

Regulating Information Flows, Regulating Conflict:

An Analysis of United States Conflict Minerals Legislation

Christiana Ochoa & Patrick J. Keenan*

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* Christiana Ochoa is Professor & Charles L. Whistler Faculty Fellow, Indiana University Maurer School of Law – Bloomington. Patrick J. Keenan is Professor & Corman Faculty Scholar, University of Illinois College of Law. We would like to express our thanks to Hannah Buxbaum, Siba Grovogui, Bill Hicks, Jeff Isaac, Leandra Lederman, Kevin McLaughlin, Edward Rackley, Peter Rosenblum, Matthew Van Hoose and Damon Yousefy for their various contributions to this article.

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Abstract

The focus of this paper is the connection between conflict and commercial activity. In particular, it focuses on the ongoing conflict in the Eastern Democratic Republic of Congo (DRC) that is funded, in large part, by the sale of conflict commodities – minerals, metals, and petroleum – that fund violent groups at their source and then enter legitimate markets and products around the world. Recently, attention has turned to how to regulate conflict commerce as a tool for divesting from violent conflict. In the United States, for example, the recently adopted Dodd-Frank Wall Street Reform and Consumer Protection Act include a provision addressing conflict minerals originating from this region. The violent and secretive nature of conflict minerals transactions makes crafting effective regulation and policing strategies challenging. As a result the Dodd-Frank Act, like other domestic and international efforts, is designed in large part to discover, gather and disseminate information about the nature and scale of conflict commodities emanating from the DRC. This paper analyzes this legislation while also discussing a number of other current conflict commerce governance efforts. It observes the difficulty of regulating in the context of conflict and corruption and analyses the use of regulation as a tool for information-extraction, information-forcing and information-dissemination as opposed to its use as a tool for directly proscribing undesirable behavior.

A. Introduction

Modern, large-scale violent conflict is costly. It is costly to human dignity, security and well-being, of course. It is also expensive for the parties to the conflict. Military spending is among the largest budget items of many states. States raise the funds necessary for these expenditures through a number of palatable and less palatable mechanisms, from taxation to rent seeking and corruption. Large scale, non-state violence is also expensive. For non-state warring parties, however, recourse to funds is a more significant challenge. During Angola's decades-long civil war, the government was able to fund its war effort largely through oil revenues¹ while the most powerful rebel group funded its efforts primarily through the

¹ Angola spent at least 14.4 percent of its annual GDP on defense and security from 1997-2000. T. Hodges, *Angola: Anatomy of an Oil State* (2004), 160.

capture, control and sale of diamonds.² The main rebel group in Colombia is the world's largest cocaine manufacturer and finances a large portion of its military actions through the sale of cocaine and cocaine paste.³ Rebel groups in the Niger Delta sell oil produced at illegal oil refineries⁴ as a means to fund their activities. Other conflicts in a number of locations including Sierra Leone, the Ivory Coast, Liberia, Cambodia and Afghanistan have similarly been funded by the sale of timber, diamonds, and minerals.

The Eastern Democratic Republic of Congo has been the site of an ongoing conflict since May 1997. The conflict, despite its shifting contours and intermittent lulls in violence, has resulted in the deaths of over 5 million people over the past thirteen years,⁵ marking it as one of the deadliest conflicts since World War II.⁶ The location is rich in natural resources – including cobalt, copper, niobium, tantalum, petroleum, industrial diamonds, gold, silver, zinc, manganese, tin, and uranium⁷ – and the illegal or “informal” sale of these raw materials is the primary source of funding for this protracted conflict.

An important aspect of this fact is that these particular materials do not have much intrinsic utility. Unlike potatoes or fish, the average person cannot actually use them until they are processed and transformed into useful goods or components. This means that rebel groups depend on a series of partners along a stream of commerce to move these raw natural

² Hodges, *supra* note 1, 176.

³ Federal Bureau of Investigation New York, ‘Two Top Associates of Colombian Narco-Terrorist Organization Found Guilty of Conspiring to Import Tons of Cocaine into the United States’ (10 April 2010) available at <http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo041410a.htm> (last visited 10 April 2011), summarizing the FARC’s involvement in the cocaine trade.

⁴ C. Purefoy, ‘Death and Oil in Niger Delta’s Illegal Refineries’ (3 August 2010) available at http://articles.cnn.com/2010-08-03/world/nigeria.oil.niger.delta_1_heating-oil-oil-industry-crude?_s=PM:WORLD (last visited 10 April 2011); S. Owen, ‘Nigeria Destroys 600 Illegal Oil Refineries’ (15 December 2009) available at <http://www.reuters.com/article/2009/12/15/nigeria-oil-thieves-idUSLDE5BE28K20091215> (last visited 10 April 2011).

⁵ CIA, ‘The World Factbook – The Democratic Republic of Congo’ available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (last visited 10 April 2011).

⁶ S. Brownback & R. Durban, ‘Hope for Africa’s Forgotten: Fact-Finding Mission Report: DRC, Rwanda, Kenya’ (2005) (on file with the authors).

⁷ CIA, *supra* note 5.

resources from their point of origin to a legitimate recipient who can process them, transform them into component parts for consumer goods and thereby derive value from them. Like in other conflict commerce situations, a large portion of the initial trade in these minerals occurs illegally or through the informal sector.⁸ But unlike cocaine or other illegal goods, these minerals are ultimately used in legal consumer products, including the electronic equipment that occupies a central role in modern western life. As a result, the early points along the trade route for these goods are difficult to fully discern or comprehend,⁹ while points closer to their end-use, once the taint of conflict has been laundered from them, are much more transparent or potentially transparent.

The link between conflict and minerals in the DRC has become the subject of a number of governance efforts including studies, discussions, and reports by non-governmental and international organizations, complaints before the OECD National Contact Points bodies, and, recently, litigation in the UK and legislation in the United States. This paper views these efforts as interrelated, given the intricate web of the global supply chain. It will focus, however, on recent U.S. legislation aimed at addressing conflict minerals emanating from the DRC. The first part will describe this legislation and dissect its underlying theories and goals. The second part will discuss the deficits of the legislation and some of the challenges it is likely to face, while the third part will highlight the legislation's potential to have a beneficial direct impact on the problem of DRC-based conflict commerce. Finally, the conclusion will provide suggestions for additional measures that might be taken to supplement this legislation.

