BLOOD ELECTRONICS: CONGO'S CONFLICT MINERALS AND THE LEGISLATION THAT COULD CLEANSE THE TRADE

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I. INTRODUCTION

The law, when enforced, can be used to punish. It can be used to articulate social norms and standards, or to define and impose responsibilities. The law can also, however, be used to change incentives. When designed and implemented properly, a good law establishes an incentive structure to align legal responsibility with the actors most able to change a set of results—actors who possess the information, the institutional capacity, and the practical ability to make a difference in a situation our society seeks to improve.

In the 111th Congress, Representative Jim McDermott proposed just such a law.[1] The Conflict Minerals Trade Act took note of America's role in the devastating humanitarian crisis it may be inadvertently fueling: the situation in the Democratic Republic of Congo ("DRC" or "DR Congo"), home to the minerals used in nearly every electronic product known to man.[2] Indeed, as the conflict in DR Congo reaches catastrophic

1. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).
2. *See id.* § 2. Conflict minerals are also used in many nonelectronic products, including

proportions,[3] the interests of a broad range of actors have become affected—and not just those in the human rights sector. Mineral wealth extracted from DR Congo is likely inside of your cell phone, your laptop, and your iPod—raising issues of personal responsibility as well as corporate ethics. As individuals confront their consciences and investors contemplate their stock portfolios, issues once relegated to the realm of international human rights law have now entered many of our homes and purses without us realizing. The Conflict Minerals Trade Act, by altering an incentive structure, aimed to change that unawareness by bringing our trade legislation in line with both our best interests and our ethical responsibilities.

Unfortunately, a different approach was ultimately taken. In the summer of 2010, several provisions of a very different minerals regulation bill were incorporated into the groundbreaking financial reform legislation that President Barack Obama signed into law.[4] These provisions purported to regulate the minerals trade through the Securities and Exchange Commission ("SEC")[5]—a sharp departure from the Conflict Minerals Trade Act, which would have regulated the trade through U.S. Customs and Border Protection ("Customs").[6] Although the human rights community was overwhelmingly supportive of the regulations, the decision to regulate minerals through the SEC rather than through Customs may have consequences that reverberate all the way to eastern DRC.

This Note aims to establish the need for effective legislation regulating the conflict minerals trade, but argues that Congress's recent decision to regulate the trade through the SEC should be reconsidered. Instead, this Note asserts that a Customs-based approach remains the best option to regulate ethically and effectively the conflict minerals trade, as it is most likely to protect both the legitimate mining industry and the interests of civilians in DR Congo.

automotive, defense and aerospace products, and medical devices. Letter from Consumer Elec. Ass'n, et al., to Mary L. Shapiro, Chairman, Sec. & Exch. Comm'n 1, *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-57.pdf. This Note, however, will focus on minerals regulation and look specifically at the electronics industry.

3. Conflicts in DR Congo "have resulted in the deaths of an estimated 5,400,000 people since 1998 and continue to cause as many as 45,000 deaths each month." H.R. 4128 § 2(3).

4. *Compare* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, sec. 1502, § 13, 124 Stat. 1376, 2213–18 (2010) (to be codified at 15 U.S.C. § 78m(p)) [hereinafter Dodd-Frank Act], *with* Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009). This Note will analyze the similarities between the two *infra* Part VI.

5. *See* Dodd-Frank Act § 1502(b), 124 Stat. at 2213 (to be codified at 15 U.S.C. § 78m(p)).

6. *See* H.R. 4128 § 8(a).

Substantively, this Note argues that we should learn from the lessons of the blood diamonds industry as we confront the realities of our "blood electronics." While the issue of conflict diamonds is by no means resolved, the efforts made to reform the international diamond industry possess both strengths and weaknesses that we can learn from as we consider the most effective means of regulating the international electronics industry.

Finally, as the recent conflict minerals legislation is analyzed, this Note attempts to consider how regulatory efforts could constructively interact with the international bodies and organizations that have already taken up this matter. Specifically, this Note argues that any legislation regulating the conflict minerals trade will have to be implemented in conjunction with both a United Nations' peacekeeping presence and ultimately, a Kimberley Process–style certification scheme.

II. BACKGROUND TO THE CONFLICT

The DRC, located in the heart of Africa, has been referred to as the home of the world's deadliest war since World War II[7] and as the site of the deadliest conflict in all of Africa's documented history.[8] In 2008, *Foreign Affairs* deemed the situation in the DRC the largest humanitarian crisis on the planet.[9] Although the DRC's civil war technically ended in 2002 with a peace agreement laying the foundation for a transitional government,[10] the humanitarian crisis rages on, with an estimated 45,000 Congolese dying every month from consequences of the ongoing conflict[11]—a figure which amounts to over 1500 preventable deaths per

7. JOHN PRENDERGAST, THE ENOUGH PROJECT, CAN YOU HEAR CONGO NOW?: CELL PHONES, CONFLICT MINERALS, AND THE WORST SEXUAL VIOLENCE IN THE WORLD 1 (2009), http://www.enoughproject.org/files/publications/Can%20Your%20Hear%20Congo%20Now.pdf. The Enough Project was founded in 2007 as a project of the Center for American Progress in order to highlight and confront key humanitarian crises in Africa, including in Sudan and the eastern DR Congo. Its founders Gayle Smith and John Prendergast are both considered experts in the field, with Ms. Smith now serving in the Obama administration and Mr. Prendergast working in particular on the issue of conflict minerals under the Enough Project's Raise Hope for Congo Campaign.

8. *See* INT'L RESCUE COMM., MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: RESULTS FROM A NATIONWIDE SURVEY, CONDUCTED SEPTEMBER–NOVEMBER 2002 14 (2003), http://www.rescue.org/sites/default/files/resource-file/2002-2003_Survey.pdf.

9. Séverine Autesserre, *The Trouble With Congo: How Local Disputes Fuel Regional Conflict*, FOREIGN AFF., May/June 2008, at 94, 95, *available at* http://www.foreignaffairs.com/articles/63401/sÃ©verine-autesserre/the-trouble-with-congo.

10. LAURA DAVIS & PRISCILLA HAYNER, INT'L CTR. FOR TRANSITIONAL JUSTICE, DIFFICULT PEACE, LIMITED JUSTICE: TEN YEARS OF PEACEMAKING IN THE DRC 8 (2009), http://www.ictj.org/static/Africa/DRC/ICTJDavisHayner_DRC_DifficultPeace_pa2009.pdf.

11. THE ENOUGH PROJECT, THE DEMOCRATIC REPUBLIC OF THE CONGO: ROOTS OF THE CRISIS

day. One report estimates that between the end of the first war in August 1998 and April 2007, 5.4 million individuals in the DRC died from this conflict.[12]

Though the conflict raging in DR Congo is undeniably complex, it is equally undeniable that the multimillion dollar global minerals trade is one of the central issues fueling the conflict and the corresponding humanitarian crisis.[13] Significantly, the majority of eastern DR Congo's violence occurs in North Kivu, South Kivu, and Orientale—the provinces with some of the greatest mineral wealth in the country.[14] True, the dimensions of the conflict in eastern DR Congo range from internal to regional power struggles to tensions over identity, ethnicity, and resources. But notably, one of the common threads among these struggles is that the various groups involved seek to obtain and sustain power through their control of the mineral mines.[15] Though mineral wealth did not cause the original war in DR Congo, the mineral trade "sustains armed combatants and fuels ongoing atrocities."[16]

In fact, many of us may already be familiar with some of the armed combatants controlling the mines in question: those wondering what became of Rwanda's génocidaires need look no further than the mineral mines of eastern DR Congo. According to reports, "many of the mines . . . are controlled by ethnic Hutu rebels from the Democratic Front for the Liberation of Rwanda (FDLR),"[17] and "[s]ome of the same commanders implicated in horrific massacres, including the slaughter of Rwandan Hutu refugees . . . have been identified as directly profiting from the minerals trade."[18] Having crossed the Rwandan border into DR Congo,

3, http://www.enoughproject.org/files/pdf/crisis_roots_congo.pdf (last visited Apr. 12, 2011) [hereinafter ROOTS OF THE CRISIS].

12. BENJAMIN COGHLAN ET AL., INT'L RESCUE COMM., MORTALITY IN THE DEMOGRAPHIC REPUBLIC OF CONGO: AN ONGOING CRISIS ii (2007), http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf.

13. THE ENOUGH PROJECT & THE GRASSROOTS RECONCILIATION GROUP, A COMPREHENSIVE APPROACH TO CONGO'S CONFLICT MINERALS 1 (2009), http://www.enoughproject.org/files/publications/Comprehensive%20Approach%20to%20Congo's%20Conflict%20Minerals.pdf [hereinafter A COMPREHENSIVE APPROACH].

14. *Id.* at 2.

15. *See id.* at 1.

16. JOHN PRENDERGAST & NOEL ATAMA, THE ENOUGH PROJECT, EASTERN CONGO: AN ACTION PLAN TO END THE WORLD'S DEADLIEST WAR 1 (2009), http://www.enoughproject.org/files/publications/eastern_congo.pdf.

17. Thomas Fessy & Mark Doyle, *From Rebel-Held Congo to Beer Can*, BBC NEWS (Apr. 9, 2009), http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7991479.stm.

18. DAVID SULLIVAN & NOEL ATAMA, THE ENOUGH PROJECT, DIGGING IN: RECENT

these FDLR rebels claim that they ultimately seek to return to Rwanda and engage in a political dialogue with the Rwandan government, but for the time being, the rebels remain "deeply implanted in the forests and mountains of DR Congo, [using weapons] to extort taxes and minerals from local diggers and traders, reaping profits worth millions of dollars a year."[19]

The génocidaires and FDLR rebels are not alone in their interest in the mineral mines, however. Renegade units from the Congolese Army, Mai Mai militias, and other armed groups also compete for control.[20] As a 2009 report put it, "With only a few guns and shovels, local warlords can establish themselves as a group that must be reckoned with, financing their own growth into a militia powerful enough to demand a seat at the table in negotiations and eventually a position in the army—from where they can continue to profit from the minerals trade."[21] A recent military offensive known as Kimia II forced Rwandan FDLR militias off of several key mines,[22] but the replacement of these militias with Congolese army units has created its own problems. Army units not only have failed to protect local civilians and "us[ed] the same tactics as the FDLR to intimidate and exploit miners and their families," but have also become "the number one perpetrator of sexual abuse against women in eastern Congo."[23] Further, the National Congress for the Defense of the People ("CNDP"), the rebel group previously headed by warlord Laurent Nkunda,[24] has now been absorbed into the Congolese military.[25] This means that when Congolese army units face local populations, their integration with CNDP members reignites tensions from communities still reeling from their last CNDP encounters.[26] A news report in 2010 indicates that the former CNDP rebels, now integrated into the army, "are running mafia-style extortion rackets in the mines" and have "far greater control of the mines [as members of the

DEVELOPMENTS ON CONFLICT MINERALS 4 (2010), http://www.enoughproject.org/files/publications/DiggingInConflictMinerals.pdf.

19. Fessy & Doyle, *supra* note 17.

20. A COMPREHENSIVE APPROACH, *supra* note 13, at 2.

21. SULLIVAN & ATAMA, *supra* note 18, at 1.

22. *Id.* at 2.

23. *Id.* at 4 (citing HUMAN RIGHTS WATCH, "YOU WILL BE PUNISHED": ATTACKS ON CIVILIANS IN EASTERN CONGO 105 (2009), *available at* http://www.hrw.org/sites/default/files/reports/drc1209webwcover2.pdf (finding Congolese soldiers to have committed 350 of 527 documented cases of sexual violence in North Kivu during Kimia II)).

24. *See* Peter Greste, *Nkunda's Spectacular Fall*, BBC NEWS (Jan. 23, 2009), http://news.bbc.co.uk/2/hi/africa/7846940.stm.

25. *See* A COMPREHENSIVE APPROACH, *supra* note 13, at 4.

26. SULLIVAN & ATAMA, *supra* note 18, at 2.

army] than they did as insurgents."[27]

Although the civil war in the DRC ended in 2002,[28] the mineral-fueled violence continues to ravage the eastern region of the country, which remains largely out of the government's control.[29] The continued violence may not be surprising given the DRC's bloody history. After Belgium's King Leopold II established a system of exploitation, oppression, and enslavement that lasted for nearly a century, the DRC gained independence in 1960 only to find itself torn between Cold War powers.[30] With support from the United States and other Western powers, Mobutu Sese Seko seized power in the DRC, implementing a regime that would last for more than thirty years and become known as one of Africa's all-time most corrupt regimes.[31] When Mobutu was finally deposed by Laurent-Désiré Kabila in 1997,[32] not only did the DRC fail to attain peace, but it also collapsed into the deadliest conflict in all of Africa's documented history.[33] Congo's 1998–2002[34] civil war swept six African nations into a current of violence that was so destructive it became known as "Africa's first world war."[35]

While the country formally emerged from civil war in 2002,[36] the situation today is best described as an ongoing armed conflict in the eastern region, which remains largely out of the central government's control and

27. Karen Allen, *Ex-Rebels Accused of Extortion in DR Congo Mines*, BBC NEWS (Mar. 11, 2010), http://news.bbc.co.uk/2/hi/africa/8561330.stm.

28. ROOTS OF THE CRISIS, *supra* note 11, at 2.

29. PARTNERSHIP AFR. CAN., DIAMONDS AND HUMAN SECURITY: ANNUAL REVIEW 2009 8 (Ian Smillie ed., 2009), http://www.pacweb.org/Documents/annual-reviews-diamonds/AR_diamonds_2009_eng.pdf.

30. *See* Guy Fiti Sinclair, *"The Ghosts of Colonialism in Africa": Silences and Shortcomings in the ICJS 2005 Armed Activities Decision*, 14 ILSA J. INT'L & COMP. L. 121, 124–26 (2007).

31. *See id.* at 127; *DR Congo Criticises Mobutu Ruling*, BBC NEWS (July 15, 2009), http://news.bbc.co.uk/2/hi/8151959.stm (reporting that Mobutu has been labeled as the third most corrupt leader of all time by the anticorruption watchdog Transparency International, behind Suharto of Indonesia and Ferdinand Marcos of the Philippines). Transparency International estimates that Mobutu personally looted nearly $6 billion in aid money from the DRC (then known as Zaire) during his reign. *DR Congo Criticises Mobutu Ruling*, *supra*.

32. FEDERICO BORELLO, INT'L CTR. FOR TRANSITIONAL JUST., A FIRST FEW STEPS: THE LONG ROAD TO A JUST PEACE IN THE DEMOCRATIC REPUBLIC OF THE CONGO vii (2004), http://www.ictj.org/images/content/1/1/115.pdf.

