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# Socio-Legal Enquiry on a Global Scale: Legal Intermediation, the Geography of Extraction, and the (Re)Negotiation of Africa's Relationship with the World Economy

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# Socio-Legal Enquiry on a Global Scale: Legal Intermediation, the Geography of Extraction, and the (Re)Negotiation of Africa's Relationship with the World Economy

*Sara Dezalay*[*]

**Abstract:** This paper asks: what does socio-legal enquiry tell us about one of the most pressing problems of our time—climate change? Can (and should) socio-legal enquiry provide a meaningful critique of the so-called green transition? Law's ubiquity in the ongoing phase of capitalism—from the predominance of private contracts in the regulation of relations between states and transnational corporations to the formidable growth of transnational dispute settlement mechanisms since the turn of the 1990s raises a challenge for socio-legal enquiry. Where do we put the cursor of law's empowering potential as opposed to its enabling role in reproducing patterns of inequality and domination? This challenge is complicated by the fact that the green transition is seemingly pitting the United States and Europe against two so-called peripheries—China as the powerhouse of the lithium-ion batteries used for electric cars and other devices of the transition away from carbon, and Africa, specifically the Democratic Republic of Congo, as the main reservoir of the critical minerals needed for "green" energy. Deploying a socio-legal enquiry on the relationship between law and the green transition *from* Africa is a way to unpack the entanglement between law, politics, and finance in the contemporary phase of capitalism. Building on the

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"global turn" in social sciences, this shifts the focus to law's entanglement as a repertoire of material and symbolic power and towards the interconnectedness of its deployment across scholarly and geographic scales. Considering the *selective* social, financial, material, and cultural globalisation fostered by global value chains helps account for the reproduction of the subaltern position of the African continent in the world economy. More broadly, this research agenda underscores how socio-legal enquiry can respond to the challenge of allowing for the possibility of studying the imperial factor over an extended period, including by tracking how imperial legacies and financialisation are shaping China's prominence in the current phase of capitalism.

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## I. INTRODUCTION

Taking stock of half a century of "socio-legal" enquiry in Europe, the Americas, and South-East Asia in a 2023 *Frontiers of Socio-Legal Studies*[1] blog post, Schmidt noted a two-fold "splintering" of the field.[2] The first was the undermining of the political hope that empirically substantiated scholarship about law could drive progressive change. From the Right, the Law and Economics movement has marshalled social science to promote very different values—such as efficiency and deregulation. From the Left, Critical Legal studies, Critical Race theories, and the broader movement towards "decoloniality"[3] tend to question existing epistemic foundations of social

[1] The *Frontiers of Socio-Legal Studies* blog provides a discussion space for socio-legal scholars and is hosted by the Centre for Socio-Legal Studies at the University of Oxford.

[2] Patrick Schmidt, 'What is Socio-Legal Studies Now?' (*Frontiers of Socio-Legal Studies*, 23 August 2023) <https://frontiers.csls.ox.ac.uk/what-is-socio-legal-studies-now/> accessed 22 November 2024.

[3] See Horatia Muir Watt, *The Law's Ultimate Frontier: Towards an Ecological Jurisprudence: A Global Horizon in Private International Law* (Hart Publishing 2023).

sciences as a viable basis for a meaningful critique. The second splintering has been fueled by the expansion of the field, thematically and geographically, into separate—somewhat siloed—subfields such as tort reform, the legal profession, and civil justice, albeit all gathered under the agenda-setting umbrella of seeking to explore the periphery of the legal field rather than its supposed centre.

In this paper, informed by my own forays into the field, as a lawyer and a political sociologist, I ask: what does a socio-legal enquiry tell us about one of the most pressing problems of our time—climate change? Can (and should) socio-legal enquiry provide a meaningful critique of the so-called green transition? Law's ubiquity in the ongoing phase of capitalism—from the predominance of private contracts in the regulation of relations between states and transnational corporations ('TNCs')[4] to the formidable growth of transnational dispute settlement mechanisms since the turn of the 1990s[5]—raises in and of itself a challenge for socio-legal enquiry. Where do we put the cursor of law's empowering potential as opposed to its enabling role in reproducing patterns of inequality and domination? This challenge is complicated by the fact that the green transition is seemingly pitting the United States ('US') and Europe against two so-called peripheries—China as the powerhouse of the lithium-ion ('Li-ion') batteries used for electric cars and other devices of the transition away from carbon, and Africa, specifically the Democratic Republic of Congo ('Congo' or 'DRC'), as the main reservoir of the critical minerals needed for "green" energy.

I argue that the global value chains ('GVCs')[6] of the minerals of the green transition are embedded in a wider transformation of the geography of extraction—at and beyond mining sites.[7] This requires socio-legal enquiry to look for the state in places it is not used to finding it, in the legal field and in finance, and for law in politics and in dynamics of capitalist accumulation. Existing socio-legal scholarship on Congo obfuscates rather than clarifies the relationship between law and the green transition as it tends to either posit law (and lawyers) as a redemptive tool against poor governance and societal violence or, even while it is built as a critique, to obscure the material origins of the rise of the West—and now China. Taking exception to exceptionalism, this paper construes Congo, like other post-colonies, as one of the "hyperextended

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4 A Claire Cutler and Thomas Dietz (eds), *The Politics of Private Transnational Governance by Contract* (Routledge 2017).

5 Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).

6 Broadly speaking, GVCs refer to international production sharing, a phenomenon where production is broken into activities and tasks carried out in different countries. Cross-border production is largely seen to have been made possible by the liberalisation of trade and investment, lower transport costs, advances in information and communication technology, and logistical innovations.

7 Martín Arboleda, *Planetary Mine: Territories of Extraction under Late Capitalism* (Verso 2020).

versions of the history of the contemporary world order running slightly ahead of itself."[8]

Deploying a socio-legal enquiry on the relationship between law and the green transition *from* Africa is a way to unpack the entanglement between law, politics, and finance in the contemporary phase of capitalism. Building on the "global turn"[9] in social sciences, this shifts the focus to law's entanglement as a repertoire of material and symbolic power and towards the interconnectedness of its deployment across scholarly and geographic scales. Considering the *selective* social, financial, material, and cultural globalisation fostered by GVCs helps account for the reproduction of the subaltern position of the African continent in the world economy. More broadly, it is a way to respond to the challenge of allowing for the possibility of studying the imperial factor over an extended period, by tracking how imperial legacies and financialisation are shaping China's prominence in the current phase of capitalism.

Following this Introduction, Section II argues that Congo's framing as a foil for arguments about European capitalist history paradoxically reduces the scope of legal intervention in GVCs, and of its deployment to tame the violence of the market and political predation in Congo, to a side show. Section III builds on the example of a curiously "global" judicial dispute between the *Générale des Carrières et des Mines*—often simply called Gécamines, the main Congolese metals and mineral trading company—and FG Hemisphere. This dispute was adjudicated in 2012 by the Judicial Committee of the Privy Council ("JCPC"), also known as the Privy Council, one of the apex courts of the British judicial system and former appeals court of the British Empire.[10] The Privy Council's decision was celebrated as a victory of Congolese sovereignty against the predation of a vulture fund.[11] Yet, it contributed to the further financialisation of Congo's sovereign debt. Tracking the financial trail and the bundles of relations and institutions of this judicial dispute pitting a fund incorporated in a tax haven, Delaware, against Gécamines, at once in Jersey, a tax haven that is at once part and not part of Britain, and in Hong Kong, a former British colony that is at once autonomous and part of the Commonwealth and mainland China, all the way to London, former imperial capital and current financial centre, points to imperial legacies in the present. It also refracts dynamics of financialisation, produced at various nodes of cobalt's GVC, through discontinuous junctions and periodisation, by

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8 Jean Comaroff and John L Comaroff (eds), *Law and Disorder in the Postcolony* (University of Chicago Press 2006) 41.

9 See Julian Go, 'The 'New' Sociology of Empire and Colonialism' (2009) 3(5) Sociology Compass 775.

10 *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27.

11 See Stefaan Smis, Dan Nshokano Kashironge, and Jean-Paul Mushagalusa Rwabashi, 'The FG Hemisphere Case: Congo's Resistance to Investor-State Arbitration or Just a Malaise with Vulture Funds?' (2021) 18(3) Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=2814> accessed 20 February 2025.

actors categorised, in legal terms, either as sovereigns, commodity producers, businesses, or financial traders. Building on this case, Section IV argues that legal forms—such as contracts or corporations—are technologies of power that reflect, as much as they produce, a selective codification of globalisation based on the valuation of specific assets, be they social, political, economic, or scholarly. The *FG Hemisphere v Gécamines* example also shows that this valuation process is deeply embedded in bundles of relations that are the outcome of the codification of globalisation. Shifting the focus to what I call legal intermediation tracked at the individual level, of geographical localities (within empires, colonial states, or nation-states) and of institutions (judicial or financial), brings the enquiry back to Asia by showing that China's deployment of the law is itself deeply embedded in imperial legacies and concurrent processes of financialisation. Section V concludes the paper by examining whether and how socio-legal scholarship on a global scale can provide a meaningful critique of the entanglement between law, politics, and finance in the green transition.