⁸ A. Tegera & D. Johnson, 'Rules For Sale: Formal and informal cross-border trade in Eastern DRC' (May 2007) available at http://www.pole-institute.org/documents/regard19_anglais.pdf (last visited 10 April 2011), 5.

⁹ Resolve, 'Tracing a Path Forward: A Study of the Challenges of the Supply Chain for Target Metals Used in Electronics' (April 2010) available at <http://www.eicc.info/documents/RESOLVEReport4.10.10.pdf> (last visited 10 April 2011), 2-3.

B. Section 1502: Conflict Minerals Legislation

I. Description of the Legislation

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) represents the United States legislative response to the collapse of the world financial market in the fall of 2008 and the credit crisis that has pervaded the banking industry since that time. It is primarily designed to better identify large-scale risk in the financial markets by significantly increasing government oversight and regulation of banks, private financial companies, and public markets, and by dramatically increasing securities regulation. It also mandates the creation of a team of federal regulators who will be charged with detecting systemic financial risk and protecting consumers from dubious financial products.

The ongoing war in the DRC is seemingly disconnected from the recent financial collapse and even more distant from the Dodd-Frank Act. But this act, in addition to attempting to tackle massive financial problems, also contains sections attempting to grapple with very complex social and legal problems like the relationship between the minerals emerging from the DRC and the seemingly interminable conflict in that region.¹⁰

Section 1502 of the Dodd-Frank Act was inserted by Senators Sam Brownback and Russ Feingold for the purpose of restricting the funding sources available to armed groups in the DRC. Section 1502 has essentially three parts. The first is addressed at companies that use conflict minerals in manufacturing their products, while the second is addressed primarily at the United States Secretary of State. The third part imposes reporting requirements on the United States Comptroller and the Secretary of Commerce.

¹⁰ 111th Congress of the USA, 'Dodd-Frank Wall Street Reform and Consumer Protection Act' available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173enr/pdf/BILLS-111hr4173enr.pdf> (last visited 21 April 2011), Section 1502.

1. SEC Disclosures¹¹

Companies covered by section 1502 will have to annually disclose to the SEC and make available on their websites¹² the following information:

a) Whether conflict minerals that are “necessary to the functionality or production of a product”¹³ which they manufacture originated in the DRC or any country with which it “shares an internationally recognized border” (Angola, Burundi, Central African Republic, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia).¹⁴

b) “[A] description of the measures taken [...] to exercise due diligence on the source and chain of custody” of conflict minerals, including a private audit of such disclosures (that must also be submitted to the SEC), naming the auditor¹⁵ and, in addition, “a description of the products manufactured or contracted to be manufactured that are not DRC conflict free,¹⁶ [...] the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to locate the mine or location of origin with the greatest possible specificity”¹⁷.

These disclosure requirements will remain in place until the President of the United States certifies that “no armed groups continue to be directly or indirectly involved and benefitting from commercial activity involving

¹¹ At the time of this writing, the SEC has tentatively approved a structure for due diligence and reporting requirements for three classes of companies, depending on their listing-status and their known use of conflict minerals. See Federal Register, Securities and Exchange Commission (23 December 2010) available at <http://www.sec.gov/rules/proposed/2010/34-63547fr.pdf> (last visited 21 April 2011) and E. Backes, ‘SEC Recommends Rules on Conflict Minerals Regulation’ (17 December 2010) available at <http://www.enoughproject.org/blogs/sec-recommends-rules-conflict-minerals-regulation> (last visited 21 April 2011).

¹² *Supra* note 10, Section 1502(b) (p)(1)(E).

¹³ *Supra* note 10, Section 1502(2)(B).

¹⁴ *Supra* note 10, Section 1502(e)(1).

¹⁵ *Supra* note 10, Section 1502 (b) (p)(1)(A)(i) and 1502 (b) (p)(1)(A)(ii).

¹⁶ “DRC conflict free” is defined in the Dodd-Frank Act as not containing minerals “that directly or indirectly finance or benefit armed groups in the Democratic Republic of Congo or an adjoining country”, *supra* note 10, Section 1502(b) (p)(1)(D).

¹⁷ *Supra* note 10, Section 1502 (b) (p)(1)(A)(ii).

conflict minerals”.¹⁸ However, no such certification can be made until at least five years of the required reporting have passed.

2. Department of State Strategy and Map

The State Department is charged with developing a strategy and a map addressing DRC conflict minerals – the Conflict Minerals Map. The strategy must “address the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products”.¹⁹ This strategy must include three components, each aimed at different constituencies. It must include:

a) a plan to assist the relevant agencies of the DRC, its neighboring countries, and the international community (specifically naming the United Nations Group of Experts on the Democratic Republic of Congo) to reduce the connection between minerals, commerce, and conflict by developing stronger institutions for the purposes of promoting transparency, monitoring, and ending conflict commerce in the region;²⁰

b) a plan addressed to commercial entities looking to perform due diligence on the points of origin and chain of custody for minerals emanating from the DRC that are used in their products (or the products of their suppliers) in order to ensure that such minerals are DRC conflict free;²¹ and

c) a description of punitive measures that *could* be taken against parties whose activities support conflict in the DRC.²²

The Conflict Minerals Map will call on data provided by the U.N. Group of Experts on the DRC as well as data received from the governments of the DRC, its adjoining countries, other U.N. member states, and local and international NGOs, disclosing all sources on which the State Department relied. It will produce and regularly update a publically

¹⁸ *Supra* note 10, Section 1502(b) (p)(4).

¹⁹ *Supra* note 10, Section 1502(c)(1)(A).

²⁰ *Supra* note 10, Section 1502(c)(1)(B)(i).

²¹ *Supra* note 10, Section 1502(c)(1)(B)(ii).