33. *See* INT'L RESCUE COMM., *supra* note 8, at 14.

34. ROOTS OF THE CRISIS, *supra* note 11, at 2.

35. Ian Fisher & Norimitsu Onishi, *Many Armies Ravage Rich Land in the "First World War" of Africa: Chaos in Congo, A Primer*, N.Y. TIMES, Feb. 6, 2000, § 1, at 1.

36. DAVIS & HAYNER, *supra* note 10, at 8.

in the hands of rebel militias.[37] The United Nations' largest and most expensive peacekeeping operation, the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC"),[38] has been deployed in the DRC since 1999 but has been unable to contain the violence at the hands of both the Congolese army and the rebel militias.[39] Indeed, in 2010, the United Nations described the situation in DR Congo as "one of the worst humanitarian crises in the world"[40]—and it is against this backdrop that militias finance themselves and profit by controlling Congo's mineral wealth.[41]

III. BLOOD MINERALS

The particular minerals at stake are known as the "3 Ts + Gold"—tin, tantalum, tungsten, and gold.[42] They are also known by their names in ore form before being processed into metals: tin ore is called cassiterite, tantalum ore is called coltan (or columbite-tantalite), and tungsten ore is known as wolframite.[43] Once processed, these ores become metals—and extremely valuable metals at that. It is estimated that in 2008, these minerals provided Congolese armed groups with approximately $185 million in profits.[44]

According to expert John Prendergast,[45] if a product has a circuit board, it probably received some of its minerals from DR Congo.[46] Tin, for

37. PARTNERSHIP AFR. CAN., *supra* note 29, at 8.

38. U.N. S.C. Rep. of the Security Council Mission to Central Africa, Nov. 21–25, 2004, ¶¶ 5, 26, U.N. Doc. S/2004/934 (Nov. 30, 2004), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Mission%20S2004934.pdf.

39. *Is This the World's Least Effective UN Peacekeeping Force?*, ECONOMIST, Dec. 4–10, 2004, at 45.

40. *UN: DRC One of World's "Worst Humanitarian Crisis,"* MAIL & GUARDIAN ONLINE (June 11, 2010), http://mg.co.za/article/2010-06-11-un-drc-one-of-worlds-worst-humanitarian-crises.

41. A COMPREHENSIVE APPROACH, *supra* note 13, at 1.

42. PRENDERGAST, *supra* note 7, at 2.

43. A COMPREHENSIVE APPROACH, *supra* note 13, at 3.

44. *Id*.

45. Mr. Prendergast is a longtime human rights activist who has worked for peace in Africa for over twenty-five years; as previously mentioned, he is also the founder of the Enough Project, an initiative to end genocide and crimes against humanity. John Prendergast, Co-Founder, The Enough Project, http://www.enoughproject.org/content/john-prendergast-co-founder (last visited Apr. 19, 2011). He was also in charge of African Affairs in the National Security Council during the Clinton Administration. John Prendergast, *"Conflict Minerals" in the Democratic Republic of Congo*, AM. UNIV. SCH. OF INT'L SERV., at 1:35 (Feb. 4, 2009), http://deimos.apple.com/WebObjects/Core.woa/Browse/american.edu.4970502297?i=1608776650 [hereinafter Prendergast Podcast].

46. Prendergast Podcast, *supra* note 45, at 11:23.

example, serves as a solder on circuit boards.[47] Given how many products use circuit boards, it is easy to see how important a role tin plays in the industry. Tantalum is used in cell phones, digital cameras, and iPods to store electricity in capacitors while tungsten is used to make cell phones vibrate.[48] Gold, the final conflict mineral, also is used frequently in the construction of electronics and is a key source of mineral wealth in DR Congo, with armed groups earning between $44 and $88 million annually from gold alone.[49]

As for the conditions under which these minerals are mined, it is difficult to generalize across mines and regions within the DRC, which are often run by different groups, but it is not difficult to articulate a pattern of vast human rights abuses connected to the industry. At its root, it is a pattern in which armed militias force local Congolese to extract minerals under extremely dangerous conditions, subjecting those who resist to violence and intimidation.[50] The militias exercise systematic extortion and "taxation" along different stages of the trade, forcing transporters and local and international buyers to pay bribes at roadblocks and border crossings, and then selling the raw ore to black-market brokers.[51] As for the profits they reap from these practices, the militias "use the money to buy more weapons and maintain a brutal form of order by killing or chopping off limbs of the men and raping the women."[52] This form of "order" merely serves to further ravage a population already devastated by extreme poverty, disease, and other effects of years of civil war.

In fact, the financial chain of mineral profits deserves a closer look, as once mineral profits reach the hands of armed groups, they fuel and finance not only the general armed conflict in the DRC, but also the particular crisis of rape and sexual violence against Congolese women. The DRC now has the dubious distinction of being the most dangerous place on earth to be a woman or girl.[53] Its epidemic of rape and sexual violence has left

47. *See* PRENDERGAST, *supra* note 7, at 2.

48. *Id.* at 3.

49. *Id.*

50. GLOBAL WITNESS, "FACED WITH A GUN, WHAT CAN YOU DO?": WAR AND THE MILITARISATION OF MINING IN EASTERN CONGO 5 (2009), http://www.globalwitness.org/sites/default/files/pdfs/report_en_final_0.pdf.

51. A COMPREHENSIVE APPROACH, *supra* note 13, at 4; Jonathan Broder, *Foreign Policy: In the Business of Change*, CQ WEEKLY, Sept. 14, 2009, at 2028, 2030. *See also* SULLIVAN & ATAMA, *supra* note 18, at 3 (describing a particularly violent incident at Bisie, eastern Congo's largest mine).

52. Broder, *supra* note 51, at 2030.

53. PRENDERGAST, *supra* note 7, at 1.

hospitals filled to the brim[54] while perpetrators roam with impunity[55] and continue in positions of power through mineral profits.[56] Human Rights Watch estimated in 2005 that tens of thousands of women and girls had been raped in DR Congo since 1998,[57] possibly hundreds of thousands,[58] with "the most sadistic rapes . . . committed by [the] depraved killers who participated in Rwanda's genocide in 1994 and then escaped into Congo[,] . . . [leaving] thousands of women with their insides destroyed."[59] More than merely generating staggering statistics, rape and sexual violence are used as a systematic weapon of war in DR Congo to subjugate and humiliate civilians in regions under militia control.[60]

While the portrait of such a crisis may be disturbing in the abstract, it is easy to regard the plight of those in DR Congo as far removed from our own lives until we realize that tracing the trail of mineral profits leads directly to us. Consumers in the know are understandably outraged by our links to DR Congo's humanitarian crisis,[61] investors and electronics corporations are inevitably made uncomfortable by the spotlight directed by corporate social responsibility efforts,[62] and corporate directors are likely to be hesitant about placing major investments in the heart of one of the world's largest humanitarian crises.[63] This convergence of interests

54. *See* Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES, Oct. 7, 2007, at A1 (noting that one hospital, for example, has 350 beds but "sends women back to their villages before they have fully recovered because it needs space for the never-ending stream of new arrivals").

55. *Clinton Demands End to Congo Rape*, BBC NEWS (Aug. 11, 2009), http://news.bbc.co.uk/2/hi/africa/8194836.stm.

56. *See* GLOBAL WITNESS, *supra* note 50, at 4.

57. Robert Walker, *"No Justice" for DR Congo's Raped*, BBC NEWS (Mar. 7, 2005), http://news.bbc.co.uk/2/hi/africa/4325397.stm.

58. Jeffrey Gettleman, *Rape Victims' Words Help Jolt Congo Into Change*, N.Y. TIMES, Oct. 18, 2008, at A1.

59. *Id.*

60. Walker, *supra* note 57.

61. *See* Nicholas D. Kristof, *Death by Gadget*, N.Y. TIMES, June 27, 2010, at WK11 (noting the protests outside an Apple store opening and mass messages to Intel calling on the companies to cease using conflict minerals in their products).

62. *See* Email from David Marshall, Nintendo of America, to author (Apr. 1, 2010, 02:01:07 PM PDT) (on file with author); Press Release, Calvert Invs., Investors Speak Out Against Fueling of Congo War by Conflict Minerals (Jan. 11, 2010), http://www.csrwire.com/press/press_release/28446-Investors-Speak-Out-Against-Fueling-Of-Congo-War-By-Conflict-Minerals [hereinafter Investor Press Release].

63. *See Mutual Convenience*, ECONOMIST, Mar. 15–21, 2008, at 12, 13 (noting that "various prospective investors have balked at Congo's instability and dropped out" and that "[f]or several years now the World Bank has ranked Congo as the worst place in the world, bar none, to do business."). *See also* Autesserre, *supra* note 9 (deeming the crisis in the DRC as the world's "largest humanitarian

may have been the impetus for the flurry of legislative initiatives introduced in the 111th Congress on the issue: then-Senator Sam Brownback's Congo Conflict Minerals Act of 2009[64] and Representative Jim McDermott's Conflict Minerals Trade Act.[65] Similarly, perhaps it was the urgency of the humanitarian situation that led Congress to incorporate the provisions from the Congo Conflict Minerals Act over the provisions of other legislative initiatives—with minimal input from the academic legal community.[66] Yet because each piece of proposed legislation represents a varying solution to the issue of conflict minerals, the method of regulation is likely to have significant ramifications for its implementation.

IV. THE NEED FOR EFFECTIVE CONFLICT MINERALS LEGISLATION: PROTECTING BOTH THE LEGITIMATE TRADE AND INTERNATIONAL HUMAN RIGHTS

It first must be made clear that despite its concerns with the method of regulation recently elected by Congress, this Note strongly advocates for the regulation of the minerals trade. Effective regulation, however, is comprised of legislation that protects both international human rights and the legitimate minerals trade—which this Section argues go hand-in-hand. While the interests of the international electronics industry, the consumers of electronics products, and the victims of human rights violations are by no means identical, they are inextricably bound by the need to protect and preserve the legitimate minerals trade coming out of DR Congo. A legislative approach that publicizes the ghastly violations in DR Congo while leaving companies unable to discern whether their minerals are conflict free can create public relations nightmares for these companies, causing them to abandon mining from DR Congo altogether.[67]

disaster").

64. Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009).

65. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

66. At the time of this Note's submission, the author is aware of only one other legal journal piece discussing the DRC's conflict minerals. *See* Daniel M. Firger, Note, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT'L L. 1043, 1087–90 (2010). That piece is focused primarily on a separate issue, the Energy Security Through Transparency Act of 2009, S. 1700, 111th Cong. (2009), but mentions the DRC's conflict minerals in the context of discussing the "resource curse" inhibiting international development efforts. *See* Firger, *supra*.

67. *See* Joe Bavier, *Traxys Says Will Stop Buying Eastern Congo Tin*, REUTERS AFRICA (May 4, 2009), http://af.reuters.com/article/drcNews/idAFL424647920090504?pageNumber=2&virtualBrandChannel=0&sp=true. Traxys did not indicate it would cease buying from the country as a whole but did pledge to stop buying from the region: "we will stop sourcing any minerals from eastern Congo, that is to say, from (the provinces of) North Kivu, South Kivu and Maniema." *Id.*

Paradoxically, this could dramatically worsen the situation on the ground.

This was the situation for metals merchant Traxys, a major tin buyer, after a United Nations report linked Traxys' minerals to mines connected to Rwandan génocidaires.[68] Following the report, Traxys announced that it would stop all tin purchases from eastern DR Congo, despite previously being one of DR Congo's biggest tin buyers.[69] A similar story can be told for Thaisarco, a subsidiary of the Amalgamated Metal Corporation; in 2009, Thaisarco announced that it would suspend all cassiterite purchases from DR Congo after the United Nations linked the mining of its minerals to FDLR militia.[70] Thaisarco claimed that while it had attempted in 2009 to set up a process to weed conflict minerals out of its supply chain, "the threat of misleading and bad publicity" caused it to abandon sourcing from DR Congo altogether.[71] These companies did not stop purchasing minerals from a particular mine or those connected to a particular group—they halted their trade with the region altogether. By condemning electronics manufacturers' connections to conflict minerals without assisting them in developing a legitimate trade or method for creating a transparent supply chain, well-meaning human rights advocates could unintentionally induce electronics manufacturers to cut DR Congo out of the supply chain altogether. This result neglects to take into consideration the livelihoods of millions of miners dependent on DR Congo's minerals trade.[72]

In addition to damaging the interests of international investors and electronics manufacturers, abandoning the vast mineral wealth in the DRC because of companies' inability to accurately identify conflict minerals

68. *Id.*

69. *Id.*

70. Nathanial Gronewold, *U.N. Peacekeepers Failing to Stem Illegal Trades That Fuel Conflicts*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/gwire/2010/01/28/28greenwire-un-peacekeepers-failing-to-stem-illegal-trades-82836.html?scp=1&sq=MONUC&st=cse; Joe Bavier, *Thaisarco Suspends Congo Tin Ore Purchases*, REUTERS AFRICA (Sept. 18, 2009), http://af.reuters.com /article/investingNews/idAFJOE58H09S20090918 (reporting that the Thaisarco chairman made the following statement: "Although acting entirely lawfully, the threat of misleading and bad publicity remains for anyone who participates in the DRC tin trade. These pressures have led Thaisarco to suspend its purchases from the DRC."). Some sources report, however, that due to a desire to "honour existing contractual commitments," Thaisarco may still be purchasing conflict minerals from the DRC. SULLIVAN & ATAMA, *supra* note 18, at 5.

71. Gronewold, *supra* note 70. Whether the publicity was or was not in fact "misleading," Thaisarco's experience nevertheless shows how such publicity can result in a company's full withdrawal from the region.

72. *See* Joe Bavier, *Ban on "Conflict Minerals" Would Hurt Congo's Poor*, REUTERS (Apr. 8, 2009), http://www.reuters.com/article/idUSL867206720090408.

would immeasurably worsen human rights conditions on the ground.[73] Companies unable to sort legitimate from illegitimate minerals may choose to withdraw from the country rather than face a public relations disaster—resulting in a de facto embargo that is in practice identical to imposing international sanctions against Congolese minerals. In fact, when the United Nations Group of Experts considered such sanctions in 2006, experts "examined the potential humanitarian fallout from such sanctions and warned that [they] could hurt the livelihoods of as many as 2 million artisanal miners and their families."[74] Similarly, a joint study by the London School of Economics, the British government, and Belgium's Ghent University indicated that a ban on minerals from eastern DRC would threaten the livelihoods of a million miners and could actually worsen the DRC's conflict.[75] Because leaving international electronics manufacturers no effective option but to abandon sourcing from DR Congo's minerals would constitute a de facto embargo, it is difficult to see how this would be a positive option for either the industry or the miners on the ground.

