of labour and human rights. However, it can also easily withdraw employment opportunities for local communities which rely heavily on the ASM industry and exacerbate poverty in local contexts. When Amnesty International highlighted the risks of using child labour and other forms of labour rights abuses, HC proactively addressed the risks and root causes of the risks, such as poverty, instead of simply cutting off the supply chain from the ASM sector in the DRC. Notably, HC’s practical measures in the Kasulo mining area have contributed to identifying and designing structural and procedural elements needed to develop responsible ASM sites for responsible production practices and improved worker outcomes. Key elements include but are not limited to: (a) controlled mine access to keep children and unauthorized individuals out of mining sites, especially through physical barriers such as walls and trenches; (b) freshwater access and sanitation facilities to ensure workers’ access to free, safe drinking water and dignified working conditions; (c) traceability to ensure responsible mineral production in line with international standards.⁹⁵⁴

The fourth element is the contribution of financial support for addressing issues and risks on the ground. So far, there are few regulatory arrangements and practical attempts to address the distribution of financial burdens and power asymmetries in the global cobalt supply chain. The financial expenses for improving local conditions often become the burden of local governments, local communities, and upstream companies in global mineral supply chains. For instance, to better regulate artisanal mining, the provincial government of Haut Katanga proposed the creation of at least 60 authorized Artisanal Mining Zones; however, this plan would need the support of more than US\$32 million in extra funding before it could be implemented.⁹⁵⁵

⁹⁵⁴ The Impact Facility has designed a responsible ASM site model comprising 14 structural and procedural elements. The model draws insights from HC’s practices in the Kasulo mining area and information from other ASM sites in Africa, Asia, and South America. HC has generally implemented these elements in the Kasulo mining area. See The Impact Facility, “Digging for Change”, *supra* note 840 at 45–49.

⁹⁵⁵ Amnesty International, “Time to Recharge”, *supra* note 167 at 22.

HC has demonstratively invested in constructing physical access barriers using trenches and walls to restrict unauthorized entry in order to eliminate child labour in ASM sites.⁹⁵⁶ The company has also financially supported projects rescuing exploited children from mining sites and helping children to go back to school, such as building new classrooms and restoring old school buildings, and developing alternatives for local communities to increase family income. Notably, HC financed infrastructure in the Kasulo site, including a health clinic for occupational injuries, a 10-foot wall to prevent children from entering the site, free access to clean water, toilets and bathrooms, and an area for trading and warehousing cobalt.⁹⁵⁷

HC has also co-founded the FCA, which is one of a few initiatives that coordinate companies to contribute to tackling issues on the ground financially. The FCA's three objectives also reflect HC's principles and practices of responsible sourcing that are being implemented at the Kasulo mine site: (a) driving the supply and demand of Fair Cobalt, (b) working toward a child labour-free Kolwezi, and (c) increasing household incomes.⁹⁵⁸ Specifically, the FCA aims to drive the professionalization of ASM site management, "ensuring an uptake of responsible mining practices and *channeling financial investment into mine improvements*, with the goal of making mines safer, minimising environmental impact and creating *decent working conditions for men and women working at the mines*."⁹⁵⁹ HC's proactive engagement with various actors is important for the ongoing transnational processes in developing innovative regulatory arrangements and practical measures to address challenges and issues on the ground.

7.5 Preliminary Conclusions

It is imperative to investigate the expansion of actors, the diffusion of labour norms, and the diversity of driving forces in developing labour governance initiatives that aim to address issues in transnational spheres. Such investigations can help to optimize governance interactions, understand the dynamics of multi-level governance, and direct the potential ways to improve the effectiveness of labour governance initiatives for workers in a globalized economy.⁹⁶⁰

⁹⁵⁶ See e.g. The Impact Facility, "Digging for Change", *supra* note 840 at 48–50.

⁹⁵⁷ *Ibid* at 33.

⁹⁵⁸ *Ibid* at 72.

⁹⁵⁹ *Ibid* [emphasis added].

⁹⁶⁰ See Kolben, "Dialogic Labor Regulation in the Global Supply Chain", *supra* note 185.

The governance power of private labour governance initiatives is entangled in different tiers and parts of GSCs in complex ways. This chapter notes the emerging proliferation of private labour governance initiatives in the global cobalt supply chain and acknowledges the questionable effectiveness and inherent limitations, as well as hidden costs, of such private initiatives. The chapter contributes new evidence and advances theoretical insights to better understand and act upon the adverse or unintended consequences of private initiatives in GSCs. It highlights the important role of the state in shaping the development of private initiatives so that such initiatives can help to challenge existing inequalities in the chain rather than embedding and extending deep-rooted global North-South inequalities.