²² *Supra* note 10, Section 1502(c)(1)(B)(iii) (emphasis added).

available map of “mineral-rich zones, trade routes, and areas under the control of armed groups” in the region.²³

3. Required Reports Addressing Conflict Minerals

Section 1502 also contains a number of charges to the U.S. Comptroller and Secretary of Commerce regarding baseline and ongoing reporting. These reports have the potential of containing important information. In addition to assessing the effectiveness of the SEC reporting requirements and the challenges faced by the SEC in obtaining the reports required by the Dodd-Frank Act, the Comptroller’s reports are to contain the following: a review of entities not required to file annual reports with the SEC, the use of conflict minerals by non-filing companies, and whether such conflict minerals originate from the DRC and its adjoining countries.²⁴ The Department of Commerce must report on the quality of the required private sector audits required and provide recommendations for improving those audits. It must also provide a list of “all known conflict mineral processing facilities worldwide”²⁵.

II. Objectives Reflected in the Legislation

The new regulations do both less and more than one might expect, given their purpose of restricting the sources of funding available to armed groups in the DRC. The new regulations do not directly prohibit or restrict imports of minerals originating in the DRC. Rather, Section 1502 is designed primarily to extract, gather and disseminate information about the connection between commercial activity and the conflict in the DRC and the sources, flow, and chain of custody between the points of origin for conflict minerals²⁶ and securities issuers that file mandatory reports with the Securities and Exchange Commission.²⁷ In doing so, the new regulations

²³ *Supra* note 10, Section 1502(c)(2).

²⁴ *Supra* note 10, Section 1502(d).

²⁵ *Supra* note 10, Section 1502(d).

²⁶ “Conflict minerals” means “(A) columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing the conflict in the Democratic Republic of Congo or an adjoining country”, *supra* note 10, Section 1502(e)(4).

²⁷ The Dodd-Frank Act actually fails to define what type of company is covered by Section 1502 due to a drafting error in which two paragraphs in which the definition of who is covered cross reference each other, while each failing to provide a

will become part of on-going international governance efforts aimed at stemming the connection between commerce and conflict in the DRC and other locations around the world. This section of the paper will discuss the designed objectives of the legislation, addressing its information-management characteristics and the portions of Section 1502 that provide key links with more proscriptive-model governance efforts addressing the conflict in the DRC.

1. Extracting, Forcing and Devolving Information

This legislation is an outgrowth of other governance and regulatory efforts that attempt to connect market activity with social problems, especially in the areas of human rights,²⁸ environmental protection²⁹ and corruption minimization.³⁰ Like many of those efforts, Section 1502 operates not to proscribe undesirable activity (here, conflict commerce), but rather to significantly affect the flow and location of information with respect to this problem.

a) Underlying Theoretical Foundation

The fundamental theoretical premise of Section 1502 appears to be that information is power and that vital information does not always reside with the state.³¹ This is the theoretical framework for what have been referred to as “information-forcing” rules.³² Environmental law scholars have discussed the information asymmetries that vex environmental

definition. (§§1502(b)(p)(1)(A) and 1502(b)(p)(2)(A)). However, a reasonable interpretation is that it will apply to companies that are required to file mandatory reports under §13(a)(2) of the Securities and Exchange Act of 1934. This Article will hereinafter refer to these entities as “companies.”

²⁸ E.g., the Kimberly Process and the work United Nations Special Representative on the issue of Business and Human Rights.

²⁹ E.g., SEC Regulation S-K, Item 103, Instruction 5.

³⁰ E.g., the Extractive Industries Transparency Initiative.

³¹ F. Foucault, *The History of Sexuality* (1978), 79; F. Foucault, *Power and Knowledge* (1980) and P. Bourdieu, *Language and Symbolic Power* (1991).

³² Most information-forcing literature has arisen in the context of private transactions, with a fundamental observation being that the law often encourages parties with deep legal knowledge to provide legal information to their less sophisticated contracting counter-parties. See A. Schwartz & L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis* (1979) and J. H. Verkerke, ‘Legal Ignorance and Information-Forcing Rules’ (2003) available at <http://ssrn.com/abstract=405560> (last visited 21 April 2011).

regulation of industrial waste, noting that manufacturing firms “almost always know much more than government about the risks associated with their products, technologies and processes”³³. Environmental regulatory approaches, which, unlike human rights efforts, have always had a commercial context in mind, have included, for example, the mandatory reporting requirements of the National Environmental Protection Act (NEPA)³⁴ and mandatory reporting of even non-material environmental litigation.³⁵ Environmental law scholars have thus noted a turn away from proscriptive legislation and toward information-forcing approaches that focus on transparency and the devolution of information to interested parties, including citizens, regulators, and NGOs.³⁶ Essentially, the idea is to move information from the entity best situated to hold or obtain information (the corporation) to the entity most likely to use it for the protection of public interests (civil society and regulators).

Information-forcing has more recently become central to the issue of business and human rights, as the United Nations Special Representative on the Issue of Business and Human Rights has made due diligence for businesses, with respect to their impact on human rights, a core component of the Guiding Principles that have emerged from his efforts.³⁷ In addition, as part of ongoing United Nations efforts with respect to conflict commerce, the Organization of Economic Cooperation and Development (OECD) has

³³ R. Zeckhauser & E. Parson, ‘Seeking Truth for Power: Informational Strategy and Regulatory Policymaking’, 89 *Minnesota Law Review* (2004) 2, 277, 286–87.

³⁴ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370, 1 January 1970.

³⁵ Regulation S-K, Item 103, Instruction 5.

³⁶ B. Karkkainen, ‘Information As Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?’, 89 *Georgetown Law Journal* (2001) 2, 257 and B. Karkkainen, ‘Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation’, 86 *Texas Law Review* (2008) 7, 1409 (noting that while information deficits pervade environmental regulatory problems, the massive amount of information agencies do receive from environmental reporting can often be debilitating).