## II. Using Law Too Well, But Not Wisely

Of the average 170 g weight of a smartphone, 10 g is cobalt, a blue metal that ensures that the Li-ion battery of the phone does not explode. Li-ion batteries are used in many consumer electronics, laptop computers, cellular phones, and electric cars. They are also used for grid-scale energy storage as well as military and aerospace applications. The usual Li-ion battery types consist of lithium and different amounts of cobalt, nickel, manganese, and natural graphite. Of these components, lithium and cobalt are the most critical. Lithium enables Li-ion batteries to be lighter and to pack more energy than conventional lead-acid batteries. Cobalt ensures that the batteries' cathodes do not overheat or catch fire.

The question of whether Li-ion batteries are better for the environment is complex. Taking the example of cars, a Wall Street journal study underscored that the environmental cost of a car includes both building it and fueling it. Building an electric car generates more carbon emissions because of the metals needed for its Li-ion battery.[12] Cobalt is most often produced as a by-product of copper and nickel mining. The ore most suitable for Li-ion batteries is geologically concentrated in Africa's Copper belt in one country only, Congo, whose known deposits contain over 70% of the world's cobalt.[13] Old European imperial cores—and to a lesser extent the US—are on the consumer end of the "green" energy supply chain. China dominates the world's Li-ion market. In 2020, it produced about 77% of all Li-ion batteries

[12] See Russell Gold, Jessica Kuronen, and Elbert Wang, 'Are Electric Cars Really Better for the Environment?' (*The Wall Street Journal*, 22 March 2021) <https://www.wsj.com/graphics/are-electric-cars-really-better-for-the-environment/> accessed 20 February 2025.

[13] See 'Cobalt Supply Chain Platform' (*Resource Matters*) <https://supplychains.resourcematters.org/explore> accessed 20 February 2025.

that entered the global market, controlled 80% of the world's raw material refining, 77% of the world's cell capacity, and 60% of the world's component manufacturing.[14] The story of the green transition therefore necessarily shifts the enquiry towards two so-called peripheries—Africa and China.

## A. Law's Ubiquity in GVCs: A Challenge for Socio-Legal Enquiry

What economists call the cobalt GVC is at the heart of what some commentators have described as a cold war between China and the US, the "digital revolution," along with a new rush for the African continent, after the rush of the later part of the 19th century and that of the Cold War. Rising demand for cobalt led to a 300% increase in the price of unrefined cobalt on the London Metal Exchange ('LME')—the world centre for industrial metals trading—between 2016 and 2018. Thanks to its massive geological wealth, the DRC "*could* become the Saudi Arabia of the electric vehicle age."[15] But the violence of the ongoing rush is also particularly severe—humanely, environmentally, and socially.[16]

Violence, political and corporate corruption in Congo, and Chinese domination over the Li-ion battery chain are overwhelmingly understood as "risks" for policymakers and the industry in Europe and the US. Two policy moves tend to be broadcasted to foster the "sustainability" of cobalt supply.[17] On the one hand, technological innovation involves getting rid of the cobalt component of Li-ion batteries. But this remains unlikely to happen in the coming decades. On the other hand, "good governance" is the idea that governance in resource-rich African states—especially Congo—needs to be reformed through rule of law reforms aimed at stabilising foreign investments and curbing elite corruption and societal violence.

However, ongoing media and judicial battles on the detrimental societal and environmental effects of extractive deals between transnational corporations and resource-rich African states continue to stress the acuteness of contests

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[14] See 'BNEF Talk: Winning the Lithium Battery Value Chain' (*Bloomberg*, 18 May 2021) <https://www.bloomberg.com/news/videos/2021-05-18/bnef-talk-winning-the-lithium-battery-value-chain> accessed 20 February 2025.

[15] Jason Mitchell, 'Kinshasa is already Africa's biggest city – could cobalt make it the richest?' (*Mining Technology*, 15 February 2022) <https://www.mining-technology.com/features/kinshasa-africa-democratic-republic-congo-cobalt/> accessed 20 February 2025 (emphasis added).

[16] See Siddharth Kara, *Cobalt Red: How the Blood of the Congo Powers Our Lives* (St Martin's Press 2023).

[17] For example, the European Commission has been assessing raw materials (including cobalt) for their criticality for EU Member states since 2011, to address the gap between endogenous supply (through mining and recycling of Li-ion batteries) and rising demand. See Patricia Alves Dias and others, 'Cobalt: demand-supply balances in the transition to electric mobility' (Publications Office of the European Union 2018) <https://publications.jrc.ec.europa.eu/repository/handle/JRC112285> accessed 20 February 2025.

over the distribution of natural resources and benefits derived from them. They also pinpoint loopholes in the reach of global regulations[18] and the difficulty (if not total lack) of judicial remedies available to disenfranchised communities at the national and international levels,[19] due to the material and financial structure of transnational corporations ('TNCs') across jurisdictions and the challenges it raises to lift the so-called "corporate veil."[20]

These studies provide some knowledge on the social, economic, political, and normative variables at play in building transnational strategic litigation on behalf of disenfranchised communities. But this knowledge is by nature post hoc. Legal strategies are studied as if they should fit within the loopholes and strategic opportunities fostered by GVCs. Therefore, these accounts tend to obfuscate rather than clarify the role of law, judicial institutions, and legal professions. In a global economy shaped by GVCs, the law is ubiquitous: from the informal transactions between the Chinese merchants buying cobalt from artisanal miners in the mineral-rich Eastern region of the DRC, to the financialisation of minerals, including cobalt,[21] through to the criminal proceedings against individuals involved as politicians, militiamen, and former child soldiers in the Congolese wars of the 1990s that have fuelled the docket of the International Criminal Court ('ICC') since it became operational in 2002.

Law's ubiquity raises significant challenges for socio-legal enquiry. The idea that "institutions"—such as legal frameworks, institutions, and professionals—"matter," espoused by the World Bank[22] from the end of the 1990s, and the policy pull it has exercised towards the re-regulation of the mining sector continues to be deployed "in a game of catch-up where the damage of the initial regulatory gaps has never fully been assessed."[23] The exceptional violence of the Far West-like rush for Congo's minerals during the 1990s, unleashed by the privatisation of state-owned extraction companies fostered by structural adjustment programs, was fuelled by, as much as it exacerbated, what has been dubbed the "African World War."[24]

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18 Cutler and Dietz (n 4).

19 Horatia Muir Watt, Lucia Bíziková, Agatha Brandão de Oliveira, and Diego P Fernández Arroyo (eds), *Global Private International Law: Adjudication without Frontiers* (Edward Elgar Publishing 2019).

20 The "corporate veil" is a Common Law doctrine which institutes a separate personality between the corporation and its shareholders. Usually, a corporation is treated as a separate legal person, which is solely responsible for the debts it incurs and the sole beneficiary of the credit it is owed. Common Law countries tend to uphold this principle of separate personhood, but in exceptional situations may "pierce" or "lift" the corporate veil.

21 The financialisation of cobalt refers to the process by which cobalt has come to be traded as a speculative asset.

22 Shahid Javed Burki and Guillermo E Perry, *Beyond the Washington Consensus : Institutions Matter* (World Bank 1998).

23 Peter Rosenblum, 'Out of Storage: Law and Minerals in the African Oil Boom' (Law and Society Annual Conference, New Orleans, June 2016).

24 Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a*

"As a type of weak, permeable underbelly of global extraction that is both backwards and in need of civilization, but also savage and dangerous,"[25] the DRC has loomed large in the "new conflicts" policy-driven literature that emerged from the breakup of the Cold War. It features widely in the concurrent boom of institutions, scholarship, and policy shifts that have transformed domestic and global politics into a legal and judicial battlefield in the past four decades. Certainly, this framing of Congo as as a foil for arguments about European capitalist history due to the resilience of kinship ties, and the tendency towards personal, anti-entrepreneurial governance,[26] justifies new forms of regulation whereby law is deployed through rule of law reforms aimed at cutting the link between violence, finance, and GVCs. However, as evidenced by a growing scholarship on law and global political economy,[27] this framing paradoxically reduces the scope of legal intervention to a side show.

The relationship between raw commodities and the expansion of capitalism has been woven into masterfully detailed histories that underscore the interconnectedness between the reorganisation of labour (from slavery and forced labour in colonised territories to the expansion of a labour class in Europe and the US from the mid-1850s), the industrialisation of production, the financial and logistical innovations of commodity circulation across the globe, through to the capture of a "consumer class."