(1) Main Findings of the Chapter

This chapter has critically investigated the recent policy updates and behaviour changes regarding labour governance developed by Chinese mining enterprises. This investigation contributes to understanding the effectiveness of these private initiatives in improving worker outcomes at the local mine level in the DRC and their implications for the evolving multi-level governance framework in the global cobalt supply chain. The chapter provides both an original illustration and an analytical structure for understanding the rising role of Chinese mining enterprises in engaging with and shaping the development of multi-level governance of labour rights in the global cobalt supply chain. The findings of this chapter highlight the important role of multiple actors in shaping TPLG initiatives that Chinese mining enterprises are developing and the potential of these ongoing interactive processes in allowing new TLOs on decent work in GSCs to be developed, shaped, as well as to become recognized and understood as the appropriate regulatory framework to be applied in GSCs. The recently developed TPLG initiatives to eliminate child labour in the ASM sector in the DRC have shown the capability and potential of Chinese mining enterprises in providing alternatives to that end.

This chapter develops three key findings from the critical investigation into TPLG initiatives developed by Chinese mining enterprises. First, an institutional emergence of TPLG initiatives is ongoing at the corporate level in China. The HC case discussed in the previous chapter is not an isolated example but a microcosm of the ongoing experimentation of Chinese mining enterprises' engagement with the evolving multi-level governance framework in the global cobalt supply chain. The emergence of TPLG initiatives amongst Chinese mining enterprises forms an important part

of the production and diffusion of labour norms across sites and levels of law in the global cobalt supply chain. As shown in this chapter, the emergence of TPLG initiatives is due to the choices and actions of multiple state and non-state actors that are associated with GSCs, including companies, civil society organizations, and industry associations, as well as governments. Public labour regulatory arrangements provided through the Chinese regulatory framework have played an important role in shaping private governance initiatives that Chinese mining enterprises are developing so that private initiatives follow the requirements set in international instruments and contribute to positive outcomes for workers in the global cobalt supply chain. The TPLG initiatives developed by Chinese mining enterprises are therefore characterized by the incorporation of public labour norms generated at the international level and national level into the corporate level.

Second, the proliferation and growth of Chinese-led TPLG initiatives will likely challenge and even alter presumed relationships between corporations, civil society actors, workers, and states that are engaged in the global cobalt supply chain. The institutional emergence of TPLG initiatives has brought two preliminary consequences to the governance of labour rights in the global cobalt supply chain. It strengthens the “privatization” of international labour standards through the intertextual network between corporate CSR policies and ILO conventions and further complicates unresolved debates in the evolutionary trajectories of TLL. Through the “privatization” of public labour standards, it promotes the mainstreaming of labour and human rights amongst companies in global mineral supply chains. Given the ongoing abuses of labour and human rights in ASMs and surging demand for cobalt, additional improvements in the responsible sourcing of cobalt are still sorely needed. Despite mixed results, the improvements at the Kasulo mining site have provided some modest examples of the effectiveness and positive outcomes of HC’s efforts and measures, either by itself or through joint efforts in partnership with other actors. Kasulo is an advanced pilot mining site compared to other sites that have not been managed through systemic monitoring and practical measures.⁹⁶¹

Third, comprehensive HRDD systems that Chinese mining enterprises are developing provide emerging examples of a worker-centred approach to HRDD. The increasing adoption of HRDD

⁹⁶¹ For instance, unlike the Kasulo mining site, access to the Kamilombe mining site is not strictly controlled. The number of artisanal miners has increased over time — from 1350 to roughly 3200 active workers as of September 2019, spread across 300 active pits. See Filipe Calvão, Catherine Erica Alexina McDonald & Matthieu Bolay, “Cobalt Mining and the Corporate Outsourcing of Responsibility in the Democratic Republic of Congo” (2021) 8:4 Extractive Industries & Society (open access), DOI: <10.1016/j.exis.2021.02.004> at 5.

standards and mechanisms indicates a potential direction toward a coherent approach to responsible sourcing of cobalt in the context of multiple public and private governance initiatives. The development of HRDD systems by Chinese mining enterprises strengthens the potential. Against this trend, a worker-centred approach to HRDD is significant for the deep coupling of policy-practice and practice-outcome to secure worker outcomes in developing private labour governance initiatives in the global cobalt supply chain.

