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REVERSE THE CURSE: CREATING A FRAMEWORK TO MITIGATE THE RESOURCE CURSE AND PROMOTE HUMAN RIGHTS IN MINERAL EXTRACTION INDUSTRIES IN AFRICA

INTRODUCTION

The continent of Africa is one of economic paradox: Abundant natural resources lie within many of the states, yet despite their mineral wealth, these same states exhibit low levels of development and a poor standard of living. Resources that seemingly should benefit African states have instead been the impetus for their stagnant development. Historically, the beneficiaries of these vast mineral deposits have not been the African populations but rather foreigners such as the colonial powers in the nineteenth and twentieth centuries,¹ exploitative corporations during the post-WWII neocolonial era,² and opportunistic military strongmen involved in Africa's civil and cross-border wars.³ The revenue that these resource caches produce is more often than not funneled to external entities, such as an international corporation or a few elites within a state.⁴

This phenomenon is generally known as the Resource Curse. Many economic and political models have been put forth to attempt to explain why countries with mineral and other resource wealth are often those with the lowest rate of growth and how to remedy this situation. This is known as the Resource Curse theory.⁵ However, while the Resource Curse theory explains developmental problems related to rent-seeking and revenue transparency, it does so from a backward-looking viewpoint—it seeks to remedy the causes of

¹ Ehiedu E.G. Iwereibor, *The Colonization of Africa*, AFRICANA AGE, <http://exhibitions.nypl.org/africanaage/essay-colonization-of-africa.html> (last visited Jan. 1, 2014).

² Joy Asongzoh Alemazung, *Post-Colonial Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic and Political Development*, 3 J. PAN AFR. STUD. 62, 69–70 (2010).

³ *Factbox- Sierra Leone's Civil War*, REUTERS (Aug. 2, 2007, 2:05 PM), <http://uk.reuters.com/article/2007/08/02/uk-leone-warcrimes-war-idUKL0286217420070802>.

⁴ See Joseph Stiglitz, *Africa's Natural Resources Can Be a Blessing, Not an Economic Curse*, GUARDIAN (Aug. 6, 2012, 7:51 AM), <http://www.guardian.co.uk/business/economics-blog/2012/aug/06/african-natural-resources-economic-curse>.

⁵ Resource Curse is being used as a general term to represent the various theories on the subject; it is comprised of many different variations, including rentier state and Dutch Disease models. For a more in-depth discussion on some of these models, see Jonathan Di John, *Is There Really a Resource Curse? A Critical Survey of Theory and Evidence*, 17 GLOBAL GOVERNANCE 167 (2011).

the problem by identifying the economic and institutional factors contributing to the problem.⁶

Therefore, while the Resource Curse theory can help academics, economists, and politicians craft policies to spur development within these resource-rich states, the theory does not provide ways to mitigate the negative human capital consequences that often attend the phenomenon. As much of the resource wealth in African states is mineral-based, this means abuses of human rights that occur during the extraction process itself for the purposes of this Comment.⁷ Although development brings better infrastructure and higher standards of living to a state, the human rights abuses at the extraction level cannot be ameliorated by the developmental considerations prescribed by the Resource Curse theory alone.

The diamond industry in Africa prompted the investigation of human rights issues being brought to the forefront in Resource Curse situations after the conflicts in Sierra Leone and Angola.⁸ However, there are other mineral industries that are tainted by human rights abuses during extraction. Some of them take place under the growing eyes of Chinese corporations on the continent, especially cobalt and copper mining; unfortunately, many of the abuses are not brought to the attention of the international community.⁹

Over the past decade, China has become one of the biggest investors in Africa, especially in the extractive resources business.¹⁰ As China's presence on the continent increases, complaints regarding mistreatment of workers, poor health and safety conditions, and occasional violence have arisen.¹¹ This is largely due to the fact that Chinese companies use Chinese nationals as their managerial staff and other higher-ups, leaving only the manual labor jobs for

⁶ See Stiglitz, *supra* note 4.

⁷ What is meant by "human rights" in this context is discussed in Part III.D.

⁸ See Girish Gupta & Santa Elana, *Not Just Out of Africa: South America's "Blood Diamonds" Network*, TIME (Aug. 20, 2012), <http://world.time.com/2012/08/20/not-just-out-of-africa-south-americas-blood-diamonds-network>; see also *About-KP Basics*, KIMBERLEYPROCESS.COM, <http://www.kimberleyprocess.com/en/about> (last visited Jan. 1, 2014).

⁹ Shen Hu & Han Wei, *China's Harsh Squeeze in Zambia's Copper Belt*, CAIXIN ONLINE (Nov. 10, 2011, 9:16 PM), <http://english.caixin.com/2011-11-10/100324752.html>.

¹⁰ *China in Africa*, INST. DEVELOPING ECON.—JAPAN EXTERNAL TRADE ORG., http://www.ide.go.jp/English/Data/Africa_file/Manualreport/cia_08.html.

¹¹ David Smith, *Chinese Mining Firms in Zambia Under Fire for Mistreating Workers*, GUARDIAN (Nov. 3, 2011, 6:01 AM), <http://www.guardian.co.uk/global-development/2011/nov/03/chinese-mining-zambia-mistreating-workers>.

the local population, fostering a clash of cultures.¹² Cobalt and copper, which are used in mobile phone batteries, electronic wiring, and other components, are especially important for China's fast-growing electronics manufacturing sector.¹³

The human rights abuses and related transparency issues in these two expanding industries will continue to go unchecked unless the extractive process is under scrutiny by institutions other than the state and corporate entity overseeing mining operations. A strong international framework is needed to act as watchdog. This framework will be most effective if it is a partnership between industry, governments, and community organizations. This kind of tripartite framework, in the form of the Kimberley Process Certification Scheme,¹⁴ helped stop the flow of conflict diamonds from Africa at the beginning of the millennium.¹⁵ However, this new framework must not only ensure that these minerals are not mined to support conflict, but also that they are being extracted in an environment that puts an emphasis on protecting the rights of the miners, increases transparency throughout the process, and is enforceable against noncompliance.

This Comment will focus on creating an international framework that would ensure mineral extraction comports with international notions of human rights in a way that holds all actors accountable and can enforce its provisions with teeth when violations arise. Part I will explain the creation, successes, and failures of the Kimberley Process Certification Scheme and will touch on other similar frameworks that seek to remedy the ills that accompany natural resource extraction. Part II will discuss China's rise in Africa, how China conducts its dealings with the continent, and its involvement in the cobalt and copper industries. It will also detail the troubled record of the Chinese extractive industry both in Africa and back home in comparison to Australia, another rising mining presence in Africa. Part III will outline a suggested blueprint for protecting human rights, encouraging transparency, and

¹² Hu & Wei, *supra* note 9.

¹³ *Copper & Cobalt Facts*, SHALINA RESOURCES, <http://www.shalinaresources.com/copper-cobalt-facts.aspx> (last visited Jan. 9, 2014); *see also* *China in Africa*, *supra* note 10, at 45.

¹⁴ The Kimberley Process Certification Scheme was developed in the early 2000s to stem the illegal trade in conflict diamonds (also known as blood diamonds) that helped support the civil wars in Sierra Leone and Angola. *See About-KP Basics*, *supra* note 8.

¹⁵ Shingirai Maparura, *To Certify or Not to Certify? Zimbabwe's Diamond Trade Under Question*, CONSULTANCY AFR. INTELLIGENCE (July 16, 2010, 8:00 AM), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=477:to-certify-or-not-to-certify-zimbabwes-diamond-trade-under-question&catid=57:africa-watch-discussion-papers&Itemid=263.

effectively reigning in noncompliance in the targeted extraction industries. To achieve this goal, this new framework will have to combine the successful aspects of the Kimberley Process Certification Scheme with the structures that subsequent frameworks have established (e.g., customizable standards and procedures), ground itself in principles of international law to make it enforceable internationally, and introduce some novel ideas to the international mineral regulatory regime.

I. THE KIMBERLEY PROCESS: AN EFFECTIVE, YET FLAWED, FRAMEWORK

The Kimberley Process Certification Scheme (“KPCS”) was established largely in response to the civil wars in Sierra Leone and Angola and the proliferation of conflict diamonds¹⁶ that sustained the two conflicts.¹⁷ The magnitude of the atrocities committed by the various fighting factions and the effect on all levels of society prompted states and industry leaders to establish a new type of international framework to ensure that diamonds were not used to support armed conflict ever again. The KPCS has been very successful in lowering the trade of conflict diamonds, but in recent years has come across problems maintaining a strict enforcement of its system. Soon after its implementation, other systems similar to the KPCS emerged to attempt to fill in the blind spots of the KPCS. Despite its failures, the legacy of the KPCS should not be minimized.

A. *Sierra Leone and the Public Eye*

The civil war in Sierra Leone began in 1991 when Foday Sankoh, a former corporal in the army, created the Revolutionary United Front (“RUF”) to overthrow President Momoh.¹⁸ The war lasted until 2002, claiming over 50,000 lives and involving an incalculable number of inhumane acts.¹⁹ Although popular sentiment in the African state turned against the RUF early on, the insurgents were still able to carry on their mission for more than a decade due to their control of the diamond mines in the country.²⁰

¹⁶ Blood diamonds, or conflict diamonds, are diamonds used to finance wars and other armed conflict. See *Factbox*, *supra* note 3.

¹⁷ See *id.*; see also Maparura, *supra* note 15.

¹⁸ *Factbox*, *supra* note 3.

¹⁹ The RUF committed murder, rape, mutilation, and used child soldiers. *Id.*

²⁰ *Id.*

The war lasted as long as it did because, in addition to the world's reluctance to intervene, the rebels had considerable aid from Charles Taylor in neighboring Liberia. Taylor helped smuggle arms to the rebels while his own forces crossed the border to help commit the atrocities that the RUF carried out.²¹ Taylor was the leader of his own rebel group in Liberia, the National Patriotic Front of Liberia ("NPFL").²² Taylor and the NPFL armed the RUF in return for diamonds, which were abundant throughout the southeast of Sierra Leone.²³ The NPFL and RUF were able to take control of the diamond mines early during the conflict and used the proceeds of sales to acquire weapons.²⁴ The sale of diamonds enabled the rebel groups to continue their bloodshed once public favor for their cause all but vanished.²⁵ During the armed conflict, there was no global system to track diamonds from extraction to market and so foreign distributors had no idea the diamonds they handled were coming from war-torn Sierra Leone via Liberia; this lack of oversight facilitated the diamonds-for-arms trade that was the lifeline of the RUF throughout the conflict.

Once the atrocities and circumstances surrounding the production of Sierra Leonean diamonds reached the world community's collective conscious, these diamonds became known as blood, or conflict, diamonds.²⁶ The prevalent use of child soldiers by Taylor, the NPFL, and the RUF was not limited to fighting and committing war crimes, but included mining the diamonds in hazardous and often fatal conditions; the blood spilt by these children both during extraction and the fighting the diamonds sustained led to the popular nomenclature.²⁷ The horrific civil war helped push conflict diamonds to the forefront of the public eye and the need to better police the sale of diamonds worldwide.

²¹ *Id.*; see also *Who Is Charles Taylor*, OPEN SOC. JUST. INITIATIVE, <http://www.charlestaylortrial.org/trial-background/who-is-charles-taylor> (last visited Jan. 9, 2014).

²² *Who Is Charles Taylor*, *supra* note 21.

²³ *Factbox*, *supra* note 3.

²⁴ Ben Brumfield, *Charles Taylor Sentenced to 50 Years for War Crimes*, CNN (May 30, 2012), <http://www.cnn.com/2012/05/30/world/africa/netherlands-taylor-sentencing/index.html>.

²⁵ See *Factbox*, *supra* note 3.

²⁶ Brumfield, *supra* note 24; see also *Factbox*, *supra* note 3.

²⁷ Brumfield, *supra* note 24.

B. *Angola and the International Community's Mobilization*

The Angolan civil war began during the war for independence in 1961 and continued until 2002.²⁸ The three major fighting factions were the Popular Movement for the Liberation of Angola, the National Union for Total Independence of Angola (“UNITA”), and National Liberation Front of Angola; all three vied for power during the country’s war for independence and continued their conflict throughout the long civil war after formal independence.²⁹ Throughout the 1980s, the civil war was largely one of the many proxy wars of the Cold War, both sides being backed by either the United States or the Soviet Union; however, despite the end of the Cold War the conflict continued through the early 2000s.³⁰ By the end of 2002, more than 500,000 people had perished during the conflict.³¹ As was the case in Sierra Leone, the conflict in Angola was prolonged through funding from diamond revenues.³²

During the civil war, UNITA held control over the diamond mines in Angola and consequently became the de facto government authority, trading over \$3.7 billion worth of conflict diamonds from 1992 to 1998.³³ The importance of diamond extraction to the civil war was not lost on the United Nations, who recognized what was happening and took action, albeit late in the conflict.³⁴ In 1998, the United Nations placed the UNITA government under sanctions with the goal of ceasing the armed conflict by using pressure from the international community.³⁵ After an UN-mandated report, known as the Fowler Report, revealed that diamond sales predominantly supported the UNITA government’s reign, and that violations of the sanctions were commonplace, Security Council Resolutions 1173 and 1176, which banned diamond purchases from Angola, were passed.³⁶ The United Nations reasoned that choking the financial lifeline of UNITA would force it to give up power

²⁸ Lucinda Saunders, *Note, Rich and Rare Are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 *FORDHAM INT’L L. J.* 1402, 1417 (2001); *The Angolan Civil War: The Concept of “Blood Diamonds” Explained*, UGS ANGL., <http://www.ugs-angola.com/the-angolan-civil-war-the-concept-of-blood-diamonds-explained.php> (last visited Jan. 9, 2014).