³⁷ See e.g. J. Ruggie, ‘Engaging Business: Addressing Respect for Human Rights’ (25 February 2010) available at http://www.hks.harvard.edu/m-rcbg/CSRI/newsandstories/Ruggie_Atlanta.pdf (last visited 10 April 2011). See also C. Ochoa, ‘The 2008 Ruggie Report: A Framework for Business and Human Rights’, 12 *ASIL Insights* (18 June 2008) available at: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=439960 (last visited 10 April 2011).

very recently launched a pilot project on due diligence, specifically addressing the mining sector.³⁸

b) Information Asymmetries and SEC Reporting

Similar information flow challenges exist in the conflict commerce context, and information-forcing is thus crucial. Arguably, however, in the area of conflict commerce, even manufacturers and other businesses covered by Section 1502 may lack crucial information about the source of the minerals that go into their products and whether the minerals they use facilitate conflict. In this way, the company disclosure portion of Section 1502 represents a regulatory experiment in information extraction because it addresses companies in a context in which they are not the entity best situated to hold or obtain the relevant information. It is therefore designed to force information not just from covered companies, but also to extract information from their supply chain, all the way to the mine of origin – finding the conflict. The aim is to allow the U.S. Comptroller, the Secretary of State and other interested parties to either – ideally – identify the mines of origin and chain of custody for conflict minerals or – alternatively – determine the points along the chain of custody at which information flows break or transparency stops.

This design seems to embed a number of objectives. First, it is designed to improve the amount and accuracy of information. In other words, it is designed to improve actual knowledge of conflict commerce and, in this way, Section 1502 is innovative. Second, it is designed to increase transparency and to force information about conflict commodities from commercial actors. Third, it is designed to improve the accessibility of information about conflict minerals and conflict commerce by making companies' mandatory reports publically available, on their websites, for example. Presumably, interested parties will use this information to, for example, place pressure at the points along the supply chain where information stops flowing, wherever that may be.

³⁸ OECD, 'Pilot Project on Due Diligence in the Mining and Minerals Sector' (May 2010) available at <http://www.oecd.org/dataoecd/28/49/44322951.pdf> (last visited 21 April 2011).

c) Producing and Gathering Official Information

The portions of Section 1502 imposing duties on the Secretary of State and USAID serve similar information-extracting, -forcing and -devolution purposes. Section 1502 asks the Secretary of State, together with USAID, to use essentially whatever information is at their disposal to collect data for the Conflict Minerals Map. Their data collection must involve the U.N. Group of Experts on the DRC as well as the governments of the DRC and adjoining countries and from local and international non-governmental organizations. This extensive information gathering effort is likely to be more than an information-forcing exercise in which relevant actors, including NGOs, provide pre-existing information. A recent job posting by USAID for an Extractive Industries Technical Advisor for the DRC would suggest that additional and different information than is currently known or verified is being sought with respect to conflict commerce in the region.³⁹

The remainder of Section 1502 requiring to the Secretary of State to develop a strategy on the DRC conflict minerals issue looks much more like a traditional mandate to develop law-like governance efforts. These efforts must be made in consultation with governments and the U.N. Group of Experts on the DRC, including a description of the punitive measures that could be used against actors engaged in conflict commerce in the region.⁴⁰

d) Information Processing, Analysis and Dissemination

The drafters of Section 1502 appear to have been cognizant of the possibility that its SEC reporting aspects will face challenges. The reports the Comptroller General is tasked with preparing must include not only assimilated and processed statistics of the reports the SEC receives but also an assessments of whether Section 1502 appears to have contributed to the region's stability, devoting special attention to sexual and gender-based violence. In addition to these two requirements, the reports must also include information about the larger conflict commerce problem, including presumably all non-reporting actors and all conflict mineral processing

³⁹ USAID solicitation number SOL-660-10-000009, 19 July 2010. (on file with the authors).

⁴⁰ *Supra* note 10, Section 1502(c)(1)(B)(i).

plants around the world.⁴¹ These reports, if prepared well, could be beneficial in raising general awareness of the conflict commerce problem.

The Secretary of Commerce is also charged with filing reports that could have real benefits outside of its discrete mandate. In analyzing the reports of the private audits that must accompany the SEC reports, the Secretary of Commerce is asked to essentially professionalize this type of private sector auditing through two measures. The first is to serve as a performance check on the accuracy of private sector audits and other due diligence measures carried out under Section 1502. The second seems to assume that the auditing process will be flawed and asks the Secretary of Commerce to recommend methods to improve the audits and to set best practice standards for the industry.⁴² Attention to the current quality and practices of social-issue auditing has the potential to have affects not just in the area of conflict commerce but also in other related fields, including corruption reduction measures like those required by the Extractive Industries Transparency Initiative,⁴³ labor standards compliance and human rights monitoring.

2. Connecting to Existing and Developing Governance Efforts

Another aspect of Section 1502 is notable for its potential to have beneficial impacts on the DRC conflict commerce problem. As previously noted, the Secretary of State's reports are to include a strategy that will include "[a] description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations in the Democratic Republic of the Congo."⁴⁴ This provision will likely be interpreted to mean that the Secretary must prepare an analysis of already-existing measures, but it could also be interpreted as a mandate for the State Department to propose punitive measures. Among the measures that should be included is the

⁴¹ *Supra* note 10, Section 1502(d).

⁴² *Supra* note 10, Section 1502(d).

⁴³ The Extractive Industries Transparency Initiative is a global effort aimed at stemming corruption in the extractive sector by requiring companies and governments to report on payments made and received in connection with extractive activities. Section 1504 of the Dodd-Frank Act enacts many of the requirements of the EITI and has the potential to bring the United States and United States companies closer to EITI compliance.

⁴⁴ *Supra* note 10, Section 1502(c)(B)(iii).

possibility that entities reporting trade in conflict minerals will be subject to targeted sanctions in accordance with two United Nations Security Council Resolutions.