Having identified the rapid policy updates made by Chinese mining enterprises and the positive impacts they have had in diffusing and implementing labour norms along the global cobalt supply chain, this thesis takes a critical approach to TPLG initiatives that Chinese mining enterprises are developing. Policy updates and follow-up corporate practices by Chinese mining enterprises have indicated a positive trend toward a responsible cobalt supply chain for improving worker outcomes. However, the theoretical implications and practical effectiveness of the emerging TPLG initiatives must be monitored, investigated, and evaluated. This thesis suggests that we should continuously observe the life cycles of labour policies and supply chain due diligence mechanisms developed by Chinese mining enterprises. By doing so, we can comprehensively understand the production and diffusion of labour norms in the global cobalt supply chain. Meanwhile, it is important to keep in mind that investigations should be conducted both at the corporate level and along the supply chains, both upstream and downstream.

(2) Limitations of the Investigation and Directions for Future Research

This chapter provides unique and meaningful contributions to future investigations into Chinese mining enterprises as well as other enterprises in the global cobalt supply chain. Based on an extensive set of theoretical insights and empirical data, this chapter presents a critical investigation into a group of 10 Chinese mining enterprises in the global cobalt supply chain. By doing so, this chapter helps to clarify the rising role of Chinese mining enterprises as a notable group of enterprises which come from emerging market economies.

The chapter helps to better understand the role of TNCs that come from emerging market economies. As newcomers to GSCs, these emerging TNCs may lack experience in managing responsible sourcing transnationally, but they have shown the increasing capability to improve their policies and behaviours and adapt to the changing transnational regulatory environment. They have also shown the potential to challenge the existing TLOs in GSCs, as well as to innovate and

allow new TLOs for better worker outcomes to be developed and understood in GSCs. The rapid policy updates and behaviour changes at HC and other Chinese mining enterprises have provided an important set of examples. The valuable resources and findings developed in this thesis can facilitate future research on the legitimacy and effectiveness of labour governance generated at the corporate level in China. Furthermore, if well developed, the advanced case examples of Chinese mining enterprises could be good practices for other emerging TNCs to consult.

Recently, the ILO has highlighted that “different actors [governments, employers’ and workers’ organizations of home and host countries] have a specific role to play” in achieving decent work for all in GSCs.⁹⁶² This chapter shows that companies at different positions (upstream or downstream) in global mineral supply chains have a distinct role to play in the emerging multi-level governance of labour rights. This chapter shows that not only downstream lead firms but also upstream companies can “raise the bar” for other suppliers by establishing higher de facto labour standards or practical requirements for operating in the chain.

The analysis and arguments presented in this chapter are based on ongoing observations and initial analyses, which in future studies should be expanded upon in several ways and directions. First, the scope and depth of analyses should be expanded to develop a deep understanding of the ongoing changes in corporate policies and practices and their implications for labour governance in the global cobalt supply chain. The number of companies is limited compared to a larger number of Chinese mining enterprises and relevant companies in the global cobalt supply chain. While the 10 companies investigated in this chapter are representative to provide a preliminary picture of the ongoing changes and developments, investigations into a larger group of companies will further capture the ongoing dynamics and trends. Second, the research method should be further developed to assess the effectiveness of these private governance initiatives in improving worker outcomes on the ground. While the preliminary assessment presented in the chapter outlined some positive examples of changes in corporate policies and practices as well as improvements in outcomes on the ground, a comprehensive assessment based on in-depth empirical research will help to reveal findings that are difficult to capture through document analysis and secondary sources. Third, the investigations could be developed further for comparative and empirical studies on issues along global mineral supply chains. For instance, once we have developed sufficient knowledge about case examples of Chinese mining enterprises, we can develop comparative studies between companies from the global South and the global North. Furthermore, it will be

⁹⁶² ILO, *MNE Declaration (2017)*, *supra* note 418, Art. 10.

helpful to conduct empirical investigations to monitor and assess the implementation of TPLG initiatives that individual companies have developed in the global cobalt supply chain. It is also important to minimize the risks of cosmetic compliance and ensure workers are key to the design and implementation of supply chain due diligence management. Integrating a worker-centred approach to HRDD into the emerging multi-level governance framework in the global cobalt supply chain is worth exploring.