²⁹ Saunders, *supra* note 28, at 1417–20; *The Angolan Civil War*, *supra* note 28.

³⁰ *The Angolan Civil War*, *supra* note 28.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Maparura, *supra* note 15.

³⁶ *Id.*; see also *The Angolan Civil War*, *supra* note 28.

and speedily end the conflict. However, despite the sanctions, UNITA was still able to smuggle conflict diamonds out of the country to support its efforts.³⁷

While Charles Taylor was helping the Sierra Leonean rebels sell their diamonds through Liberian markets and dealers, the Angolan rebel factions had a much more direct route to the market through De Beers, which had a near-monopoly on the world's diamond supply.³⁸ Throughout the 1990s, De Beers directly purchased diamonds from UNITA. Human Rights Watch placed the figure around \$760 million, approximately a fifth of UNITA's revenue throughout the decade.³⁹ Even after the sanctions were promulgated in 1998, De Beers continued to purchase Angolan diamonds: whether they did so knowingly is still being debated.⁴⁰

Regardless of De Beers' intent, its involvement in Angola and indirect purchases of Sierra Leonean diamonds showed the world that policing the States themselves would not be enough to curb the proliferation of conflict diamonds. Even companies as powerful as De Beers, who had a virtual monopoly worldwide, could not be sure that the diamonds they were purchasing were completely conflict-free.⁴¹ Diamonds needed to be tracked from extraction to market, meaning that both states and industry leaders had to be involved in policing and held accountable for the proliferation of conflict diamonds.

C. *Creation of the KPCS*

In response to the failed UN sanctions in Angola, a group of southern African diamond-producing states met in Kimberley, South Africa in 2000.⁴² There, the states agreed to establish an international standard of trading only

³⁷ *The Angolan Civil War*, *supra* note 28.

³⁸ Saunders, *supra* note 28.

³⁹ *Id.*; see also Vikki Kratz, *Is Your Engagement Ring Funding a War?*, ALTERNET (Mar. 31, 2000), http://www.alternet.org/story/318/is_your_engagement_ring_funding_a_civil_war.

⁴⁰ Kratz, *supra* note 39. De Beers's control of the diamond trade was possible through its ownership of mines, purchase of as many diamonds from the open market as possible, and its many subsidiaries; the use of subsidiaries suggests that De Beers's actual contribution to the UNITA diamond trade was higher than a fifth of total sales. Patricia O'Connell, *The Issue: De Beers' Multifaceted Strategy Shift*, BUSINESSWEEK (Jan. 6, 2009), <http://www.businessweek.com/stories/2009-01-06/the-issue-de-beers-multifaceted-strategy-shift> *businessweek-business-news-stock-market-and-financial-advice*; Saunders, *supra* note 28. De Beers's wide-reaching diamond acquisition strategy was the reason the company bought from the Angolan rebels before the sanctions were in place and from sources illegally trading Angolan diamonds after the sanctions. *Id.* De Beers's oversight, if any, was weakened by its sheer number of sources. *Id.*

⁴¹ *Id.*; see also Kratz, *supra* note 39.

⁴² Maparura, *supra* note 15.

conflict-free diamonds.⁴³ The United Nations supported the Kimberley proposal with a resolution in the General Assembly later that year stating its approval of the creation of such an international framework.⁴⁴ By 2002, negotiations between states, civil society organizations, and the diamond industry succeeded in creating the KPCS.⁴⁵

The KPCS entered into force in 2003.⁴⁶ States, industry leaders, and civil society organizations are part of the KPCS, jointly policing the diamond industry in a tripartite framework.⁴⁷ There are currently fifty-four sovereign participants signed onto the KPCS, and because the European Union is considered as one participant, the KPCS has eighty-one total state participants.⁴⁸ The World Diamond Council largely represents the diamond industry in the KPCS, while Global Witness,⁴⁹ KPCS's largest NGO member, and Partnership Africa Canada represent civil society.⁵⁰

The KPCS represents over ninety-nine percent of the world's diamond producers, effectively giving the KPCS the ability to monitor the entire world's diamond industry.⁵¹ Though the UN plays no formal role in the implementation of the KPCS, it does officially renew its support of the framework annually.⁵² The cooperation between state governments, civil society organizations, and the diamond industry allows the KPCS to involve nearly all of the invested actors of the diamond trade, from extraction to market.⁵³

D. Structure and Successes of the KPCS

The KPCS is not an international organization per se; instead, aided by both industry and civil society, it relies on its state participants to self-police through national legislation.⁵⁴ It is not a legal international agreement or treaty

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *About-KP Basics*, *supra* note 8.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Global Witness withdrew in 2011. *See infra* Part I.F.

⁵⁰ *Frequently Asked Questions*, KIMBERLY PROCESS, <http://www.kimberlyprocess.com/en/faq> (last visited Feb. 20, 2014).

⁵¹ *About-KP Basics*, *supra* note 8.

⁵² *See, e.g.*, G.A. Res. 64/109, U.N. Doc. A/RES/64/109 (Mar. 2, 2010).

⁵³ *About-KP Basics*, *supra* note 8.

⁵⁴ *Frequently Asked Questions*, *supra* note 50.

either Rather, it is implemented through the national legislatures, each state doing so independently of one another.⁵⁵ While state participants enforce the KPCS through their legislatures, the non-state participants do their part by providing technical and administrative support.⁵⁶ Only suppliers must be KPCS-approved; individual retail jewelers do not need KPCS approval.⁵⁷ Participant suppliers can only purchase diamonds accompanied by a KPCS certificate issued by the authorities of both the importing and exporting states. These certificates state that the diamonds within that particular shipment are conflict-free, have been approved by the exporting state, and may be exported only to those states that have acceded to, and complied with, the KPCS.⁵⁸

Twice a year, the participants and observers of the KPCS meet to discuss its implementation.⁵⁹ Working groups of states monitor its implementation, accept new members, discuss the technical aspects of the scheme, and generally ensure that the KPCS is running smoothly.⁶⁰ To become a participant of the KPCS, a state must be able to certify that the diamonds meet KPCS standards for KPCS participant suppliers.⁶¹ Furthermore, participants must pass national legislation supporting the goals of the KPCS, create institutions to further those goals, establish import and export controls related to the diamond trade, and commit to a transparency and exchange of statistical data.⁶²

One state chairs the KPCS Secretariat on a rotating basis and oversees the framework as a whole.⁶³ The combination of governmental, civil society, and industry efforts has yielded impressive results in the short time of the KPCS's operation.⁶⁴ By 2009, the KPCS succeeded in lowering the sales of conflict diamonds from their 1990s level of fifteen percent of the world's diamond trade to merely 0.4 percent.⁶⁵ The legal diamond market has greatly expanded thanks to the KPCS. Sierra Leone's diamond revenue has grown from virtually

⁵⁵ *Id.*

⁵⁶ Participants are the state actors, while observers are made up of the various civil society organizations and industry actors. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Polished diamonds do not need a certificate. *Id.*

⁵⁹ *See, e.g., April 2012 Working Group Publication Summaries*, KIMBERLY PROCESS (July 28, 2013, 1:17 PM), <http://www.kimberlyprocess.com/en/april-2012-working-group-public-summaries-0>.

⁶⁰ *About-KP Basics*, *supra* note 8.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* To date, South Africa, Canada, Russia, Botswana, the EU, India, Namibia, Israel, the Democratic Republic of Congo, and most recently, the United States have chaired the KPCS. *Id.*

⁶⁴ *Id.*

⁶⁵ *Maparura*, *supra* note 15.

zero during the civil war to \$125 million in 2006 and already \$102 million just in the first half of 2013.⁶⁶

Two successful cases of self-policing occurred: when Israel expelled one of its Diamond Exchange's members in 2010 for importing Zimbabwean diamonds while the latter country was under a ban by the KPCS; and when the Democratic Republic of Congo ("DRC"), in order to avoid criticism for noncompliance with the KPCS, voluntarily suspended its trade due to its inability to effectively stop illegal trading.⁶⁷ This is the system working as envisaged.

E. Shortcomings of the KPCS

Although the KPCS has been largely successful in its mission, it is far from perfect. The KPCS lacks a central authority and any enforcement organ independent of the participants' own governments.⁶⁸ Any action taken by the KPCS requires unanimous consent, which makes any proposed resolution tough to act upon. Moreover, the rotating nature of the Secretariat is also an obstacle to achieving consistency in governance and policy.⁶⁹ The non-binding nature of the KPCS regulations furthers this enforcement problem, because compliance is voluntary and any action taken by the KPCS is not backed by international law binding or persuasive.⁷⁰

Consequently, countries such as the DRC, Côte d'Ivoire, Zimbabwe, and Venezuela have continued exporting conflict diamonds despite varying degrees of noncompliance.⁷¹ Côte d'Ivoire is currently under UN sanctions for its trade in conflict diamonds during its present civil war and is now suspended from participation in the KPCS after no action from the KPCS could quell the illegal trade.⁷² Zimbabwe and Venezuela are discussed in detail below.

⁶⁶ *Frequently Asked Questions*, *supra* note 51; see also Christo Johnson, *Sierra Leone Diamond Exports up 43 Pct in First Half of 2013*, REUTERS (Aug. 16, 2013, 7:45 AM), <http://www.reuters.com/article/2013/08/16/sierraleone-diamonds-exports-idUSL6N0GB0D120130816>.

⁶⁷ *Israeli Diamond Trader Banned for 'Blood Diamond' Link*, BBC NEWS (Dec. 29, 2010, 8:08 AM), <http://www.bbc.co.uk/news/business-12088658>; Maparura, *supra* note 15.

⁶⁸ Maparura, *supra* note 15.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* The DRC eventually removed itself from the KPCS. *Id.*

⁷² *KP Participants and Observers*, KIMBERLY PROCESS, <http://www.kimberlyprocess.com/web/kimberly-process/kp-participants-and-observers> (last visited Jan. 9, 2014); see also Maparura, *supra* note 15.

1. Zimbabwe: Opaque State-Run Mines

One interesting example of the shortcomings of the KPCS is Zimbabwe's continued KPCS-violating exports, especially those from the Marange diamond fields.⁷³ While the KPCS banned imports from, and exports to, Zimbabwe in 2009 due to reports relating to military control of the diamond mines, the KPCS reinstated Zimbabwe in late 2011 after reassessment.⁷⁴ Zimbabwe's 2009 suspension, based on allegations of the military controlling the mines and funneling revenues to President Robert Mugabe's Zanu-PF party, was not challenged by the state at the time.⁷⁵ The violations were not limited to the military control as human rights groups claimed that workers were not only physically beaten at the Marange mines, but that some were conscripted to work there.⁷⁶ Though it did not bring the violations to light on its own accord, Zimbabwe did accept its temporary ban and soon sought reinstatement, citing improved conditions at its mines.⁷⁷ Both the European Union and the United States attempted to block Zimbabwe's reinstatement to the KPCS when talks were held in 2011.⁷⁸

Zimbabwe's exports were considered conflict diamonds because the proceeds going to President Mugabe supported his violent, dissent-eradicating regime and thus ran afoul of the KPCS standards.⁷⁹ Furthermore, Zimbabwe did not report the incidents at the mines nor did it reveal where the revenue was going, which was a breakdown in the self-policing facet of the KPCS.⁸⁰ Zimbabwe also continued to export its conflict diamonds, which under the KPCS should have ceased once the KPCS took action.

While the KPCS deemed that the allegations that brought the temporary suspension were remedied,⁸¹ there are still problems with the operation of the

⁷³ Maparura, *supra* note 15.

⁷⁴ *Kimberley Process: Zimbabwe Diamond Exports Approved*, BBC NEWS (Nov. 2, 2011, 9:34 AM), <http://www.bbc.co.uk/news/world-africa-15554609>. The Zimbabwean government co-owns Marange Resources while it co-owns another company with the Chinese government; these two companies are currently exporting diamonds from the controversial Marange mines. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ While the conflict these diamonds supported was not a civil war, the Mugabe regime still used the revenue to violently crack down during elections and at other times. *See* Maparura, *supra* note 15.

⁸⁰ *See Kimberley Process, supra* note 74.

⁸¹ *See Marange Diamonds: Zimbabwe Denies "Torture Camp"*, BBC NEWS (Aug. 9, 2011, 1:47 PM), <http://www.bbc.co.uk/news/world-africa-14468116> (discussing allegations of whippings, dog maulings, death

mines. There have been contracts awarded to companies with little to no experience in diamond mining. More often than not, these companies had connections to the Zimbabwean government.⁸² These companies receive very favorable concessions and have not been able to adequately prove where the diamonds they are exporting are coming from within Zimbabwe.⁸³ Furthermore, the actual owners of many of these companies are unknown; this, combined with a \$2 billion annual yield of diamonds,⁸⁴ results in little guarantee of the circumstances surrounding extraction and even less accountability.⁸⁵ Without such proof, the KPCS's certification becomes meaningless. Zimbabwe approves these diamonds in spite of the inability to ensure conflict-free extraction.

The lack of transparency in the process enables the state to funnel revenue back into itself, as well as to the companies running the mines, with no watchdog stopping them. Though the KPCS does require some sort of transparency in the national legislation of its participants, it is not sufficient to preclude corruption in revenue distribution because states that do not want to fully comply generally will not police themselves within the KPCS.