In these scholarly and policy accounts, the law tends to remain "an institutional backdrop against which the economic and inter-organizational dynamics driving the globalization of production play out"[28]—either because it is not mentioned at all—or because it is invoked as a *future-oriented* fix to tame the violence of the market or regulate poor governance, foremost in resource-rich economies. Legal intervention is studied as if it should fit within the loopholes and strategic opportunities fostered by GVCs.

The sociology of the legal profession does not provide much help to overcome this critique. Lawyers in the colonial realms have long remained the suppressed underside of the North. When not marginalised to the point of oblivion, they have predominantly been studied with the lens of the contemporary hegemon, under the purview of the US sociology of legal

*Continental Catastrophe* (Oxford University Press 2009).

[25] 'Interview – Christoph Vogel' (*E-International Relations*, 21 July 2023) <https://www.e-ir.info/2023/07/21/interview-christoph-vogel/> accessed 20 February 2025.

[26] See Frederick Cooper, *Africa in the World: Capitalism, Empire, Nation-State* (Harvard University Press 2014).

[27] See The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4(1) London Review of International Law 57; Cutler and Dietz (n 4); Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (Cambridge University Press 2020); Hannah Appel, *The Licit Life of Capitalism: U.S. Oil in Equatorial Guinea* (Duke University Press 2019).

[28] IGLP (n 27) 60.

professions, with two self-opposed images, as either champions of the rule of law,[29] or mercenaries of autocratic regimes or corporate interests.[30] However, this tends to obfuscate the critical role played by law in the deployment of empires and colonial rule, and the fact that lawyers in the present continue to be structurally, albeit ambiguously, positioned as both champions of the rule of law and as allies of political and corporate interests.[31]

## B. Law and the Transformation of the Geography of Extraction

A part of the problem of these accounts relates to what Steinmetz calls the "imperial entanglement"[32] of scientific knowledge, including law as a science. Studies of the "colonial question" have undergone a relative boom in the past fifteen years. But these studies remain largely entangled in ideologically laden controversies.[33] The "imperial entanglement" of scholarship relates more broadly to the boundaries of socio-legal studies, in terms of conceptual scope and empirical scale. In this journal, for example, Buchanan noted the enduring rigidity characterising debates on transnational constitutionalism, which even as they purport to transcend the nation-state, cannot escape some form of re-inscription of the relation between law and a centralised sovereign authority.[34]

This is especially problematic to understand the processes at play in the financialisation of cobalt and other commodities. A growing literature on the limits of financialisation argues that financialisation is a much more fraught process than the mainstream understanding of a clear-cut "divorce" of value from the underlying material form. For example, since 2017, the LME has deployed initiatives to screen cobalt traded for child labour, even though the LME has little direct exposure to consumer pressure, is not targeted by activists, and does not sell audit or consultancy services. Though useful, existing socio-legal scholarship analysing this move in a wider context of proliferation of actors involved in private labour governance does little to explain why and

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29 Terence C Halliday, Lucien Karpik, and Malcolm M Feeley (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (Cambridge University Press 2012).

30 See Richard L Abel and Philip SC Lewis (eds), *Lawyers in Society: Comparative Theories* (University of California Press 1989).

31 See Chidi Oguamanam and W Wesley Pue, 'Lawyers' Professionalism, Colonialism, State Formation and National Life in Nigeria, 1900–1960: "The Fighting Brigade of the People"' in W Wesley Pue, *Lawyers' Empire: Legal Professions and Cultural Authority, 1780–1950* (University of British Columbia Press 2016).

32 George Steinmetz, *Sociology and Empire: The Imperial Entanglements of a Discipline* (Duke University Press 2013).

33 Todd Shepard, '"Of Sovereignty": Disputed Archives, "Wholly Modern" Archives, and the Post-decolonization French and Algerian Republics, 1962–2012' (2015) 120(3) American Historical Review 869.

34 Ruth Buchanan, 'Reconceptualizing Law and Politics in the Transnational: Constitutional and Legal Pluralist Approaches' (2009) 5(1) Socio-Legal Review 21.

how the LME as a financial actor is now acting as a regulator of the cobalt market.[35]

By the same token, the expansive Third World Approaches to International Law ('TWAIL') scholarship has cut large swathes in the past couple of decades in deploying a Eurocentrism critique of international law. TWAIL scholarship has underscored that the idea that the non-European world was civilisationally inferior has been constitutive of modern international law since its emergence as a distinct discipline during the last quarter of the nineteenth century.[36]

Yet, as Tzouvala powerfully argues,[37] this critique, essentially woven as a cultural account of international law, tends to obscure the material origins of the rise of the West. Building a structuralist account of law requires considering the selective social, financial, material, and cultural globalisation fostered by GVCs. The global competition for "green" minerals is unfolding against the backdrop of a wider expansion of the geography of extraction,[38] fueled by the reorganisation of the mining industry since the turn of the 2000s fostered by expansive technological transformations (robotisation, geo-exploration, etc.) and the globalisation and financialisation of GVCs.

The transformation of the geography of extraction is pushing the mining industry toward greater functional integration. Mining giants are still little more than a handful. Dominant players, like Glencore or Trafigura, are referred to as "global traders" which operate vertically integrated supply chains to buy and sell physical commodities. The quintessence of an insider market, global traders are essentially an "international clearing house for essential goods."[39] Global traders' "power to act as de facto gatekeepers to the market gives large buyers extraordinary advantages over both firms and states competing for their favor."[40]

This means that global traders are at once commodity and financial traders and, as such, critical actors in the wider "on-shoring" of the "offshore" economy that is dissociating the wealth produced by commodity trading from domestic economies.[41] Until the 2008 financial crisis, "tax havens were

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35 Nick Bernards, 'Child Labour, Cobalt and the London Metal Exchange: Fetish, Fixing and the Limits of Financialization' (2021) 50(4) Economy and Society 542.

36 See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2012).

37 Tzouvala (n 27).

38 Arboleda (n 7) 5.

39 Javier Blas and Jack Farchy, *The World for Sale : Money, Power, and the Traders Who Barter the Earth's Resources* (Penguin 2022) 8.

40 Dan Danielsen and Jennifer Bair, 'The Role of Law in Global Value Chains: A Window into Law and Global Political Economy' (*Law and Political Economy Project*, 16 December 2018) <https://lpeproject.org/blog/the-role-of-lawinglobalvalue-chains-a-window-intolaw-and-global-political-economy/> accessed 20 February 2025.

41 See Blas and Farchy (n 39).

generally seen as exotic sideshows to the global economy." [42] Yet, major tax havens are in advanced economies and their territories. Recent studies have demonstrated that a huge number of onshore jurisdictions act as conduits towards the offshore economy—that is, as places where a disproportionate amount of value is disconnected from the onshore economy and is moved towards traditional offshore tax havens.[43]

Thus, the structuration of GVCs around vastly dispersed networks of logistical infrastructures, transoceanic corridors, financial intermediation, and geographies of labour "cannot be fully elucidated by the *loci classici* of state-centric concepts of political economy, such as resource curse, dependency, imperialism, and so forth."[44] Yet "[t]he political authority that underpins the international movement of capital continues to be mediated nationally."[45] Far from the policy pull of the story about "state failure," the wealth of foremost political economic scholarship criticising the heuristic limits of the "resource curse"—the paradox of resource-rich economies entrapped in poverty—documents the predominance of elite bargaining (the "who wins" question) in the post-colonial trajectories of African states—and with it, the redeployment, rather than retreat, of the state induced by the neoliberal turn.[46]

On the other hand, as Pistor argues, capitalism "is more than just the exchange of goods in a market economy; it is a market economy in which some assets are placed on legal steroids."[47] What she calls the "code of capital" relies on the fact that "[a]sset holders do not need to capture the state directly, much less win class struggles or revolutions; all they need is the right lawyers on their side who code their assets in law."[48] Yet the code of capital "owes its power to law that is backed and enforced by a state."[49] Global capitalism can be sustained by a single domestic legal system provided that other states recognise and enforce its legal code. Most financial assets traded globally are coded in only two legal systems: British Common Law and the laws of the state of New York. Conflict-of-law rules have divested the difficulty of harmonising the law by political means, instead enabling private parties to choose the legal system in which the entity that is issuing their assets is incorporated as the one determining the property law for the assets it issues.[50]

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42 Nicholas Shaxson, 'Tackling Tax Havens' (2019) 56(3) Finance & Development 6, 9.

43 Javier Garcia-Bernardo, Jan Fichtner, Frank W Takes, and Eelke M Heemskerk, 'Uncovering Offshore Financial Centers : Conduits and Sinks in the Global Corporate Ownership Network' (2017) 7 Scientific Reports 6246.

44 Arboleda (n 7) 5.

45 ibid 6.