The Section 1502 SEC reporting requirements put the United States in technical compliance with the requirements of UNSC Resolution 1857, under which U.N. member states are requested to ensure that relevant parties are performing due diligence with respect to DRC conflict related natural resources.⁴⁵ However, UNSC Resolutions 1857⁴⁶ and 1896⁴⁷ also call for targeted sanctions in the form of asset bans and travel freezes against “[i]ndividuals or entities supporting the illegal armed groups in the eastern part of the Democratic Republic of the Congo through illicit trade of natural resources”⁴⁸ and encourages member states to submit a list of entities that fit this description.⁴⁹

Arguably, the language in the UNSC Resolutions encouraging member-states to report on relevant entities does not create binding obligations for member-states. However, litigation in the United Kingdom recently addressed claims that the U.K. has acted unlawfully in failing to submit names of British entities trading in conflict minerals in accordance with the terms of UNSC Resolutions 1857 and 1896.⁵⁰ Although the UK High Court has decided not to review the UK government’s decision not to list such companies, the United States Government should be watching this litigation carefully, as it may be a model for claims against the United States if it fails to submit the names of entities who report reliance on conflict minerals in their SEC reports.

⁴⁵ SC Res. 1857, 22 December 2008, para.15.

⁴⁶ SC Res. 1857, paras 4(g), 16-19.

⁴⁷ SC Res. 1896, 30 November 2009, paras 19-20.

⁴⁸ SC Res. 1857, para.15.

⁴⁹ SC Res. 1857, para.16.

⁵⁰ Global Witness, ‘Global Witness takes UK government to court for failing to list UK companies trading Congo conflict minerals for UN sanctions’ (26 July 2010) available at <http://www.globalwitness.org/library/global-witness-takes-uk-government-court-failing-list-uk-companies-trading-congo-conflict> (last visited 21 April 2011). The UK High Court has denied review of the UK government’s decision to not list these companies.

C. Deficits and Challenges

Up to this point in this Article, we have described Section 1502 of the Dodd-Frank Act and provided an analysis of its grounding and purposes. This section will proceed by pointing to the failings and challenges we see in the legislation. They fall into three categories. First, we will critique the information-extraction and information-forcing portions of Section 1502. Second, we will critique the information-dissemination portions of Section 1502. Finally, we will discuss the potential negative consequences of the legislation.

I. Section 1502 Information-Forcing and Information-Extracting Assumptions

The information-extraction and information-forcing portions of Section 1502, both in the context of the required SEC reports and with respect to the Map on Conflict Minerals seem to assume that current information levels regarding DRC conflict minerals are low. The general parameters of the DRC conflict commerce problem are understood by the U.S. Congress at this point⁵¹ and are even reported in the popular press.⁵² A number of international organizations and local and international NGOs that focus on discovering specific and detailed information regarding conflict commodities, specifically conflict commodities emerging from the DRC,

⁵¹ S. Brownback & R. Durbin, *Hope for Africa's Forgotten, A Report on the Fact-Finding Mission to the Democratic Republic of Congo, Rwanda and Kenya* (2005). See also Resolve, 'Tracing a Path Forward: A Study of the Challenges of the Supply Chain for Target Metals Used in Electronics' (April 2010) available at <http://www.eicc.info/documents/RESOLVEReport4.10.10.pdf> (last visited 21 April 2011), 6-7.

⁵² See e.g., B. Harden, 'The Dirt in the New Machine' (12 August 2001) available at <http://www.nytimes.com/2001/08/12/magazine/the-dirt-in-the-new-machine.html> (last visited 21 April 2011) and 'Bringing Congo's Great War to an End' (1 August 2002) available at <http://www.nytimes.com/2002/08/01/opinion/bringing-congo-s-great-war-to-an-end.html> (last visited 21 April 2011) and D. Gilson, 'What's Really Inside Your iPhone?' (31 March 2010) available at <http://motherjones.com/blue-marble/2010/03/whats-inside-your-apple-iphone-ipad> (last visited 21 April 2011) or D. Gilson, 'The Scary Truth About Your iPhone' available at <http://motherjones.com/environment/2010/03/scary-truth-about-your-iphone> (last visited 21 April 2011) or A. Hochschild, 'Blood and Treasure' (March/April 2010) available at <http://motherjones.com/politics/2010/02/congo-gold-adam-hochschild> (last visited 21 April 2011).

regularly produce very valuable information and recommendations.⁵³ In order to make the five-year window for this legislation as effective as possible, such that the work of the relevant agencies results in new knowledge and a better understanding of the conflict minerals problem, rather than simply placing an official imprimatur on pre-existing knowledge, the Secretary of State, together with USAID, the Comptroller General and the Secretary of Commerce must make full use of the pre-existing information.

This is necessary because the biggest challenge with respect to curing information asymmetries in this context is not forcing information from legitimate actors – though that alone may be a significant challenge. Rather,

⁵³ For example, a number of organizations, including U.S. law school human rights clinics have been engaged in the mapping required from the State Department. See e.g., Columbia Law School, 'Human Rights Clinic Docket' available at http://www.law.columbia.edu/center_program/human_rights/Docket#165357 (last visited 21 April 2011) and The New Security Beat, 'DRC's Conflict Minerals: Can U.S. Law Impact the Violence?' (13 July 2010) available at <http://newsecuritybeat.blogspot.com/2010/07/drcs-conflict-minerals-can-us-law.html> (last visited 21 April 2011). DRC-based organizations have been studying the issues of conflict minerals and have provided very useful information regarding the chain of custody for many minerals in the region. See e.g. Tegera & Johnson, *supra* note 8 and Pole Institute, 'Blood Minerals: The Criminalization of the Mining Industry in Eastern DRC' (August 2010) available at http://www.pole-institute.org/documents/Blood_Minerals.pdf (last visited 21 April 2011). A number of international NGOs have also devoted significant attention to the issue of DRC conflict minerals. See e.g., a description of Global Witness' campaigns on Natural Resources in Conflict and on the DRC (described here: Global Witness, 'Conflict' available at http://www.globalwitness.org/pages/en/natural_resources_in_conflict.html (last visited 21 April 2011) and here Global Witness, 'Democratic Republic of Congo' available at http://www.globalwitness.org/pages/en/democratic_republic_of_congo.html (last visited 21 April 2011), respectively). Finally, the UNSC and the Group of Experts on the Democratic Republic of Congo have been focused on this issue for many years. See e.g. K. A. Annan, 'Letter dated 12 April 2001 from the Secretary-General to the President of the Security Council, Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' (12 April 2001) available at <http://www.un.org/News/dh/latest/drcongo.htm> (last visited 21 April 2011) and M. L. R. Viotti, Letter dated 21 May 2010 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, UN Doc S/2010/252, 25 May 2010.

given the current level of knowledge, the difficulty and the place of much greater importance lies deeper in the chain of custody, much closer to the mines and the conflict. Information regarding these locations will be crucial in actually linking commercial activity to conflict. Reports from the most relevant regions of the DRC, including very recent reports, indicate that the area is beyond the reach of the DRC government and is, instead, under the control of military and police battalions that operate in a highly occlusive, illegal and corrupt environment.⁵⁴ Similarly, recent efforts to develop a code of conduct on supply chain management for minerals used in electronics discuss the “difficulty verifying sources that enter the supply chain from mines that are illegal or part of the informal economy”⁵⁵.