Even after taking the mining fields from the police forces that oversaw them, under state control, there have been reports of underage child miners, severe beatings, and even wrongful death suits against the companies.⁸⁶ Zimbabwe has even exported diamonds to Mozambique, a state currently not a member of the KPCS and so in further violation of the KPCS.⁸⁷ To accomplish this, Zimbabwe is exporting its diamonds through unregulated ports, making it difficult to ensure workers are treated humanely. The most egregious allegation, however, is the report of mass rapes by soldiers at the mines.⁸⁸

The KPCS has minimum standards in determining whether diamonds are conflict-free, but, according to the KPCS Secretariat, Zimbabwe is in a strange position of meeting the KPCS standards while extracting the diamonds in an

cover-ups by military personnel, mock drownings, and rape). Representatives from the KPCS visited the mines in 2010 and though finding sub-par conditions, determined there was significant progress. *Id.*

⁸² *Mugabe Man Cashes in on Diamond Fields*, MAIL & GUARDIAN (Sept. 7, 2012), <http://mg.co.za/article/2012-09-07-00-mugabe-man-cashes-in-on-diamond-fields>.

⁸³ *See id.*

⁸⁴ Jason Moyo, *Murky World of Marange Mining Firms*, MAIL & GUARDIAN (July 6, 2012, 7:13 AM), <http://mg.co.za/article/2012-07-05-murky-world-of-marange-mining-firms/>.

⁸⁵ *See Mugabe Man Cashes in on Diamond Fields*, *supra* note 82.

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *Id.*

environment allegedly full of human rights abuses.⁸⁹ Only a stronger regulatory framework can prevent situations like that in Zimbabwe. The Mugabe regime is endangering the state and flouting the authority of the KPCS, all the while using diamond revenue to keep itself above the hyperinflation that is so rampant in Zimbabwe.⁹⁰ Proper distribution of diamond revenue is integral to further development. A truly international and legally binding framework is needed to prevent Zimbabwe's government from this abuse of its resources. Otherwise, Zimbabwe will continue to profit from its diamond trade. This is a tragedy as neither Zimbabwe nor the legitimacy of the KPCS benefit from the current situation.⁹¹

2. *Venezuela: Unregulated and Unmonitored*

Another example of the KPCS's failure is Venezuela. Although the country voluntarily removed itself from the KPCS in 2008, it was largely the result of the inability of the KPCS to enforce compliance in a legally binding manner.⁹² The state is still considered a member, albeit one on probation.⁹³ This situation shows that a state can continue to export inhumanely-mined diamonds, whether under the KPCS's framework or while suspended. Thus, if a state does not want to comply, it will not. Venezuela exported conflict diamonds via Guyana using falsified KPCS certificates stating the shipments were legally mined, marketed, and generally in compliance with KPCS standards.⁹⁴

Venezuela did little to ensure that diamond extraction was regulated, a clear abdication of its responsibilities to ensure compliance with the KPCS within its borders.⁹⁵ For Venezuela, forging certificates while participating in the KPCS was no different than exporting its diamonds to whomever it wanted without going through the motions of compliance and thus withdrew from the KPCS. Continuance of this conduct may result in Venezuela's expulsion from the KPCS—something Global Witness had called for in recent years⁹⁶—but as of the writing of this Comment, the state is still only temporarily suspended.⁹⁷

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *KP Participants and Observers, supra note 72.*

⁹³ *See id.*

⁹⁴ Gupta & Elana, *supra note 8.*

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.*

In addition to fabricating certificates, Venezuela has not submitted its required annual reports about diamond exports and imports for many years.⁹⁸ Though it has started producing these reports recently, they are usually filed late and almost always substantively insufficient.⁹⁹

As for human rights abuses, child miners are used exclusively in the mines near Icabarú, one of many mines whose yields are untraced from extraction to market.¹⁰⁰ Venezuela does not seem concerned with tracking the mine deposits or ensuring that extraction is taking place in an ethical manner.¹⁰¹ There is nothing the KPCS can do other than expel Venezuela from the KPCS; even then the state will face no impediment to continuing its illicit trade as there is no binding international law backing the actions of the KPCS.

Venezuela has some of the biggest deposits of diamonds in the world, and smugglers make millions of dollars every year from the state's failure to follow KPCS protocols.¹⁰² Even the smugglers have learned to not worry about reprisals from the authorities—whether KPCS or state—and engage in the illicit trade regardless of the unregulated dangers. One smuggler claimed that the ever-present violence and high risk of death in the illegal diamond trade is something he must deal with to make a living.¹⁰³ For him there is no longer a legitimate diamond trade in which to engage and nothing to ensure he can make a humane living.¹⁰⁴

F. Alternatives to the KPCS

The situations in Zimbabwe and Venezuela highlight some of the institutional problems with the KPCS. If non-compliance issues were not substantial enough, Global Witness withdrew from the KPCS in 2011 in response to the situations in Zimbabwe and Côte d'Ivoire.¹⁰⁵ In 2009, an official with Partnership Africa Canada, another NGO that is a major part of the KPCS, resigned from the organization, claiming that the KPCS was quickly turning into a "toothless League of Nations."¹⁰⁶ Adding to this, the continuing

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

civil war in Côte d'Ivoire, the violence in Venezuela, and Zimbabwe's liminal behavior show that the consequences of a framework with insufficient enforcement are dire. However, since the creation of the KPCS, several new organizations have been created to attempt to solve the problems that the KPCS faces in enforcement. Each of them provides blueprints for a more effective framework.

1. The Responsible Jewellery Council

The Responsible Jewellery Council ("RJC") is an organization consisting of large companies from the mining sector and the retail sector of the gold and diamond industries.¹⁰⁷ There are more than 400 members, but unlike the KPCS, states are not involved.¹⁰⁸ RJC seeks to have its members meet certain ethical, social, and environmental criteria.¹⁰⁹ The environmental factor brings a new concern under the extraction framework purview. RJC uses a third-party independent auditor to determine compliance, rather than having an internal enforcement organ like the KPCS's monitoring system.¹¹⁰ This ensures that the shortfalls of self-policing in the KPCS are not encountered, but there is a weakness in the monitoring of the minerals in that the RJC framework does not have the mandatory chain of custody procedures that the KPCS has.¹¹¹

Additionally, a third-party auditor should help lower the risk of corruption of an extraction framework. However, it lacks an extraction-to-market assurance of human rights protections due to the lack of state involvement. National governmental resources are necessary in regard to import and export controls and RJC loses out on the more localized authority of municipal governments where extraction takes place. Local authorities have the ability to

¹⁰⁷ SHAWN BLORE & IAN SMILLIE, TAMING THE RESOURCE CURSE: IMPLEMENTING THE ICGLR CERTIFICATION MECHANISM FOR CONFLICT-PRONE MINERALS 20 (2011), available at http://www.pacweb.org/Documents/icglr/PAC_Report_on_ICGLR_RCM-03-2011-eng.pdf.

¹⁰⁸ *Members*, RESPONSIBLE JEWELLERY COUNCIL, <http://www.responsiblejewellery.com/members> (last visited Oct. 14, 2013).

¹⁰⁹ *Id.*

¹¹⁰ *See* RESPONSIBLE JEWELLERY COUNCIL, <http://www.responsiblejewellery.com> (last visited Oct. 14, 2013).

¹¹¹ *Chain-of-Custody Certification*, RESPONSIBLE JEWELLERY COUNCIL, <http://www.responsiblejewellery.com/chain-of-custody-certification> (last visited Oct. 14, 2013). This procedure entails stringent requirements that must be met in each stage of the extraction-to-market progression; failure to meet requirements in one stage can halt the shipment until the problems are rectified. *See* RESPONSIBLE JEWELLERY COUNCIL, CHAIN-OF-CUSTODY (COC) STANDARD 7 (2012), available at http://www.responsiblejewellery.com/files/S002_2012_RJC_CoC_Standard_PM.pdf.

keep tabs on daily mining practices and respond quicker to reported human rights abuses.

2. *The Diamond Development Initiative*

The Diamond Development Initiative (“DDI”) seeks to build upon the KPCS by fostering an environment that leads to economic development not just for the state as a whole, but also for the miners and their communities through the collaboration of civil society and the diamond industry.¹¹² Partnership Africa Canada, an observer with the KPCS, is also involved with DDI.¹¹³ DDI operates in collaboration with the KPCS as well.¹¹⁴ DDI focuses largely on the plight of artisanal and alluvial (surface diamonds) miners, attempting to put in place regulations that will give laborers a better share of the revenue from their efforts outside of large mining companies.¹¹⁵ DDI works with the KPCS’s Working Group on Artisanal and Alluvial Production; however, both Côte d’Ivoire and Zimbabwe are members of the Working Group.¹¹⁶ Thus, DDI’s effectiveness in the KPCS is limited because it works closely with states that currently do not comply with the KPCS.

The organization’s main goals are greater transparency, open markets, and greater organization in the artisanal and alluvial industries.¹¹⁷ In November 2011, DDI and RJC partnered to advance each of their goals.¹¹⁸ Each organization became a member of the other to ensure greater cooperation to achieve improved social, environmental, and labor practices.¹¹⁹ The joint venture will seek governmental and intergovernmental sponsors for its projects, a move that will enable both organizations to better ensure ethical mining.¹²⁰ Using state entities as sponsors avoids the KPCS’s problem of self-

¹¹² *Diamond Development Initiative Builds on Kimberley*, INT’L DIAMOND EXCHANGE (Apr. 1, 2007, 6:28 AM), http://www.idexonline.com/portal_FullNews.asp?id=27291.

¹¹³ *Id.*

¹¹⁴ See *Kimberley Process Development Agenda*, DIAMOND DEV. INITIATIVE, <http://www.ddiglobal.org/pages/projects-kimberley-process-development-agenda.php> (last visited Oct. 6, 2013).

¹¹⁵ *DDII Mission Statement*, DIAMOND DEV. INITIATIVE, <http://www.ddiglobal.org/pages/mission.php> (last visited Oct. 16, 2013).

¹¹⁶ *Kimberley Process Development Agenda*, *supra* note 114.

¹¹⁷ *Id.*

¹¹⁸ *Diamond Development Initiative International (DDII) and Responsible Jewellery Council (RJC) Announce Working Relationship on Artisanal Diamond Production*, DIAMOND DEV. INITIATIVE (Nov. 16, 2011, 3:00 PM), available at http://www.ddiglobal.org/login/Upload/News-Release-DDII-RJC_MOU.pdf.

¹¹⁹ *Id.*

¹²⁰ See *id.*

policing by corrupt states but adds the benefit of having a localized authority and the resources of governments at the ready.

DDI would be more effective in a framework that has an enforcement mechanism, as attempting to promote transparency in resource extraction will fail if there are no consequences to noncompliance. The sponsor aspect promotes compliance: if states are stakeholders as sponsors who have committed resources, they are more invested in the success of the framework than if they were merely participants subject to oversight.

3. *Extractive Industries Transparency Initiative*

Perhaps the best KPCS-type framework for protecting human rights is the Extractive Industries Transparency Initiative (“EITI”), a global framework that promotes revenue transparency at the local level of production.¹²¹ Like the KPCS, EITI is a tripartite collaboration between states, industry, and civil society that places responsibility of implementation in the hands of the states.¹²² The EITI standard is implemented in the oil, gas, and mining industries and therefore provides a relevant model.¹²³ EITI was established in 2003 via a Statement of Principles at a conference in London and was first implemented in Azerbaijan in 2009.¹²⁴ As of this writing, twenty-five countries are compliant with the standard, thirty-five states are submitting reports, sixteen are candidates, and over eighty industry leaders were involved.¹²⁵

Unlike the KPCS, the self-implementation aspect involves adopting the general EITI framework and adapting it to suit a state’s particular needs and circumstances (e.g., level of development).¹²⁶ This customizable facet gives EITI the flexibility to work at many different levels of both state development and the extraction chain of production.¹²⁷ Such flexibility enables each state to meet base standards of transparency and expand upon them for maximum effectiveness, while not constraining them to standards they may not be able to

¹²¹ *What Is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org/eiti> (last visited March 1, 2014).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *History of EITI*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, eiti.org/eiti/history (last visited March 1, 2014).

¹²⁵ *EITI Countries*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org/countries> (last visited March 1, 2014); *Stakeholders*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://eiti.org/supporters/companies> (last visited March 1, 2014).

¹²⁶ *Id.*

¹²⁷ *Cf. id.*

achieve due to a lack of resources. The benefit of this system is clear: at a recent conference in 2011, many states brought to the table many new ways of implementing the system that could be used by other participants.¹²⁸ This sort of innovation allows for an international framework to adapt quickly when shortcomings are identified.

Furthermore, EITI has received the support of the UN, the G8, the G20, the African Union, and other organizations; this broad spectrum of support on top of the tripartite enforcement framework state, civil society, industry makes EITI a great model for extractive industry safeguards.¹²⁹ The KPCS has the support of the UN, but EITI involves these IGOs at a higher level of integration.¹³⁰ The more than 200 reports filed by implementing states has accounted for over \$1 trillion U.S. dollars of revenue that can be traced.¹³¹

States provide financial support to the EITI framework through the World Bank, while the International Monetary Fund helps states fund initiatives.¹³² This is similar to DDI's sponsor system and makes the involved actors more invested in the success of the framework. EITI's system allows for lesser-developed states to implement the EITI standards at a much broader and effective manner than would be feasible if they only had their own resources for implementation.

EITI is rather new and its success in the long-term will not be known for a while. EITI also does not have an enforcement mechanism. Rather, states announce their intentions to implement it and are then either deemed compliant with EITI's standards or not by the EITI Secretariat—there are no penalties for non-compliance.¹³³ For all the positives EITI involves, the lack of enforcement is a major problem. However, EITI provides a good framework as a blueprint for future endeavors; the flexibility of implementation and involvement of IGOs set it apart from the other frameworks developed so far.

¹²⁸ *History of EITI*, *supra* note 124. For example, Ghana and Peru started tracking payments to the subnational level of government, Liberia included forestry and agricultural industries in its monitoring, and Nigeria's use of additional audits. *Id.*

¹²⁹ See *EITI Factsheet*, EITI, <http://eiti.org/document/factsheet> (last visited Mar. 3, 2014).