46 Amber Murrey and Nicholas Jackson, 'Africa and the Resource Curse Idea' in Toyin Falola and Mbah (eds), *Routledge Encyclopaedia of African Studies* (Routledge, forthcoming).

47 Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019) 11.

48 ibid 22.

49 ibid 15.

50 ibid 134.

The "licit life of capitalism," as Appel argues, [51] is licit because it builds on dynamics of segregation that paradoxically highlight the performative value of capitalist standardisation. Corporations, or the contract as a standardised legal form are performatively efficient because they lean on exclusive categories such as the "resource curse" versus "good governance." They are also materially powerful because they are backed up by a code of capital constituted by the alliance between financial clout (the US dollar) and US state power.[52]

Certainly, the dramatic expansion of investment arbitration since the turn of the 2000s[53] has been fueled by the integration of arbitration clauses in bilateral and multilateral investment treaties—with the ostensible goal of protecting foreign investments from political or societal instability, based on standardised legal technologies such as stabilisation clauses.[54] But the code of capital is foremost connected to the US position as a major tax haven, the US economic market, and the role of the US dollar in global trade and financial markets. The targeting of Glencore by US sanctions in 2017 under the 1997 US Foreign Corrupt Practices Act ('FCPA') is emblematic. Since the mid-2000s, the FCPA, the US Department of Justice, and the US Securities and Exchange Commission ('SEC') have launched an average of thirty-six charges per year, predominantly against non-US corporations and individuals. These charges are very effective as they involve so-called secondary sanctions, including the threat to block access to the US financial system to corporations that have done business with sanctioned entities even when these transactions were not conducted in US dollars.[55]

Therefore, understanding the relationship between law and the green transition requires socio-legal enquiry to look for the state in places it is not used to finding it, namely, finance and in the relationship between political change and capitalist accumulation. This does not deny that developing countries are the prime losers from global profit shifting.[56] But such a research agenda can help understand that though uneven and unequal, the African South's relationship with global markets is also reciprocal. Indeed, it points

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[51] Appel (n 27).

[52] Pistor (n 47).

[53] See Sara Dezalay and Yves Dezalay, 'Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market of Arbitration' in André Nollkaemper, Jean d'Aspremont, Wouter Werner, and Tarcisio Gazzini (eds), *International Law as a Profession* (Cambridge University Press 2017) 287.

[54] Stabilisation clauses are explicit, specific commitments made by a host State to one or more foreign investors, which are designed to shield foreign investors from political risk subsequent adverse legislative or regulatory change in a host State.

[55] Sara Dezalay, *Lawyering Imperial Encounters: Negotiating Africa's Relationship with the World Economy* (Cambridge University Press 2024) 113.

[56] Giorgia Albertin and others, 'Tax Avoidance in Sub-Saharan Africa's Mining Sector' (2021) International Monetary Fund Departmental Paper No 2021/022, 13 <https://www.imf.org/en/Publications/Departmental-Papers-Policy-Papers/Issues/2021/09/27/Tax-Avoidance-in-Sub-Saharan-Africas-Mining-Sector-464850> accessed 20 February 2025.

to the interconnectedness of dynamics of change both across sectors—in law, finance, or politics—and across geographical scales, namely in the Global North and the Global South.

## III. Unpacking Law's Entanglement *from* the African South

Building a socio-legal enquiry *from* African sites is a particularly powerful way to deploy this research agenda. Indeed, the hyper-violence and hyper-legality at play, for example, in the ongoing rush for Congo's cobalt, underscores what Appel describes as the "licit" life of capitalism,[57] that is, practices that are legally sanctioned, widely replicated and ordinary, at the same time as they are messy, contested, and arguably indefensible. In other words, these practices are far from exceptional but constitute, rather, capitalism *tout court* as people and places differentially valued by gender, race, and colonial histories are the terrains on which the rules of the capitalist economy are built.

Deploying a socio-legal enquiry on law and the green transition *from* Africa also underscores that what Ogle terms "archipelago capitalism"—commonly understood as referring to tax havens and secrecy jurisdictions—is "by no means a deviation from normal economic practice."[58] Rather, offshore capitalism emerged as an outgrowth of the nation-state system shaped by the New Deal, the European welfare state, and decolonisation and modernisation projects in the Third World. Revisiting, as Ogle does, the period between the 1950s and the 1980s, pushes against common narratives about historical change, specifically the historiographic obsession with either the 1960s as a moment of political and economic break for the independent states that emerged from colonialism, or the 1980s as a period of redeployment of the state in the West under the impetus of the ideological, economic, and political neoliberal project.

The case recounted below illustrates the relevance of building a socio-legal enquiry on the relationship between law and the green transition *from* Africa. The case *is* about Congo but in a way that builds against, and beyond accounts that "have teeth and teeth that bite through time,"[59] such as the resource curse, dependency, and common critiques about capitalist violence.

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[57] Appel (n 27).

[58] Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122(5) American Historical Review 1433.

[59] Appel (n 27) 4.

## A. A Curiously "Global" Dispute: *FG Hemisphere v Gécamines*

On 17 July 2012, the Privy Council gave a decision that shifted the power balance in a long-standing judicial struggle between FG Hemisphere Associates LLC and Gécamines.[60] The FG Hemisphere case relates to a complex series of post-award legal proceedings over twenty years.[61] In the 1980s, what was then Zaire (current Congo) entered into a construction agreement with Energoinvest, a then Yugoslav corporation. When Congo defaulted, Energoinvest invoked the arbitral clauses included in the agreement and successfully obtained two arbitral awards in 2003 under the aegis of the International Court of Arbitration of the Paris International Chamber of Commerce ('ICC in Paris').

FG Hemisphere is a vulture fund incorporated in the state of Delaware, a tax haven in the US. Like other vulture funds, it specialises in the purchase of distressed assets at a cheap rate. FG Hemisphere allegedly paid USD 3.3 million to redeem Congo's debt. This enabled FG Hemisphere to become the assignee of the benefit of debts owed by Congo in consequence of the two ICC in Paris arbitration awards made against it. While the original debt totalled around USD 34 million minus interests, FG Hemisphere claimed more than USD 100 million including interests and the costs of the two arbitral proceedings. It deployed an aggressive multi-front legal war to enforce the awards against assets (real estate and bank accounts) owned by Gécamines. This included proceedings in Jersey, where Gécamines owned shareholdings in a joint venture company, and in Hong Kong, where China Railway Group Ltd, a Chinese state-owned enterprise which had concluded a joint-venture agreement with Congo, was listed on the Hong Kong Stock Exchange.[62]

FG Hemisphere had also filed claims in Belgium, Bermuda, South Africa, and the US where it managed to recover some of the debt. However, contrary to these other courts, the Privy Council found that Gécamines was an entity distinct from the state and that FG Hemisphere was therefore unable to enforce Congo's debt against Gécamines' assets.[63] The judicial process that led to the Privy Council as an appeals court is the puzzling part. The Privy Council was seized to appeal a 2011 Jersey Court of Appeal decision which found that Gécamines was an organ of the state. In its rationale, the Privy Council espoused a 2010 decision by the Hong Kong Court of Final Appeal which concluded the opposite.

Both Jersey and Hong Kong are at once part and not part of Britain. Jersey is a self-governing parliamentary democracy under a constitutional

60 *FG Hemisphere* (n 10).

61 See Smis and others (n 11).

62 ibid.

63 See *FG Hemisphere* (n 10) [29].

monarchy, with its own financial, legal, and judicial systems. But Jersey has retained the jurisdiction of the Privy Council in London as its apex court. As for Hong Kong, under the 1997 handover to China, the Common Law system continues to be practiced as constitutionally guaranteed, making the city the only Common Law jurisdiction within China. Nevertheless, the Hong Court of Final Appeal was pressured into submitting the matter for constitutional interpretation to the Chinese Central Authorities which found that it related to China's foreign relations, must be interpreted by (mainland) Chinese courts, and that absolute immunity of the Congolese state must be upheld.[64]

The Gécamines example is emblematic of the fact that the structural adjustment programs championed by the World Bank have tended to consolidate what Cooper calls "gatekeeping politics,"[65] rather than displace them. The corporation continues to play a key political role in Congo's post-colonial politics. World Bank-engineered liberalisation reforms from the early 2000s failed to displace Gécamines' position as gatekeeper of some of the country's most promising mineral deposits or its incorporation into a commercial company under private law in 2010.[66]

Although its production of copper and cobalt fell, Gécamines maintained its strategic role because it controlled the country's most sought-after mining permits.[67] Gécamines started selling permits while the war was still raging in the east of the country. The initial deals were signed with relatively junior companies—more risk-inclined than major mining conglomerates. This contributed to the Far West-like looting of Eastern Congo. From the early 2000s, Joseph Kabila's regime actively retained Gécamines' role as a gatekeeper with foreign investors, while using the commercial status of the corporation to shield it from governance inquiries such as requests to disclose its contracts, income, and dealmaking activities.