Some experts claim that the fear of industry abandonment of DR Congo is premature and distinguish the companies who have abandoned DR Congo by noting that they were specifically identified as "knowingly" purchasing from FDLR sources.[76] The Enough Project claims that "[i]t remains to be seen whether other companies that have avoided such censure will be so quick to relinquish their access to Congo's mineral wealth."[77] However, as the issue of conflict minerals increasingly generates media attention, it is unclear that consumers will differentiate between "knowing" and "negligent" sourcing of conflict minerals, or whether companies that "knowingly" versus "negligently" source from conflict minerals would experience differential results in their public relations damage control. Indeed, as this Note describes in its discussion of the international diamond industry,[78] even diamond companies who assisted in the process of developing an international certification scheme suffered

73. *See* A COMPREHENSIVE APPROACH, *supra* note 13, at 6.

74. *Id*.

75. Bavier, *supra* note 72. *See also* NICHOLAS GARRETT & HARRISON MITCHELL, CRISIS STATES RESEARCH CTR., TRADING CONFLICT FOR DEVELOPMENT: UTILISING THE TRADE IN MINERALS FROM EASTERN DR CONGO FOR DEVELOPMENT 5 (2009), http://www.resourceglobal.co.uk/documents/Trading%20Conflict%20for%20Development.pdf (advocating formalizing the minerals trade rather than trying to stop or interrupt the trade, which would "have severe retarding effects on regional development").

76. SULLIVAN & ATAMA, *supra* note 18, at 5.

77. *Id.*

78. *See infra* Part V.

public relations damage and a resultant consumer backlash.[79] Further, one of the primary motivations for diamond regulation was to "ensure the protection of the legitimate trade in these diamonds by breaking the link between conflict and rough diamonds,"[80] a situation highly analogous to the conflict minerals trade, as this Note will argue.

Finally, even if fears of industry withdrawal from DR Congo are "premature" or the occurrence of such a result "remains to be seen," taking such a colossal gamble with the lives and livelihoods of millions of Congolese poor may simply constitute bad policy. Instead, effective efforts to regulate the trade should incorporate the paramount need to protect the legitimate minerals trade in DR Congo while condemning illegitimate conflict minerals. For the sake of Congolese miners, as well as for the sake of an international electronics industry reasonably seeking to access one of the world's richest sources of valuable minerals, such is the type of pragmatic, proactive legislation that could work to protect domestic and international interests alike, before either the legitimate minerals trade or traders are further harmed.

V. COSTLY LESSONS FROM THE BLOOD DIAMONDS TRADE

Efforts to design effective conflict minerals regulation can be aided by examining the lessons from efforts to regulate another conflict commodity: blood diamonds. Of course, there are key differences between the diamond trade and the minerals trade. For one, conflict diamonds are a luxury item which Western consumers can choose not to purchase altogether while conflict minerals are integrated into products that Western consumers increasingly deem essential: their laptops, cell phones, and cameras. That said, there are also key similarities between diamonds and minerals beyond their respective conflict histories. Conflict diamonds and conflict minerals are both fungible, easily portable and easily smuggled, and possess an intrinsically high value.[81] These qualities make both resources prime candidates for trade on the black market.[82] Given the financing of rebel

79. *See* Vanessa O'Connell, *Boss Talk: De Beers Polishes Its Image*, WALL ST. J., July 7, 2008, at B1.

80. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-978, CONFLICT DIAMONDS: AGENCY ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF THE CLEAN DIAMOND TRADE ACT 2 (2006), *available at* http://www.gao.gov/new.items/d06978.pdf [hereinafter AGENCY ACTIONS NEEDED].

81. *See* Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. MIAMI BUS. L. REV. 217, 219 (2005) (describing these properties for diamonds).

82. *See id.*

militias through both conflict diamonds and conflict minerals, the development of regulatory initiatives for conflict minerals would be wise to learn from the attempts to regulate the international diamond trade, which were crystallized into the Kimberley Process Certification Scheme (the "KPCS" or "Kimberley Process")[83] and the United States' correlated legislation, the Clean Diamond Trade Act.[84]

A. THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The KPCS is a collaborative effort between human rights advocates, the United Nations, governments, and the international diamond industry to respond to the problem of blood diamonds.[85] Similar to conflict minerals' financing of rebel militias in the DRC, "the mining and sale of 'conflict diamonds' have provided significant funds to a number of murderous organizations, including the Revolutionary United Front ("RUF") in Sierra Leone and Al Q[]aeda in Afghanistan" and left "displacement, destruction and death in its wake."[86] After the United Nations attempted (and failed) to end the conflict diamonds trade through sanctions on countries like Angola and Sierra Leone, the United Nations General Assembly voted in 2000 to form an international certification scheme for rough diamonds.[87] The end result was the KPCS, an association of states that agreed they were mutually eligible to be part of a conflict-free world diamond trade.[88] To be so eligible, each member state must commit to the following:

> 1) each Participant must ensure that each export or import of rough diamonds be accompanied by a Kimberley Process certificate and is therefore tamper and forgery resistant; 2) each Participant must guarantee that no shipment of rough diamonds is imported from or exported to a non-participant; 3) each Participant is required to establish a system of internal controls designed to remove conflict diamonds from shipments coming in and out of its territory; and 4) each Participant is required to provide the others with information on their relevant laws, regulations, rules, procedures and practices.[89]

83. Kimberley Process, Background, http://www.kimberleyprocess.com/background/index_en.html (last visited Apr. 19, 2011).

84. Clean Diamond Trade Act, 19 U.S.C. §§ 3901–3913 (2006); *See infra* Part V.B.

85. O'Connell, *supra* note 79.

86. Edward R. Fluet, *Conflict Diamonds: U.S. Responsibility and Response*, 7 SAN DIEGO INT'L L.J. 103, 104 (2005).

87. *Id.* at 109–11.

88. *Id.* at 111.

89. *Id.* at 112. *See also* Kimberley Process Certification Scheme, §§ III–IV, Nov. 2002, http://www.kimberleyprocess.com/download/getfile/4.

As states sign on to trade only with other Kimberley Process members, pressure rises on each state in the international community to join the process or risk being marginalized and shut out of the conflict-free diamond trade.[90]

The record from the Kimberley Process is decidedly mixed.[91] While it was estimated that 99.8 percent of the world's diamonds flowed through the Kimberley Process as of 2008,[92] some experts claim that the process itself is failing, in that the Kimberley Process implicitly sanctions smuggled conflict diamonds.[93] The DRC, for example, is a Kimberley Process member, yet "there is nothing in the DRC system that would prevent the FDLR—or any other rebel group—from laundering their diamonds into the 'certified' KP diamond stream."[94] Similarly, when mines from Zimbabwe were criticized for containing conflict diamonds after reports emerged of killings and forced labor at Zimbabwean diamond fields,[95] Zimbabwean diamonds were simply rerouted through Mozambique, smuggled along an illegal diamond pipeline so that they could be exported from Mozambique free of scrutiny.[96] Indeed, the Kimberley Process itself estimated that in 2008, more than half of Zimbabwean diamond production was not exported through official channels.[97] When such smuggling and diamond laundering occurs within the Kimberley Process–certified stream of diamonds, faith in the significance of the certification scheme inevitably wavers.[98]

Beyond laundering and smuggling conflict diamonds into the "legitimate" diamond supply, the Kimberley Process possesses a series of deep and significant structural flaws. First, its central method of ensuring compliance among members is a peer review mechanism that occurs once

90. *See* Fishman, *supra* note 81, at 230–31.

91. *See* PARTNERSHIP AFR. CAN., *supra* note 29, at 1 ("the Kimberley Process [], designed to halt and prevent the return of 'conflict diamonds,' is failing"). *But see* O'Connell, *supra* note 79 (noting statements by De Beers chief executive officer Gareth Penny that "[i]t is estimated that 99.8% of all diamonds in the world flow through the Kimberley Process, which is extraordinary").

92. O'Connell, *supra* note 79.

93. *See* PARTNERSHIP AFR. CAN., *supra* note 29, at 1, 8.

94. *Id.* at 8.

95. Sarah Childress & Farai Mutsaka, *Zimbabwe's Diamond Production Draws Scrutiny*, WALL ST. J., Sept. 14, 2009, at A6.

96. Sarah Childress, *Diamond Trade Finds Regulatory Loophole in Mozambique*, WALL ST. J., Nov. 5, 2009, at A14.

97. *Id.*

98. *See* Donald G. McNeil, Jr., *Measuring a Diamond's True Price*, N.Y. TIMES, Dec. 17, 2006, § 4, at 3 ("Diamonds from war-torn areas get mixed in with others. Corrupt officials can forge certificates. Diamonds are easily smuggled.") (quoting Global Witness).

every three years.[99] The peer review missions visit member countries at the member countries' will[100] and then issue recommendations. In some cases, the recommendations are simply ignored.[101] In other cases, the review missions themselves are, as one report put it, "completely bogus,"[102] such as the 2008 review mission to Guinea, which spent "less than two hours outside the capital."[103] In addition to a weak and ineffective compliance mechanism, the Kimberley Process lacks any accountable authority, as "[t]he 'chair' rotates annually and has virtually no responsibility beyond a convening function" and "[p]roblems are shifted from one 'working group' to another."[104] Finally, there is no private right of action that allows an individual to sue a company or person for violations under the current KPCS, further inhibiting enforcement of Kimberley provisions.[105] In sum, without accountability, without a private right of action, and critically, without an independent monitoring system to ensure compliance, the Kimberley Process remains far less effective than it could and should be.

Moreover, the decisionmaking rules of the Kimberley Process require that members make decisions by consensus, such that the veto of one member can block an initiative from going forward.[106] This means that when a peer review team finds evidence of noncompliance with the KPCS and recommends a country for expulsion, any one member can effectively block that country's expulsion.[107] Such was the situation for Zimbabwe, which was allowed to remain a member after Kimberley Process members failed to obtain a consensus vote for its recommended expulsion.[108]

A further flaw in the structure of the Kimberley Process is the lack of

99. PARTNERSHIP AFR. CAN., *supra* note 29, at 1.

100. *See* Fishman, *supra* note 81, at 229 (citing Final Communiqué: Kimberley Process Plenary Meeting Sun City, South Africa, October 29–31, 2003, at 2, http://www.kimberleyprocess.com/download/getfile/7).

101. PARTNERSHIP AFR. CAN., *supra* note 29, at 1.

102. *Id.*

103. *Id.*

104. *Id.*

105. Fishman, *supra* note 81, at 235.

106. PARTNERSHIP AFR. CAN., *supra* note 29, at 1.

107. *See* Celia W. Dugger, *Africa's Diamond Trade Under Scrutiny*, N.Y. TIMES, Nov. 4, 2009, at A8.

108. Thierry Vircoulon, *Time to Rethink the Kimberley Process: The Zimbabwe Case*, INT'L CRISIS GRP., (Nov. 4, 2010), http://www.crisisgroup.org/en/regions/africa/southern-africa/zimbabwe/time-to-rethink-the-kimberley-process-the-zimbabwe-case.aspx ("[M]ost African countries, India, China and Russia advocated lifting the export ban, and the U.S., Canada and Australia opposed."). *See also* Dugger, *supra* note 107 (quoting Kimberley Process architect Ian Smillie as saying that "[i]t only takes one government to object and South Africa has been protecting Robert Mugabe for years").

uniformity it requires from its members.[109] While the KPCS requires that participating countries enact legislation to ban diamond trade with nonparticipating countries, it lacks requirements as to what that legislation must look like.[110] With wide discretion left to each country,

> a blood diamond trader in one participating nation might receive a penalty as extreme as capital punishment, while a blood diamond trader in another participating country could face little more than a slap on the wrist. Under the terms of the Scheme as currently drafted, however, both nations are complying with the requirements for membership and are considered participants in good standing.[111]

As one commentator argues, minimum punishments should be enacted for violators of the KPCS, as "[a] mechanism that allows for such a wide range of punishments will not deter blood diamond trading, but rather may have the adverse [e]ffect and actually encourage such traders to choose to trade in a country with softer punishments."[112]

Finally, the Kimberley Process can only be of limited effectiveness unless participating states tighten control of diamonds between the mine and the export stage of the trade.[113] It is between these stages that serious potential exists for diamonds to fall into the hands of rebel militia and escape valid certification under the KPCS.[114]

It is true that since the implementation of the Kimberley Process, conflict diamonds have gone from representing some 25 percent of the world diamond trade to a tiny fraction of the trade.[115] It is also true that the legitimization of much of the diamond trade has provided critical tax revenue for developing countries such as Botswana and Namibia[116] and that the implementation of the Kimberley Process has coincided with a transformation of major industry players like De Beers to significantly clean up their sources.[117] With worldwide name recognition and a record of

109. Fishman, *supra* note 81, at 235–37.
110. *See id.* at 235–36.
111. *Id.* at 236.
112. *Id.*
113. *See id.* at 237–38.
114. *See id.*
115. PARTNERSHIP AFR. CAN., *supra* note 29, at 2.
116. O'Connell, *supra* note 79 (noting diamond industry partnerships in Botswana and Namibia, and quoting the chief executive officer of De Beers: "[i]f you look at the contribution that the diamond industry makes in a country like Botswana, 33% of gross domestic product is directly accountable to the diamond industry and to the mines that De Beers operates with its partners").
117. *See* Joe Nocera, *Diamonds Are Forever in Botswana*, N.Y. TIMES, Aug. 9, 2008, at C1.

99.8 percent of world diamonds flowing through the KPCS, the Kimberley Process, by some, is deemed a success.[118] That said, it is hard to disregard the words of Ian Smillie, an architect of the Kimberley Process and an international diamond expert, when he stated that he "[could] no longer in good faith contribute to a pretence that failure is success"[119] and noted that "the diamond industry, which means so much to so many, is being ill served by what has become a complacent and almost completely ineffectual Kimberley Process."[120] Mr. Smillie resigned from the Kimberley Process in frustration in May 2009.[121]

B. THE CLEAN DIAMOND TRADE ACT

To meet its obligation as a member of the Kimberley Process, the United States enacted the Clean Diamond Trade Act ("CDTA"), which bans the importation of rough diamonds into the United States unless they are certified under the Kimberley Process.[122] The CDTA is enforced by civil and criminal penalties,[123] with exports certification controlled by the Kimberley Process Authority agency,[124] exporting authority under the Bureau of the Census, and importing authority under the U.S. Bureau of Customs and Border Protection.[125]

Perhaps the most significant flaw of the CDTA is the infrequency of enforcement by Customs, which conducts examination only on a "random and infrequent basis."[126] Indeed, a 2006 report by the Government Accountability Office ("GAO") reported that "[t]he United States does not periodically or regularly inspect rough diamond imports or exports" (important for matching KPCS certificates with the actual contents of rough diamond parcels), and that "[t]he United States does not have an

118. *See id.* ("The blood diamond issue largely went away when De Beers, at the urging of the N.G.O. community, helped devise something called the Kimberley Process . . . ."). *See also* O'Connell, *supra* note 79.