¹³⁰ See *supra* Part I.C–D.

¹³¹ *History of EITI*, *supra* note 124.

¹³² *EITI Factsheet*, *supra* note 129.

¹³³ See *id.*

G. The Legacy of the KPCS

The KPCS was a great international innovation and has been largely successful in its mission to stymie the flow of conflict diamonds in the world. In just one decade, the percentage of the diamond trade consisting of conflict diamonds has been reduced to nearly nothing. However, there are fundamental flaws in the framework that keep it from being a perfect system.

The self-policing aspect of the KPCS allows for illegal trade to occur in countries where government institutions are weak, or worse, where the governments either fail to take action or are actively involved in the circumvention of KPCS protocols. Compounding this problem is the fact that every KPCS decision requires unanimity, making it next to impossible to take compliance action against a member that refuses to comply. Venezuela, Zimbabwe, Côte d'Ivoire, and the DRC are examples of these flaws. Furthermore, the KPCS does not seek to create an environment that protects human rights or promotes development through transparency, both of which would help clean up the industry more effectively than by only ensuring that the mined minerals are conflict-free.

The framework would benefit from a permanent secretariat akin to that of EITI. By coordinating the various stakeholders, implementation, and funding of the framework, such a structure would provide stability at the heart of the framework. This consistency is something the annually rotating chair of the KPCS lacks. An EITI-like secretariat would create a degree of separation between states implementing the framework and the apparatus that keeps the framework operating efficiently.

Of course, the biggest improvement the KPCS would benefit from is making its protocols an internationally legally binding treaty. In doing so, violations could be brought before an international or national tribunal to adjudicate compliance issues. This would give the framework the ability police compliance in states like Venezuela, Zimbabwe, and Côte d'Ivoire. With the force of law behind the obligations imposed upon states and non-state actors, there would be real ramifications for noncompliance.

The KPCS is a framework that, while flawed, provides a great blueprint for tackling the problems involved in extractive industries worldwide. Using the KPCS experience as lessons learned, the rest of this Comment will focus on the need for a similar international framework in response to China's increased involvement in the cobalt and copper industries in Africa.

II. CHINA IN AFRICA

When discussing Africa's experience with the rest of the world vis-à-vis resource exploitation, the conversation has historically focused on the West.¹³⁴ Today, the geopolitical landscape is shifting toward the East; China's emergence as one of the biggest economic powers has inevitably had direct effects in resource-rich Africa. China claims that its growing relationship with Africa is not exploitive in the vein of Western colonialism, but rather its objective is to help spur development in Africa as China itself grows.¹³⁵ However, the structure of Chinese mining firms in Africa has created a troubled environment where human rights are infringed upon, safety standards are minimal, and shady business deals with corrupt governments take place.¹³⁶ Two of China's most mined minerals are cobalt and copper, both of which are used in technologies like mobile phones.¹³⁷ The growing reliance on these minerals for its expanding manufacturing economy means that unless China is sincere in its statements of investing with Africa's interests in mind, there will be terrible consequences—at best, business as usual.

A. *A New Type of Relationship?*

China is in the midst of a decade during which it has developed a substantial and growing relationship with Africa.¹³⁸ Africa's wealth in resources makes it attractive for the resource-poor Asian state.¹³⁹ China needs an incredible amount of minerals for their growing electronics industry, especially the mobile phone and computer industries.¹⁴⁰ As worldwide demand for these technologies continues to increase, it seems inevitable that China will expand its mining operations in Africa. Cobalt and copper are integral to these industries, with China importing the large majority of its cobalt from Africa and increasing its import of African copper in recent years.¹⁴¹

¹³⁴ Jacob Kushner, *Corruption in the Congo: How China Learnt from the West*, THINK AFRICA PRESS (Oct. 3, 2013, 10:29 AM), <http://thinkafricapress.com/drc/corruption-congo-how-china-learnt-west>.

¹³⁵ Chad Fraser, *How China Is Remaking Africa's Mining Sector*, RESOURCE INVESTING NEWS (Aug. 20, 2012, 11:00 AM), <http://resourceinvestingnews.com/41702-china-africa-mining-sector-investing-barrick-gold.html>.

¹³⁶ *Id.*

¹³⁷ See *infra* notes 188–97 and accompanying text.

¹³⁸ See *China in Africa*, *supra* note 10.

¹³⁹ See *id.*

¹⁴⁰ *Supra* text accompanying notes 10–13.

¹⁴¹ Fraser, *supra* note 135.

China is now the biggest investor in Africa, but in doing so has sought to distinguish itself from the previous eras of colonialism and exploitive foreign investment.¹⁴² China believes that, like Africa, it was a victim of Western colonialism's exploitive practices and thus would be a better benefactor for the continent than the Western powers.¹⁴³ This "South-South" investment focuses on the mineral-rich areas of Africa.¹⁴⁴ China, in return for mineral concessions, pours money into large infrastructure projects such as roads, railways, and telecommunications.¹⁴⁵ The rate of this investment evinces just how fast China is growing its presence in Africa. In 1990, Chinese foreign direct investment ("FDI") was around £30 million; during the last decade FDI has grown immensely, reaching £1 billion in 2005 and approximately £53 billion by 2008.¹⁴⁶ China characterizes their investment strategy as "non-interference," meaning that there are no conditions attached to the money being sent into the receiving states.¹⁴⁷ Attaching conditions to investment or aid money is something Western countries have often done with their foreign investment in Africa to ensure some of their interests are met.¹⁴⁸

B. *Conflict of Cultures*

However, despite the desire to distinguish itself from the rest of the world, China's increased presence in Africa still creates problems. Chinese mining companies hire Chinese nationals to run and manage their operations in Africa, leaving only the physical mining jobs available to Africans.¹⁴⁹ Problems arising between the African labor force and the Chinese managers are common in most employment situations, but the gap between what companies often get away with in China despite the state's labor laws and what is expected from

¹⁴² *Id.*

¹⁴³ *See id.*; *see also* Tim Whewell, *China to Seal \$9bn DR Congo Deal*, BBC NEWSNIGHT (Apr. 14, 2008, 12:07 PM), <http://news.bbc.co.uk/2/hi/programmes/newsnight/7343060.stm>.

¹⁴⁴ *See China in Africa*, *supra* note 11. South-South relations are trade, technical, environmental, and social relations between developing countries. *See South-South Cooperation*, KNOWLEDGE FROM THE SOUTH, <http://www.saberdelsur.org/en/definition-south-south-cooperation> (last visited Oct. 24, 2013). North-South relations are those between developed and undeveloped nations; the terms emerged from the fact that most Northern Hemisphere states are developed while developing states tend to be in the Southern Hemisphere. *Cf. North-South Relationship*, EIONET, <http://www.eionet.europa.eu/gemet/concept?ns=1&cp=11106> (last visited Oct. 24, 2013).

¹⁴⁵ Fraser, *supra* note 135.

¹⁴⁶ Róisín Hinds, *African Labour and the Chinese Dragon*, RED PEPPER, <http://www.redpepper.org.uk/african-labour-and-the-chinese-dragon> (last visited Oct. 24, 2013).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Shen & Han, *supra* note 9.

international firms in the eyes of African workers makes these problems difficult to resolve.¹⁵⁰

What is acceptable in China may not be acceptable in Africa, especially in the realm of labor issues. For example, though Chinese labor law caps weekly hours at forty-nine, many factories on the mainland ignore it.¹⁵¹ Firms doing business in Africa continue this behavior and circumvent labor laws even further than they can in China.¹⁵² Chinese firms, having become used to lax application of labor laws back home, have created an environment resulting in African miners singling out Chinese firms as worse than other foreign companies doing business in Africa. Workers often raise claims that Chinese firms pay the lowest wages out of any nationality, while at the same time the Chinese managers claim that the African workers are “inefficient, lazy, unskilled and disloyal.”¹⁵³

This situation is exacerbated by Chinese executives in China who do not understand the labor environment in Africa and continue to demand standards that are more permissible in China than in Africa.¹⁵⁴ As a result, African workers face mistreatment at the hands of Chinese managers as well as generally poor working conditions.¹⁵⁵ China is not the only state with mining operations that have been reported for abuses of human rights;¹⁵⁶ however, Chinese firms have been reported more than any other foreign-owned mining operation. Moreover, their reaction to complaints is less an understanding of the issues than it is begrudging acceptance and remedying of the situation.¹⁵⁷

Despite the money Chinese firms pour into large infrastructure projects in Africa, their sense of Corporate Social Responsibility (“CSR”) is severely

¹⁵⁰ See NATHAN JACKSON, CHINESE LABOR AND EMPLOYMENT LAW (2011), available at <http://blogs.law.uiowa.edu/ebook/uicifd-ebook/what-are-relevant-issues-concerning-chinese-labor-and-employment-law>.

¹⁵¹ Peter Svensson, *Foxconn Apple Factories Violated Chinese Labor Laws, According to Fair Labor Association*, HUFFINGTON POST (MAR. 29, 2012, 4:54 PM), http://www.huffingtonpost.com/2012/03/29/foxconn-apple-factories-labor-violations_n_1389392.html.

¹⁵² See Sung Un Kim, *Apple Suppliers Violating China Labor Laws: Report*, JURIST (Jun. 29, 2012, 2:10 PM), <http://jurist.org/paperchase/2012/06/apple-suppliers-violating-china-labor-laws-report.php>.

¹⁵³ Shen & Han, *supra* note 9. This sentiment is not limited to Chinese mining companies; Chinese business owners in Ghana are unable to work with Africans due to the two peoples' vastly contrasting views on wage, hours, work ethic, and employer-employee relationship. See generally, Karsten Giese, *Same-Same but Different: Chinese Traders' Perspectives on African Labor*, 69 CHINA J. 134, 138, 142, 144 (2013).

¹⁵⁴ Shen & Han, *supra* note 9.

¹⁵⁵ See *id.*

¹⁵⁶ See Kim, *supra* note 152.

¹⁵⁷ *Zambia: Workers Detail Abuse in Chinese-Owned Mines*, HUMAN RTS. WATCH (Nov. 3, 2011), <http://www.hrw.org/news/2011/11/03/zambia-workers-detail-abuse-chinese-owned-mines>.

lacking in Africa.¹⁵⁸ Those that do engage in CSR in China are predominantly firms that are monitored the closest by the government; those in less scrutinized regions do not participate in the practice at the same level.¹⁵⁹ The firms in Africa view themselves as beyond the reach of the Chinese state where they would be most likely to try to help society. Therefore, they do not practice CSR in Africa beyond the capital invested in infrastructure projects as part of their entry into a state.

Mines that are owned by other states have their share of problems and incidents, but it is the combination of poor compliance back home and the shortcomings of the Chinese South-South investment strategy that make China's endeavors in Africa the focus of this Comment. When analyzed in comparison to Australia's increasing involvement in Africa's mineral industry and its method of investment, the problems associated with China's growing relationship with Africa are that much more troubling.

C. Differing Mining Explosions: Australia and China

To further illustrate why China is of particular concern, it is helpful to discuss Australia's mining activities in Africa. The growing industry and burgeoning expansion into Africa provide a close parallel to China's recent development. Australia's situation shines additional light as to why exactly China's increased presence in Africa is particularly cause for concern.

1. Australia's Brand of Investment

Australia is projected to invest approximately \$50 billion over the next three years in its mining operations in Africa.¹⁶⁰ Australian companies have more operations in Africa than any other region in the world, with over 200 Australian Stock Exchange-listed companies involved in over 700 projects.¹⁶¹ Not content to merely reap the mineral riches, Australia has invested in many

¹⁵⁸ Corporate social responsibility includes health and safety of the community, improving disclosure to the public, creating equal treatment environments, and building a strong relationship with stakeholders. Wing S. Chow & Yang Chen, *Corporate Sustainable Development: Testing a New Scale Based on the Mainland Chinese Context*, 105 J. BUS. ETHICS 519, 521 (2012); see Fraser, *supra* note 135.

¹⁵⁹ See *id.* at 523.

¹⁶⁰ Olive Newell, *Why Australian Mining Companies Are Eyeing Africa*, AFR. REP. (Feb. 4, 2013, 2:46 PM), <http://www.theafricareport.com/News-Analysis/why-australian-mining-companies-are-eyeing-africa.html>. Seeing the success and resources of Chinese firms in Africa, Australian companies seek Chinese investment and the two countries have worked together on mining projects throughout the world. *Id.*

¹⁶¹ *Africa Down Under*, AUSAID, <http://www.usaid.gov.au/MediaReleases/Pages/Display.aspx?QID=1754>.

programs that help spur development, such as the Mining for Development Initiative and sponsoring the creation of the African Minerals Development Centre.¹⁶²

Programs such as AusAID bring African officials to Australia on study tours of the mining sector, while Australia's donations to EITI and its partnership with the International Monetary Fund assist African states in developing tax policy, liability management, and economic regulation serve the African community directly.¹⁶³ Australia has announced that it is joining the African Development Bank and is extending 1,000 scholarships to African students to study in Australia.¹⁶⁴ Compared with China's infrastructure-based investment, Australia injects cash into African states in ways that are more beneficial in the long run: Education, expertise, troubleshooting, and investment outside of the mining industry all show that Australia is investing in a sincere manner towards Africa's future development.