Obviously, the more accurate, specific, and complete companies are able to be in their SEC reports on conflict minerals, the more useful those reports will be in effectively stopping the use of minerals to fund the DRC conflict. However, when companies discover that minerals on which they depend contribute to the conflict in the DRC, they will face significant disincentives to fully comply with their reporting requirements, given the potential legal and economic consequences of their activities,⁵⁶ including potential litigation under the Alien Tort Statute,⁵⁷ complaints before

⁵⁴ See e.g., P. P. Rudahigwa, ‘Seventy-Two Hours at the Mining Site of Bisie’, in Pole Institute, ‘Blood Minerals: The Criminalization of the Mining Industry in Eastern DRC’ (August 2010) available at http://www.pole-institute.org/documents/Blood_Minerals.pdf (last visited 21 April 2011), 12.

⁵⁵ Resolve, *supra* note 9, 3. The Resolve report is not exclusively focused on the DRC and notes the challenges of illegality and corruption generally. For example, it cites the following report: FinnWatch, ‘Legal and Illegal Blurred: Update on tin production for consumer electronics in Indonesia’ (June 2009) available at <http://makeitfair.org/the-facts/reports> (last visited 21 April 2011) (published as part of the makeITfair campaign, a European wide project on consumer electronics).

⁵⁶ C.Ochoa, ‘Corporate Social Responsibility and Firm Compliance: Lessons from the International Law – International Relations Discourse’, *Santa Clara Journal of International Law* (2011, forthcoming) (discussing compliance theory as applied to businesses in the CSR context).

⁵⁷ 28 USC § 1350. At the time this Article was drafted, *Kiobel v. Royal Dutch Petroleum*, United States Court of Appeals for the Second Circuit, 17 September 2010, available at http://online.wsj.com/public/resources/documents/091710_atsruling.pdf (last visited 21 April 2011) had recently been decided. In that case the United States Court of Appeals for the Second Circuit decidedly held that corporations are not subject to liability under the Alien Tort Statute. See also *John Doe I v. Nestle*, CV 05-5133 SVW, United States District Court – Central District of California, 8

National Contact Point bodies, targeted sanctions under the UNSC Resolutions discussed above, and consumer boycotts.

II. Section 1502 Information-Devolution Assumptions

As discussed above, Section 1502 is designed not just to extract and accumulate information but also to increase access to DRC conflict mineral information through requirements that companies post required information on their websites and through the various mandated reports. Below, in the section we have reserved for an optimistic analysis of legislation, we will discuss the benefits this may have for future legislative and international organization efforts and NGO-sponsored campaigns and litigation. Here, however, we merely note that one of the assumptions of this legislation is that consumers will actually care enough about this issue that they will use their purchasing power to dissuade companies from using conflict minerals in electronic equipment. The legislation stands to be extremely effective if consumers are educated about conflict minerals and, on a scale large enough to matter, make decisions to purchase products that can be certified as “conflict free”. The Kimberly Process, which is an effort to end the connection between diamonds and conflict, has been successful largely for this reason. It remains to be seen, however, whether consumers will act similarly in the context of electronic equipment and conflict minerals.

III. Potential Negative Consequences of Section 1502

Although the legislation has been lauded as a real victory and step forward in terminating the link between conflict and minerals in the DRC,⁵⁸ there is real concern that the legislation could have devastating economic consequences in the Eastern region of the DRC. Despite oppressive corruption and abysmal standards of living for miners in the region, the miners still depend on the continued viability of local mines as their only source of work and income. It is possible that Section 1502 will, over time, improve conditions in the Eastern DRC. This could happen if minerals from the region retain their value, but only when “conflict free”. A legitimate

September 2010 holding that the existing authorities fail to show that corporate liability is sufficiently well-defined to sustain an ATS claim.

⁵⁸ See e.g., Global Witness, ‘U.S. passes landmark reform on resource transparency’ (15 July 2010) available at http://www.globalwitness.org/media_library_detail.php/1028/en/u.s._passes_landmark_reforms_on_resource_transparency (last visited 21 April 2011).

concern coming from the region, however, is that the SEC reporting requirements of 1502 will act as a strong deterrent for reporting companies, and they will effectively divest from the region, rendering minerals in the region valueless, leaving a mining-dependent economy in ruins. Locally-based NGOs have warned that this may lead to even more conflict.⁵⁹ This concern is elevated by frustrations expressed by local communities that they are not being consulted by key players tasked with designing conflict commerce governance mechanisms.⁶⁰

D. Moving Forward

In this section we will conclude by analyzing those portions of the bill that support reasonable optimism regarding Section 1502's efficacy. The reporting requirements and performance measures of the portion addressing information-extracting and information-forcing are designed well enough to effectively address some aspects of conflict commerce problem, and may induce firms to adopt a normative stance against the use of conflict minerals. The information dissemination portion opens up the possibility of market behavior shifts resulting from effective consumer awareness, more effective sanctions as well as the use of information in future litigation in coordination with other efforts (e.g., Red Flags, German Federal Bureau of Geo-Sciences and Natural Resources initiative to render Eastern DRC minerals conflict-free, the English Tin Supply Chain Initiative, the World Bank's Department for International Development/Congolese Ministry of Mines work on cassiterite etc.).