The *FG Hemisphere v Gécamines* dispute illustrates the wider financialisation of sovereign debt and its disconnection from democratic oversight.[68] The exceptionality of this example relates to its visibility. If the DRC had not been the target of a myriad of advocacy campaigns and policy moves since the 1990s from the US, the Organisation for Economic Cooperation and Development ('OECD'), the European Union, and NGOs—drawing a direct link between the "digital minerals" of Congo (cobalt, coltan,

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64 See Horatia Muir Watt, 'L'immunité souveraine et les fonds 'vautour'. À propos de La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC' (2012) 4(4) Revue critique de droit international privé 789.

65 Gatekeeping politics refer to the competition over "the nodal point where local society meets external economy, dependent on manipulating revenues and patronage deriving from that point, including foreign and commercial deal"; see Cooper (n 26) 30.

66 'A State's Affair: Privatizing Congo's Copper Sector' (The Carter Centre 2017).

67 ibid 5.

68 Benjamin Lemoine, *Chasseurs d'État. Les fonds vautours et la loi de New York à l'assaut de la souveraineté* (La Découverte 2024).

copper) and the exceptional violence of conflicts in the Great Lakes region[69]—the judicial saga that brought FG Hemisphere to the Privy Council based on the two ICC in Paris awards would have remained invisible. Arbitration, by definition, is rendered behind closed doors. Awards are rarely public—and neither, by extension, are the financial and symbolic stakes they raise such as in terms of sovereign control and democratic oversight over sometimes essential services like access to health or water.[70]

The hyper-visibility of the DRC as both a high-risk site for foreign investors and a magnet of geopolitical rivalries enabled the re-construction of the FG Hemisphere judicial saga into a legal dispute across jurisdictional divides, to use Felstiner, Abel, and Sarat's terminology.[71] It is precisely because this case involves apparently disconnected geographical sites and judicial institutions that it provides a startling starting point to examine the stakes raised by socio-legal enquiry on the relationship between law and the green transition. How can we make sense of the entanglement between the imperial past imprinted in this case (illustrated by the role played by the Privy Council), the articulation between finance, tax havens, and states, and the role played by law and dispute settlement institutions across the various local nodes of the economic, political, and legal components of the dispute?

## B. Selective Globalisation and Financialisation

I argue that seeing these links matters. The FG Hemisphere judicial saga constitutes a petri dish of the social and professional networks, the norms, and the institutions that determine, justify, and transform the uneven and unequal relationship between the African South and the world-economy. Identifying the combination of variables (socio-political, financial, professional, normative, and institutional) that contribute to the production of the legal categories shaping the relationship between the African South and globalisation can also provide us with a history of the ongoing transformation of the geography of extraction. This is because it uncovers how boundaries between what is perceived as public (like the state) and private (like business interests), international and national, legal and illegal, between the so-called core(s) of the world economy and its peripheries are transformed, and foremost justified.

Tracking the possibilities shaped by law enables a critique of the distributive effects of GVCs—the "who wins" question. Mapping the legal geography of GVCs helps show what the traditional division of law into discrete subfields misses or conceals. It also underscores the way domestic and international

[69] Christoph N Vogel, *Conflict Minerals, Inc.: War, Profit and White Saviourism in Eastern Congo* (Hurst 2022).

[70] See Michael Waibel, Asha Kaushal, Kyo-Hwo Liz Chung, and Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

[71] William LF Felstiner, Richard Abel, and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) 15(3-4) Law & Society Review 631.

hard and soft law and private ordering mechanisms intermingle in ways that challenge efforts to maintain clear distinctions between them.[72] Thus, mapping the legal geography of GVCs shows that law itself generates material and symbolic value.

But the *FG Hemisphere v Gécamines* example also raises an acute problem for socio-legal scholarship. On the one hand, the contradictory position of Congo as at once backwater and vanguard of capitalism pushes against common tropes about GVCs and TNCs. GVCs are usually understood to be driven by the expansion of TNCs primarily headquartered in advanced economies, which consolidate their international operations by controlling and coordinating international production networks consisting of multiple firms—including third parties with no equity links to them (what is otherwise known as "international outsourcing")—headquartered or operating in other national jurisdictions. According to some estimates, GVCs "governed" by TNCs account for 80% of global trade each year. The underlying assumption is that GVCs enable developing countries to focus on individual links in the chain so that their firms can integrate with the world economy "on a shoestring without facing the large risks (and costs) incurred by investing in all the tasks required for producing the finished product or services."[73]

Africa remains predominantly integrated into GVCs through what are called *forward* linkages, meaning that resource-rich African countries and/or raw commodity producers supply these commodities as inputs that are used for production in other countries. Emblematically, in 2018, mining contracts between African states and TNCs were worth a total of USD 47 billion[74]—just a little under the total flow of Official Development Assistance that same year to sub-Saharan Africa which constitutes its biggest recipient.[75] For exporting African states, the value of minerals and raw commodities, in economic terms, is supposed to be mainly accrued through tax returns, i.e., the royalties paid by foreign investors to host states on exported raw commodities and unrefined minerals. But where does Gécamines—and for that matter, FG Hemisphere—feature in the celebratory pitch about inclusive growth and shared prosperity fostered by GVCs?

The nickname "vulture fund" labels FG Hemisphere as a profiteer. Yet, by definition, vulture funds are risk investors—the rationale behind the risk taken by private investment firms and hedge funds in suing sovereign award-

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72 IGLP (n 27) 64.

73 'Trade and Development Report 2018: Power, Platforms and the Free Trade Delusion' (UNCTAD 2018) 50.

74 'The Largest Mineral Industry in the World' (*Investing in African Mining Indaba*, 19 December 2019) <https://www.miningindaba.com/Articles/infographic-the-african-mining-sector-in-numb> accessed 20 February 2025.

75 See Organisation for Economic Co-operation and Development (OECD), 'Official Development Assistance (ODA)' <https://www.oecd.org/en/topics/official-development-assistance-oda.html> accessed 20 February 2025.

debtors, who, depending on national jurisdictions, may benefit from sovereign immunity and are therefore likely to default, is the high-profit margin between the actual investment and the expected returns. In a 2013 Resolution, the UN Human Rights Council "condemn[ed] the activities of vulture funds for the direct negative effect that the debt repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil their human rights obligations."[76] The "problem" of vulture funds, therefore, harks back to the "morally outrageous outcome" of their venture.[77]

But this moral critique masks the financialisation of sovereign debt. Thus, Gécamines constitutes an anomaly to the common understanding of GVCs. One of the largest mining companies on the African continent, and the biggest in the DRC, Gécamines is headquartered in Lubumbashi, in the Katanga region, and sits on the world's greatest deposit of cobalt. Transformed into a commercial company in 2010—with the state as the sole shareholder—it formally engages in the exploration, research, exploitation, and production of mineral deposits, including copper and cobalt.[78] But, in practice, it does not directly engage in extraction activities.

The adoption of a new mining code in Congo in 2003, under the pressure of the World Bank, aimed at liberalising the DRC's mining sector and attracting foreign investors.[79] Yet, a subtle transitional clause enabled Gécamines to retain ownership over the exploitation rights of its most valuable concessions and therefore act as the *de facto* gatekeeper to Congo's mineral wealth.[80] It is this regulatory framework and financial trail that positions Gécamines as a transnational corporation with the ability to wage either the "corporate veil" or sovereign immunity to protect its assets in other jurisdictions.

On the other hand, this financial trail helps expose some of the nodes of cobalt's GVC through the judicialisation chain constituted by the *FG Hemisphere v Gécamines* dispute. In the framework of the so-called 2007 "deal of the century" between China and the DRC, Gécamines entered a joint venture with China Railway Group Ltd, listed on the Hong Kong Stock Exchange. [81] Gécamines also holds shares in venture companies based in

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[76] United Nations Human Rights Council, 'Resolution 27/30: Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights: The Activities of Vulture Funds' (3 October 2014) UN Doc A/HRC/RES/27/30.

[77] Devi Sookun, *Stop Vulture Fund Lawsuits: A Handbook* (Commonwealth Secretariat 2010) 7.

[78] Carter Centre (n 66) 5.

[79] ibid 16.

[80] ibid 21.

[81] See 'The Backchannel: State Capture and Bribery in Congo's Deal of the Century' (The Sentry 2021) <https://cdn.thesentry.org/wp-content/uploads/2021/11/TheBackchannel-TheSentry-Nov2021.pdf> accessed 20 February 2025.

Jersey. However, the relevance of these connections remains limited if studied in isolation.

