

## *Human Rights Due Diligence in Mineral Supply Chains: International Developments and Chinese Efforts*

*by Jannick Saegert and Gregor Grossman; September 2018*

Smartphones, electric vehicles and wind turbines all have one thing in common: they cannot be manufactured without critical mineral resources which often originate from conflict-affected or high-risk areas. These minerals, which are often termed “conflict minerals”, include tin, tantalum, tungsten, gold and, since more recently, cobalt. They make semiconductors faster, batteries more powerful, and metal alloys and more resistant to extreme temperatures.

Over the past decade, media coverage and NGO publications have uncovered large-scale human rights violations in the extraction and transportation of such minerals, including the financing of conflict perpetrated by armed rebel groups or criminals, the extortion of miners and the occurrence of the worst forms of child labour.

A new EU rule will require importers of such minerals to disclose information on their mineral supply chain due diligence. However, to break the link between human rights violations and mining, China is a crucial player which needs to be involved in the international framework for human rights due diligence.

### The Winding Road to Responsible Mineral Supply Chains

The most horrendous reports about the linkages between the extraction of mineral resources and violent conflict came from the Eastern part of the Democratic Republic of Congo (DRC). Violent conflicts have been rampant in the Eastern DRC for the past 25 years since the genocide in Rwanda and have resulted in the deaths up to five million people and caused massive internal displacement.

In response, the international community deployed one of the largest UN peacekeeping missions in history to the DRC. Furthermore, in

2011, the Resolution 1952 of the UN Security Council recommended the establishment of guidelines for due diligence for importers, processing industries and consumers of Congolese mineral products. The UN Group of Experts final report endorses and relies on the OECD Due Diligence Guidance for Responsible Mineral Supply Chains from Conflict-affected and High-risk Areas, which to date serves as the **international framework for all human rights supply chain due diligence** efforts. Supply chain due diligence is now regarded as the **'gold-standard'** of responsible business conduct, especially for downstream companies which rely on critical commodities – e. g. minerals, timber, agricultural products – from high-risk and conflict-affected areas for their products.

While the UN Guiding Principles and the OECD Guidance provide the framework and the forum for human rights supply chain due diligence, they lack the power to enforce. Therefore, the international framework for supply chain due diligence is crucially supplemented by government rules and regulations as well as by voluntary initiatives, often led by industry groups.

## Government Action

The most influential piece of legislation to support mineral supply chain due diligence is the *US Dodd-Frank Wall Street Reform and Consumer Protection Act* (DFA) which was passed in 2010 and came into effect in 2012. Section 1502 of the law requires companies listed on US stock exchanges to assess whether or not 3TG minerals in their supply chains originate from the DRC or its neighbouring states and disclose the results of this assessment. Companies that identify minerals from this region in their supply chain must report on the due diligence measures taken to determine the mineral's origin and chain of custody.<sup>1</sup> The impact of the DFA has been significant in that it forced US listed companies to explore ways to comply with the reporting requirement and gather the information necessary to determine the origin of their raw materials. For the DRC, the impact of the DFA was initially devastating, as it served as a *de facto* embargo for minerals from Eastern Congo.

Human rights due diligence does not mean that companies should disengage from conflict-affected or high-risk areas. If companies stay away, the results can be even worse for the local population in the mining communities. However, one might say that the disruption helped, or was even necessary, to achieve some initial success in driving rebel groups out of the mines and away from the transport routes. The bottom line is that the DFA has undoubtedly created a ripple effect in the industry and made due diligence reporting a staple for every major electronics company and many related industries.

Other countries have subsequently also passed legislation furthering supply chain due diligence. In the Lusaka Declaration, the 11 heads of state of the International Conference of the Great Lakes Region (ICGLR) have adopted a regional monitoring and certification process for due diligence. In addition, the governments of the DRC, Rwanda and Burundi have issued national laws to make mineral supply chain due diligence mandatory.

One new highly anticipated piece of legislation is the 'EU Conflict Minerals Regulation', which will enter into force in 2021.<sup>2</sup> The mineral scope of the EU Regulation encompasses the 3TGs but goes beyond the DFA with regard to geographic scope by covering minerals from all "conflict-affected or high-risk areas", in accordance with the OECD Guidance. However, the EU Regulation faces widespread criticism from civil society for limiting its scope to importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas while leaving out imports of metals and semi-manufactured products containing said minerals.<sup>3</sup> By limiting the scope to raw minerals the regulation leaves massive loopholes, especially with regard to the trade with China.