2. *Mining Down Under*

Australia's home mining sector has boomed in recent years, as employment has jumped from 28,500 workers in 2001 to 101,100 in 2011, almost a quadruple increase in one decade.¹⁶⁵ Western Australia, the most active mining state in Australia, generated \$5 billion in 2010 alone, compared to \$22 billion from 1984 to 2009.¹⁶⁶ Southern Australia, meanwhile, amended its Mining Act in 2011 to include a provision requiring leaseholders to file compliance reports with the Minister for Mineral Resource Development after each period set by the Minister.¹⁶⁷

¹⁶² *Id.* The Mining for Development sponsors 150 African individuals to study the mining practices, regulations, and implementation in Australia. *Id.*; *Mining Development Initiative*, AUSAID, <http://www.ausaid.gov.au/aidissues/mining/Pages/mining-for-development-initiative.aspx>.

¹⁶³ *See Africa Down Under*, *supra* note 161.

¹⁶⁴ *See id.* Australia has provided assistance to South Sudan in formulating its resource laws, provided Liberia with technical advisors, and created projects that account for a sizeable chunk of some African states' GDP. *Id.*

¹⁶⁵ Sarah Moolman, *New Regulations Will Impact Australia's Mining Boom-KPMG*, *MINING WKLY.* (Aug. 10, 2012), <http://www.miningweekly.com/article/new-regulations-will-impact-australias-mining-boom-kpmg-2012-08-10>.

¹⁶⁶ AUDITOR GENERAL, *ENSURING COMPLIANCE WITH CONDITIONS ON MINING* 4, 18 (Sept. 2011) (Austl.).

¹⁶⁷ *Mining Act 2001* (SA) (Austl.).

Western Australia included a comprehensive mental health assessment of workers in the mining industry in its investigation of incidents.¹⁶⁸ In another report, Western Australia noted that many of the compliance and enforcement apparatuses were working inadequately and in response to the findings, overhauled its system.¹⁶⁹ Of course, no amount of precaution can make the extractive industry completely incident-proof, but preventative measures, especially enforced regulations, can mitigate the dangerous nature of the industry.

In June of 2012, there were 168 serious injuries and high-risk situations in Australian mines.¹⁷⁰ In 2010, only three workers died, a decrease from seven the year before.¹⁷¹ However, there were sixty-five more disabling injuries than the previous year.¹⁷² Only twenty fatalities occurred from 2005–2010.¹⁷³ In 2011 and 2012, Western Australia successfully resolved all complaints of inadequate health and safety conditions in its mines and completed all investigations resulting from incidents.¹⁷⁴ As the mining industry expands in Australia, officials have been responsive and successful in making practices as safe and worker-oriented as possible. Such are the problems inherent in a rapidly expanding industry, but the conditions in Australia are considerably better than those in China.

3. *Mining on the Mainland*

Mining in China is governed by The Mineral Resources Law of the People's Republic of China, which sets down standards for concessions, safety and inspection, taxation, and environmental concerns.¹⁷⁵ On its face, the law is fairly comprehensive. Currently, the State Council owns all mineral resources on behalf of the Chinese government—who in turn owns all mineral resources

¹⁶⁸ DEP'T OF MINES & PETROLEUM, RESOURCES SAFETY ACHIEVEMENTS AND PERFORMANCE 2011–12, at 7 (2012).

¹⁶⁹ See generally, ENSURING COMPLIANCE WITH CONDITIONS ON MINING *supra* note 166, at 8, 10.

¹⁷⁰ Susie Nordqvist, *Safety Concerns in Booming Australian Mining Industry*, 3 NEWS (Aug. 19, 2012, 6:15 PM), <http://www.3news.co.nz/Safety-concerns-in-booming-Australian-mining-industry/tabid/421/articleID/265970/Default.aspx>.

¹⁷¹ DEP'T OF MINES & PETROLEUM, SAFETY PERFORMANCE IN THE WESTERN AUSTRALIAN EXTRACTION INDUSTRY: ACCIDENT AND INJURY STATISTICS 2009–2010, at 7 (2011).

¹⁷² *Id.* at 2. Injuries requiring more than two weeks off or a change of job responsibility are considered disabling injuries.

¹⁷³ *Id.* at 7.

¹⁷⁴ DEP'T OF MINES & PETROLEUM, *supra* note 168, at 3.

¹⁷⁵ William L. MacBride, Jr. & Wang Bei, *Chinese Mining Law Overview—Part 1 of 4*, INFOMINE (Jun. 15, 2001), <http://www.infomine.com/suppliers/supplymine-news/June15-2001.html>.

in China under the Chinese Constitution—and is the sole entity that empowers the various agencies to implement administrative regulations in the mining industry.¹⁷⁶ Though there is great state control over the mining industry, provinces may adopt local mining regulations not under the purview of the Ministry of Land and Resources.¹⁷⁷ With a state the size of China, it is logical to allow for flexibility of implementation.

China's mining laws are comprehensive, including safety procedures, noncompliance reporting, equipment training, and compliance investigation.¹⁷⁸ Depending on the degree of noncompliance, fines are levied upon investigation and in instances of extreme violation of the mining laws, criminal charges may be brought against the violating entity.¹⁷⁹ Trade unions are permissible and often bring complaints of safety violations.¹⁸⁰ However, weak rule of law, unfair competition facilitated by the state, and rent-seeking by companies all make it difficult for these mining laws to be effective.¹⁸¹ Insufficient health and

¹⁷⁶ *Id.* State-owned companies were at one time the only entities involved in mineral mining, but recently the expansion of the economy has brought in privately and collectively owned enterprises from Hong Kong, Taiwan, and other foreign investment sources. *Id.* What this means for the future is yet to be determined on an industry-wide scale.

¹⁷⁷ William L. MacBride, Jr. & Wang Bei, *Chinese Mining Law Overview—Part 2 of 4*, INFOMINE (Jun. 25, 2001), <http://www.infomine.com/suppliers/supplymine-news/June25-2001.html>. Provinces govern exploration of medium-scale mineral reserves and prefectures and counties control exploration of small-scale mineral reserves. *Id.*

¹⁷⁸ *See, e.g.*, Law on Work Safety (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 29, 2002, effective Nov. 1, 2002), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154931087d471.html>; Law on Safety in Mines (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 1992, effective May 1, 1993), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154932041d472.html>; Regulations for the Implementation of the Law on Safety in Mines (promulgated by the State Council, Oct. 30, 1996, effective Oct. 30, 1996), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154929995d467.html>.

¹⁷⁹ *See* Law on Work Safety (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 29, 2002, effective Nov. 1, 2002), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154931087d471.html>; Law on Safety in Mines (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 1992, effective May 1, 1993), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154932041d472.html>; Regulations for the Implementation of the Law on Safety in Mines (promulgated by the State Council, Oct. 30, 1996, effective Oct. 30, 1996), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154929995d467.html>.

¹⁸⁰ *See* Law on Safety in Mines (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 1992, effective May 1, 1993), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154932041d472.html>; Regulations for the Implementation of the Law of the People's Republic of China on Safety in Mines (promulgated by the State Council, Oct. 30, 1996, effective Oct. 30, 1996), *available at* <http://www.chinamining.org/Policies/2006-08-07/1154929995d467.html>.

¹⁸¹ Genia Kostka, *Mobility and Agency: Private Sector Development in Rural Central China*, 67 CHINA J. 47, 48 (2012).

safety conditions in the mines are a direct result of this environment and directly cause the high fatality numbers in Chinese mines.¹⁸²

The numerous large-scale accidents at mines in China shows no sign of abatement. Compared with South Africa, another Newly Industrialized Country,¹⁸³ China's fatality figures from the past few years were similar, but South Africa has implemented successful measures to decrease deaths while China's figures have not seen a similar drop—therefore it is not a question of level of development.¹⁸⁴ China's fatality numbers are well above those of the other major mining States; a recent mine incident in August 2012 claimed more than forty lives, sending the total deaths in 2012 through August up to 832.¹⁸⁵ In 2011, there were 1970 fatalities in Chinese mines, down from 3786 in 2007 and close to 7000 in 2002. There is some improvement but these numbers are only fatalities and do not include the total number of serious and disabling injuries.¹⁸⁶ More alarming is that many of these large disasters occur in illegal private mines, showing that while there are laws in place, they are highly ineffective in regulating the extraction industry.¹⁸⁷ China has made great strides in reducing extraction-related deaths, but the underlying dysfunction of its regulatory system poses considerable hurdles to overcome.

China's mining environment is markedly different from Australia's and it consequently affects the way firms of either state do business in Africa.

¹⁸² See Mark Gregory, *Why Are China's Mines so Dangerous?*, BBC NEWS (Oct. 7, 2010, 2:14 PM), <http://www.bbc.co.uk/news/business-11497070>.

¹⁸³ A Newly Industrialized Country is one that is less-than-developed, but is becoming rapidly industrialized. *Explanatory Notes—Asian Newly Industrialized Countries (NICs)*, INDUS. CAN. (last modified June 14, 2012), <http://www.ic.gc.ca/eic/site/tdo-dcd.nsf/eng/00042.html>.

¹⁸⁴ *Mining Safety in South Africa*, MINING SAFETY, <http://www.miningsafety.co.za/dynamiccontent/61/Mining-Safety-in-South-Africa> (last visited Oct. 24, 2013). From 2003 to 2010, mining-related fatalities have decreased from 270 to 128. *Id.* South Africa has been struggling with increased strikes over working conditions, many of which have gotten violent. Tula Dlamini, *Mine Revolt: It's the Working Conditions*, SABC NEWS (Sept. 13, 2012, 2:35 PM), <http://www.sabc.co.za/news/a/dc79de804cb45813848ac4b060346904/Mine-revolt-It's-the-working-conditions—20120913>; see also Shona Kohler, *Death in the Name of Profit: South Africa's Mine Safety Scourge*, CONSULTANCY AFRICA (Aug. 2, 2010, 8:01 AM), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=500:death-in-the-name-of-profit-south-africas-mine-safety-scourge&catid=82:african-industry-a-business&Itemid=266.

¹⁸⁵ Elizabeth Yuan, *Death Toll Rises to 41 in China Mine Blast*, CNN NEWS (Aug. 31, 2012, 3:34 AM), <http://www.cnn.com/2012/08/30/world/asia/china-miners-blast>; Chen Xin & Zhi Yun, *China's Coal Mines Still Risky*, CHINA DAILY (Aug. 25, 2012, 12:57 AM), http://www.chinadaily.com.cn/china/2012-08/25/content_15705033.htm.

¹⁸⁶ Yuan, *supra* note 188; James T. Areddy, *China Coal Sector Has Safety Setback*, WALL ST. J., (Sept. 4, 2012), at A13.

¹⁸⁷ Mike Head, *A Wave of Mine Disasters*, WORLD SOCIALIST WEB SITE (May 31, 2010), <http://www.wsws.org/en/articles/2010/05/pers-m31.html>.

Furthermore, Australia's investment in Africa is spread through society at many levels and is directed towards setting a state on solid footing for development, while China's is focused on statewide infrastructure projects that, while beneficial in some aspects, do not tend to improve the situation of human rights nor of individual communities within the extractive industry. Australia's focus remains on the local level of improvement within the industry and China's investment is often not focused on the industry at all.

D. Technology-Driven Mineral Investment

China's technology industry, which relies on cobalt and copper, has driven its increased resource demand. Both minerals represent some of the biggest investments by China in Africa: China imports sixty percent of Africa's entire cobalt deposits and twenty-five to thirty percent of the continent's copper, according to 2009 figures.¹⁸⁸ By 2012, oil, cotton, cobalt, and copper made up seventy percent of China's total imports from Africa.¹⁸⁹ China mines these two minerals from many states in Africa, but there are two that play a more pronounced role: the DRC and Zambia.

1. DRC: Cobalt and Copper Controversies

African mines account for about eighty-five percent of China's total cobalt imports, though the continent contains only fifty-three percent of the world's deposits.¹⁹⁰ Cobalt is mined mainly from the DRC, a country whose history is marked by human rights abuses and exploitation—not limited to the extractive sector. In 2007, China signed an unprecedented agreement with the DRC that opened up 400,000 tons of cobalt and ten million tons of copper in exchange for Chinese investment in roads, schools, railways, and hospitals.¹⁹¹ The DRC is often in the middle of discussions regarding exploitation and human rights abuses in the extractive industries, especially their diamond mines, where

¹⁸⁸ Chris Alden & Ana Cristina Alves, *China and Africa's Natural Resources: The Challenges and Implications for Development and Governance*, 41 S. AFR. INST. INT'L AFFAIRS 15 (2009), available at http://www.voltairenet.org/IMG/pdf/China_and_Africa_s_Natural_Resources.pdf (citing VIVIAN FOSTER ET AL., THE WORLD BANK, BUILDING BRIDGES CHINA'S GROWING ROLE AS INFRASTRUCTURE FINANCIER FOR SUB-SAHARAN AFRICA 38–39 (2009)).

¹⁸⁹ Arezki Daoud, *Competing for Africa: Is China's Africa's Economic Campaign Unstoppable?*, N. AFR. J. (Sept. 27, 2012, 12:15 PM), http://www.north-africa.com/naj_economy/economy_trade/1septtwentyseven47.html.

¹⁹⁰ Anthony Halley, *Japan Chasing China with \$32 Billion African Resource Push*, MINING.COM (June 23, 2013), <http://www.mining.com/japan-chasing-china-with-32-billion-african-resource-push-48124/>.

¹⁹¹ Whewell, *supra* note 143.

warring factions compete for control.¹⁹² The cobalt mines are no exception to these abuses.