⁵⁹ D. Johnson, 'Killing the Economy in the Name of Peace?' (19 July 2010) available at <http://www.pole-institute.org/site%20web/echos/echo138.htm> (last visited 21 April 2011). On March 1, 2011 a group of local NGOs from the DRC filed a submission with the SEC expressing these concerns. See M. Choyt, Democratic Republic of Congo: Mining Cooperatives speak out critically about Dodd-Frank Act' (1 March 2011) available at <http://www.africafiles.org/article.asp?ID=25062> (last visited 21 April 2011) and ITRI, 'DR Congo miners request direct talks with US government on trade embargo' (4 March 2011) available at http://www.itri.co.uk/pooled/articles/BF_NEWSART/view.asp?Q=BF_NEWSART_322533 (last visited 21 April 2011).

⁶⁰ Johnson, *supra* note 59.

I. Compliance with and Effectiveness of Section 1502

Despite a well-developed body of literature that observes high levels of state compliance with international law and theorizes as to the reasons for otherwise sovereign entities to submit to a legal system that curtails their freedom of action, very little attention has been given to the question of why firms comply with global governance initiatives.⁶¹ While a direct analogy to existing theories of compliance with international law and international relations is imperfect, there are very useful insights that suggest reasons for optimism about corporate compliance with Section 1502, as part of the global governance efforts aimed at stemming conflict commerce.

In this particular context, one viable critique of Section 1502 could be that corporations will not or will only marginally comply with the reporting requirements, especially given the SEC's already-thin enforcement capacity. Two observations are important here, however. The first is that a failure to attain full compliance does not necessarily render governance ineffective. In this case, if the legislation results in more or better information than we currently have about the sources of DRC-linked minerals or about the connection between minerals and conflict, the legislation will have been at least somewhat effective. Second, a growing body of research demonstrates that firms have significant incentives to comply with their obligations, and actually do comply, even when not strongly monitored or consistently or strongly sanctioned for deviance.⁶²

Management theory is helpful in explaining this phenomenon. It argues that the inclusion of institutionalized performance measures strongly promotes obedience, even when enforcement is lacking.⁶³ These measures typically include the regular collection of pertinent information, performance reviews of various sorts, and opportunities to modify norms

⁶¹ Ochoa, *supra* note 56.

⁶² See G. Downs *et al.*, 'Is the good news about compliance good news about cooperation?', 50 *International Organization* (1996) 3, 379 (advancing a political economy view of compliance and arguing that the strength of enforcement is central to compliance).

⁶³ D. G. Victor, K. Raustiala & E. B. Skolnikoff, 'Introduction and Overview' in D. Victor, K. Raustiala & E. B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments* (1998), 1-46.

and institutions in light of increased or changing knowledge.⁶⁴ All of these features can be found in the corporate reporting-related components of Section 1502, including the obligations imposed on the Comptroller General and the Secretary of Commerce. This may augur well for corporate compliance with the act and, ultimately, for its effectiveness. All the more so, given the surveillance role for civil society that is implied in the information-devolution aspects of the legislation and the effectiveness-analysis reports required from the Comptroller General.

In addition to the design of Section 1502, which lends itself to optimism given the observations of managerial theory, the growing mass of governance efforts with respect to conflict commerce and business activity in conflict zones to which business actors have actively contributed opens space for earnest reasons for optimism, given the observations of constructivist and legal process compliance scholars.

Constructivist international relations scholars have built their theories around the importance of rules and the power of shared knowledge and dialogue in altering states' value systems, normative beliefs, and identities.⁶⁵ Similarly, international legal process scholars have argued that the discourse and process of norm articulation is effective in moving states toward compliance.⁶⁶ Louis Henkin, like later constructivist compliance theorists, asserted that the process of discursive engagement in the creation of knowledge and the elaboration of norms and expectations is itself the thing that brings states closer to compliance. It is this joint endeavor that has a deep effect on the identity of the affected actors.⁶⁷ Under this view, it is not so much the strategic self-interest of a given regimes' creator that causes compliance, but rather the shared ownership over knowledge and norms arising from the discourse that births the regime.⁶⁸ This would certainly suggest that firms may internalize the conflict commerce reducing norms

⁶⁴ *Id.*

⁶⁵ See e.g., R. Keohane, 'When Does International Law Come Home?', 35 *Houston Law Review* (1998) 3, 699.

⁶⁶ L. Henkin, *How Nations Behave*, 2nd ed. (1979).

⁶⁷ F. Kratochwil, *Rules, Norms and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

⁶⁸ K. Raustiala & A.-M. Slaughter, 'International Law, International Relations and Compliance', in T. Risse, W. Carlsneas & B. A. Simmons, *Handbook of International Relations* (2005), 538, 540. This, together with factors such as reputation and domestic politics, tilts states in the direction of compliance.

they are participating in creating, despite the possibility of increased sourcing costs as well as reputational, economic, and legal risks as governance efforts start to eliminate the possibility of taking financial advantage of a market made fragile by its entanglement with conflict.

II. Potential Uses of Information

There are a number of potential uses for information that is accumulated and made publically available. Among these uses are the potential for consumer awareness and boycotts, targeted sanctions from a state or international organizations, the basis for legal or quasi-legal claims, and coordination with or assimilation into other conflict commerce governance efforts.

As mentioned previously, it is reasonable to question whether this legislation will change consumer choices enough that reductions in sales outweigh the economic gains that companies currently implicated in this activity currently enjoy. However, consumer boycott studies have noted that boycotts can be successful in attaining their objectives even when this is not the case.⁶⁹ In addition to this observation, literature on consumer boycotts suggests that conflict commerce is the type of issue that could easily lead to a successful boycott, either because it is effective at significantly altering consumer behavior or because it affects the risk calculation of targeted companies enough that they stop relying on conflict commodities.⁷⁰ The factors that contribute to a boycott's efficacy include the "awareness of consumers; the values of potential consumer participants; the consistency of boycott goals with participant attitudes; the cost of participation; social pressure; and the credibility of the boycott leadership"⁷¹. Many of these factors are likely to fall in the direction of conflict commerce-based boycotts. In addition, the psychological motivations of boycotters indicate that such boycotts would be successful. These motivations include a desire

⁶⁹ N. C. Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (1990).