Concluding Remarks

This thesis resonates with recent investigations of the rising role of China in a global context, including China's participation in developing new international economic orders⁹⁶³ and China's role in various transnational legal processes in the context of the BRI.⁹⁶⁴ It also parallels the ongoing developments in China's engagement with international labour law, including its recent ratification of the two ILO fundamental Conventions on the elimination of all forms of forced or compulsory labour: ILO Conventions No. 29 and No. 105.⁹⁶⁵ The ILO Director-General, Mr. Guy Ryder, welcomed the ratification by China and said:

This is a crucial opportunity to promote renewed momentum and further efforts by the government and the social partners in China to combat forced labour and support human-centered development and decent work in the second largest economy in the world. These two ratifications also pave the way towards the realization of the Sustainable Development Goal 8, Target 7, which calls on states to take immediate and effective measures to eradicate forced labour and end modern slavery and human trafficking.⁹⁶⁶

This thesis concludes with three key findings surrounding the rising role of China and Chinese enterprises in TLL. First, a multi-level governance framework has emerged to address governance deficits on decent work in the global cobalt supply chain. Notably, China and Chinese enterprises are rising in the global cobalt supply chain alongside a few other actors from the global South. This emerging multipolarity is important for developing a counterbalancing force against the dominant role of powerful actors from the global North. Second, China and Chinese enterprises are becoming *proactive participants* in constructing and reshaping TLL. A multifaceted Chinese regulatory framework for labour governance has evolved incrementally to regulate, facilitate, and guide Chinese OFDI toward a responsible model. Partly resulting from the enhanced labour governance in Chinese OFDI, TPLG initiatives that Chinese mining enterprises are developing have closely aligned with public labour norms and mechanisms established at the international and

⁹⁶³ See e.g. Shaffer & Gao, *supra* note 16.

⁹⁶⁴ See e.g. Heng Wang, "China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability" (2019) 22:1 J Intl Econ L 29; Heng Wang, "Selective Reshaping: China's Paradigm Shift in International Economic Governance" (2020) 23:3 J Intl Econ L 583; Matthew S. Erie & Thomas Streinz, "The Beijing Effect: China's 'Digital Silk Road' as Transnational Data Governance" (2021) 54:1 N.Y.U. J. Int'l L. & Pol 1; Congyan Cai & Yifei Wang, "Transnational Judicial Dialogue in the Rise of China: How the Chinese Judiciary Enhances the Belt and Road Initiative" (2022) Asia Pacific L Rev, DOI: <10.1080/10192557.2021.2013663>.

⁹⁶⁵ ILO, "China Ratifies the Two ILO Fundamental Conventions on Forced Labour" (12 August 2022), online: *ILO Newsroom* <[https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_853575/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_853575/lang-en/index.htm)>. As of August 2022, China has ratified seven of ten ILO fundamental Conventions.

⁹⁶⁶ *Ibid.*

national levels. These developments are important since they provide alternative normative paths that challenge the existing unequal laws that govern GSCs, allowing the development of new TLOs on decent work in GSCs that challenge the persistent power asymmetries and inequitable distribution of wealth in GSCs. Third, the regulatory innovations and behavioural changes in Chinese outward mining investment can potentially shape the dynamics of multi-level governance of labour rights both at home and abroad. These innovations and changes can broadly influence the labour practices of Chinese enterprises and provide examples for other actors that are engaging with the dynamics of multi-level governance in a globalized economy.

(1) The Emerging Multi-level Governance Framework in the Global Cobalt Supply Chain

Initiated to eliminate child labour in the artisanal copper-cobalt mining sector in the DRC, a multi-level governance framework has recently emerged and rapidly evolved in the global cobalt supply chain. The diversification and proliferation of actors, norms and processes do not necessarily improve labour rights in transnational spheres. However, the emerging multipolarity of labour governance can allow the development of new legal orders that can challenge the unequal patterns of labour governance in GSCs.

The multi-level governance framework is complex, pluralistic, and decentred. The various actors seem hardly coordinated, considering their different mandates, interests, and approaches. The various initiatives and promoted labour norms have been highly diverse and fragmented. It is worth noting that most of these initiatives have been developed by actors from the global North, with a few exceptions developed by actors from China and the DRC. Furthermore, it is notable that workers are largely marginalized in the development and implementation processes of most initiatives.

Based on the mapping review of the relevant actors, norms and processes in the multi-level governance framework, this thesis identifies three notable limitations that must be addressed carefully for the multi-level governance framework to benefit workers in the global cobalt supply chain. First, there is a notable lack of a coherent approach to ensuring decent work in GSCs. Second, a worker-centred approach to HRDD is yet to be developed in the global cobalt supply chain and, more broadly, for all GSCs. Third, while private governance initiatives are becoming the dominant

form of labour governance in the global cobalt supply chain, the effectiveness of such initiatives in ensuring labour rights in GSCs is questionable.

The marginalization of workers and the proliferation of private initiatives have necessitated a rethinking of the role of the state and business enterprises in the multi-level governance of labour rights in the global cobalt supply chain. Decent work in GSCs will not happen unless states fulfill their duties to protect labour rights through standard-setting and -implementing processes and unless workers themselves remain front and centre in the dynamics of multi-level governance of GSCs. Therefore, understanding the significant role of the state and both the limitations and potential of private governance initiatives are crucial to shaping a multi-level governance framework that puts workers at the centre.