119. Sebastien Berger, *Kimberley Process Considers Ban on Zimbabwe Diamond Exports*, TELEGRAPH U.K. (Nov. 2, 2009), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/6486414/Kimberley-Process-considers-ban-on-Zimbabwe-diamond-exports.html.

120. Greg Campbell, *Blood Diamonds Are Back*, FOREIGN POL'Y (Dec. 24, 2009), http://www.foreignpolicy.com/articles/2009/12/22/blood_diamonds_are_back?page=0,2.

121. *Id.*

122. Clean Diamond Trade Act, 19 U.S.C. § 3903(a) (2006).

123. *Id.* § 3907(a).

124. *See* U.S. Kimberley Process Authority, https://www.uskpa.org/default.aspx (last visited Apr. 20, 2011).

125. 19 U.S.C. § 3705(a).

126. Fluet, *supra* note 86, at 114.

effective system for confirming the receipt of rough diamond import shipments" (important for tracking shipments and preventing their diversion).[127] Dismally, Customs reports that less than 1 percent of all rough diamond shipments are selected for physical inspection upon entry under the CTDA.[128] In addition to failing to regularly conduct physical inspections of rough diamond imports, the United States also fails to ensure that importers confirm import receipts with foreign exporting authorities.[129] However, Customs does flag rough diamond shipments for review, enters their information into a computer system, and reviews all rough diamond import documentation.[130] Nevertheless, the failure to conduct physical inspections or confirm imports with exporting authorities significantly undermines the credibility of the CTDA in complying with the KPCS requirements and stemming the flow of blood diamonds.

In recognition of the various flaws in the implementation of the CTDA, the GAO made numerous recommendations to improve this oversight process in its report, including tightening the recordkeeping of rough diamond shipments, requiring importers and exporters to fax Kimberley Process certificates to the Census Bureau, and requiring confirmation with foreign exporting authorities.[131] While the GAO has not issued another report on the effectiveness of these recommendations, it has reported that the measures have been implemented.[132]

VI. COMPARING PROPOSED CONFLICT MINERALS LEGISLATION

The past few years have witnessed the introduction of numerous legislative attempts to regulate conflict minerals; these include the Senate's Congo Conflict Minerals Act,[133] the House of Representatives' Conflict Minerals Trade Act,[134] and section 1502 of the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank

127. AGENCY ACTIONS NEEDED, *supra* note 80, at 4.

128. *Id*. at 20.

129. *Id*. at 21.

130. *See id.* at 18.

131. *See id.* at 40–45.

132. *See* U.S. Gov't Accountability Office, Conflict Diamonds: Agency Actions Needed to Enhance Implementation of the Clean Diamond Trade Act—Recommendations, http://www.gao.gov/products/GAO-06-978#recommendations (last visited Apr. 25, 2011) [hereinafter GAO Recommendations].

133. Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009).

134. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

Act"),[135] which incorporates many of the Congo Conflict Minerals Act's central provisions. While grassroots and nonprofit advocacy groups have campaigned vigorously to rally support for these congressional efforts, analysis of the bills from the legal community has been virtually nonexistent.[136] Indeed, analysis from the legal community may be precisely what these bills require, as their central regulatory mechanisms differ in critical and largely unexamined ways. The discussion below aims to launch such a debate within the legal community.

A. SECURITIES-BASED REGULATION OF CONFLICT MINERALS: THE CONGO CONFLICT MINERALS ACT AND ITS SUCCESSOR PROVISION IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

The Congo Conflict Minerals Act, introduced in the Senate by Senator Sam Brownback, aimed to address the problem of conflict minerals by requiring companies using tin (cassiterite), tantalum (columbite-tantalite), or tungsten (wolframite) to disclose the origin of their minerals annually to the SEC.[137] The bill assigned to the U.S. Department of State the task of developing a map of mineral-rich zones and armed groups to assist companies in determining which mines are conflict free, and then required companies to disclose their minerals' origin through an amendment to the Securities Exchange Act of 1934 ("Securities Exchange Act").[138]

While the Congo Conflict Minerals Act died in committee with the close of the 111th Congress, its central provisions remain alive and well in the form of the Dodd-Frank Act, enacted into law in July 2010.[139] The legislation, better known as the sweeping "financial reform law," constitutes an 848-page response to the financial crisis, covering subjects such as the regulation of bank and savings association holding companies, financial stability, mortgage and insurance reform, and corporate governance.[140] Yet within the legislation's "Miscellaneous Provisions," in

135. Dodd-Frank Act, Pub. L. No. 111-203, sec. 1502, § 13, 124 Stat. 1376, 2213–18 (2010) (to be codified at 15 U.S.C. § 78m(p)).

136. As of the date of this Note's submission, the author is aware of only one other legal journal piece discussing the DRC's conflict minerals. *See supra* note 66 and accompanying text.

137. S. 891 Preamble, § 5.

138. *Id.* §§ 4(b), 5.

139. *See* Dodd-Frank Act § 1502, 124 Stat. at 2213–18.

140. *See id.* §§ 101–176, 124 Stat. at 1391–1442 (to be codified in scattered sections of 12 U.S.C.) (financial stability); *id.* §§ 501–542, 124 Stat. at 1580–96 (to be codified in scattered sections of 31 U.S.C.) (insurance reform); *id.* §§ 601–628, 124 Stat. 1596–1641 (to be codified in scattered sections of 12 U.S.C.) (regulation of bank and savings association holding companies); *id.* §§ 971–979, 124 Stat.

section 1502 (of 1601 sections), lie many of the essential concepts embodied in the earlier Congo Conflict Minerals Act.[141]

Like the Congo Conflict Minerals Act, section 1502 of the financial reform legislation establishes a securities-based regulatory regime for the conflict minerals trade, placing regulatory authority for the trade in the hands of the SEC.[142] Fundamentally, the legislation would amend the Securities Exchange Act by adding to it an entirely new subsection, entitled "Disclosures Relating to Conflict Minerals Originating in the Democratic Republic of the Congo."[143] This subsection instructs the SEC to promulgate regulations requiring companies to annually disclose whether their tin, tantalum, tungsten, and gold originated in DR Congo or an adjoining country, with those who cannot confirm that their minerals are not from DR Congo required to submit a certified "Conflict Minerals Report" to the SEC.[144] This report would describe the measures taken to exercise due diligence on the source and chain of custody of the minerals, including an independent private sector audit of the report that describes the facilities used to process the minerals, the country of origin of the minerals, and the efforts made to determine the mine or location of origin with the "greatest possible specificity."[145] This information is then required to be made available to the public on the company's website.[146]

An examination of potential concerns with the legislation follows.

1. There Exists Little Precedence for Requiring Nonfinancial Disclosures to the SEC

The single most critical aspect of the financial reform act's conflict minerals scheme is its inclusion of a mandatory SEC reporting requirement. Section 1502(b) of the legislation amends the Securities Exchange Act of 1934 by adding a new subsection (p) to the Act, requiring any person for whom "conflict minerals are necessary to the functionality or production of [their] product"[147] to disclose whether or not their tin, tantalum, tungsten,

1915–26 (strengthening corporate governance); *id.* §§ 1400–1498, 124 Stat. at 2136–2212 (to be codified in scattered sections of 12 U.S.C. and 15 U.S.C.) (mortgage reform).

141. *See id.* § 1502, 124 Stat. at 2213–18.

142. *See id.*

143. *Id.* § 1502(b), 124 Stat. at 2213.

144. *Id.* § 1502(b), 124 Stat. at 2213–15.

145. *Id.* § 1502(b), 124 Stat. at 2214 (to be codified at § 78m(p)(1)(A)(ii)).

146. *Id.* (to be codified at § 78m(p)(1)(E)).

147. *Id.* § 1502(b), 124 Stat. at 2214 (to be codified at § 78m(p)(2)).

or gold originated in the DRC or an adjoining country.[148] Further, if the country disclosed is either the DRC or an adjoining country, the company must submit a report detailing extensive disclosures as to the source and chain of custody of the minerals, describing all products that cannot be guaranteed to be DRC conflict free, and the company's "efforts to determine the mine or location of origin with the greatest possible specificity."[149]

The central problem with using the SEC as the main regulatory body for conflict minerals is that the SEC was not designed for, has not historically been used for, and is not well suited for the promotion of social or foreign policy goals. The Securities Exchange Act,[150] one of the founding pieces of securities legislation in this country, governs public trading of securities after the initial public offering, regulates the securities market, and provides for disclosure by issuers of securities.[151] Though the mandate of the SEC is broad—15 U.S.C. § 78m(a) provides that every issuer of a security shall file such reports as the SEC may prescribe as necessary or appropriate for the proper protection of investors and to ensure fair dealing—the SEC "has traditionally limited its rulemaking to the service of investors' financial well-being."[152]

Formed in the wake of the Great Depression, the central purpose of the SEC is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[153] The SEC's investor-protection function compels the disclosure of information such as outstanding securities, financial results of operations, and compensation of officers, with the information then "'filtered' through the screen of materiality,"[154] with materiality defined as information for which "there is a substantial likelihood that a reasonable shareholder would consider it important in

148. *See id.* § 1502(b), 124 Stat. at 2213–14 (to be codified § 78m(p)(1)(A)).

149. *Id.* § 1502(b), 124 Stat. at 2214 (to be codified at § 78m(p)(1)(A)(ii)).

150. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78nn).

151. David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVTL. L.J. 137, 145–46 (2007).

152. Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1455 (2002).

153. U.S. Sec. & Exch. Comm'n, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml (last visited Apr. 21, 2011).

154. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1208–09 (1999).

deciding how to vote."[155] The "longstanding SEC spin on that standard," however, is that "the reasonable investor generally focuses on matters that have affected, or will affect, a company's profitability and financial outlook."[156] The SEC has not traditionally looked to advance the human rights, foreign policy, or social concerns of investors. Instead, SEC disclosure requirements tend to support the interpretation of securities legislation as focused on the economic importance of information and the traditional view of the economic investor as one "primarily interested in financially significant information."[157] This view of securities law, whether appealing or not, comports with the general underlying philosophy of American corporations law, in which, "[a]ccording to the majority of corporate law professors in the United States, a corporation's primary, and possibly exclusive, goal is to maximize shareholder wealth within the confines of the law."[158] The crux of this argument, of course, is not that regulation to advance our social and human rights concerns has no place in American jurisprudence, but that securities law, using the SEC as the chief regulatory body, may not be the instrument best suited for this mission.

Moreover, a preliminary glance at section 13 of the Securities Exchange Act,[159] the section amended by section 1502 of the Dodd-Frank Act, shows that adding a conflict minerals–reporting requirement under a new section does not fit into the current legislative scheme. Subsections (a) through (*l*) of section 13 all govern broad reporting requirements centered around disclosure of a company's economic data, rather than confronting narrow topical issues.[160] These subsections govern broad topics such as disclosures by persons with more than 5 percent of a certain class of security,[161] large trader reporting,[162] or real time issuer disclosures.[163] They do not govern disclosures of particular resources or in particular industries,[164] and it is difficult to see how adding a new subsection entitled "Disclosures Relating to Conflict Minerals Originating in the Democratic

155. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).
156. Note, *supra* note 152, at 1433–34.
157. Williams, *supra* note 154, at 1278.
158. Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 75 (2005).
159. Securities Exchange Act § 13, 15 U.S.C. § 78m (2006).
160. *See id.* §§ 78m(a)–(*l*).
161. *Id.* § 78m(d).
162. *Id.* § 78m(h).
163. *Id.* § 78m(*l*).
164. Except, perhaps, for the insurance industry. *See id.* § 78m(d).

Republic of the Congo"[165] would fit comfortably into a legislative scheme that has been in place for decades.

Further, in the days leading up to the passage of the Securities Exchange Act in 1934, the Senate Committee Report discussed section 13's periodic disclosure requirements in "purely financial terms, by noting that the registration of securities for trading on an exchange would require the 'furnishing of complete information relative to the financial condition of the issuer, which information shall be kept up to date by adequate periodic reports.'"[166] The current subsections of section 13 also support this interpretation of the disclosure requirements, as does the "dominant view of shareholder responsibility," in which "a firm is not obligated to disclose so-called social and environmental information because such information is not, strictly speaking, relevant or material to the financial condition of a company."[167] Indeed, "the idea that SEC should expand disclosure requirements to include social, environmental, and governance information has historically garnered little more than skepticism among scholars."[168]

2. Basing Expansion of SEC Disclosure Requirements on Conflict Minerals Is Inappropriate and Creates the Potential for a De Facto Embargo

Nevertheless, two recent legal journal pieces have encouraged the SEC to expand social or nonfinancial disclosure requirements, one noting that "today's social issue is tomorrow's financial issue"[169] and that investors increasingly find such information relevant in making investment decisions.[170] These scholarships, however, focused on whether the SEC's pre-financial reform mandate authorized it to require the disclosure of nonfinancial information,[171] rather than on whether it was appropriate to expand the SEC's mandate or whether an issue such as conflict minerals was the proper first basis for such an expansion. Furthermore, if legislators

165. *See* Dodd-Frank Act, Pub. L. No. 111-203, sec. 1502(b), § 13, 124 Stat. 1376, 2213 (2010) (to be codified at 15 U.S.C. § 78m(p)).

166. Williams, *supra* note 154, at 1241–42 (quoting S. REP. NO. 73-792, at 10 (1934), *reprinted in* 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item No. 17 (J.S. Ellenberger & Ellen P. Mahar comps., 2001)).

167. *See* Monsma & Olson, *supra* note 151, at 161.

168. *Id.* at 163.

169. Williams, *supra* note 154, at 1284.

170. *See id.* at 1287.

171. *See generally id.* (arguing that the SEC has the statutory authority to require expanded social disclosure); Monsma & Olson, *supra* note 151 (arguing that the SEC should require greater social, environmental, and governance information as it is material to an increasing number of investors).

were going to expand the SEC mandate to include greater nonfinancial disclosures, perhaps this goal would have been better served by beginning with a less topical amendment, such as requiring companies to disclose a list of countries in which they do business and information about their general employment practices or domestic charitable contributions.[172] These general categories would likely better assist investors interested in nonfinancial disclosures and would have been a stronger starting point for expanding the SEC's mandate to include social disclosure requirements compared to disclosures on a single topical issue.