⁷⁰ See generally M. Freedman, *Consumer Boycotts: Effecting Change through the Market Place and the Media*, (1999), 21-32.

⁷¹ J. Klein, A. John & N. C. Smith, 'Exploring Motivation in Consumer Boycott' (November 2001) available at <http://www.london.edu/facultyandresearch/research/docs/01-701.pdf?pagewanted=all> (last visited 21 April 2011), 4-5, citing D. E. Garrett, 'The Effectiveness of Marketing Policy Boycotts: Environmental Opposition to Marketing' 51 *Journal of Marketing* (1987) 2, 46-57.

among consumers to maintain consistent beliefs about the kind of person they already believe themselves to be and to have “clean hands” with respect to behavior or issues they judge as wrong.⁷² These two interrelated motivations suggest some reasons for optimism on this issue, given the strong normative case against contributing, actively or passively, intentionally or unintentionally, to the type of violent conflict present in the DRC.

In addition to consumer boycotts, the UNSC Resolutions mentioned above authorize targeted sanctions against companies engaged in commercial activity associated with the conflict in the DRC. Also, as previously discussed, litigation recently initiated against the United Kingdom arguing that the U.K. had acted unlawfully in failing to submit names of British entities trading in conflict minerals in accordance with the terms of UNSC Resolutions 1857 and 1896 provides evidence of civil-society policing of UN member state compliance with the relevant resolutions.⁷³ This may elevate the pressure on states and international organizations to impose targeted sanctions that might include naming specific corporate actors and conflict leaders, prohibiting business dealings with named entities and imposing asset freezes and travel bans for named entities. As the amount of information about particular companies’ involvement in conflict commerce is improved, targeted sanctions may become a more popular and more useful tool for states to employ.

E. Conclusion

This conclusion will provide some recommendations that fall outside the relatively narrow ambit of Section 1502 that we believe will optimize the likelihood that this legislation – and future efforts on conflict commerce in the DRC and elsewhere – will be effective.

First, we propose that, before financing a transaction in a conflict or post-conflict area, a bank or other lender collect a conflict bond and that finance and guarantee institutions such as the U.S. Overseas Private Investment Corporation and the Multilateral Investment Guarantee Agency consider requiring that such bonds be in place before they will provide

⁷² Klein, John & Smith, *supra* note 71, 6.

⁷³ Global Witness, *supra* note 50.

financing or insure against political risk. In most countries, corporations operate with care for a host of reasons, among them the potential that they will suffer a penalty if they violate a regulation. In conflict areas, this important incentive is absent. Imposing a conflict bond would provide a financial incentive to corporations and other investors to take a similar level of care in conflict areas – where government oversight is virtually non-existent – as they take in non-conflict areas. Such bonds would be forfeited in the face of successful claims before international bodies like the OECD National Contact Points,⁷⁴ or domestic courts.⁷⁵ If forfeited, such a bond would be used to compensate the local community for any harm they suffer as a result of the commercial activity.

Second, we propose vigilant attention to engagement with and empowerment of local communities and civil society so that they can better enforce local norms and preferences. We are concerned, in particular, that a portion of the Congolese community appears dissatisfied by the amount of participation they have had in the SEC rule drafting process.⁷⁶ It is imperative to the legitimacy of any future regulatory regime that local communities and leaders have had (and believe they have had) a role in the process by which it was formed and that it is structured around the realities they live. We propose two specific tactics to give effect to this strategy.

First, we propose that any local Congolese organization asking for an opportunity to inform the SEC's rule formation process be granted a reasonable time and opportunity to make appropriate interventions. This is a mandatory baseline. Second, we propose that the jurisdiction of the World Bank Inspection Panel be expanded to include projects financed by any international body. The Inspection Panel is an independent arm of the World

⁷⁴ 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd' (28 August 2008) available at <http://www.berr.gov.uk/files/file47555.doc> (last visited 21 April 2011).

⁷⁵ In November 2010, a group of Congolese citizens filed a class action case against Anvil Mining Ltd. in Montreal Canada alleging that "the company, by providing logistical assistance, played a role in human rights abuses, including the massacre by the Congolese military of more than 70 people in the Democratic Republic of Congo in 2004". See Global Witness, 'Congolese victims file class action against Canadian mining company' (8 November 2010) available at <http://www.globalwitness.org/library/congolese-victims-file-class-action-against-canadian-mining-company> (last visited 21 April 2011).

⁷⁶ Johnson, *supra* note 59.

Bank created to give a forum to persons affected by Bank-funded projects. As it is currently structured, the Inspection Panel reviews requests for inspection from people adversely affected by Bank-funded projects to ensure that the Bank has followed its own procedures. The Panel has the authority to conduct an independent investigation of complaints and, if necessary, order changes necessary to bring projects into compliance with the Bank's procedures. We propose expanding the Inspection Panel's jurisdiction to permit it to review complaints regarding projects or investments funded by any part of the World Bank Group or other international institution. This would include projects receiving support from e.g. the Multilateral Investment Guarantee Agency (MIGA), any of the regional development banks, or any import/export-credit agencies. Finally, we propose expanding the jurisdiction of the International Center for the Settlement of Investment Disputes (ICSID) to permit community groups to intervene in or initiate claims against corporations for human rights violations. The ICSID is an international institution created by treaty to resolve investment disputes between member states and foreign investors. As currently structured, the ICSID's jurisdiction does not permit members of the local communities affected by investments to raise concerns about those investments. Modifying the ICSID's jurisdiction would begin to put local communities on the same legal footing as the corporations and financial institutions whose projects affect them.

Section 1502 and the forthcoming SEC rules it requires are an experiment in information management and the regulatory capacity of information-extraction, information-forcing and information-devolution. For the reasons we have stated herein, there is room for cautious optimism that it will have some effect on the flow of information and also on the flow of minerals that fund one of the worst on-going conflicts in recent history. How this information is reported and used will ultimately affect other efforts aimed at curbing the connection between minerals and conflict in the DRC. The on-going strategies we describe herein, and also those we have proposed will surely benefit from well drafted SEC rules emerging from Section 1502.