Actors from China have responded quickly to the identified governance deficits in eliminating child labour in the artisanal copper-cobalt sector in the DRC. These governance responses have been prominent and proactive amongst various governance initiatives relevant to eliminating child labour in the DRC. The role of China and Chinese enterprises in the global cobalt supply chain is crucial since they are not only rising-power actors in the chain but also part of a few actors that have provided responses and proposals from the global South.

(2) The Rising Role of China and Chinese Enterprises in Transnational Labour Law

China and Chinese enterprises are playing a rising role in shaping the dynamics of multi-level governance of labour rights in the globalized economy. The transnational legal processes are likely to be ongoing in the coming decade. Both Chinese state agencies and industry associations have contributed to incrementally integrating the social dimension into the Chinese regulatory framework for OFDI. Furthermore, Chinese enterprises have proactively engaged with various labour governance initiatives in GSCs. Specifically, Chinese mining enterprises have played an important role in constructing the multi-level governance framework in the global cobalt supply chain to address governance deficits on decent work, especially in eliminating child labour.

China's state-centric approach to CSR has helped to enhance the legitimacy of TPLG initiatives developed by Chinese enterprises. China has developed a web of various forms of regulatory arrangements for labour governance in the context of Chinese OFDI. This increasingly multifaceted web consists of regulations and regulatory documents promulgated by state agencies, as well as other forms of CSR guidance such as industry guidelines. The role of state agencies is

essential to set general principles and specific guidance on CSR. Chinese state agencies, especially the MOC and the NDRC, have played a crucial role in making labour rights an essential component of the social responsibility of Chinese enterprises. Regulatory documents promulgated at the ministerial level have clarified that all Chinese enterprises are responsible for respecting the rights of Chinese and non-Chinese workers engaged by Chinese OFDI. Furthermore, they direct Chinese enterprises to consult a wide range of applicable labour standards, including local laws, regulations and customs in host states, and relevant international standards and industry standards. The role of nationwide industry associations is supplementary in providing industry-specific operational guidelines for Chinese enterprises to fulfill CSR in their transnational business activities. State agencies have entrusted and supported several associations to develop industry-specific guidelines for Chinese enterprises. Industry guidelines have further clarified the scope of labour rights in the social responsibilities of Chinese enterprises, particularly the responsibility to respect labour and human rights. The unique relationship between industry associations and state agencies has allowed the associations to explore and experiment with innovative regulatory arrangements for labour governance in Chinese OFDI. The regulatory innovations and pragmatic experimentation within a specific industrial context will, in turn, provide input on regulatory design at the ministerial level.

The above-summarized dynamics have been exemplified in the development of CSR in Chinese outward mining investment. The CCCMC has played a crucial role in operationalizing the CSR principles and guidance set by state agencies. Through comprehensive CSR guidelines and initiatives, the CCCMC has detailed the labour component of social responsibilities and constructed operational mechanisms, including a six-step framework for risk-based supply chain due diligence in mineral supply chains. This six-step framework puts labour rights at the centre, specifically ILO fundamental Conventions concerning the elimination of child labour, and it sets accompanying requirements such as transparency and access to remedy. Furthermore, the implementation and revision processes are ongoing.⁹⁶⁷

⁹⁶⁷ Recently, the CCCMC issued the updated version of the Chinese Due Diligence Guidelines, *Chinese Due Diligence Guidelines for Mineral Supply Chain (Version 2)*. Compared to the old version issued in 2015, this new version further aligns with international instruments, specifically the OECD Due Diligence Guidance for responsible mineral supply chains. In addition, the new version develops the sixth step of the due diligence framework to strengthen access to remedy. This updated sixth-step requires “When the company recognize[s]

The detailed requirements have guided Chinese mining enterprises to specify and operationalize their commitments to labour and human rights in transnational business operations. One of the positive impacts is a substantive development of the intertextual networks between COCs produced by Chinese mining enterprises and international labour standards, particularly standards regarding eliminating child labour.