Where and how does the value-adding process of the cobalt GVC start? This question raises the acute problem of accounting, in economic terms, for the value share that escapes the cobalt GVC, be it through material evasion (for example, the cobalt extracted by artisanal miners not included in the "official" cobalt GVC),[82] or financial evasion (bribes, corruption, and tax evasion in conduits, secrecy jurisdictions, and tax havens). While the UK Privy Council ruled that a state-owned company could only be assimilated to the state in "quite extreme circumstances,"[83] which it found had not been met in the case of Gécamines, it is in the City, in London, that the price of refined cobalt is rated: at the LME, based on an expanding array of intermediaries and increasingly sophisticated financial tools. It is also in London's backyard, Jersey, a tax haven, that part of the value of the cobalt GVC can at once escape the onshore economy (including as taxes to the Congolese state) and be converted as legitimate investments in the formal economy. Thus, the *FG Hemisphere v Gécamines* case underscores at once the complex interplay between imperial legacies and the interconnectedness between the trajectory of post-colonial states and that of financial markets. Making sense of this interplay requires tracking the entanglement between political and legal change and financialisation.

## IV. Tracking the Entanglement between Law, Financialisation, and the Green Transition

To track the entanglement between political and legal change and financialisation, it is not sufficient to focus exclusively on the financial trail of GVCs. This, indeed, risks obfuscating the fact that GVCs are not only a business strategy, but also part and parcel of capitalist expansion. This means that across GVCs, value is regularly invoked in two ways and in two ways at the same time— "as an adjective to modify a product that can be measured in price and captured based on one's position in a chain *and* as a social and moral hierarchy."[84] Capitalism, in other words, is made up of transactions in value that are both financial and symbolic. This raises a challenge for socio-legal enquiry as it requires not only combining different empirical scales—local, national, supra-national—to track law's deployment. It also involves

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[82] From 20-40% of Congo's cobalt is extracted by artisanal miners. See Todd C Frankel, 'The Cobalt Pipeline: Tracing the Path from Deadly Hand-Dug Mines in Congo to Consumers' Phones and Laptops' (*The Washington Post*, 30 September 2016) <https://www.washingtonpost.com/graphics/business/batteries/congo-cobalt-mining-for-lithium-ion-battery/?tid=a_inl> accessed 20 February 2025.

[83] *FG Hemisphere* (n 10) [29].

[84] Amy Cohen, 'On Law and Value' (*Law and Political Economy Project*, 12 December 2019) <https://lpeproject.org/blog/on-law-and-value/> accessed 20 February 2025 (emphasis added).

accepting that the categories usually understood to explain law's social effectiveness—sovereignty *v* private interests, finance *v* development—are themselves contingent on financial and symbolic value. This compels us to channel our attention to the *entanglement* between law, states, GVCs, and financial markets.

Law's role in the relationship between states, GVCs, and financial markets is itself entangled. Legal forms—such as contracts or corporations—are technologies of power that reflect, as much as they produce, a codification of globalisation based on the valuation of specific assets, be they social, political, economic, or scholarly. The *FG Hemisphere v Gécamines* example also shows that this valuation process is deeply embedded in bundles of relations that are the outcome of the codification of selective globalisation. Thus, the value of the commodities that circulate through GVCs is financial. It depends on power relations along the nodes of GVCs. It is also reflective of social and moral hierarchies that are determined in part by legal forms, and by law as science and symbolic capital.

## A. Lawyering and Imperial Encounters

The *FG Hemisphere v Gécamines* example complexifies the "who wins" question in GVCs. It also highlights the dual role of law as both a fix to, and an enabler of, the reproduction of structural relations of power between capitalism's cores and its peripheries and of the financialisation of the relationship between sovereign states, markets, and societies. Looking at the operations of codification of globalisation at play through valuation processes performed through law as a technology of power shifts the focus towards the variables (social, economic, political, etc.) that account for these operations as either "structurally banal"[85] or happenstance.

In my own work, I refer to these operations of the law as modalities of legal deployment—what I call lawyering—whose societal, political, and economic effects vary according to historical junctures and empirical scales.[86] In some instances, the interplay between historical juncture and scale seems to lend itself to an obvious understanding of the structural effects of lawyering. In the *FG Hemisphere v Gécamines* case, for instance, the Privy Council decision contributed to the further financialisation of Congo's debt—despite the ostensible outcome of shielding Congo's sovereignty against the predation of a vulture fund. Major critical junctures like the 1884-1885 Berlin Congress, the two World Wars, the 1960s wave of independence, the end of the Cold War, the neoliberal turn, and the deregulation of financial markets can also appear straightforward. But in most instances, in the absence of the delicate

[85] To use Vauchez and France's expression: Antoine Vauchez and Pierre France, *The Neoliberal Republic: Corporate Lawyers, Statecraft, and the Making of Public-Private France* (Cornell University Press 2020) 156.

[86] Dezalay (n 55).

exercise of going back to original encounters, critical junctures offer limited heuristic value when they do not easily map onto the grid of concurrent changes. It is a truism to say that legal decolonisation did not coincide with the political independence of former African colonies—if only because the trajectories, strategies, and choices of the legal professionals that served the new states continued to be shaped by the imperial realm for a decade—and much longer in some cases.

Channeling attention to lawyering in crisis situations provides an alternative entry. Crises are sometimes objectified through policy and scholarly pulls. They can also be legitimated, as crises, through the law's objectivation of societal disputes. The Privy Council decision in the *FG Hemisphere v Gécamines* case emerges as a critical juncture when it consolidates the position of Gécamines as a private-public incarnation of the Congolese state. Crises in all cases "reactivate the initial conflicts and contradictions that existed at the outset."[87]

Thus, the *FG Hemisphere v Gécamines* judicial saga—across the African, North American, European, and Asian jurisdictions, all the way to the Privy Council—can be construed as what I call an "imperial encounter"[88] to refer to normative, institutional, and professional spaces of real connections. These spaces are imperial because they reflect processes produced by, as much as they transform, concurrent geographies of power expansion and capital accumulation. Because they take place simultaneously within different scales and in distinct social spaces, imperial encounters also provide us with a history of the present relationship between capitalism's cores and its so-called peripheries, and more broadly between states, finance, private wealth, and societies.

The *FG Hemisphere v Gécamines* dispute does not capture historical changes in their totality. It helps unpack the "exceptional normal"[89] of the conditions of possibility of circulation of material and symbolic goods and individuals, and with them of processes of valuation (through, for example, professionalisation, institutionalisation, and financialisation) across geographical scales and over time. Thus, in 2019, the Congolese state created the *Entreprise Générale du cobalt* ('EGC') as a subsidiary to Gécamines and entrusted it with the monopoly over the sale and commercialisation of the cobalt extracted by artisanal miners in the DRC. Following the creation of the EGC, Trafigura, the world's second-largest metals and oil trader, announced that it would provide funding to create strictly controlled artisanal mining zones in Kolwezi, in Eastern Congo. The installation of ore purchasing

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87 Yves Dezalay and Bryant G Garth, 'State Politics and Legal Markets' (2011) 10(1) Comparative Sociology 38, 40.

88 An expression borrowed from Romain Bertrand, 'Rencontres impériales : L'histoire connectée et les relations euro-asiatiques' (2007) 54(4) Revue d'Histoire Moderne & Contemporaine 69.

89 See Romain Bertrand and Guillaume Calafat, 'La microhistoire globale: affaire(s) à suivre' (2018) 73(1) Annales. Histoire, Sciences Sociales 12 (my translation from French).

stations ostensibly aims to foster the transparent and traceable delivery of cobalt hydroxide, in compliance with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[90] In one fell swoop, Trafigura positioned itself in such a way as to capture the cobalt produced by artisanal miners that would otherwise enter Chinese commodity chains through unofficial routes, lowering the price for global traders.

The move becomes even more interesting when we zoom in on the lawyer who coded this arrangement into law: Pascal Agboyibor, a French Togolese corporate lawyer. His late father, Yawovi Agboyibo—the first corporate lawyer upon Togo's independence, a doctor of law from a university of the former French *métropole*, a political opponent, and a human rights advocate—was also the first legal counsel of Gécamines at the onset of the *FG Hemisphere v Gécamines* judicial saga.[91] Pascal Agboyibor recently set up a multinational corporate law firm, Asafo & Co, as "a law firm committed to Africa, that understands Africa."[92] The firm's success built in part on the powerful clientele—foremost Gécamines—brought in by Agboyibor, thanks to a lasting relationship with the Congolese businessman Albert Yuma, Congo's "CEO of the CEOs" at the helm of the Federation of Businesses of the DRC (*Fédération des entreprises du Congo*).[93]

This underscores that the law's relationship to power must be assessed empirically and historically. The FG Hemisphere saga marshals multiple scales and historical periodisation, from the British imperial realm to the post-1960s reconversion of the city in London as the world's financial capital and the expansion of the Eurodollar market, and from the globalisation and financialisation of GVCs to the expansion of the geographical, technological and infrastructural landscapes of extraction beneath and beyond nation-states. It brings together, in other words, different localities and time periods whose interconnectedness in the present requires unpacking.