Socially responsible investing has grown rapidly,[173] however, and it is worth considering whether, despite not comporting with the traditional interpretation of the SEC mandate, it was appropriate to amend the Securities Exchange Act to include disclosure requirements for this important issue. Some might look at the ill-fitting amendment relative to other provisions of the Securities Exchange Act, or the few mandatory social disclosure requirements, and ask, so what? For this important issue, perhaps using the regulatory power of the SEC is our best option, and section 1502 merely took advantage of this opportunity. In 2002, the Harvard Law Review published a note analyzing the circumstances under which the SEC should require social disclosures ("nonfinancial disclosure indicators"), and the note argues that expanding the mandate of the SEC to include social disclosures would be appropriate in the following circumstances: (a) when a significant number of investors or would-be investors are interested in the information; (b) when the benefits of disclosure to investors outweigh the costs to investors of collecting and disseminating the information; (c) when the potential for the information to cause firms to change or abandon profitable projects is considered; and (d) when effects on third-party disclosures are evaluated.[174] In applying these nonfinancial disclosure indicators to the case of conflict minerals, several concerns emerge.

While the precise extent to which investors care about the issue of conflict minerals is unclear, evidence suggests that a significant proportion of investors are in fact concerned about mineral sourcing in DR Congo.[175]

172. Williams, *supra* note 154, at 1299.

173. Note, *supra* note 152, at 1442–43.

174. *Id.* at 1450–52.

175. *See* Investor Press Release, *supra* note 62*;* Press Release, AsYouSow.org, Investor Statement Regarding Conflict Minerals from the Democratic Republic of the Congo (Apr. 9, 2010), http://www.asyousow.org/publications/2009-01-07%20-%20DRC%20Investor%20Sttmt.pdf [hereinafter Investor Statement].

In February 2010, a group of global investors with assets close to $200 billion called on the international electronics industry to be more proactive in condemning the use of conflict minerals and to develop policies to identify the origin of their minerals and ensure that conflict minerals are not entering their supply chains.[176] While such statements call for companies to avoid conflict minerals rather than to release mineral origin information to the SEC, the statement certainly appears indicative of investor interest in the subject. Further, the withdrawal of key players in the electronics supply chain after being criticized for their use of conflict minerals[177] suggests their fears of investor retribution if practices remain unchanged.

Even if investor interest in the issue is high, however, the other nonfinancial disclosure indicators may signal future problems with expanding the SEC mandate. Cost is one concern that cannot be discounted—"as interesting as social data may be to investors in the abstract, social disclosure is only desirable in cases in which those costs are relatively low."[178] The cost of disclosure, which is comprised of the costs of both information collection and dissemination, likely is not a serious concern if a policy focuses on increased dissemination of information, as "[m]erely communicating additional information along with current reports is unlikely to add much expense."[179] Disclosure costs, however, weigh more heavily against policies which "would amount to a mandate to collect new data" because "hiring additional accountants, auditors, and lawyers is expensive."[180]

In the case of conflict minerals, not only is information collection required by end-user electronics companies under section 1502—a cost likely to be passed on to consumers—but it is also required from a remote part of the world that is in the midst of one of the world's largest humanitarian crises.[181] Literature in the non-government organization ("NGO") and human rights community is rife with information about the complexity of the crisis in the DRC.[182] Further, a recent submission to the SEC by a coalition of industry groups noted that

176. Investor Statement, *supra* note 175.

177. *See supra* notes 67–71 and accompanying text.

178. Note, *supra* note 152, at 1451.

179. *Id.*

180. *Id.*

181. *See* Autesserre, *supra* note 9 (deeming the crisis in the DRC the world's "largest humanitarian disaster").

182. *See, e.g.*, A COMPREHENSIVE APPROACH, *supra* note 13, at 1.

> [t]he assumption that downstream users are able to trace the metals in their products back to the mine assumes a supply chain is a transparent, linear process, when, in fact, it is a complex, multilayered network of trading companies and suppliers where products are sourced and consolidated from multiple countries and multiple manufacturers.[183]

While industry statements are obviously not objective, given the bribery, extortion, and smuggling that occur regularly in the critical phase from mine to export,[184] expecting end-user electronics companies in the United States or their auditors to be able to know and accurately disclose to the SEC the origin of their minerals is a heavy burden. Only time will tell whether mineral sourcing is a task that companies and their auditors are able to accurately accomplish.

This brings us to the third nonfinancial disclosure indicator: the effect that requiring such information's disclosure could have on activity levels.[185] While the Harvard Law Review note focuses on reductions in activity level in terms of the indirect costs this may pose for investors,[186] also relevant here is the impact of the reduction in activity level on the very social issue at stake. Socially responsible investors will be ill-served if disclosure of minerals information ironically leads to a worsening of the situation in DR Congo—and some experts believe this is precisely what would occur. Experts wrote in a key report that section 1502's predecessor, the Congo Conflict Minerals Act, put "too much faith in the ability of the Congolese government or international bodies to effectively implement these mechanisms,"[187] and that perversely, the legislation is far more likely to cause military involvement in the minerals chain to become hidden, to cause military groups to exploit other resources to "diversify" their income, and to result in conflict minerals being laundered and smuggled into the certified supply chain.[188] Notably, the report predicts that minerals monitoring "will be incomplete, ineffective and corruptible or coercible."[189] As the Congolese government is currently unable to assert

183. Letter from Consumer Elec. Ass'n, *supra* note 2, at 2.

184. *See* A COMPREHENSIVE APPROACH, *supra* note 13, at 4–5.

185. Note, *supra* note 152, at 1451.

186. *See id.*

187. HARRISON MITCHELL & NICHOLAS GARRETT, CMTYS. & SMALL-SCALE MINING, BEYOND CONFLICT: RECONFIGURING APPROACHES TO THE REGIONAL TRADE IN MINERALS FROM EASTERN DRC 44–45 (2009), http://www.resourceglobal.co.uk/documents/Beyond%20Conflict_RCS_CASM.pdf.

188. *Id.* at 45.

189. *Id.*

control over the rebel militias controlling eastern DR Congo, and the world's largest and most expensive peacekeeping force is unable to restore eastern DR Congo to government control,[190] it is unclear how auditors or end-user electronics companies such as Apple and Hewlett-Packard can be expected to accurately discover and disclose the mines of origin for their minerals in the first full fiscal year after the SEC's promulgation of regulations.[191] Relevant on this point are the lessons of conflict diamonds:

> [D]espite 10 years of hard work, the KPCS is unable to guarantee point of origin for its diamonds in artisanal mining countries, primarily because the size and geography of the artisanal mining sector make this logistically extremely difficult. There is a potentially insurmountable gap between the necessary requirements of the scheme to fully guarantee the origin of diamonds by monitoring artisanal diamond mining areas, and the ability or political will of governments to meet these requirements.[192]

Instead of leading to accurate disclosure of mineral origin, section 1502 of the financial reform legislation is likely to herald a de facto embargo on Congolese minerals, a result likely to cause devastating consequences in the region. In reality, "the risk-freest response for the private sector to be able to guarantee that its products do not contain minerals that may have been associated with conflict dynamics *is to completely withdraw from purchasing from Eastern DRC*."[193] It is true that section 1502 requires only that companies sourcing from DR Congo undertake due diligence to determine mineral origin and take efforts with the "greatest *possible* specificity"[194]—but these are burdens not imposed on countries that do not source from DR Congo. Not to be easily dismissed are the actions of Thaisarco and Traxys, which took steps to withdraw from trading in the DRC after being criticized for their potential roles in the conflict minerals trade.[195] Replication of this pattern across the industry would not only destroy the livelihoods of millions of already impoverished miners in eastern DR Congo, but also would represent "the loss of a

190. *See Is This the World's Least Effective UN Peacekeeping Force?*, *supra* note 39.

191. *See* Dodd-Frank Act, Pub. L. No. 111-203, sec. 1502(b), § 13, 124 Stat. 1376, 2213 (2010) (to be codified at 15 U.S.C. § 78m(p)(1)(A)). The legislation requires that the regulations be issued within 270 days after the enactment of section 1502.

192. MITCHELL & GARRETT, *supra* note 187, at 46 (footnote omitted).

193. *Id.* at 47 (emphasis added). *See also id.* at 48 (describing the challenges posed by conflict minerals sourcing from the perspective of corporate social responsibility managers).

194. Dodd-Frank Act § 1502(b), 124 Stat. at 2214 (to be codified at § 78m(p)(1)(A)(ii)) (emphasis added).

195. *See supra* notes 67–71 and accompanying text.

potential partner in the reform of the sector."[196] Because the constructive engagement of the international electronics industry is critical to protecting the legitimate miners and millions of jobs in DR Congo, such a loss would merely serve to worsen what is already one of the world's largest humanitarian crises.[197]

Finally, the last nonfinancial disclosure indicator would have us consider the potential ability of mandatory disclosure to solve the "prisoners' dilemma" of corporate information.[198] Since the disclosure of (potentially negative) information about corporate practices may be expensive and create investor backlash, investors have an incentive to discourage their own firm alone from releasing such information, though they may desire that all firms release the information.[199] These situations may therefore make good candidates for mandatory social disclosure laws.[200]

In the case of conflict minerals, however, mandatory disclosure would likely not solve this type of prisoners' dilemma. On one hand, section 1502 seems a good candidate for the prisoners' dilemma indicator: the disclosure of conflict minerals information is likely not something investors would want their firm alone to disclose due to the potential for consumer backlash, and investors would likely prefer that all firms have to disclose such information under a uniform regulation like section 1502. Investors, however, would only desire minerals' origin information if they are the type of socially conscious, ethical investors concerned with the human rights situation in the DRC. These ethical investors would not be better off if the very issue they were most concerned about is worsened by the disclosure of the information—a possible result of section 1502, as described above. Prisoners' dilemma–type situations are only solved if investors would be better off with disclosure by all firms, so if disclosure resulted in corporate withdrawal from the DRC and a worsening of the human rights situation on the ground, socially conscious investors would not be better off and the conflict minerals issue would not be a good candidate for mandatory social disclosures based on prisoners' dilemma justifications.

196. MITCHELL & GARRETT, *supra* note 187, at 45, 49.

197. *Id.* at 45. *See also* Autesserre, *supra* note 9 (deeming the crisis in the DRC the world's "largest humanitarian disaster").

198. *See* Note, *supra* note 152, at 1452.

199. *Id.*

200. *See id.*

In sum, the nonfinancial disclosure indicators on the case for mandatory disclosure likely prescribe against mandatory SEC disclosure for conflict minerals information. Even assuming investors are interested in mineral origin, requiring burdensome disclosures from those sourcing from DR Congo, but not from those sourcing elsewhere is likely to result in a de facto embargo in the DRC—a cost that neither investors nor the Congolese people can afford. A more risk-free approach, described in Part VI.B, would require sourcing information as a blanket requirement for the industry, thereby avoiding incentives to cease sourcing from DR Congo entirely.

3. Limited Enforcement Capacity for SEC Nonfinancial Disclosure Requirements

Also relevant to evaluating the appropriateness of expanding the SEC mandate is whether the SEC is well suited to evaluate the accuracy of nonfinancial disclosures. Under section 1502 of the financial reform legislation, the SEC is charged with evaluating key disclosures by electronics companies pertaining to their minerals' origin.[201] Section 1502 instructs a company to first disclose whether its minerals came from the DRC (or an adjoining country), and if they did, to submit a report with further disclosures about the chain of custody of its minerals, including an independent audit of such report.[202] However, a closer look at the language of section 1502 suggests that an audit is only required of a minerals report if such a report is required in the first place, and minerals reports are only required of companies who report that their minerals originated in the DRC or an adjoining country.[203] What safeguards, then, are in place to verify the accurate reporting by companies who report that their minerals did not originate in the DRC? Under the SEC's December 2010 draft of proposed rules, a company "would be required to make a reasonable country of origin inquiry as to whether its conflict minerals originated in the DRC countries, but [the proposed SEC] rules would not set forth what constitutes a reasonable country of origin inquiry."[204] Essentially, this places in the hands of the SEC the responsibility of evaluating "what constitutes a reasonable country of origin inquiry," an inquiry that is likely to be highly

201. *See* Dodd-Frank Act, Pub. L. No. 111-203, sec. 1502(b), § 13, 124 Stat. 1376, 2213–15 (2010) (to be codified at 15 U.S.C. § 78m(p)).

202. *Id.* § 1502(b), 124 Stat. at 2213–14 (to be codified at § 78m(p)(1)(A)).

203. *Id.* § 1502(b), 124 Stat. at 2213 (to be codified at § 78m(p)(1)(A)).

204. Conflict Minerals, 75 Fed. Reg. 80948, 80954 (Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249).

fact-specific to the conflict minerals trade and sensitive to the numerous ways in which armed groups seek to conceal and obscure the country of origin for their minerals shipments. Does the SEC have the capacity to properly evaluate whether a country undertook a "reasonable country of origin inquiry" for its minerals? Given that its traditional mandate generally avoided tasking the SEC with evaluating such social disclosures, it is unclear that this is information the SEC is readily able to effectively assess.

One indicator of the SEC's capacity to accomplish such a task is its record in evaluating another form of social disclosure, such as environmental reporting requirements. The GAO released a 2004 report on SEC tracking of environmental disclosure[205]—one of the few topics on which some social disclosure requirements exist—and some insights into the SEC's capacity to enforce minerals disclosure can be gleaned from the GAO's conclusions.

In its analysis of SEC enforcement of environmental disclosure, the GAO concluded that "[l]ittle is known about the extent to which companies are disclosing environmental information in their filings with SEC."[206] While some stakeholders felt part of the problem was related to lack of clarity in SEC guidance, others felt the key problem was inadequate oversight and enforcement.[207] The GAO found that assessing disclosure of nonfinancial environmental information is difficult because with company records kept private, there is no way to tell what is missing from the reports.[208] This is a problem that may also plague the minerals trade, as without accessing all company records, it could be difficult for the SEC to tell whether particular mines used by a company had been omitted from its disclosures. Under the SEC's proposed rules, companies would be required to "maintain reviewable business records to support its determination [that its minerals did not originate in the DRC]."[209] Yet even with such records available, it is unclear that the SEC would be able to determine whether a given company reasonably reached its conclusion regarding the origin of its minerals. Such a determination may require more extensive expertise on

205. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-808, ENVIRONMENTAL DISCLOSURE: SEC SHOULD EXPLORE WAYS TO IMPROVE TRACKING AND TRANSPARENCY OF INFORMATION (2004) [hereinafter ENVIRONMENTAL DISCLOSURE], *available at* http://www.gao.gov/new.items/d04808.pdf.

206. *Id.* at 4.