Over the past seven years (2016-2021), there has been an institutional emergence of TPLG initiatives in Chinese outward mining investment. The development of these private initiatives is driven and shaped by both external pressure (the enhanced public labour regulatory environment) and internal incentives (market-based sanctions and incentives). HC is an advanced case example that has developed comprehensive CSR policies and HRDD mechanisms to improve labour protections and other social impacts of transnational business activities. HC has closely followed CCCMC guidelines in developing TPLG initiatives. Labour rights are core components of CCCMC guidelines and core issues relating to the identified problems of the ASM sector in the DRC. Therefore, HC has developed the labour dimension as a core part of its HRDD system. The HC case is not isolated but a representative example alongside other examples that have emerged in recent years. At least 10 Chinese mining enterprises in the global cobalt supply chain have started developing comprehensive CSR policies and HRDD mechanisms at the corporate and supply chain levels. The current development of private governance initiatives is characterized as a practical, ongoing approach that attempts to strengthen labour protections and, more broadly, human rights protections in GSCs. In particular, eliminating child labour is a top priority of private governance initiatives. This development of the labour dimension of HRDD has resulted from a combination of both external pressures and internal consciousness, and it is continuously shaped by a variety of state and non-state actors, including Chinese state agencies, Chinese industry associations, international organizations, and civil society organizations, as well as actors at the local level in the ASM sector in the DRC.

TPLG initiatives that Chinese mining enterprises are developing may be a promising starting point toward improving the legitimacy and effectiveness of private governance in the global cobalt

that it has caused or contributed to actual adverse impacts, they should mitigate these impacts by providing for or cooperating in remediation when appropriate.” See CCCMC, “Chinese Due Diligence Guidelines for Mineral Supply Chain (Version 2)” (18 July 2022) at 31–32, online (pdf): <<http://www.cccmc.org.cn/kcxfzxx/zyzx/bz/ff80808181489d3201820f3ad0a01201.html>>.

supply chain. Three notable examples support this assumption. First, these initiatives are more responses to recent developments in public labour regulatory arrangements and other institutional arenas than purely voluntary and self-regulatory actions. Therefore, these private initiatives can hardly replace or dislodge public labour regulatory arrangements as what may happen in the proliferation of private governance initiatives in other contexts. Second, these initiatives can hardly remain at the stage of cosmetic commitments without substantive behaviour changes since they are now under multiple monitoring mechanisms in the enhanced transnational labour regulatory environment. Notably, the rising role of state agencies and industry associations in engaging with the dynamics of multi-level governance has considerably contributed to building an increasingly rigorous transnational labour regulatory environment for Chinese mining enterprises. Meanwhile, the emerging multi-level governance framework in the global cobalt supply chain has contributed to consolidating the institutional environment for compliance with labour standards. Third, a preliminary assessment of the effectiveness of these initiatives shows that Chinese mining enterprises have not only established CSR commitments but also taken measures in order to effectively implement the policies and mechanisms at both the corporate level and supply chain level. Third-party assessments and empirical examples from ASM in the DRC have shown that a group of Chinese mining enterprises have started collaborating with other stakeholders and providing alternative measures to eliminate child labour in artisanal mining sites. A preliminary assessment of the progress on the ground suggests that policies and practices of Chinese mining enterprises have had positive impacts on reducing child labour in the ASM sector in the DRC.

(3) Implications for the Future of Transnational Labour Law

The development of Chinese regulatory arrangements and corporate practices on labour governance can potentially influence labour governance both at home and abroad. First, the development of the Chinese regulatory framework for labour governance can broadly influence the labour practices of Chinese enterprises. Chinese mining enterprises' CSR policies and HRDD mechanisms are not exclusively on cobalt nor applicable only to sourcing from the DRC. Instead, they are developed at both the firm and supply chain levels, applying to all aspects of their transnational business activities. For instance, in addition to its investment focusing on copper and cobalt in the DRC, CMOC invests in copper, gold, niobium, and phosphates in mining sites in China, Brazil, and Australia. The CSR policies and HRDD mechanisms apply to all their domestic and transnational business activities. In addition to its investment in the DRC, HC invests in nickel

and cobalt in mining sites in Indonesia. Furthermore, good practices of Chinese enterprises have been compiled and disseminated widely to Chinese enterprises operating overseas.⁹⁶⁸

Second, the development of HRDD practices by Chinese mining enterprises can potentially enhance the labour dimension of HRDD both at home and abroad. While more than a decade since the adoption of the UNGPs by the Human Rights Council, substantive HRDD practices are still only under development amongst large TNCs from the global North. Chinese mining enterprises mark the first group of TNCs from the global South with a high rate of establishing HRDD for RBC. This group of TNCs consists of both large SOEs and POEs of relatively smaller sizes. HRDD practices developed by Chinese mining enterprises might potentially provide feasible examples for small and medium-sized enterprises that are rising from emerging market economies and developing countries.

Third, the development of labour governance in Chinese outward mining investment can positively impact labour governance inside China. Labour rights inside China have been under international scrutiny for decades. China and Chinese enterprises are important not only for the upstream processing of minerals but also for midstream manufacturing and downstream assembly of electronics. The improvement of labour governance in the upstream processing of minerals can positively impact the midstream manufacturing and downstream assembly of electronics inside China.