There have been reports of acid dumps into rivers, use of child labor, and deadly working conditions in the Katanga cobalt and copper mines.¹⁹³ China has significant relations with the DRC due to the fact that the African country contains about ten percent of the world's copper deposits, as well as large cobalt deposits.¹⁹⁴ The 2007 deal is expected to produce over 400,000 tons of copper for China per year through 2013.¹⁹⁵ Chinese abuses have occurred throughout their extractive relationships with African countries, especially due to China's ever-increasing presence.¹⁹⁶ Africa contains the world's largest reserve of cobalt, practically ensuring China's permanent presence on the continent and specifically within the DRC.¹⁹⁷

2. Zambia: Striking Copper

Copper is mined largely in Angola and Zambia, the latter of which has been the site of many reports of human rights abuses, poor working conditions, and violence.¹⁹⁸ Zambia is also notable because it is on the receiving end of a great amount of Chinese FDI, having just completed a \$832 million deal with a Chinese firm called China Ferrous Mining Corporation to mine copper.¹⁹⁹

¹⁹² See U.N. Expert Group Meeting on Natural Resources and Conflicts in Africa: Transforming a Peace Liability into a Peace Asset, Cairo, Egypt, June 17–19, 2006, http://www.un.org/africa/osaa/reports/Natural%20Resources%20and%20Conflict%20in%20Africa_%20Cairo%20Conference%20ReportwAnnexes%20Nov%2017.pdf.

¹⁹³ Frik Els, *Billionaire Behaving Badly? Glencore's Glasenberg Caught in Africa Child Labour, Acid Dumping Row*, MINING.COM (Apr. 14, 2012), <http://www.mining.com/billionaire-behaving-badly-glencores-glasenberg-caught-in-africa-child-labour-acid-dumping-row/>.

¹⁹⁴ *Nickel and Cobalt Mining in Democratic Republic of The Congo-Copper and Cobalt Mining*, MBENDI, <http://www.mbendi.com/indy/ming/nkcb/af/zr/p0005.htm> (last updated Oct. 24, 2013).

¹⁹⁵ Democratic Republic of Congo's Mining Industry Accepts US \$9Bn in Investments from China in First Half of 2009, BLOOMBERG (Sept. 7, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awKjdVsQybWQ>.

¹⁹⁶ Mark Mobius, *China's Growing Presence in Africa*, REUTERS (May 24, 2011), <http://blogs.reuters.com/tnewsmaker/2011/05/24/chinas-growing-presence-in-africa/>.

¹⁹⁷ See U.N. Econ. Comm'n for Afr., *Africa Review Report on Mining: Executive Summary 2*, <http://www.uneca.org/sites/default/files/publications/aficanreviewreport-on-miningsummary.pdf> (last visited Mar. 3, 2014).

¹⁹⁸ *Zambia: Workers Detail Abuse in Chinese-Owned Mines*, *supra* note 160; (citing HUMAN RIGHTS WATCH, *YOU'LL BE FIRED IF YOU REFUSE: LABOR ABUSES IN CHINESE STATE-OWNED COPPER MINES* 32–73 (2011)) available at <http://www.hrw.org/sites/default/files/reports/zambia1111ForWebUpload.pdf> (documenting numerous abuses by Chinese mine operators in Zambia).

¹⁹⁹ *Zambia Approves \$832 mln Chinese Copper Project*, REUTERS (Sept. 20, 2012, 10:31 AM), <http://www.reuters.com/article/2012/09/20/zambia-mining-idUSL5E8KKHQ20120920>.

Zambians see the intrusion as mostly negative, not only do Chinese business owners hire mainly Chinese workers, but the businesses are undercutting local ones and driving them out.²⁰⁰

China's recent and substantial investment in Zambia is due to the country's large deposits of copper. From 2000 to 2010, China's FDI in Zambia grew from £60 million to over £560 million per year.²⁰¹ China's demands for copper have gone up, and Zambia is Africa's largest producer of the mineral.²⁰² Currently, China is second only to the United States in copper consumption.²⁰³ Recently, workers rioted and killed a Chinese manager and injured another at the Collum coal mine in the course of demanding that the Chinese firm in charge implement the newly established minimum wage.²⁰⁴ This occurred only one year after two Chinese managers were acquitted of shooting at striking workers.²⁰⁵ The Collum incident illustrates the problems arising in areas where Chinese firms are establishing extractive operations.²⁰⁶ As Chinese investment grows in the copper industry, the frequency of these incidents will only increase at copper mines.

Human Rights Watch ("HRW") reported that the Chinese mining companies ultimately paid the striking workers the minimum wage but nevertheless still pay the lowest wages among foreign-owned mining businesses across different mineral industries.²⁰⁷ HRW also found that Chinese firms maintain low safety standards in Africa and that the underreporting of accidents and bribery of safety officers by Chinese firms are commonplace.²⁰⁸

²⁰⁰ Palash R. Ghosh, *Zambia Seizes Chinese-Owned Mine Over Poor Safety Record: The Fraying Relations Between Beijing and Africa*, INT'L BUS. TIMES (Feb. 21, 2013), <http://www.ibtimes.com/zambia-seizes-chinese-owned-mine-over-poor-safety-record-fraying-relations-between-beijing-africa>. The former agriculture minister recently stated that while foreign investment and immigration is nothing new, "the Chinese are the worst of all." *Id.*

²⁰¹ Hinds, *supra* note 146.

²⁰² *Id.*

²⁰³ William L. MacBride, Jr. & Wang Bei, *Chinese Mining Law Overview—Part 4 of 4*, INFOMINE (Aug. 6, 2001), <http://www.infomine.com/suppliers/supplymine-news/Aug06-2001.html>.

²⁰⁴ See Zhang Boling & He Xin, *The Killing of a Miner in Zambia*, CAIXIN ONLINE (Aug. 20, 2012 6:56 PM), <http://english.caixin.com/2012-08-20/100426275.html>.

²⁰⁵ U.S. Dep't. of State, Bureau of Democracy, Human Rights & Labor, 2011 HUMAN RIGHTS REPORT: Zambia (Oct. 17, 2013), *available at* <http://www.state.gov/documents/organization/186467.pdf>.

²⁰⁶ The situation at Collum deteriorated and the Zambian government seized the mine from the Chinese company over safety concerns in February of 2013. Ghosh, *supra* note 200. The government cited failure to pay mining royalties by the company, poor health and safety conditions, hard labor, shifts of twelve and eighteen hours, and the preclusion of unions. *Id.*

²⁰⁷ See HUMAN RIGHTS WATCH, YOU'LL BE FIRED IF YOU REFUSE 3 (2011), *available at* <http://www.hrw.org/node/102594/section/3>.

²⁰⁸ *Id. passim.*

Chinese mines also regularly assign twelve-hour and eighteen-hour shifts to their workers, despite other states maintaining a standard of eight-hour shifts.²⁰⁹ Some workers reported that a few Chinese copper firms do not give even a single day off during the entire year.²¹⁰

E. Sincerely Changing Standards?

In response to the HRW report, the Chinese government claimed that the subcontractors were at fault in some cases reported and that the government is aware of the workers' complaints.²¹¹ As for rectifying the problems, the Chinese government seems to limit its response to doing only what it needs to do to quiet complaints.²¹² What is troubling about the rest of the Chinese response is their contentment to pass off many of the allegations as the result of two very different cultures and not as substantive problems.²¹³ This is alarming because it signals that Chinese officials do not recognize wrongdoing per se. Rather, they attribute it to African workers not being used to the Chinese conception of labor rights and employment relationships. According to this view, there are no problems to be alleviated beyond satisfying international watchdog norms.²¹⁴

The tragic 2005 explosion at the Chambishi copper mine evinces the potential disasters that can result from this practice.²¹⁵ The explosion claimed forty-seven lives and was ultimately attributed to insufficient safety standards at the mine.²¹⁶ Recently, a Chinese company announced a new mining venture at the Kilembe copper deposits in western Uganda worth \$100 million.²¹⁷ China's need for copper will only grow in the coming years as its economy and manufacturing sector continue to grow, meaning that more mines will open up under the management of Chinese corporations, further diluting the oversight of the Chinese government back home even further than it already is.

²⁰⁹ *Id.* at 51, 52, 65.

²¹⁰ *Id.*

²¹¹ See generally David Smith, *Chinese Mining Firms in Zambia Under Fire for Mistreating Workers*, GUARDIAN (Nov. 3, 2011, 6:01 AM), <http://www.guardian.co.uk/global-development/2011/nov/03/chinese-mining-zambia-mistreating-workers>.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See *id.*

²¹⁵ HUMAN RIGHTS WATCH, *supra* note 207, at 3.

²¹⁶ *Id.* at 7.

²¹⁷ *Chinese Company To Invest US \$100 Million in Kilembe Mines*, STATE HOUSE UGANDA (April 27, 2013), <http://www.statehouse.go.ug/media/news/2012/04/27/chinese-company-invest-us100-million-kilembe-mines>.

Beyond China's involvement in cobalt and copper, Chinese entities own fifty percent of the largest mining company in Zimbabwe.²¹⁸ Despite the KPCS's approval of exports from that country, there are still many reports of whippings, rapes, and waterboarding-type activities from the mines owned by that company.²¹⁹ Zimbabwe's problems in the diamond industry were discussed above and China's involvement with the worst violators is troubling for the future. China shows no sign of slowing its rate of investment in Africa and may soon be involved in a much more extensive way on the continent; it is of the utmost importance to establish an international framework that can successfully curb human rights abuses, prohibit the sale of conflict-supporting minerals, and ensure transparency and equity in revenue distribution. A new framework is needed and with China as a focal point due to its presence in Africa, the framework should initially focus on two of the fastest growing resource needs of China and biggest reserves in Africa—cobalt and copper.

III. CREATING A FRAMEWORK

The Resource Curse is no small obstacle to overcome. One of the reasons why mining does not lead to development is the lack of linkages with the extraction-related industries and local, regional, and national governments.²²⁰ The lack of these linkages is why the Chinese method of pouring money into large infrastructure projects is not as beneficial as Australia's investment strategy of education and expertise, especially when the former is often directed by an underlying self-interest (e.g.: better roads help with transportation of minerals). Though many African countries have revised their mining codes, harmonized their regulations internally, and increased involvement in and benefits to the mining communities, foreign companies still hold the majority of power in decision-making.²²¹

As discussed in Part I, the KPCS is an important endeavor to stop abuses in the extractive industry. However, it is limited to one mineral, focuses only on conflict areas, and generally has little authority to bind members legally and demand compliance. There is no doubt that the KPCS succeeded in its mission to halt the conflict diamond trade in its first couple of years in existence.

²¹⁸ Jason Moyo, *Murky World of Marange Mining Firms*, MAIL & GUARDIAN (July 6, 2012, 7:13 AM), <http://mg.co.za/article/2012-07-05-murky-world-of-marange-mining-firms/>.

²¹⁹ *Marange Diamonds: Zimbabwe Denies "Torture Camp,"* BBC NEWS (Aug. 9, 2011, 1:47 PM), <http://www.bbc.co.uk/news/world-africa-14468116>.

²²⁰ U.N. Econ. Comm'n for Afr., *supra* note 197.

²²¹ *Id.* at 7–10.

Unfortunately, the institutional shortcomings prevent it from keeping everyone in check over time. The solution lies in creating a framework with two characteristics. First, the framework should be a hybrid that combines the successful aspects of the KPCS and other similar frameworks with an enforcement mechanism recognized by international law. Second, the framework must be able to be applied to more than one mineral. By creating an adaptable framework, other industries can graft it on to their existing regulatory structure to effectively ameliorate their specific ills.

The KPCS's tripartite collaboration between governments, civil society organizations, and leaders of industry works well. The authority of state governments, bolstered by the localized efforts of civil organizations, gives the Framework the ability to put legitimate pressure on non-compliers and provides a large information base to analyze the industry under regulation. By adding the expert knowledge and power of industry leaders, this three-pronged structure ensures informed decision-making and a multitude of different resources at the Framework's command.

Years of experience of both industry insiders and human rights lawyers will enable governments, civil society organizations, and the workers themselves to work with a better understanding of what can be achieved in regulation, the more technical aspects of the cobalt and copper industries, and how to tackle the ethical implications of extractive practices. By deepening the Framework's involvement in all stages of the process, it will better respond to problems that develop.

A. *Industry Leaders*

There are two industry organizations that may be able to act in a similar role to the World Diamond Initiative within the KPCS for the Framework, the Cobalt Development Institute and the International Copper Association. Each has certain strengths that would help create an effective Framework. The Cobalt Development Institute ("CDI") is a non-profit organization made up of producers, users, recyclers, and traders of cobalt, including forty-four members from eighteen countries.²²² CDI is primed for this role because it already works with state governments, others in the cobalt industry, and civil society.²²³ Its partnerships enable it to promote good environmental and human safety

²²² *The Institute*, COBALT DEV. INST., <http://www.thecdi.com/institute> (last visited Oct. 24, 2013).

²²³ *Id.*

practices among its members.²²⁴ The organization advises governments and industry actors to foster cooperation and scientific data sharing.²²⁵ Having been in existence in its current form since 1982 and actively seeking the goals the Framework should achieve, CDI is suited for acting as a lead industry representative for the cobalt industry.²²⁶

The International Copper Association, Ltd. (“ICA”) was established in 1989 and was formed by twenty-four industry-leading producers to coordinate efforts of copper productions worldwide.²²⁷ As the biggest coalition of copper industry members currently operating, ICA would play a vital role.²²⁸ Along with promoting use of the mineral, ICA also seeks to protect the environment and safety of those involved in the mining and manufacturing process.²²⁹ ICA has forty-three members and focuses its efforts in more than sixty countries.²³⁰ The organization partners with over 500 NGOs throughout the world to achieve its objectives, an important facet for the Framework’s purposes.²³¹ While ICA is concerned with increasing copper production, it aims to do so in a way for the industry to become more sustainable, healthier for its workers, and more environmentally friendly.²³² It has a solid foundation to begin working as an industry partner within the Framework.