## Voluntary Initiatives

The debate about the effectiveness of supply chain due diligence often circulates around the question whether voluntary initiatives are as effective as government regulation, whereas in fact, these different approaches are mutually

reinforcing. Firstly, the OECD Guidance explicitly encourages the participation of companies in industry programmes. Secondly, industry programmes are often indispensable for organizing audits and reducing the transaction costs of companies to engage in supply chain due diligence and for gathering and sharing information along the supply chain. Some industry programmes can also be considered quasi-mandatory, as they ensure market access for companies. The London Bullion Market Association, for example, requires compliance with the LBMA Responsible Gold Guidance from gold refiners as a prerequisite for doing business with banks.

Industry programmes have also faced criticism based on the assertion that the requirements for membership and the quality of audit programmes fall behind the expectations formulated in the OECD Guidance. Nearly all of the assessed programmes have recently updated their audit guidelines to be more closely aligned with the OECD Guidance. Industry schemes should thus be seen as enhancing rather than replacing mandatory measures on responsible supply chains. Also compliance with the EU regulation will rely on assurance provided through voluntary industry programmes.

## China's Role

The international developments outlined above understate China's role in supply chain due diligence. In fact, China is undoubtedly the major power with regard to the mining and international trade in 3TGs and cobalt. In terms of global production share in 2017, China was the leading producer of tin (34%), tungsten (83%), and gold (86%), as well as the largest importer of these minerals. In short, if a company sells a product that contains either tin, tantalum, tungsten, or gold, chances are their supply chain at some point runs through a Chinese company. This puts both China's government and Chinese industry in a strong position to shape mineral supply chains.

In the coming years, China is poised to transition away from its role as the 'factory of the world' towards becoming a centre for high-end



manufacturing, in line with its 'Made in China 2025' strategy. This means that its importance for global supply chains for high end products will further grow. As of 2017, China already accounted for 45% of global investment in renewable energy,<sup>4</sup> as well as 50% of global electric vehicle production,<sup>5</sup> to name but two key sectors.

Without China's participation, there is no effective responsible mineral supply chain system!

Until recently, concepts like responsible business conduct or supply chain due diligence were largely unknown in China. In recent years, however, the Chinese government, industry associations and – to a lesser extent – Chinese companies have been more responsive and proactive with regard to responsible business practices. In 2008, *Corporate Social Responsibility Guidelines* and reporting requirements for state-owned enterprises were issued, while in 2012 the *Green Credit Guidelines* were issued to promote sustainable lending practices. Recent environmental regulations require all listed companies in China to disclose relevant environmental information by 2020. While these efforts targeted the behaviour of Chinese companies domestically, the Belt and Road Initiative (BRI) has put greater focus on the impact of Chinese enterprises abroad. In seeking greater participation in the BRI, China's government has sought to **promote the "sustainable" and "green" nature of BRI investments** while moving to manage the reputational fallout when Chinese companies misbehave.

With regard to promoting responsible mineral supply chains, so far, the Chinese industry has taken the lead. In 2015, the *China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters* (CCCMC) published the

*Qinghai Coking Coal Group*  
(Image: Wu Haitao, Greenpeace)

voluntary *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (available in Chinese, English and French). The Chinese guidelines are based on the *OECD Guidance* and establish a due diligence framework that both meets international standards while also incorporating Chinese characteristics. The guidelines were jointly developed with the OECD.

## Do we need a Chinese industry programme?

The *CCCMC Guidelines* are perceived positively by the Chinese government and business community and have succeeded in establishing China as an actor shaping the framework for responsible mineral supply chains. The question is whether there is a need for a Chinese industry programme which also includes an audit and capacity building programme to enforce compliance with the Guidelines.

Prior to the release of the *CCCMC Guidelines*, Chinese companies were already participating in existing industry schemes, particularly in the Responsible Minerals Initiative (RMI), **after being forced to do so by their international downstream buyers**. As of December 2017, a total of 66 Chinese 3TG smelters and refiners were conformant with a responsible sourcing standard. A Chinese industry programme could, however, instil a higher degree of ownership of Chinese companies.

At the minimum, it would be useful for *CCCMC* to play a stronger role in supporting Chinese companies in conducting effective due diligence, since the quality of supply chain due diligence is also crucially important. Awareness raising for supply chain due diligence also remains very important in China as there are **still many companies that are not aware of the concept**. *CCCMC* could play a more forceful role in filling these gaps by providing capacity building for Chinese companies.