Over the past decade, China has incrementally integrated the UNGPs into the Chinese regulatory framework for OFDI through both national policies on human rights and industry guidelines on social responsibility. CSR and similar concepts such as BHR, ESG, and RBC have become deeply rooted in Chinese regulatory arrangements and corporate practices. The second and third National Human Rights Action Plan of China have already stipulated CSR in trade and investment. In September 2021, the Information Office of the State Council issued the fourth National Human Rights Action Plan of China (2021-2025).⁹⁶⁹ Through this Action Plan, China commits to implementing “the UN 2030 Agenda for Sustainable Development in its full sense” and promoting “responsible business conduct in global supply chains.”⁹⁷⁰ More specifically, China commits:

⁹⁶⁸ See e.g. Alliance of Chinese Business in Africa for Social Responsibilities, “Chinese Business in Africa: Cases on Social Responsibility Practices” (2021), online (pdf): <<http://www.acbasr.org.cn/#/homeCarba/report>>.

⁹⁶⁹ State Council Information Office of the People’s Republic of China, *supra* note 783.

⁹⁷⁰ *Ibid.*

It [China] will encourage Chinese businesses to abide by the *UN Guiding Principles on Business and Human Rights* in their foreign trade and investment, to conduct *due diligence on human rights*, and to fulfill their *social responsibility to respect and promote human rights*. It will participate and play *a constructive role in negotiations on the UN business and human rights treaty*.⁹⁷¹

This marks the first time a Chinese national policy document explicitly references the UNGPs and the core concept of HRDD after several Chinese industry guidelines have done so over the past decade. Therefore, it is foreseeable that the development of the labour dimension of HRDD in Chinese outward mining investment will broadly influence legal orders on decent work at home and abroad in the coming decade.

This thesis concludes by acknowledging the challenges of achieving the objective of decent work in GSCs in a new phase of economic globalization. Much work remains to be done to establish and institutionalize new TLOs on decent work in a globalized economy. Target 8.7 of Goal 8 of the UN Sustainable Development Goals calls for “by 2025 end[ing] child labour in all its forms.”⁹⁷² With only three years left to achieve this target, it is clear that there is still a need for intensified action in the global cobalt supply chain and, more broadly, in all GSCs. Actors from China have been motivated to participate in shaping the dynamics of multi-level governance, and so do other actors. Therefore, it is worth investigating how these actors will interact with each other, in which directions they will develop and shape new legal orders in TLL in the coming decade, and whether these new legal orders will benefit workers in a globalized economy.

⁹⁷¹ *Ibid* [emphasis added].

⁹⁷² Goal 8 of the UN Sustainable Development Goals is to “Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.” Target 8.7 is to “Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.” See UN, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNGAOR, 70th Sess, UN Doc A/RES/70/1 (2015) at 19–20.

Annexes

Annex A List of 25 Research Reports Concerning Labour and Human Rights in the Artisanal and Small-scale Copper-Cobalt Mining Sector in the Democratic Republic of the Congo