However, ICA is not in as good a position as CDI to take on the role of an industry representative in the Framework because it is governed by a board of directors made up of only industry members with no civil society or state representation.²³³ Having the decision-making apparatus controlled only by industry brings up the self-policing problem seen in the KPCS—albeit on the industry side.²³⁴ However, this problem should be mitigated by the

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *History of Organization*, COPPER ALLIANCE, <http://copperalliance.org/about-us/history-of-organization> (last visited Oct. 24, 2013).

²²⁸ *ICA Members*, COPPER ALLIANCE, <http://copperalliance.org/members> (last visited Oct. 24, 2013). ICA currently works with over 500 organizations worldwide. *Id.*

²²⁹ *Id.*

²³⁰ *About Us*, COPPER ALLIANCE, <http://copperalliance.org/about-us> (last visited Oct. 24, 2013).

²³¹ *Id.*

²³² *Our Value Proposition*, COPPER ALLIANCE, <http://copperalliance.org/about-us/our-value-proposition> (last visited Oct. 24, 2013).

²³³ *Governance*, INT’L COPPER ASS’N, <http://copperalliance.org/about-us/governance> (last visited Oct. 24, 2013).

²³⁴ ICA does have an offshoot organization that works regionally in Africa, but it is mainly concerned with making market inroads rather than improving the lives of the workers and communities around copper

involvement of CDI and other institutional structures of the Framework developed below.

ICA is the biggest coalition of copper industry members currently operating and does work with over 500 organizations worldwide.²³⁵ In joining the Framework as an industry leader, ICA would need to increase its collaboration with both civil society and state entities and focus increasingly on human rights issues over promoting the use of copper in products. Both CDI and ICA could help in monitoring and reaching out to the cobalt and copper industries in Africa and the markets of the resulting manufactured products. Of course, even with industry efforts, the Framework would not be effective if there was no way of ensuring compliance.

B. An Enforceable Framework

The Framework requires the ability to hold violators accountable under the law. The KPCS lacks binding power over its members and there is no applicability of international law within the KPCS framework, allowing countries like Zimbabwe and Venezuela to continue to export their diamonds regardless of their status in the KPCS. It would be wise to include IGOs to the mix to bolster the binding nature of the new organization—the experience of negotiating the various interests of states is vital for any international institution to function, especially when it comes to economic concerns.

While the United Nations does express its support of the KPCS, it has little involvement in the framework otherwise.²³⁶ Creating a framework that is not just working in collaboration with the UN—like EITI does—but is also legally backed by the UN will ensure greater accountability by the use of UN Monitors or harsh sanctions. If a state is faced with penalties that extend past the regulated industry, there is more of an impetus to reign-in corruption and non-compliance.²³⁷ Perhaps if Venezuela or Zimbabwe were faced with economy-wide sanctions they would be more willing to rein-in the smuggling

mines. *See Introduction*, COPPER DEV. ASS'N AFR., <http://www.copper.co.za/about-cdaa/introduction/> (last visited Oct. 24, 2013).

²³⁵ *See supra* notes 230–31.

²³⁶ *The Kimberley Process*, GLOBAL WITNESS, <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds/kimberley-process> (last visited Oct. 24, 2013).

²³⁷ However, if sanctions are proposed they need to be worth more to the countries imposing it than if they chose another path of punishment. If the sanctions' worth is outweighed, there is no incentive to levy them on a noncomplying entity. *See* Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 927 (2005).

of and abuses surrounding its diamonds. Success in South Africa and Libya makes this an attractive way to bolster enforcement.²³⁸ The drawback to UN sanctions is that they are only used against state actors and thus corporations would not be under direct scrutiny; instead, it would be up to states through their own sanctions or increased tariffs and industry leaders to take action against non-complying corporations. However, sanctions with the force of IGOs behind it would be more effective.

C. *Regional Legitimacy*

The UN has its share of critics, but having its involvement furthers the legitimacy of an international body. More importantly, involving regional IGOs, especially in Africa, furthers the ability to enforce. The African Union and especially the Southern African Development Community (“SADC”) can provide information, enforcement assets, and legitimacy to the Framework. Additionally, SADC encompasses the cobalt and copper states in Africa.²³⁹ Due to the structure of these IGOs, they would enable state members of the Framework to come together and tailor the standards of the Framework to that particular region—southern Africa for the initial purposes of the Framework.²⁴⁰

SADC already has institutions that would benefit this task, including tribunals to adjudicate disputes and deal with non-compliance and a secretariat with the means to effectively monitor mining sites.²⁴¹ The regional organization has also succeeded in harmonizing state regulations and creating a tentative framework that contains guidelines for mineral rights, tax issues, and environmental engagement.²⁴² Regional involvement is key since it is often at the local level where resources are lacking to deal with the negative consequences of the extractive industry; organizations like SADC and the

²³⁸ *Experts: Sanctions Partially Successful as Diplomatic Tool*, VOICE OF AMERICA (Oct. 27, 2009, 11:20 AM), <http://www.voanews.com/content/a-13-2008-03-10-voa20-66635467/556927.html>.

²³⁹ *Member State*, S. AFR. DEV. COMMUNITY, <http://www.sadc.int/member-states> (last visited Oct. 24, 2013).

²⁴⁰ *Southern African Development Community (SADC)*, AFR. UNION, <http://www.africa-union.org/root/au/recs/sadc.htm> (last visited Oct. 24, 2013).

²⁴¹ *Id.*; see also *Vision, Mission & Mandate*, S. AFR. DEV. COMMUNITY, <http://www.sadc.int/sadc-secretariat/vision-mandate> (last visited Oct. 24, 2013). Though the tribunal that adjudicates disputes between member states is suspended at the moment, SADC has resolved to create a new one. SADC Tribunal, S. AFR. DEV. COMMUNITY, <http://www.sadc.int/about-sadc/sadc-institutions/tribun> (last visited Oct. 24, 2013).

²⁴² U.N. Econ. Comm’n for Afr., *supra* note 197, at 8.

African Union can sponsor initiatives on behalf of the resource-low local municipalities.²⁴³

D. Empowered Through International Standards

The KPCS was not a true international organization nor was it a legal agreement amongst its members. The new framework would be best served if it had the force of an international agreement, such as the United Nations Convention on the Law of the Seas²⁴⁴ or the Universal Declaration of Human Rights (“UDHR”).²⁴⁵ The latter is not itself binding but has led to the creation of binding international human rights agreements.²⁴⁶ While non-compliance within the KPCS results in a ban and thus the inability to trade diamonds with members, those non-complying countries may still trade with countries outside of the KPCS. There is no other recourse for the KPCS to take. As seen in the case of Venezuela, being outside of the KPCS may end up being more beneficial for the state than remaining an active participant.

The UDHR is on point for the Framework and it is a good source to mine standards from.²⁴⁷ Article 23(1) states that all peoples have the right to work and to “just and favorable conditions of work,” while other subsections give people a right to equal pay for equal work and the right to form unions.²⁴⁸ Article 23 ensures that the wage discrepancies in Chinese firms will be remedied and that African workers will be able to join organizations that will represent their interests when disputes arise. The following article stipulates that periodic holidays and limitation of hours are granted as a right to all workers, meaning Chinese mining companies will no longer be able to work their employees to exhaustion with no respite.²⁴⁹ Article 5 prohibits torture and cruel, degrading, or inhuman treatment; this speaks to the reported beatings

²⁴³ *Id.* at 14.

²⁴⁴ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

²⁴⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

²⁴⁶ *Human Rights*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/human_rights (last visited Oct. 24, 2013).

²⁴⁷ The UDHR is just one of the human rights documents that form what is known as the International Bill of Human Rights. For the purposes of the Framework, the broader provisions of the UDHR will not be needed; however, there are provisions that may serve as models for the Framework. It must be noted that the UDHR is not a legally binding treaty but rather an internationally-recognized document that directly informs states' human rights behavior.

²⁴⁸ UDHR, *supra* note 245, art. 23.

²⁴⁹ *Id.* art. 24.

and whippings African works claim have been brought upon them in various mines.²⁵⁰

There are shortcomings of the UDHR and other such documents (e.g., European Convention on Human Rights), but the smaller scope of rights protection and other aspects of the Framework should alleviate state worries about sovereignty and the ability to expend resources in the protection of human rights.²⁵¹ While the UDHR serves as an overarching human rights regime foundation, the provisions in the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) are better suited for the Framework due to the actual international obligations they bestow upon ratifying states.

ICCPR contains provisions against inhuman treatment, forced labor, and banning trade unions.²⁵² ICESCR, due to its subject matter, is more germane to the Framework. Article 2 lays out a general requirement for ratifying states to ensure protection of human rights through their national legislature, with focus on developing states.²⁵³ The main provision for the Framework outlines the right to favorable and just conditions of work, including healthy and safe working conditions (encompassing environmental degradation) and reasonable limitation of hours.²⁵⁴ On a broader level, ICESCR includes the right to an adequate standard of living—a tough right to enforce, but one that lays a foundation for better wages and a fairer distribution of resource revenue.²⁵⁵ Having been ratified by many states across varying cultures, the language and framing of these treaty provisions serve as a great model for implementing an international framework involved in a specialized industry of which many states take part that would be approved of by those states.

These provisions found in the UDHR, ICCPR, and ICESCR lay out the human rights issues of employment and serve as blueprint for an adequate Framework for targeting abuses in extractive industries. The Framework must build on this and establish more specific protections related to the extractive

²⁵⁰ *Id.* art. 5.

²⁵¹ Cenap Çakmak, Shortcomings in the ECHR and Other Council of Europe Legal Documents on Human Rights, 2 REV. INT’L L. & POL. 117, 123, 127 (2006).

²⁵² International Covenant on Civil and Political Rights arts. 7, 8, 22, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976).

²⁵³ International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 UNTS 3 (entered into force Jan. 1, 1976).

²⁵⁴ *Id.* art. 7.

²⁵⁵ *Id.* art. 11.

process and general nature of abuses by Chinese and other extra-national corporations as well as states themselves.

E. Home Remedies

Two legally binding international human rights treaties—ICCPR and ICESCR—laid the foundation for human rights of workers. Due to their force of law for ratifying states, they have provisions detailing enforcement procedures and institutions that monitor the Covenants and ensure compliance.²⁵⁶ This aspect of the Framework is one that will determine its success down the road.

The ICCPR establishes a Human Rights Committee (“Committee”) of state members that are elected and serve a limited term.²⁵⁷ The Committee takes on disputes that arise between ratifying states and cases brought before it claiming noncompliance; interestingly enough, the Committee will only take cases after all domestic remedies have been exhausted.²⁵⁸ This would be greatly needed in the Framework as it prevents members—whether governmental, civil society, or industry—from believing that they immediately are forced to take disputes before the Framework’s judiciary organ. It allows the states to remedy abuses on their own terms or engage in non-adjudicatory means of dispute resolution. Flexibility is key to the wide application of the Framework—dispute resolution must be multi-faceted and allow for multiple avenues towards compliance.

Allowing for domestic remedies as the first step of resolving compliance issues may prompt quicker dispute resolution and a willingness to have parties negotiate on their own. Using this sort of procedure grants the parties in question the power to mutually decide who sits in judges’ chairs during the proceeding, which creates an environment more favorable to dispute resolution;²⁵⁹ the process places more control in the hands of the parties, important especially when dealing with extraordinary allegations like human rights abuses.

²⁵⁶ International Covenant on Civil and Political Rights, *supra* note 252, arts. 7, 8, 22; International Covenant on Economic, Social, and Cultural Rights, *supra* note 253, art. 2.

²⁵⁷ International Covenant on Civil and Political Rights, *supra* note 252, arts. 28, 32.

²⁵⁸ *Id.* art. 41.

²⁵⁹ *Id.* art. 41–42.

F. Tribunal Tribulations

However, if the Framework was established in the form of a legally binding international agreement and non-compliance can be remedied by members bringing suit against others, perhaps it would be wise to also consider implementing a tribunal on the international level similar to the International Court of Justice (“ICJ”).²⁶⁰ Of course, making the procedure to take disputes before an ICJ clone court mandatory will cause countries that normally opt out of ICJ jurisdiction—regardless of its discretionary nature—to not join the Framework, as both the United States and China have done on numerous occasions.²⁶¹

While many countries do submit themselves to the jurisdiction of the ICJ, the absence of China’s compulsory jurisdiction may cause problems if China is one of the countries that will be monitored by the Framework.²⁶² Furthermore, some of the copper and cobalt producing countries do not submit themselves to the compulsory jurisdiction of the ICJ either.²⁶³ To remedy this, an exact copy of the ICJ may need to be left off the table as the court of adjudication, instead creating a specialized court available only to members of the Framework; the non-affiliation with the UN may be a better selling point to these countries that refuse to be brought before the ICJ.

However, the power of the ICJ to promulgate advisory opinions would be beneficial to the Framework’s tribunal system in that it would not be binding on parties in the dispute—allaying worries about compulsory jurisdiction.²⁶⁴ Advisory opinions serve as a fact gathering of sorts and give the disputants an idea of how the conflict would play out in court, if it comes to that.²⁶⁵ Thus, advisory opinions may prompt parties to solve the dispute through diplomatic

²⁶⁰ The International Court of Justice (“ICJ”) is the principal judicial organ of the United Nations. The Court, INT’L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Oct. 24, 2013). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. *Id.* The Court’s role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. *Id.*

²⁶¹ Declarations Recognizing the Jurisdiction of the Court as Compulsory, INT’L CT. JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Oct. 24, 2013); see also Treaties, INT’L CT. JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> (last visited Oct. 24, 2013).

²⁶² Declarations Recognizing the Jurisdiction of the Court as Compulsory, *supra* note 264.

²⁶³ *Id.*

²⁶⁴ Advisory Jurisdiction, INT’L CT. JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited Oct. 24, 2013).