207. *Id.* at 3. Similarly, the lack of guidance from the SEC in the "reasonable country of origin inquiry" may create an analogous concern in the case of conflict minerals.

208. *Id.* at 16.

209. Conflict Minerals, 75 Fed. Reg. 80948, 80954 (Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249).

the minerals trade than the SEC is able to obtain.

Further, even assuming that companies make their business records available and disclose sufficient information about their processes for the SEC to determine what information is missing, the SEC relies on auditors and reporting companies to verify the accuracy of disclosures and "does not have the resources to review all company filings or conduct onsite examinations to proactively ensure that companies are disclosing all material information."[210] For environmental disclosures, if an SEC reviewer questions the accuracy of a company's disclosure, the SEC submits a comment letter requesting further information from the company.[211] Indeed, the "SEC's primary means to monitor and enforce requirements for the disclosure of material information . . . are the review of companies' filings and the issuance of comment letters to obtain additional information, as appropriate."[212] In their submissions to the GAO, "SEC officials said that companies may sometimes be reluctant to respond to the comment letters, claiming that providing the requested information is too difficult or expensive or will hurt their competitive position."[213] Then, "when a company's failure to respond is particularly egregious, SEC may refer the case to its Division of Enforcement."[214] While the Division of Enforcement takes actions such as investigating potential securities violations and seeking injunctions, penalties, and disgorgement of illegal profits to enforce securities legislation,[215] the GAO could identify only four enforcement actions related to inadequate environmental disclosure since 1977.[216] If this is any indication of the intensity of enforcement likely to be applied to the issue of conflict minerals, we have cause for concern as to whether the SEC is the proper regulatory body for the job.

The key phase for ensuring accuracy in conflict minerals reporting is an auditing mechanism between mine and export in the DRC—yet section 1502 currently only subjects those companies who already affirm that their minerals are from the DRC to such an audit. Given that companies who deny that their minerals are from the DRC are (1) not subject to an audit, (2) are subjected only to an SEC evaluation of their determination that they

210. ENVIRONMENTAL DISCLOSURE, *supra* note 205, at 24.
211. *Id.* at 25.
212. *Id.* at 24.
213. *Id.* at 25.
214. *Id.*
215. U.S. Sec. & Exch. Comm'n, About the Division of Enforcement, http://www.sec.gov/divisions/ enforce/about.htm (last modified Aug. 1, 2007).
216. ENVIRONMENTAL DISCLOSURE, *supra* note 205, at 25.

conducted a "reasonable country of origin inquiry," and (3) the SEC lacks the capacity to evaluate this determination effectively, the SEC's enforcement capacity to meaningfully regulate this trade is subject to concern.

4. Considering the End Goals for the Legislation

Finally, and perhaps most importantly, it is necessary to consider our end goals for the minerals legislation, and whether section 1502 is the instrument best suited to accomplish them. Section 1502 does not restrict companies from using conflict minerals or sourcing from the worst mines in eastern DRC—it merely requires companies to disclose information regarding their minerals' origin and chain of custody.[217] Perhaps this is one of the better features of the law—by using disclosure requirements as a means of applying consumer-based pressure, companies have an incentive to avoid conflict minerals without being immediately banned from their use. By regulating minerals under the SEC, however, conflict minerals will not be kept out of the stream of commerce ex ante, but companies will be punished for nondisclosure ex post. The result, then, is that only companies that provide incomplete disclosure will be punished while companies that openly use and disclose conflict minerals will be allowed to continue trading under the SEC, and fully disclosed conflict minerals will be permitted to enter the stream of commerce. Of course, the hope is that investors and consumers will pressure companies to avoid using conflict minerals, and that such pressure will create ex ante effects rather than just after-the-fact SEC punishment, but this may not be the most direct or effective means of regulating the trade. A regulatory model under the authority of Customs, discussed next, provides an alternative option.

B. CUSTOMS-BASED REGULATION OF CONFLICT MINERALS: REINTRODUCING THE CONFLICT MINERALS TRADE ACT

The Conflict Minerals Trade Act, House Bill 4128,[218] was the House of Representatives' response to the Senate's Congo Conflict Minerals Act, yet the two bills possessed crucial differences in their chief regulatory instruments. Though the Conflict Minerals Trade Act, the Congo Conflict Minerals Act, and section 1502 of the Dodd-Frank Act were all widely

217. *See* Dodd-Frank Act, Pub. L. No. 111-203, sec. 1502(b), § 13, 124 Stat. 1376, 2213–15 (2010) (to be codified at 15 U.S.C. § 78m(p)).

218. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009).

supported by the NGO and human rights community,[219] this Note analyzes the ways in which a Customs-based regulation of the trade (such as that advocated by the Conflict Minerals Trade Act) represents a substantively different result on implementation. Further, while the Conflict Minerals Trade Act died in committee with the close of the 111th Congress, this Note advocates for a reintroduction of its central provisions as a more appropriate and effective alternative to the recently passed section 1502.

In its most critical provisions, House Bill 4128 purported to create an auditing mechanism for facilities processing tin, tantalum, and tungsten, a means of identifying and labeling shipments potentially containing conflict minerals, and entrusted to Customs the responsibility of prohibiting shipments from unaudited facilities, beginning two years after the enactment of the legislation. A closer look at these provisions follows.

1. Inclusion of an Auditing Mechanism and Mineral Shipment Labeling System

Like section 1502, House Bill 4128 provided for an independent, third-party auditing mechanism—but unlike section 1502, House Bill 4128's proposed audits would apply equally across the industry and be paired with a mineral shipment labeling system. Section 6 of the bill provided for the creation of a list of approved auditors (to be updated annually) and entrusted the Secretary of Commerce with ensuring that all facilities processing tin, tantalum, and tungsten for use in products shipped into the United States be subject to random audits at least once every four months.[220] Under the bill, auditing reports would be required to include the country of origin of the minerals being processed, and if the country was the DRC, the region or specific mine of origin.[221] Yet because audits would be required of all processing facilities rather than section 1502's requirement that companies obtain audits only if their minerals are sourced from DR Congo, there would be no incentive for companies to withdraw from the DRC to evade this burden.

Further, the auditing report must determine whether any minerals are

219. *See* Press Release, Center for American Progress et al., Statement: NGOs Welcome the Conflict Minerals Trade Act of 2009 (Nov. 19, 2009), http://www.enoughproject.org/files/Congo JointStatement.pdf; Press Release, Global Witness, U.S. Passes Landmark Reforms on Resource Transparency (July 15, 2010), http://www.globalwitness.org/sites/default/files/pdfs/reformbill.pdf (supporting section 1502 of the Dodd-Frank Act).

220. *See* H.R.4128 § 6(b)–(c).

221. *Id.* § 6(c)(2)(B)(v).

being processed at the facility "for which there is not a credibly documented and verifiable chain of custody."[222] At this point, auditors would publish the audit reports in the Federal Register, certifying processing facilities as either "conflict mineral free" or a "conflict mineral facility," with a "conflict mineral free" processing facility defined as one that has not processed conflict minerals since the last audit.[223] Finally, articles containing components from these facilities would be labeled "conflict mineral free" or "contains conflict minerals" based on the audit of the processing facility, and "articles made wholly or in part with components containing conflict minerals from facilities that have not been audited in accordance with [the bill] may not be imported into the United States."[224]

Rather than suggesting that end-user companies themselves figure out how to conduct a "reasonable country of origin inquiry"[225] to determine the origin of their minerals (in the midst of a humanitarian crisis), as section 1502 does, and subjecting only some companies to an audit, House Bill 4128's inclusion of a comprehensive auditing and labeling mechanism is less likely to result in companies opting out of mining in DR Congo and would go far to clean up the supply chain. One of the key problems with the Kimberley Process in regulating the diamond trade is the absence of any mechanisms for independently auditing or regularly monitoring the supply chain.[226] By requiring audits of minerals processing facilities once every four months by independent, private, third-party auditors (unlike the "bogus" and hardly independent KPCS review missions once every three years),[227] the bill has learned from the lessons of the diamond trade and provides for a regular means of monitoring the minerals supply chain.

Further, auditing at the stage of processing facilities is likely a feasible way of monitoring the supply chain. There are limited numbers of refining companies for "3Ts" minerals—ten smelting companies process some 80 percent of the world's tin and four companies process the vast majority of

222. *Id.* § 6(c)(2)(B)(vi).

223. *Id.* § 6(c)(3).

224. *Id.* §§ 7(a)–(b).

225. *See* Conflict Minerals, 75 Fed. Reg. 80948, 80954 (Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249).

226. *See* Fishman, *supra* note 81, at 235; Ann C. Wallis, *Data Mining: Lessons from the Kimberley Process for the United Nations' Development of Human Rights Norms for Transnational Corporations*, 4 NW. J. INT'L HUM. RTS. 388, 415–16 (2005).

227. *See* PARTNERSHIP AFR. CAN., *supra* note 29, at 1.

tantalum.[228] Thus, focusing on audits at the minerals processing stage is an intelligent and practicable way to monitor the trade. Of course, many of the facilities are located in other countries, especially countries in East Asia.[229] The bill required that the audits occur "in recognition of the rights of processing facilities worldwide and the sovereignty of the country in which they are located."[230] While it is conceivable that auditors could encounter problems in conducting their missions abroad, it is also possible that a bill crafted as protecting legitimate trade could garner substantial support and cooperation from both electronics companies and from countries hosting the auditors. This is particularly true if presented as an alternative to companies who are currently faced, under section 1502, with developing their own means of conducting a "reasonable country of origin inquiry."[231]

2. Penalize End-User Companies Only After the Disclosure System Is in Place

In sharp contrast to section 1502, House Bill 4128 would have only imposed responsibility on end-user electronics companies once an origin identification system is already in place—at least under one interpretation. The statutory language was unclear in its imposition of responsibilities on end-user companies, but at least one reasonable interpretation of the language would yield an extremely constructive result for the regulation of conflict minerals. This Note describes two possible interpretations and argues that upon a potential reintroduction of the bill, the statutory language should reflect the more constructive interpretation.

The first part of the statutory language—pertaining to what types of minerals shipments may be imported into the United States—is straightforward. The bill would prescribe that beginning two years after its enactment, unrefined conflict minerals and "articles made wholly or in part with components containing conflict minerals from facilities that have not been audited in accordance with section 6(c) may not be imported into the United States"[232] and makes Customs the regulatory body for this task.[233]

228. SASHA LEZHNEV & JOHN PRENDERGAST, THE ENOUGH PROJECT, FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN 6 (2009), http://www.enoughproject.org/files/publications/minetomobile.pdf.

229. *Id.*

230. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. § 6(d)(2) (2009).

231. *See* Conflict Minerals, 75 Fed. Reg. 80948, 80954 (Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249).

232. H.R. 4128 § 7(b).

233. *See id.* § 8(a) (assigning to U.S. Customs the task of publishing in the Federal Register a list

Dissecting this language reveals that the legislation would allow both shipments labeled "conflict minerals free" and "contains conflict minerals" to enter the country, so long as the shipment is coming from an audited facility under section 6 and has a label identifying it as one or the other—it is only unaudited shipments and unrefined conflict minerals that would be prohibited from entering the United States.[234]

The import requirements in the statutory language, however, pertain only to what shipments may enter the United States—it does not pertain to what types of penalties would be imposed for trying to ship conflict minerals into the United States. For penalties on end-user companies, we must turn to section 9 of the legislation, which is subject to at least two interpretations.

Section 9 states,

> If any person, by fraud, gross negligence, or negligence, enters, introduces, or attempts to enter or introduce any good that contains one or more conflict minerals . . . into the territory of the United States by means of inaccurate information with respect to the imported good, such person shall be subject to penalties pursuant to section 592 of the Tariff Act of 1930 (19 U.S.C. § 1592).[235]

Section 1592 of the Tariff Act imposes a range of civil penalties based on whether the prohibited import is done in negligence, gross negligence, or fraud,[236] which is relatively straightforward. The ambiguity arises from the phrase "by means of inaccurate information with respect to the imported good"[237] in section 9: this language could imply that penalties can be imposed only on companies that attempt to introduce conflict minerals into the country by affirmatively providing some inaccurate information or representing some inaccurate fact about the minerals being imported. Logically, this would mean that companies could face liability only in the following situations: (1) if they represented that their minerals were "conflict free" when the processing facility had been audited and found to contain conflict minerals; (2) if the shipments were labeled as "conflict free" when the facility had not been audited; or (3) if their shipments were labeled as containing conflict minerals (and thereby would still be allowed to enter the country by virtue of having been audited) when the processing

of importers that imported articles containing conflict minerals).

234. *See id.* § 7.

235. *Id.* § 9(a).

236. Tariff Act of 1930, 19 U.S.C. § 1592 (2006).

237. H.R. 4128 § 9(a).

facility had not been audited at all.[238]

Imposing liability in the above three situations represents a constructive way to impose penalties for end-user companies—a company would face liability for "inaccurate information" only if a system for identifying mineral origin (identifying the "accurate" information) had already been put in place. By defining penalties against companies as applying only to persons who attempt to introduce conflict minerals into the United States "by means of inaccurate information,"[239] the bill would necessarily mean that such a minerals identification system is in place before a company could be penalized for a conflict minerals import. By contrast, section 1502 requires that companies undertake an inquiry into the origins of their minerals—and would penalize them for failing to do so—at a time when mineral origin identification systems may be nonexistent or near impossible for end-user companies. True, the proposed rules would require only that an origin inquiry be "reasonable"—but as described above, it is unclear that the SEC has the capacity to effectively evaluate what does and does not constitute a "reasonable country of origin inquiry." This risks that a company could be considered "unreasonable" for the failure to do something it realistically was not able to do.

While one might argue that a system for identifying mineral origin will occur either way, the timing of when liability can be imposed on an end-user company is critical to companies' reactions to the legislation—and to keeping them engaged in DRC's legitimate minerals trade. By assuring companies that penalties can be imposed only after a system has been put in place to identify mineral origin, the enforcement of House Bill 4128 would occur in conjunction with a ground-up minerals identification and certification system, rather than imposing penalties for failing to accurately disclose information end-user electronics companies legitimately cannot obtain. As such, this legislation would be more likely to work with the industry in building a constructive relationship with the DRC, rather than working against the industry and risking the type of de facto embargo that could devastate conditions on the ground.

The statutory language of House Bill 4128 could also be interpreted to imply, however, that companies could be penalized for having "inaccurate information" in the sense of an unlabeled shipment. An unlabeled shipment

238. Technically, a company could also inaccurately report that its products contained conflict minerals when they were found to be conflict free, but this is clearly an unrealistic scenario.