MM/YY	Organization	Title
06/2013	Amnesty International	Profits and Loss: Mining and human rights in Katanga
11/2015	OECD	Mineral Supply Chain and Conflict Links in Eastern Democratic Republic of Congo: Five Years of Implementing Supply Chain Due Diligence
01/2016	Amnesty International	'This is What We Die for': Human Rights Abuses in The Democratic Republic of the Congo Power the Global Trade in Cobalt
04/2016	SOMO	Cobalt Blues: Environmental Pollution and Human rights Violations in Katanga's Copper and Cobalt Mines
05/2017	Center for Effective Global Action, University of California, Berkeley	Artisanal Mining, Livelihoods, and Child Labor in the Cobalt Supply Chain of the Democratic Republic of Congo
11/2017	Amnesty International	Time to Recharge: Corporate Action and Inaction to Tackle Abuses in the Cobalt Supply Chain
03/2018	Development International e.V.	3TG+C Smelter and Refiner Disclosure Conformance with Leading Due Diligence and Assurance Standards
07/2019	Development International e.V.	Worst Forms of Child Labour in the Democratic Republic of the Congo: Cobalt Refiner Due Diligence Reporting
10/2019	Federal Institute for Geosciences and Natural Resources of Germany	Mapping of the Artisanal Copper-Cobalt Mining Sector in the Provinces of Haut-Katanga and Lualaba in the Democratic Republic of the Congo
11/2019	OECD	Interconnected Supply Chains: A Comprehensive Look at Due Diligence Challenges and Opportunities Sourcing Cobalt and Copper from the Democratic Republic of the Congo
01/2020	British Institute of International and Comparative Law, Civic Consulting & LSE Consulting	Study on Due Diligence Requirements through the Supply Chain
05/2020	ILO	Mapping Interventions Addressing Child Labour and Working Conditions in Artisanal Mineral Supply Chains
06/2020	The Impact Facility	Digging for Change: Towards a Responsible Cobalt Supply Chain
06/2020	Joint Research Centre of the European Commission	Responsible and Sustainable Sourcing of Battery Raw Materials: Insights from Hotspot Analysis, Company Disclosures and Field Research
07/2020	SOMO	Time to Start Caring about Cobalt: Evaluating the Due Diligence Conducted by Nine Insurers Active in the Dutch Insurance Market to Address Human Rights Abuses in the Cobalt Supply Chain
08/2020	Bread for All, Swiss Catholic Lenten Fund & ATE Swiss Association for Transport and Environment	Batteries: At the Centre of E-Mobility, A Review of Social and Environmental Aspects
09/2020	World Economic Forum	Making Mining Safe and Fair: Artisanal cobalt extraction in the Democratic Republic of the Congo
11/2020	International Peace Information Service, Project on Resources and Governance, Sub-Saharan Field Research and Consulting Services & Ulula	Evaluating Due Diligence Programs for Conflict Minerals: A Matched Analysis of 3T Mines in Eastern DRC
04/2021	Federal Institute for Geosciences and Natural Resources of Germany	Mining Conditions and Trading Networks in Artisanal Copper-Cobalt Supply Chains in the Democratic Republic of the Congo
06/2021	SOMO	China's Global Mineral Rush: Learning from Experiences around Controversial Chinese Mining Investments
07/2021	Responsible Sourcing Network & Department of Anthropology of the University of British Columbia	Baseline Study of Artisanal and Small-Scale Cobalt Mining in the Democratic Republic of the Congo
07/2021	Pole Institute	Socio-economic Baseline Study of Kasulo, Kolwezi, Democratic Republic of the Congo
07/2021	International Peace Information Service	Comparative Analysis between Cobalt and 3T Sourcing from the DRC
2021	OECD	Costs and Value of Due Diligence in Mineral Supply Chains
12/2021	RE-SOURCING	State of Play and Roadmap Concepts: Electronics Sector

Annex B List of 10 Multi-stakeholder Online Conferences Concerning Labour and Human Rights in Artisanal and Small-scale Cobalt Mining in the Democratic Republic of the Congo

(Representatives of key actors discussed in this thesis have participated as speakers in these online conferences, including representatives from the ILO, OECD, DRC, and China. The author participated in these events as an academic audience and followed the Chatham House Rule. The information in the table was collected from the website of each event.)

MM/YYYY	Organizer	Theme	Web Link
9-12 June 2020	UN	UN Virtual Forum on Responsible Business and Human Rights: New Challenges, New Approaches	https://www.rbhrforum.com/
27-28 October 2020	Responsible Minerals Initiative	The Responsible Minerals Initiative Annual Conference 2020	http://www.responsiblemineralsinitiative.org
29 October 2020	CSR Europe	Environmental Protection & Human Rights in Supply Chains: From Due Diligence to Impact	https://www.csreurope.org/plenary-4-due-diligence-law
16-18 November 2020	UN	The Ninth UN Forum on Business and Human Rights	https://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx
1-3 December 2020	CCCMC	2020 International Forum on Sustainable Mineral Supply Chains	http://en.cccmc.org.cn/events/ff8080817c07a5ef017c10ac0c56038b.html
27-28 April 2021	OECD	The 14 th OECD Forum on Responsible Mineral Supply Chains	https://oecd-events.org/2021-responsible-mineral-supply-chains/en/
26 October 2021	CCCMC & Responsible Mining Foundation	CCCMC-RMF Webinar: Mining and Climate Change	https://www.responsibleminingfoundation.org/events/
2-4 May 2022	OECD	The 15 th OECD Forum on Responsible Mineral Supply Chains	https://www.oecd.org/corporate/mne/forum-responsible-mineral-supply-chains.htm
12 May 2022	Responsible Business Alliance	Responsible Business Alliance European Conference 2022	https://www.responsiblebusiness.org/training-events/
2021-2022	RCS Global	Better Mining Webinar Series on the ASM sector	https://www.rcsglobal.com/summary-better-mining-webinar-delivering-measurable-improvement-asm-sector/

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Domestic Instruments

The People's Republic of China

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The Democratic Republic of the Congo

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