One promising Chinese scheme that has emerged since 2016 is the **Responsible Cobalt Initiative (RCI)**, which targets cobalt supply chains. RCI is significant both in the constella-

tion of its membership, which includes prominent up- and downstream companies from China and abroad, as well as for its scope of action. Rather than focus solely on transparency, as is the case for most industry initiatives, RCI also seeks to enhance the capacity for risk mitigation.

## Should there be a Chinese regulation on supply chain due diligence?

In recent years, there has been speculation about a Chinese due diligence regulation for mineral supply chains. In 2016, the General Administration for Quality Inspection and Quarantine (AQSIQ) – which was a cabinet level institution<sup>6</sup> – began contemplating the idea of issuing a regulation or ‘national standard’ for the import of tin, tungsten, and tantalum. Ultimately, this has not happened.

A **mandatory Chinese regulation for mineral supply chain due diligence** would be an asset in that it would lend more vigour and rigor to supply chain due diligence in China. Internationally, a Chinese regulation has the potential to reinforce international efforts that have been facing headwinds, such as a US administration threatening the repeal of Section 1502. Ideally, the regulation could even fill gaps left by the EU Regulation. By referencing the *CCCMC Guidelines*, a Chinese regulation could enhance the adoption of international standards domestically while contributing to a coherent regulatory landscape globally for supply chain due diligence.

It should be emphasized, however, that not just *any* Chinese government regulation is desirable. Three potential pitfalls should be avoided. First, the regulations should avoid a narrow focus only on Central Africa and 3TGs, as this could undermine efforts already made by Chinese industry to look at other mineral supply chains and geographies. Second, the government should be aware of credibility issues that might arise if it wants to be directly involved in the auditing of companies. Finally, the regulations should in no way lessen the significant



pressure already created by the DFA and the EU Regulation on Chinese industry to conduct and report on supply chain due diligence.

In closing, it is also worth mentioning the *Measures for the Administration of Overseas Investments of Enterprises*, promulgated by the National Development and Reform Commission (NDRC) in 2018, which many observers believe could be the legal tool that could potentially be used to enforce supply chain due diligence as it includes provisions for punishing non-complying companies by publishing company information. *Amnesty International* has called for the measures to be used to encourage companies to respect human rights throughout their business operations, as well as to require relevant companies to explain how they are assessing and mitigating supply chain risks.<sup>7</sup>

## Conclusion

Responding to ongoing concerns about the links between mineral supply chains and human rights abuses, a series of legislative measures and industry initiatives have emerged that either require companies to conduct supply chain due diligence or assist them in doing so. Last year, the EU finally took legislative action in this area by passing the 'Conflict Minerals Regulation.'

Despite its key role in mineral supply chains, China has so far done little on a legislative level to require or promote supply chain due diligence. Instead, the Chinese industry association CCCMC has taken the lead by releasing its own guidelines and launching an **industry initia-**



**ive targeting cobalt supply chains.** At the same time, the Chinese government has started taking steps to push its businesses to act responsibly at home while suggesting that it may do more to ensure that they do so abroad.

The problem remains, however, that large numbers of Chinese companies are still either unaware of their obligations with regard to supply chain due diligence or lack the capacity or willingness to meet these obligations effectively.

In this context, a Chinese government regulation on supply chain due diligence is welcome *if* it is mandatory and **continues to build on existing international standards and best practice**, preferably in reference to the CCCMC Guidelines and, by extension, the OECD Guidance. Any such regulation would depend on a strong industry initiative to ensure effective implementation. As China moves to become a technological leader in the coming years, it is up to both the Chinese government and Chinese industry that it becomes a leader in responsible business conduct, too.

*A view of S11D mine surrounded by Carajás National Forest, Canaã dos Carajás, Brazil (Image: Milton Leal/ Dialogo China/ China-File)*

## Notes

- 1 <https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>, <https://www.sec.gov/spotlight/dodd-frank-section.shtml#1502>
- 2 <http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/>
- 3 <https://www.globalwitness.org/en/campaigns/conflict-minerals/conflict-minerals-europe-brief/>
- 4 <http://fs-unep-centre.org/sites/default/files/publications/gtr2018v2.pdf>
- 5 [https://www.theicct.org/sites/default/files/publications/EV\\_Government\\_WhitePaper\\_20180514.pdf](https://www.theicct.org/sites/default/files/publications/EV_Government_WhitePaper_20180514.pdf)
- 6 AQSIQ no longer exists as its functions were absorbed by the new State Administration for Market Regulation following China's 2018 government restructuring.
- 7 <https://www.amnesty.org/download/Documents/AFR6273952017ENGLISH.PDF>

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