## B. Legal Intermediation and Interconnectedness

The term interconnected, which I borrow from global history scholarship,[94] is an invitation to re-examine knowledge categories and social spaces

[90] 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition' (OECD 2016) <https://www.oecd.org/en/publications/oecd-due-diligence-guidance-for-responsible-supply-chains-of-minerals-from-conflict-affected-and-high-risk-areas_9789264252479-en.html> accessed 20 February 2025.

[91] Sara Dezalay, 'Le barreau africain de Paris : entre Big Bang sur le marché du droit des affaires et sillons d'Empire' (2020) 119–120 Cultures & Conflits 67.

[92] See the website of the firm < https://www.asafoandco.com/vision/> accessed 20 February 2025.

[93] Dezalay (n 55) 33.

[94] Sanjay Subrahmanyam, *From Tagus to the Ganges: Explorations in Connected History* (Oxford University Press 2005).

constructed in their alterity—be it the distinction between the public sphere and private interests, capitalism's cores and its peripheries, the national and the international, onshore and offshore capitalism—as connected spaces. Steinmetz's contention that empires "are more than giant states and are more than the forerunners of modern states"[95] offers a powerful way to do this. The field of power of colonial states was determined by the partial refraction of the field of power in imperial cores. Conversely, conflicts within the field of state power in colonial peripheries—and inter-imperial competition—also affected metropolitan politics. This helps explain, for example, that the same colonising power, Germany, could enact dramatically different policies—the brutal slaughter of the Herero people in Southwest Africa; a paternalistic defence of native culture in Samoa; and the alternation between harsh racism and cultural exchange in China.[96]

That law could operationalise both hierarchy and difference reflected the interconnectedness between changes in imperial *métropoles* and at the scale of colonial states and inter-imperial struggles. As a result, sovereignty within imperial realms was layered as it reflected flows and counterflows[97] between multiple actors (individuals, states, corporations) and different localities of power. Foremost, law enabled the co-existence of the consolidation of European nation-states, the deployment of imperial power, and the expansion of capitalism.

Law also operationalised the contradiction that colonial power was weak in its effective reach yet strong in the systemic upheavals it engendered. Despite the contrast often drawn between British indirect rule and French direct rule,[98] a similar pattern of legal imperialism was deployed across all empires as "colonizing powers could only stray so far from indirect rule without encountering expenses and dangers they did not wish to entertain."[99] This meant that the extraction of the commodities that connected colonies to the imperial *métropoles* was mediated by intermediaries, at both ends of this encounter, whose characteristics varied across space and time and whose physical and symbolic control over territorial units, peoples, and the

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[95] George Steinmetz, 'Book Review "Focus on Pierre Bourdieu". Pierre Bourdieu, *On the State. Lectures at the Collège de France 1989–1992*, Cambridge Polity, 2014' (2014) 3 Sociologica 1, 9.

[96] George Steinmetz, *The Devil's Handwriting: Precoloniality and the German Colonial State in Qingdao, Samoa, and Southwest Africa* (University of Chicago Press 2007).

[97] See Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford University Press 2013).

[98] The system of direct colonial rule (associated with the French empire) implied a direct government over colonies from the *métropole,* through the intermediation of colonial administrators, while indirect rule (associated with the British empire) referred to the maintenance of traditional structures of power at the local level, under the control of the colonial administration.

[99] Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton University Press 2010) 316-17.

products of extraction, depended on multiple and often contradictory forms of lawyering.

As a form of middling, legal intermediation could be construed as a core imperial repertoire of power of the British hegemon that produced flows and counterflows between the Crown and Britain's colonies and inter-imperial rivalries. As world hegemon until the Second World War, "[t]he [British] empire itself represented a middle sort of power"[100] as its expansion "consisted in the simultaneous extension of imperial jurisdiction within and without the empire."[101] The very structure of the British empire fostered at once capital flight, and the enforcement, beyond the formal boundaries of the empire, of Britain's imperial rule of law.

Legal intermediation, thus, refers to the *structurally* dynamic relationship between law, power, and capitalism. This dynamic must be assessed in the synchrony—at a given time—and in the diachrony, that is, in the *longue durée*. While a distinct legacy of the 19th century Scramble is that most resource-rich African states are dependent on a single node of contact with the world economy, middling underscores rent seeking as a two-way process: on the one hand, the rent derived from international material and symbolic links, deployed domestically; on the other, the uneven resistance and adaptability to external pressure. Middling was therefore a core symbolic resource fostered by the imperial scale: the individual, collective, or institutional resource derived from being positioned both inside and outside.

Middling is certainly not the monopoly of lawyers. But it is law's trademark. Legal intermediaries are structurally positioned as "double agents"[102] who juggle contradictory social, political, and economic interests. Between the *jurisconsult*[103] at the service of a national diplomacy and the law merchant at the service of a transnational corporation, there is a community of situation. The latter is determined by the promotion, under multiple yet converging guises, of a legal type of expertise as a condition to negotiate contradictory social interests. Lawyers are double agents because they must act as servants of sovereign powers while simultaneously safeguarding the autonomy of the law. This semi-autonomy is a condition for the legitimacy of power.[104]

Thus, the FG Hemisphere judicial saga reflects chains of legal intermediation that result from imperial legacies and concurrent transformations that can be

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[100] Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press 2016) 10.

[101] ibid 194.

[102] Yves Dezalay and Bryant G Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002).

[103] A person authorised to give legal advice to a sovereign.

[104] Pierre Bourdieu, *Sur l'État : Cours au Collège de France (1989–1992)* (Éditions du Seuil 2012).

tracked at the individual level, that of geographical localities (within empires, colonial states or nation-states) and that of institutions. This case also underscores that the relationship between these chains of intermediation and GVCs is structurally dynamic. The paradoxical outcome of the Privy Council's decision—sustaining Congo's sovereignty while contributing to the further financialisation of Congo's sovereign debt—is neither linear nor accidental. The Privy Council's decision, as a legal form, constitutes a technology of power that contributes to the codification of globalisation based on the valuation of specific assets. But as a node in a chain of legal intermediation, it can only be understood by considering the interconnectedness of structural changes over time across the different scales of the geography of extraction. The new rush for Africa's critical minerals is embedded in imperial and post-independence tracks, as much as it is reflective of the ongoing transformation of the geography of extraction, fueled by financialisation, the structural effects of the debt crisis in African States, and the global thrust of neoliberalism from the early 1980s.

## C. From Africa to Asia

In their account of Britain's expansion as world hegemon based on the extension of British juridical power within and outside the British imperial realm, Benton and Ford "find active analogies at work between imperial and global order."[105] As they put it, "[n]ot unlike the unstable and merely aspirational dominance of British legal authority in many of the corners of the empire, the contemporary global order takes its shape from largely hidden hierarchies."[106] Hidden hierarchies were fostered by the circulation of norms, individuals, and institutions across empires through to the 1940s. They shape the institutionalisation of an international legal order with the extraterritorial waging of the law of the City in London and that of New York as the law codifying and sanctifying the international movement of capital. Hidden hierarchies help understand the connections, illustrated in the *FG Hemisphere v Gécamines* case, between Britain's former colonial peripheries like Jersey and Hong Kong to Paris as a former metropolitan capital and world arbitration centre and Kinshasa, as Congo's capital.

Hidden hierarchies can also help question and track the dynamics of expansion of China as the 21st-century world hegemon because, as Benton and Ford put it, "focusing anew on the disorganized legal routines that other, aspiring hegemons have deployed in their flawed attempts to project power" can help account for the continuous patchiness, in the present, of global legal order.[107] Congo's example underscores that China's investments in Africa are threading on the trail of global traders. Even though they cannot benefit from the sociopolitical and cultural threads of an imperial past on the continent,

[105] Benton and Ford (n 100) 193.

[106] ibid 194.

[107] ibid 181.

Chinese mining corporations can evade the cost of relying on local fixers thanks to the 2007 "deal of the century" with Congo which enabled the expansion of state-owned Chinese corporations while essentially positioning the Chinese state as Congo's prime market outlet and creditor. [108]

Likewise, the competition between China and the US reflects the imprint of past imperial encounters. Chinese expansion in Africa, and particularly in Congo, relies on the selective legal codification enabled by the US dollar. China's moves to evade the regulatory sway of the US FCPA illustrate that the game of catch-up between deregulation and reregulation is therefore as much about access as it is about competing legal ordering claims.[109] But Chinese legal ordering claims also remain vested in old imperial tracks. The position of Hong Kong is a case in point. Hong Kong has already played a dominant role for the export of Chinese capital and legal institutions in the past two decades. Zooming in onto professional flows across corporate law firms, Liu and others[110] have tracked Hong Kong's economic transformation since the 1990s, following Hong Kong's handover to China in 1997 and the 2008 global financial crisis. The unique position of Hong Kong as at once a Common Law jurisdiction and part of continental China is reflected in the exceptional internationalisation of its legal market. While elite law firms, namely the Magic Circle[111] and Wall Street firms, continue to dominate this market, their power has been increasingly shaken since the turn of the 2010s by lateral moves towards Chinese firms' offices in the city. Thus, while Hong Kong was—until the 2008 financial crisis— foremost a gateway for the expansion of US and UK corporations into continental China, it is now increasingly a key financial highway for the expansion of Chinese business interests abroad.