²⁶⁵ *See id.*

means and avoid being bound by larger international law standards after a long trial process. Also, the ICJ allows third parties to bring cases on behalf of those claimants who do not have the resources to bring a suit before the court;²⁶⁶ for the purposes of the Framework such a facet would be invaluable to its adjudication system because many of the resource-rich countries do not have the ability to expend the assets necessary to bring a case to an international tribunal.²⁶⁷ Furthermore, miners subject to abuse may not have the means to bring suit in court—here, NGOs could represent the interests of miners.

Other shortcomings of the ICJ itself support its exclusion as the court of adjudication for the Framework. A losing party need not comply with the ruling of the ICJ (thus making compliance dependent on UN Security Council action) and though twenty-six out of thirty-two judgments on the merits have been complied with, only half of the judgments are complied with when not brought by special agreement and where the respondent lost.²⁶⁸ Furthermore, African nations in general have been reluctant to take their claims to the ICJ.²⁶⁹

Despite these problems, there have been successes of the ICJ: a 1992 case between El Salvador and Honduras over illegal immigration was brought before the court, a border dispute that turned into a war between Mali and Burkina Faso was resolved by the court, and Libya withdrew troops from Chad when the ICJ ruled against it.²⁷⁰ Ultimately, the insufficiency of enforcement and absence of compulsory jurisdiction leave the ICJ ineffectual against states that do not wish to comply with the standards the court upholds.²⁷¹ A trustee-type court that uses the effective aspects of the ICJ discussed above would ensure compliance with judgments and thus better serve the Framework.²⁷²

As a step between exhausting national remedies and a purely international court modeled on the ICJ, there should be a hybrid court within the

²⁶⁶ *See id.*

²⁶⁷ *See* Edwin Müller & Patricia Schneider, *The ICJ 1945–2001: Empirical Findings About its Performance and Recommendations for an Improvement of its Efficiency*, 3 *REV. INT'L L. & POL.* 71, 86 (2007).

²⁶⁸ *Id.* at 73, 81.

²⁶⁹ *Id.* at 77.

²⁷⁰ *Id.* at 83–84.

²⁷¹ *Id.* at 83.

²⁷² *See* Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes*, 1 *J. L. & COURTS* 61, 62 (2013). A trustee court is the authoritative interpreter of a legal regime, has compulsory jurisdiction, and its decisions cannot be overturned by parties. *Id.* Essentially, its power is that which is not left to states to derogate. *Id.* at 75. Trustee courts in turn make the establishing document a “living instrument,” which is to be interpreted dynamically. *Id.* at 66.

adjudicatory organ of the Framework. Hybrid courts combine national and international law to decide cases and feature judge panels of both international and national jurists.²⁷³ Used in Sierra Leone, the former Yugoslavia, and Rwanda—among others—hybrid courts can be successful due to their combination of national and international law.²⁷⁴ The Framework is not dealing with genocide or crimes against humanity during armed conflict as the tribunals set up for the above examples were, but human rights abuses do fall in the same national-international nexus, making hybrid courts an appropriate adjudicatory organ. Such a design promotes cooperation between the two levels of law and aides in the development of national judges to decide such cases, usually subject matter with which these judges have not previously dealt.

By developing national judiciaries, hybrid courts also address the legitimacy problem that purely international courts face on the local level by lessening the appearance of external (i.e., foreign) control over judicial matters.²⁷⁵ These courts pool the resources of state judicial systems with international tribunals, ensuring that such a court will be able to handle the case if it becomes a long-running affair—something that will occur when greater violations of the Framework occur.²⁷⁶ Additionally, this median step between national and international adjudication will act as a safety valve for when national courts become overburdened by complaints. One potential complication is that to date, most ad hoc hybrid courts have dealt with crimes during armed conflict and thus their effectiveness in non-conflict and non-ad hoc situations has not been as comprehensively examined.²⁷⁷

G. A Broader Scope

Another aspect of the Framework that needs to be differentiated from the KPCS is the subject matter. Obviously, the Framework will not deal with diamonds (and if truly successful not be limited to only cobalt and copper), but what is needed is expansion beyond conflict minerals—human rights abuses in the extractive industries that concern the Framework do not necessarily take place during armed conflict. Because the Framework will scrutinize human rights abuses and the transparency of revenue, members will have to ensure

²⁷³ Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 298 (2003).

²⁷⁴ *Id.* at 295.

²⁷⁵ *See id.* at 301, 306, 308.

²⁷⁶ *See id.* at 308.

²⁷⁷ *See id.* at 295, for a succinct discussion on the potential of hybrid courts in more expansive situations.

that their mineral production is not just conflict-free, but that extraction is done in a responsible, ethical, and sustainable way. Countries like Zimbabwe and Venezuela will be under greater scrutiny if the objectives of the Framework are not limited to conflict circumstances but human rights problems related to mining.

1. A Frankenstein Framework

The Framework will include parts of the KPCS and other KPCS-like organizations that aim to accomplish such objectives as discussed in Part I of this Comment. EITI's flexibility and country-specific customization would be perfect for the framework because it allows adaptability, a necessity for a region as heterogeneous as southern Africa's copper and cobalt belts.²⁷⁸ Countries with differing levels of civil society strength and development will be able to implement the Framework and not be bound by requirements that are untenable with current levels of institutional strength. EITI's transparency framework is key for an industry where many contracts between governments and mining companies are done in secret and make it impossible to track revenue—avoiding pitfalls like Zimbabwe and Venezuela.²⁷⁹ Development is stymied in a classic case of the Resource Curse when revenue is consolidated in the coffers of state elites and corporations, either on account of a too-weak state or a strong, corrupt one.

2. Educating Civil Society

One part of the tripartite Framework is civil society; being one-third of the structure, it must be strong enough to deal with the obligations of the Framework. The saying that knowledge is power is doubly true when dealing with human rights abuses. The International Senior Lawyers Project (“ISLP”) would enable greater integration with civil society and governments. ISLP assists human rights and transactional NGOs in furthering the protection of human rights while encouraging economic development in countries worldwide.²⁸⁰ If ISLP signs on as a sponsor and civil society representation, the Framework's civil society prong becomes immediately stronger. The

²⁷⁸ *EITI Factsheet*, *supra* note 129.

²⁷⁹ U.N. Econ. Comm'n for Afr., *supra* note 197, at 4–9.

²⁸⁰ *Human Rights*, INT'L SENIOR LAW. PROJECT, <http://islp.org/content/human-rights> (last visited Oct. 24, 2013).

organization works with governments as well,²⁸¹ a useful tool if the Framework is to be a legal entity and not just a watchdog entity.

ISLP would benefit from a partnership with the African Legal Support Facility (“ALSF”), an organization created in 2009 as part of the African Development Bank.²⁸² Though ALSF works on financial concerns, the African expertise it brings to the table and its international state connections would be helpful in bringing this part of the Framework together.²⁸³ Bringing the knowledge of human rights law experts into the domestic arena at all levels of governance will enable developing states to uphold the Framework from their end as well—not rely predominantly on the larger international institutions involved.

Perhaps the greatest asset ISLP brings is their local lawyer education program. The program sends lawyers from ISLP to foreign states to teach local lawyers various aspects of environmental, human rights, and international law.²⁸⁴ With domestic lawyers that understand the legal aspects of the Framework, states will have an easier time implementing the Framework in a way that comports with local legal customs and societal norms. More importantly, it empowers communities to combat noncompliance issues right where the mines are located by giving them knowledge of their legal rights. Using ALSF’s assets in this endeavor would strengthen the Framework. Consequently, miners will have a better understanding that the abuses they suffer are not merely the result of two clashing cultures, but rather a legitimate infringement of their rights as human beings.

Educating civil society on the rights and powers they have and what they can do to combat human rights abuses and corruption in the extraction industry only strengthens the Framework—akin to Australia’s method of FDI and its associated programs. A strong civil society can force the hand of a state to deal more strictly with a multinational corporation that is exploiting its workers and change laws that previously played to the latter’s interests, such as the case of El Salvador in the mid-2000s.²⁸⁵ Furthermore, human rights abuses are lower

²⁸¹ *Id.*

²⁸² U.N. Econ. Comm’n for Afr., *supra* note 197, at 11.

²⁸³ *Goals and Objectives*, AFR. DEV. BANK GROUP, <http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/goals-and-objectives> (last visited Oct. 24, 2013).

²⁸⁴ *Human Rights*, *supra* note 284.

²⁸⁵ See Denis Collins, *The Failure of a Socially Responsive Gold Mining MNC in El Salvador: Ramifications of NGO Mistrust*, 88 J. BUS. ETHICS 245 (2009).

in countries that accede to a protection-type treaty and that have a strong civil society.²⁸⁶

The use of experts from other countries or regions helped facilitate rural industrial growth in China; it is a strategy that works and one that the KPCS lacked.²⁸⁷ There will be less of a chance of a situation arising where workers give up and simply try to deal with the illegal practices and dangers of a state's extractive industries. Additionally, educating local officials about human rights issues and changing their incentive mindset would help stop human rights abuses at the mines and quell corruption; it is mostly at the local levels of government that human rights abuses and corruption often take place.²⁸⁸

3. *Extraction-to-Market Guarantees*

The Framework should also borrow the World Diamond Council's System of Warranties and graft it onto the cobalt and copper industries.²⁸⁹ The System of Warranties ensure that diamonds are accompanied by proper invoices, a written assurance based on personal knowledge or other legitimate written guarantees that the diamonds are conflict-free, and an independent audit.²⁹⁰ This system is used in the KPCS but it has not been fully effective, as states have forged certificates to export conflict diamonds.²⁹¹ Combining the System of Warranties with a legally binding framework as previously discussed would strengthen the Framework's enforcement ability; the certificates in the System of Warranties may have been successfully counterfeited in the past, but the threat of legitimate legal consequences—not just from the Framework's adjudicatory procedure but the larger international community as well—if caught may further disincentivize smugglers and corrupt governments.

One foreseeable problem to using the System of Warranties is that it would effectively stop once these minerals reach China's manufacturing and processing plants. With diamonds, the minerals did not change form from extraction to market—though cut and refined, they are still diamonds and are

²⁸⁶ See Neumayer, *supra* note 237, at 941. However, states that accede to such a treaty but have weak civil societies actually have more human rights abuses than the average. *Id.* at 946.

²⁸⁷ Kostka, *supra* note 181, at 64.

²⁸⁸ See Neumayer, *supra* note 237, at 929.

²⁸⁹ *Conflict Diamonds*, DE BEERS, <http://www.debeersgroup.com/Sustainability/ethics/Conflict-diamonds> (last visited Oct. 24, 2013).

²⁹⁰ *Id.*

²⁹¹ *Enforcement*, KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/en/enforcement> (last visited Oct. 24, 2013).

the majority of the end-product. Unfortunately, cobalt and copper are often processed and combined with other materials when put into electronics; furthermore, they are just a few of many other components going into the product and largely unseen by consumers. This means to ensure that the final product is ethically built may be more difficult. The Framework warranty system must continue past input into the final product and attend these electronics to their final distribution, meaning the warranty will not apply to the minerals only but the whole product. These are international trade considerations that are better off discussed in detail in another article. For the purposes of this Comment, the Framework's warranty system will cover cobalt and copper shipments from extraction to manufacturing in a similar fashion to the KPCS and then a secondary certificate declaring the ethical nature of the two minerals within the final product will accompany the end product from manufacturing to market. In doing so, consumers and retailers can be confident that the products using these two mined materials are ethically produced.

CONCLUSION

The Kimberley Process Certification Scheme is an effective framework in curbing the trade of conflict diamonds in the world. It has been largely successful but is by no means perfect in its enforcement or in its structure. However, the KPCS serves as a great blueprint for creating a new framework for ensuring ethically mined minerals—both in terms of transparency and human rights protection—in the cobalt and copper industries. The Framework is a response to the human rights abuses and poor working and safety conditions that are often found at mining sites, especially those owned and operated by Chinese companies.

With China's presence in Africa steadily growing over the past decade, it is only a matter of time before China is the dominant foreign player in Africa's mineral resource industry. The problems that have emerged in copper, cobalt, and other mineral industries under their watch serve as a warning of what a more economically independent China may bring to bear on Africa's developing states. While China's brand of South-South investment does have its benefits in the form of large infrastructure capital, it lacks the linkages essential in combating the Resource Curse beyond pumping in capital; these linkages are present in Australia's investment strategy.

By taking the KPCS as a lesson learned, combining it with aspects of similar frameworks that emerged to fill the gaps in the KPCS enforcement

procedure, and grafting international law onto it, the Framework will be able to protect actors in the cobalt and copper industries at all levels with effective and binding authority. To ensure that extraction of these two technologically integral minerals is conflict-free, respectful of human rights, and transparent is no small task; however, the strength of the tripartite membership system, deep integration into society, and legal force will enable the Framework to effectively monitor and enforce the cobalt and copper industries.

Given cobalt and copper's importance in so many technology industries, especially the mobile phone and computer industries, it is integral to ensure that these growing industries do not foster negative practices and consequences on the human side of them. Our world is getting more dependent on technology with each passing generation—technology that now must be manufactured on such a scale to meet demand that only manufacturing countries with huge manufacturing assets such as China can meet that demand. If the world community saw the need to create the Kimberley Process Certification Scheme, shouldn't the same be done for minerals that are much more prevalent in society? On a day-to-day basis almost everyone—whether for entertainment, business, or necessity—uses some piece of technology that contains copper and cobalt. From our phones and computers to our buildings and water pipes to our medical machines, these two minerals are ingrained in society. Isn't it time that we ensure that something so important to society is brought to us as ethically as possible? Shouldn't the process of extraction of such important minerals benefit society not just once a product gets to market, but when it is first dug out of the Earth?

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