239. H.R. 4128 § 9 (a).

comes from either a processing facility that has been audited but remains unlabeled or a processing facility that has not been audited. While we certainly would want to impose liability for shipments from audited facilities that have been left unlabeled (because otherwise there is potential for fraud), we should be concerned about imposing liability for unlabeled shipments from truly unaudited facilities. The danger here lies in the potential for companies to face liability for unlabeled shipments before auditing processes have been implemented. As described above, the timing here matters greatly in terms of companies' reaction to the legislation: if companies fear that they could be penalized for an unlabeled shipment from an unaudited facility, then they are more likely to withdraw sourcing from the DRC because they have no legitimate way to identify the origin of their minerals.

So the question remains: would not labeling a shipment be construed as "inaccurate information" if it was from an unaudited processing facility and it was truly unknown whether the shipment contained conflict minerals or not? On the one hand, the phrase "by means of inaccurate information" seems to imply that affirmative information would have to be provided to be liable, rather than simply trying to import an unlabeled shipment. On the other hand, if attempting to import by means of "inaccurate information" were construed to include a shipment required to have that information but was left unlabeled, severe problems could arise. This Note argues strongly against the latter interpretation due to the risk of industry withdrawal from the DRC and a de facto embargo on the region.

In sum, with no case history on which to base an interpretation of the statutory language, it is difficult to tell how to interpret the phrase "by means of inaccurate information with respect to the imported good." This Note argues for a revision of the legislation upon reintroduction to reflect liability only when "inaccurate information" means affirmative misrepresentations about a shipment that has been audited or an omission of labeling information from an audited shipment—and argues against the imposition of liability for unlabeled shipments coming from unaudited facilities. If the proposed revisions are made, a bill modeled on House Bill 4128 could present immense potential for imposing penalties on end-user companies in conjunction with the creation of a mineral origin identification system—a constructive way to hold companies accountable when, but only when, they can legitimately obtain the information for which they are held liable. Subject to these revisions, an approach following this model is significantly preferable to section 1502 in the way it imposes liability.

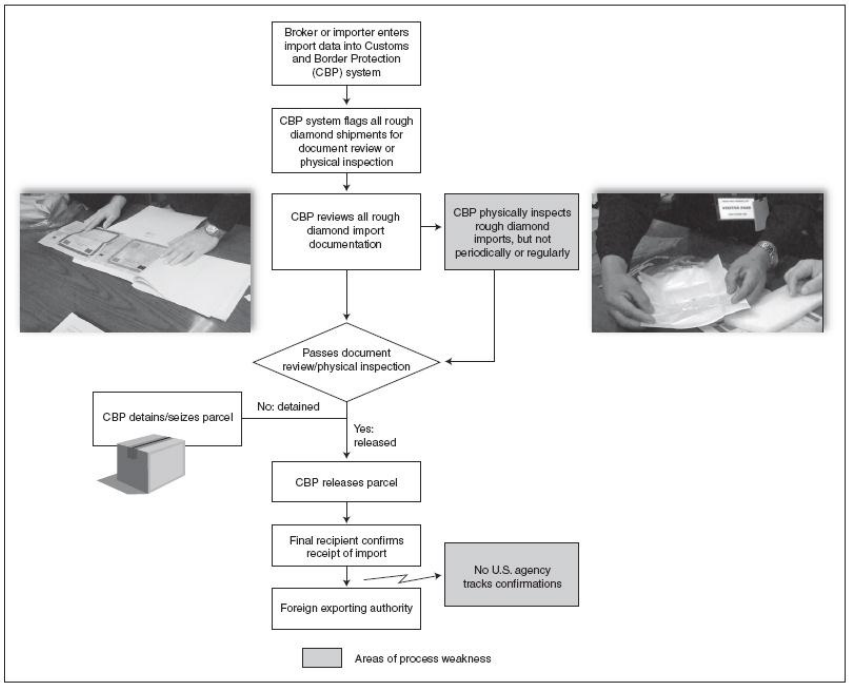
3. Precedence of Using U.S. Customs and Border Protection to Inspect Conflicted Resources

Despite the significant structural flaws in diamond trade regulations, the CDTA provides a precedent for using Customs for the inspection of shipments of conflict resources,[240] in a process that has been reviewed and improved over the last several years.[241] Critical aspects of the CDTA are not currently enforced, as discussed earlier.[242] Nevertheless, Customs reviews all rough diamond import documentation, flags rough diamond shipments for review, and enters each shipment's information into a computer system.[243] Thus, conflict minerals legislation has the opportunity to learn from and improve on the use of this agency in regulating conflict diamond imports, rather than expanding the mandate of the SEC to cover an issue it lacks precedence in confronting or capacity to handle effectively.

In analyzing Customs's implementation of the CDTA, the GAO released the following figure[244] to convey the areas of process weaknesses:

240. *See* Clean Diamond Trade Act, 19 U.S.C. § 3905(a) (2006).
241. *See* GAO Recommendations, *supra* note 132.
242. *See supra* Part V.B.
243. *See* AGENCY ACTIONS NEEDED, *supra* note 80, at 19.
244. *Id.* at 18 fig.3.

Figure 3: U.S. Import Control Process and Weaknesses



Source: GAO analysis of CBP and OFAC information.

The GAO figure shows the import processes for diamonds and identifies areas of process weakness shaded in grey.[245] At the time of the 2006 GAO report, Customs had not been able to regularly and physically inspect rough diamond shipments and was not confirming import shipments with exporting authorities.[246] These flaws, revealed by the 2006 GAO report, were the basis of reforms that relevant agencies have since taken steps to implement.[247] Customs reports that in 2007, they began physically examining diamond shipments on a random basis and conducted some 289 such examinations during 2007, with twelve shipments seized.[248] In terms of confirmation with export authorities, by 2008, Customs was reporting to the State Department on diamond imports on a quarterly basis, with the State Department then forwarding confirmations to foreign exporting authorities.[249] Thus, the import systems reviewed in 2006 have

245. *Id.* at 18 fig.3, 19.
246. *Id.* at 20–21.
247. *See* GAO Recommendations, *supra* note 132.
248. *See id.*
249. *Id.*

been improved and reformed even as of the last few years. While we await the next GAO analysis on import control of diamond shipments, the process certainly seems to be one with the major steps and infrastructure in place for the regulation of diamond imports, likely providing a framework usable for the minerals trade.

Further, the steps required by Customs in the regulation of minerals shipments may be less complex than those for the diamond trade. Section 7 of House Bill 4128 would require only that Customs prevent the importation of shipments that were not audited under section 6. Thus, Customs could technically permit the importation of both shipments containing conflict minerals or free of conflict minerals (with the exception of unrefined conflict minerals), so long as they have the requisite label as having been shipped from an audited facility.[250] This is essentially a matter of reviewing documentation, a process that Customs appears to be successfully implementing for diamonds, and it likely has the infrastructure to successfully implement a similar process for conflict minerals. Because Customs would merely be required to report those shipments with a "contains conflict minerals" label to the U.S. Trade Representative[251] for publication, having the capacity to review documentation and input the data into a computer system is the bulk of what would be required of Customs. Using the diamond trade as a means of estimating Customs capacity, there is every indication that they would be able to accomplish these tasks.

Finally, "facilitating legitimate trade" is one of the primary missions of Customs,[252] and extending trade regulation to conflict minerals under House Bill 4128 would fully comport with its current functions—unlike section 1502's expansion of the SEC mandate. Customs identifies its own goals in facilitating trade as working to "facilitate legitimate imports while protecting our Nation's economy and people from unfair trade practices [and] illicit commercial enterprises"[253]—goals that could reasonably include efforts to eliminate the unfair trade practices and illicit enterprises that have come to constitute a part of our modern electronics industry. Indeed, on a typical day, Customs processes approximately 70,000

250. *See* Conflict Minerals Trade Act, H.R. 4128, 111th Cong. § 7 (2009).

251. *Id.* § 8(a).

252. U.S. CUSTOMS & BORDER PROT., SECURE BORDERS, SAFE TRAVEL, LEGAL TRADE: U.S. CUSTOMS AND BORDER PROTECTION FISCAL YEAR 2009–2014 STRATEGIC PLAN 2 (2009), *available at* http://www.cbp.gov/linkhandler/cgov/about/mission/strategic_plan_09_14.ctt/strategic_plan_09_14.pdf

253. U.S. CUSTOMS & BORDER PROT., CBP TRADE STRATEGY: FISCAL YEARS 2009–2013 2 (2009), *available at* http://www.cbp.gov/linkhandler/cgov/trade/trade_outreach/trade_strategy/cbp_trade_strategy.ctt/cbp_trade_strategy.pdf.

containers, seizes over 5000 pounds of narcotics, and seizes over 1000 prohibited meat, plant materials, or animal products.[254] Processing shipments, identifying shipments not imported according to trade regulations, and seizing illegal shipments is what Customs does—and placing this agency in charge of similar tasks for conflict minerals is a practicable and feasible way to regulate the trade.

4. Improving Industry Incentives Under House Bill 4128

There is, of course, room to improve the legislation upon reintroduction. In addition to revising the statutory language so that liability would be imposed on end-user companies only once an origin certification system is securely in place, this Note proposes the establishment of a gradated incentive structure to ease the industry into taking responsibility for the origin of its minerals, a progression that averts a full-out withdrawal from Congolese mining.

Under the current language of House Bill 4128, both shipments labeled "conflict free" and "contains conflict minerals" would be allowed through Customs and presumably would be permitted to go to market, but the companies that had imported shipments containing conflict minerals by means of inaccurate information (as in mislabeled shipments) would be subject to civil monetary penalties.[255] This still would permit companies to import and sell products containing conflict minerals so long as they are disclosed and labeled as such. The bill does not make clear whether the "conflict free" or "contains conflict minerals" label must be maintained on the end-result electronics product, but this Note argues strongly in favor of such a label. Maintaining the "conflict free" or "contains conflict minerals" label all the way from audit to market would give consumers the ability to use their purchasing power in a way that comports with their ethical values and would take advantage of the consumer activism campaign promoted by nonprofit organizations such as the Enough Project.[256] Of course, if consumer reaction is strong and occurs before an origin certification system

254. *See* U.S. CUSTOMS & BORDER PROT., CBP: SECURING AMERICA'S BORDERS 1 (Sept. 2006), *available at* http://www.cbp.gov/linkhandler/cgov/newsroom/publications/mission/cbp_securing_borders.ctt/cbp_securing_borders.pdf (based on data from fiscal year 2005). On a typical day in 2009, Customs processed nearly 60,000 containers and seized nearly 7000 pounds of narcotics, but a similar statistic was not available for seizures of prohibited meat, animal, and plant material products. *See* U.S. CUSTOMS & BORDER PROT., SNAPSHOT: A SUMMARY OF CBP FACTS AND FIGURES (2010), *available at* http://www.cbp.gov/linkhandler/cgov/about/accomplish/snapshot.ctt/snapshot.pdf.

255. *See* H.R. 4128 § 9; Tariff Act of 1930, 19 U.S.C. § 1592 (2006).

256. *See* Kristof, *supra* note 61.

is successfully in place, companies may withdraw prematurely in the region to maintain their public relations image as disassociated from human rights abuses. To offset the corporate incentives to withdraw from such a consumer label, this Note proposes the following incentive structure.

Phase 1: According to the current terms of the Bill, civil monetary penalties for importing conflict minerals by misinformation could not be imposed until approximately two years after the enactment of the legislation.[257] This Note suggests that during those first two years (Phase 1), import labels will be required to stay on the products until the products reach consumer shelves, but that during this time companies can receive the positive incentive of a tax break for products they take to market with an audited "conflict free" label. This tax break would constructively compound the positive public relations effect such a company would receive from selling "conflict free" products and could work in conjunction with nonprofit organizations' efforts to fuel consumer demand for ethical products coming out of the DRC. An approach using labeling as a positive incentive approach has precedent in the Dolphin Protection Consumer Information Act, a bill that did not affirmatively mandate the adoption of any particular fishing standards in the tuna fishing industry but simply required certain dolphin-protection fishing standards in order to use the affirmative label "dolphin safe" on tuna products.[258] Consumer pressure that resulted from the adoption of the dolphin-safe label by major U.S. tuna companies was such a success that within a few years of the legislation's passage, almost all dolphin-unsafe tuna had been eliminated from the U.S. market.[259] Though the international electronics industry and conflict

257. This is because under section 7 of the bill, importers of minerals shipments would not need to identify whether their shipments "contain conflict minerals" or are "conflict minerals free" on their Customs declaration until at least two years after the passage of the bill; since penalties could not be imposed under section 9 of the bill unless importers attempted to import conflict minerals by means of inaccurate information (presumably an inaccurate Customs declaration), this likely would prevent companies from being penalized for at least two years. *See* H.R. 4128 §§ 7–9. This, of course, is complicated by the ambiguity of the phrase "by means of inaccurate information." *See supra* Part VI.B.2.

258. *See* Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d) (2006).

259. *See* Raul Pedrozo, *The International Dolphin Conservation Act of 1992: Unreasonable Extension of U.S. Jurisdiction in the Eastern Tropical Pacific Ocean Fishery*, 7 TUL. ENVTL. L.J. 77, 81 (1993) (noting that the success was due to a combination of the Marine Mammal Protection Act, processing facilities becoming "dolphin-safe," the Dolphin Protection Consumer Information Act labeling scheme, and the embargoes ordered by American courts). Although the standards for the dolphin-safe label were later weakened by free trade cases, this does not change their initial success at reforming the U.S. tuna market. *See* Carol J. Miller and Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 99–107 (1999).

minerals supply chain involve different types of regulatory concerns, the use of labeling as positive incentive could be a constructive Phase 1 approach for easing the industry into supply chain reform.

Phase 2: Two years after the passage of the legislation (Phase 2), the bill's imposition of civil monetary penalties for mislabeling a product should be implemented, but the tax breaks from Phase 1 for conflict-free products should be maintained during Phase 2. This set of incentives would continue to push the electronics industry toward a transparent supply chain to obtain tax and public relations benefits but would not frighten the industry out of the DRC prematurely, as liability could be imposed only for not disclosing the conflict minerals a company was importing. In short, companies could continue to import conflict minerals, but would be discouraged from doing so by the positive incentives that a conflict-free supply chain could yield.

Phase 3: Four years after the passage of the legislation (Phase 3), civil monetary penalties should be expanded to penalize companies not only for mislabeling products, but also for importing conflict minerals, even if accurately labeled.[260] Presumably, by this point after the passage of the legislation, a reliable system of mineral origin identification would be in place, but a clause could be included to allow the Department of State to delay the implementation of Phase 3 in case such an origin identification system was still unreliable. Tax breaks would be maintained for companies selling audited conflict-free electronics products.