## V. Conclusion

This paper argues that building a global socio-legal enquiry from the African South helps expose hidden hierarchies beyond the ostensible opposition between the peripheries of the legal field and their supposed centres. Hidden hierarchies are formed, reformed, and performed by individuals, norms, and institutions. They are shaped by the selective legal globalisation enabled by

[108] See Tristan Coloma, 'Quand le fleuve Congo illuminera l'Afrique : Le « contrat du siècle »' (*Le Monde Diplomatique,* February 2011) <https://www.monde-diplomatique.fr/2011/02/COLOMA/20108> accessed 20 February 2025.

[109] Dezalay (n 55) 114.

[110] Sida Liu and Anson Au, 'The Gateway to Global China: Hong Kong and the Future of Chinese Law Firms' (2020) 37(2) Wisconsin International Law Journal 308; Sida Liu, Daniel Blocq, Ali Honari, and Anson Au, 'Professional Flows: Lateral Moves of Law Firm Partners in Hong Kong, 1994–2018' (2022) 9(1) Journal of Professions and Organization 1.

[111] The Magic Circle is an informal term describing the five most prestigious London headquartered multinational law firms (Allen & Overy, Clifford Chance, Freshfields Bruckhaus Deringer, Linklaters, Slaughter and May). The term has also been used to describe the most prestigious barristers' chambers in London.

imperialism and financialisation. Tracking hidden hierarchies helps account for law's ubiquity in the green transition and the protracted tension between its empowering potential and its enabling role in reproducing relations of domination. It requires confronting ourselves to the imperial entanglement of scientific knowledge and the interconnectedness of legal change, politics, and capitalism in the so-called centres and the peripheries of the world economy. This implies a research strategy that zooms in and out across scalar units and analytical lenses.[112] Zooming in to track legal intermediation and out onto structural geopolitical changes helps get to grips with at least one aspect of the "grand" narrative of historical *longue durée*. It is a way, indeed, to identify the connections, in the present, between the legacies of formal colonisation and the longer term of trade interests.

In this, I join forces with many others who seek to clarify the central place of law in political economy, including lawyers and social scientists who follow the law to dismantle the black boxes of institutions such as money, capital, the corporation, and GVCs.[113] Like them, I am also confronted to the issue of deploying a meaningful critique. As a research strategy, interconnectedness is risky. There is a fine line between global history, micro-histories, and totalising history. In my own work I deploy field theory to avoid this pitfall as it "requires us to stop thinking in terms of entities, proper names, concrete individuals, and things and begin grasping all of these as bundles of relations."[114] This approach calls into question the characteristics of the relationship between objectified functions or divisions—such as that of the state, the legal profession, or the public-private divide—by tracking the bundles of relations that structure these relationships and their objectification over time. This shifts socio-legal enquiry away from corrections through court intervention or regulation, towards understanding how law is co-constitutive of contemporary capitalism and the ongoing entanglement with the raced and gendered histories of colonialism, empire, and white supremacy out of which capitalism and liberalism emerged.[115]

This research strategy is therefore a plea for what Lonsdale called "epistemological impurity."[116] It is an invitation to researchers, teachers, students to embrace messiness to capture the present. It is an invitation, in other words, as the historian Marc Lazar puts it so well, for us as researchers and as teachers, to be seismologists,[117] and to convey the curiosity and desire

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[112] Cooper (n 26).

[113] See Isabel Feichtner and Geoff Gordon (eds), *Constitutions of Value: Law, Governance, and Political Ecology* (Routledge 2023).

[114] Gil Eyal, 'Spaces between Fields' in Philip S Gorski (ed), *Bourdieu and Historical Analysis* (Duke University Press 2013) 158.

[115] See Appel (n 27).

[116] John Lonsdale, 'States and Social Processes in Africa: A Historiographical Survey' (1981) 24 African Studies Review 139.

[117] Marc Semo, 'Marc Lazar: « La "peuplecratie" est un défi pour la démocratie libérale et représentative »' (*Le Monde*, 2 May 2019) <https://www.lemonde.fr/idees/

to question boundaries. This, I argue, is a way to respond to the challenge of allowing for the possibility of a meaningful critique on law and the green transition. To this end, the "global scale" invoked in this paper is an invitation for a twofold decentring. Revisiting "Africa" as an empirical site of inquiry—in this case, specifically the DRC in its relationship with the world economy—not from Congo itself but from apparently distant sites in London, Hong Kong, or Paris, constitutes a form of what Appel calls "ethnographic refusal."[118] Arguably more than any other postcolonial site, Congo embodies the imperial entanglement of scientific disciplines, as a foil for arguments not only about capitalist expansion, but about rational, Western, modernity. Like "decolonial" scholarship, ethnographic refusal is an acknowledgement of the limited heuristic capacity of objectified categories of so-called modernity—such as the state, the dichotomy between the public sphere and private interests, the international and the national, and the law—to track the imperial factor over an extended period.

In the decentring I advocate, however, I embrace Makaran and Gaussens' argument that in the absence of prolonged, systematic ethnographic inquiry, it is empirically impossible and scientifically irresponsible to seek to "replace" the throng of the dominant with the voice of the "subaltern."[119] Rather, I claim that seeing "Africa" from so-called Northern centres can tell us as much about the Global North as about the Global South. The "global" here stands indeed for a disruption of established dichotomies. What makes the FG Hemisphere saga an imperial encounter, and, as such, at once a grand narrative and a microhistory, is that it reflects chains of legal intermediation that result from imperial legacies and concurrent transformations that can be tracked at the level of individuals, geographical localities, and institutions. As an imperial encounter, the *FG Hemisphere v Gécamines* dispute is at once imperial in its making and shaped and transformed by the interconnectedness of competing local histories—from the relationship between Jersey, Hong Kong, and London, Congo's colonial, post-Independence, and post-1980s trajectory, the expansion of supra-national dispute settlement mechanisms, through to the deployment of the City of London as a financial capital. All of these selective empirical sites are partial refractions of concurrent dynamics of structuration of the "global" into what I call "archipelagos of sedimented imperialism."[120]

The fact that the imperial past matters is, certainly, a truism. But the dynamics at play in the transformation of Congo's relationship with the world economy fostered by the "green" transition matter for socio-legal scholarship in Asia and elsewhere. What arguably distinguishes the European

article/2019/05/01/marc-lazar-la-peuplecratie-est-un-defi-pour-la-democratie-liberale-et-representative_5456931_3232.html> accessed 20 February 2025.

118 Appel (n 27) 4.

119 Gaya Makaran and Pierre Gaussens (eds), *Piel Blanca, Máscaras Negras : Crítica de la razón decolonial* (Centro de Investigaciones sobre América Latina y el Caribe 2020).

120 Dezalay (n 55).

Scramble for the African continent of the 19th century is that there was not any single imperial strategy—from settler colonialism in Rhodesia or Algeria, violent economic predation in Congo, to military occupation in Chad. With some exceptions—such as Ghana and Nigeria, where "indigenous" legal professions emerged from the middle of the 19th century—there was no equivalent to the "shining example" that the Indian Raj was to play for the British Empire's "civilising" mission.[121] Throughout African sites, however, the extraction of minerals that was based on the concession model (the exchange of the right to extract against royalties)— fostered by South-African mining giants and combined with US expertise and financial speculation—was not displaced at independence. Rather, it was consolidated based on the extortionate compensation that accrued to colonial *métropoles*. When what was then Zaire collapsed in the 1980s following the sovereign debt crisis, it was a colossus with feet of clay. Its population was left entirely vulnerable to the far-west like rush for the minerals of the "green" transition characterised by the combination of hyper societal violence, hyper legality, and hyper financialisation. Yet, the new rush in Congo is only exceptional in so far as the characteristics of the new geography of extraction are deployed with extraordinary violence. As I seek to argue here: there is no perfect response to such a perfect storm. All we can, all we *should* do, is relentlessly seek to re-examine and question the invisible hierarchies that form, transform, and perform law's empowering potential in the nexus between politics and finance across the various localities of our globalised world.

[121] See Roland Lardinois 'Entre monopole, marché et religion: L'émergence de l'État colonial en Inde, années 1760–1810' (2008) 171–172 Actes de la recherche en sciences sociales 90.