Phase 4: Finally, six years after the passage of the proposed legislation (Phase 4), Customs should be required to seize conflict minerals shipments so they have no opportunity to enter the market, and tax breaks for conflict-free shipments should end (since at that point the only shipments permitted to enter the country would be conflict free). Similar to Phase 3, the statutory language could be phrased to allow Phase 4 to be delayed if deemed necessary by the Department of State, but a six-year full implementation scheme would aim to end the importation of conflict minerals into the United States while assisting the industry in creating a transparent supply chain.

260. Ideally, over the next four years, Customs would take steps to enhance its capacity to physically inspect shipments to be able to more effectively carry out this mandate.

VII. FITTING THE LEGISLATION INTO CURRENT EFFORTS

A. REINTRODUCING HOUSE BILL 4128 IN CONJUNCTION WITH AN INTERNATIONAL MINERAL CERTIFICATION SCHEME

With some revisions, a Customs-based approach modeled on House Bill 4128 represents a constructive response to the problem of conflict minerals. Its passage can be truly successful, however, only if implemented in conjunction with an international mineral certification scheme that builds on the lessons of the Kimberley Process.[261]

As described above, House Bill 4128 poses a set of regulatory initiatives for the minerals trade from the time that minerals are being processed at refineries until they are brought to market as electronics products for consumption. Remaining concerns center around the mineral supply chain in the stages from mine to refinery—stages particularly prone to smuggling, extortion, and bribery.[262] To regulate these stages, American legislation can only go so far—what is truly needed is an international origin certification scheme with the following features:

Credible International Body Comprised of Minerals Supply Chain Experts: Like the Kimberley Process, the international minerals trade requires a respected international team of experts to provide certification of conflict-free supply streams. However, unlike the Kimberley Process, the human rights abuses in the minerals trade do not generally span continents but are largely geographically concentrated in the DRC and adjoining countries. Thus, review teams should not be sent only once every few years but should regularly monitor the regional supply chain and certify that minerals arriving at processing facilities originated from the mine they are claimed to have originated from. Such a team should operate in cooperation with the Congolese government to certify minerals from mine to export, so that U.S. legislation can pick up from the point at which minerals arrive in processing facilities to ensure that the supply chain is conflict free until products reach consumer shelves.

Regular Auditing at the Source: Ultimately, American minerals legislation would be incomplete standing alone because regular auditing must be done not only at the minerals processing stage, but also at the mining source to ensure that minerals reaching processing facilities

261. *See supra* Part V.A.

262. *See* A COMPREHENSIVE APPROACH, *supra* note 13, at 4–5.

originate from the mine they are purported to be from.[263] This requires ensuring that allegedly conflict-free mines are truly free of the presence of coercive armed militia—a feat that can only be accomplished by regular monitoring and auditing of the mines themselves. Such monitoring must be regular but randomized, in accordance with the sovereignty of the Congolese government, but free of restrictions that could subject such audits to the kind of government bias that could render the monitoring ineffective. This will likely require that international review teams be accompanied by United Nations peacekeepers that could navigate the difficult conditions on the ground.

Security from Mine to Export: The next critical stage of the supply chain is the transport of minerals between mine and export—a stage prone to smuggling, extortion, and bribery.[264] Even minerals mined in conflict-free environments can become blood minerals along the transport route, as illegal profits are extracted by armed groups through bribery and extortion.[265] Further, many of DRC's minerals are not exported out of the DRC, but are smuggled across borders and exported out of other east African countries such as Rwanda.[266] Increasing border security will therefore be part of this mission, but so will monitoring mineral transport and confirming that mineral quantities leaving individual mines match up with quantities arriving at DRC export points. These tasks will likely require a combination of United Nations peacekeeping assistance, mining experts, and security personnel to get minerals legitimately from mine to export, so that they can arrive at processing facilities for audit and connect into the processes created under the American legislation.

Strong Decisionmaking Structure: Further, if either mines or mineral transport routes are not conflict free, any international body charged with certifying mineral origin must have both the capacity to deem such supply chains as containing conflict minerals and the ability to promptly deem supply chains conflict free once they are reformed. Indeed, a flexible decisionmaking process is nonnegotiable: structures that require consensus in order to deem a mine or region as harvesting conflict minerals will lack the necessary flexibility to provide the proper incentives to mines looking

263. *See id.* at 10 (noting that industry should trace and audit supply chains down to the mine of origin).

264. *See id.* at 4–5.

265. *See id.*

266. *See id.* at 14.

to be included in the certified mineral stream.[267] Thus, an international body with decisionmaking structures by majority or even supermajority is preferable in this regard.

Mine-Based Participation: Unlike the KPCS, a mineral certification body should not focus on including or excluding countries from the process, but rather including or excluding individual mines.[268] Consequences for mines or supply streams containing conflict minerals or subject to armed-group coercion should include a lack of certification from this international body;[269] these shipments would thus arrive at processing facilities without origin certification and would presumably be labeled as "containing conflict minerals." Companies attempting to import such shipments into the United States would then be subject to the gradated penalties articulated in our proposed Customs-based legislation.[270]

B. IMPLEMENTING LEGISLATION IN CONJUNCTION WITH THE MONUC PEACEKEEPING FORCE

Furthermore, the presence of MONUC, the United Nations' peacekeeping force in the DRC, is integral to the successful implementation of both our proposed Customs-based legislative solution and any international body charged with origin certification. Extremely concerning are the May 2010 reports that the United Nations plans to withdraw some 2000 MONUC peacekeepers from the region to comply with sovereignty concerns expressed by the Congolese government.[271] This news came after reports that DRC President Kabila does not want a MONUC presence in the DRC during the 2011 elections and also after reports of MONUC's mixed track record in the DRC: the peacekeepers' mission has been plagued by reports of peacekeepers themselves committing human rights abuses, sex abuses, and gold smuggling.[272]

267. *See* PARTNERSHIP AFR. CAN., *supra* note 29, at 1.

268. *See* A COMPREHENSIVE APPROACH, *supra* note 13, at 11 (proposing to identify and secure individual strategic mines within a single country).

269. For example, the following three mines controlled by armed groups are examples of mines that would remain uncertified: Bisie Mine in North Kivu, Lueshe Pyrochlore Mine in North Kivu, and Bisembe Mine in South Kivu. *See id* at 12.

270. *See supra* Part VI.B.4.

271. *See* Jeffrey Gettleman, *U.N. to Pull 2,000 Peacekeepers From Congo, Draft Resolution Says*, N.Y. TIMES, May 28, 2010, at A10 (noting also that the name of MONUC will be changed to MONUSCO, or the "United Nations Organization Stabilization Mission in the Democratic Republic of Congo").

272. *See UN Plans to End DR Congo Peacekeeping Mission*, BBC NEWS (Mar. 4, 2010), http://news.bbc.co.uk/2/hi/8548794.stm (noting that MONUC troops were "accused of working with

Indeed, some have speculated that MONUC may be the United Nations' least effective peacekeeping force.[273]

Yet despite even MONUC's most glaring failures,[274] it nevertheless may be impossible to create an environment secure enough for minerals monitoring to occur without a peacekeeping presence, albeit a peacekeeping presence in need of serious reform. Indeed, Human Rights Watch's DRC expert has expressed concern over the withdrawal of peacekeepers, stating that the organization "[has] been very critical of Monuc's operations in the past, but the fact remains that the region is still far too unstable and the militias far too much of a problem for them to go now."[275] Likewise, an expert with Oxford Analytica, a global analysis and advisory firm,[276] expressed doubt that President Kabila "can run his country without the peacekeepers."[277] With natural resource exploitation, lack of government control, and ethnic tension rendering the situation in the DRC precarious,[278] a MONUC withdrawal would be not only premature, but also would render efforts to secure the mineral supply chain nearly impossible. The implementation of any American minerals legislation requires an effective peacekeeping presence and cooperation.[279]

C. DEVELOPING A CONSOLIDATED REGIONAL TAX BASIS

Any conflict minerals legislation must consider not only the DRC but also regional issues and incentives within which the minerals trade operates. One particularly important issue that must be confronted is

Congolese troops who had committed human rights abuses" as well as "sex abuse, gold smuggling and running from rebels").

273. *See Is This the World's Least Effective UN Peacekeeping Force?*, *supra* note 39, at 45 (noting an incident in which "militiamen burned 17 people to death while a detachment of MONUC troops 200 metres away, whose mandate authorized them to use force to prevent such massacres, did nothing.").

274. *See id.*

275. *Can DR Congo Cope Without UN Force?*, BBC NEWS (May 27, 2010), http://www.bbc.co.uk/news/10175593.

276. Oxford Analytica, Global Strategic Analysis, http://www.oxan.com/ (last visited Apr. 25, 2011).

277. *Can DR Congo Cope Without UN Force?*, *supra* note 275.

278. *See Not Quite as Bloody as Before*, ECONOMIST, Nov. 28–Dec. 4, 2009, at 54, 54 (noting that "the situation is as fraught as ever" due to factors including "the loathing many locals in Kivu harbour towards the Tutsis," the "[f]ear and hatred [that] abound," and the "mineral wealth of the region, along with continuing lawlessness, [which] means that groups still compete, often bloodily, for power.").

279. *See* A COMPREHENSIVE APPROACH, *supra* note 13, at 11 (describing a role for MONUC in collaborating with the Congolese government to identify and secure strategic mining sites under the control of armed groups).

"regional export harmonization."[280] Currently, "[d]ue to drastically different tariff rates, exporting a container of tin ore from Rwanda costs $200 in taxes while exporting the same container from the DRC costs $6,500."[281] Naturally, this creates significant incentives for smuggling minerals into neighboring countries before exporting them, taking the minerals out of the transparent supply chain and forcing the trade underground.[282] Initiatives to harmonize export tax regimes would go far toward reducing cross-border smuggling of minerals and increasing the transparency of the supply chain.

D. CONSIDERING ISSUES SPECIFIC TO THE GOLD TRADE

The inclusion of gold in minerals legislation has been controversial: while section 1502 of the Dodd-Frank Act explicitly includes gold as one of its regulated minerals,[283] House Bill 4128 does not.[284] Yet gold is one of the key minerals fueling human rights abuses in DR Congo,[285] with experts noting that "[t]he export of illicit gold alone is reckoned to be worth $1.2 billion a year, almost none of it accruing to Congo's treasury."[286] A recent *60 Minutes* segment exposed the connections between gold and the crisis in DR Congo,[287] and experts report that gold provides a critical source of financing for the FDLR and other armed groups.[288]

The Enough Project reports, however, that the gold trade differs from the "3Ts" trade in at least three critical ways: (1) gold has a higher value by weight, and is thus easier to smuggle in small quantities; (2) gold is easier to refine, can be smelted into metal earlier in the supply chain, and is thus more difficult to trace; and (3) gold serves as a store of value in the international financial system, so additional complications arise in attempting to regulate the international gold trade.[289] While it is essential

280. *Id.* at 14.

281. *Id.*

282. *See id.*

283. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 1502(e)(4), 124 Stat. 1376, 2218 (2010).

284. House Bill 4128 deemed a "conflict mineral" as any mineral that the Secretary of State determines to be financing conflict in the DRC, but gold was not specifically included. Conflict Minerals Trade Act, H.R. 4128, 111th Cong. § 11(3) (2009).

285. *See* A COMPREHENSIVE APPROACH, *supra* note 13, at 2–3.

286. *Clean Them Up*, ECONOMIST, Aug. 21–27, 2010, at 38, 38.

287. *See How Gold Pays for Congo's Deadly War*, CBS NEWS (Nov. 29, 2009), http://www.cbsnews.com/stories/2009/11/25/60minutes/main5774127.shtml.

288. *See* LEZHNEV & PRENDERGAST, *supra* note 228, at 4; Will Ross, *On the Trail of DR Congo's "Cursed" Gold*, BBC NEWS (June 3, 2005), http://news.bbc.co.uk/2/hi/africa/4604627.stm.

289. David Sullivan, *What Should Be Done About Congo's Gold Trade?*, THE ENOUGH PROJECT

that gold regulation be passed in order to improve the situation in the DRC, a reintroduction of Customs-based minerals legislation should consider these key differences, incorporating both academic scholarship and industry viewpoints on this issue.

VIII. CONCLUDING THOUGHTS

When confronting situations as dire as that in eastern DR Congo, it is not merely the intent behind a piece of legislation that matters, but also the design of the law and its ability to affect and alter the incentives of relevant actors. At the time of this Note's submission, reports revealed that some three hundred new bodies had been found massacred in the DRC;[290] at stake for this legislation is not abstract theory, but lives. In this light, a few concluding points. First, passing legislation to regulate the international minerals trade is critical—critical for those in the human rights field who are concerned about the perpetuation of one of the largest humanitarian crises on Earth; critical for those of us who consume electronics products like cell phones, laptops, and cameras (check your purses and backpacks now) and are not comfortable knowing that our purchases are contributing to the devastation of communities, families, and lives; and critical for those in the international electronics industry who care about maintaining the brand names and images of some of the largest companies on Earth (Apple, HP, Dell, Motorola, to name a few). Some of these companies have already expressed willingness and taken steps to reform their supply chains[291]—and a successful approach to minerals regulation will work with the industry to create change.

Secondly, the proposed Customs-based bill modeled on House Bill 4128, with some important revisions, could present immense potential to align the incentives of industry leaders and investors with consumers and human rights activists. Thus, this constitutes our current best option for establishing responsible policy in our electronics imports and our foreign

(Nov. 10, 2009), http://www.enoughproject.org/publications/mine-mobile-phone?page=8.

290. Martin Plaut, *DR Congo Rebel Massacre of Hundreds Is Uncovered*, BBC NEWS (Mar. 28, 2010), http://news.bbc.co.uk/2/hi/africa/8587305.stm.

291. *See* THE ENOUGH PROJECT, GETTING TO CONFLICT-FREE: ASSESSING CORPORATE ACTION ON CONFLICT MINERALS 2, 5 (2010), http://www.enoughproject.org/files/publications/corporate_action-1.pdf (noting Intel, Motorola and HP's efforts to visit suppliers and chair industry-wide efforts to audit tantalum; the report also applauds several companies' efforts to investigate loopholes in supplier statements on mineral sourcing, to visit smelters, and to aid the transparency effort by publishing their lists of suppliers).

policy.

Finally, whether it is a bill modeled on House Bill 4128 or another piece of minerals legislation, this issue deserves the attention of the legal community. As one of the first pieces of legal scholarship on the topic of conflict minerals, this Note does not purport to hold all the answers but aims to begin the debate in the legal community as to how we can use precedent, agency expertise, and incentive alignment to solve a modern day crisis. Our responsibility as lawyers demands no less.