

BREAKING THE NEXUS BETWEEN ARMED CONFLICT AND CONSUMER PRODUCTS: WHERE'S THE APP FOR THAT?

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I. INTRODUCTION

Africa is a continent in flames. And deep down, if we really accepted that Africans were equal to us, we would all do more to put the fire out. We're standing around with watering cans, when what we really need is the fire brigade. – Bono¹

There is an open wound in central Africa, and we may all have blood on our hands. For almost two decades in the eastern Democratic Republic of Congo (DRC), civil wars and unprecedentedly violent un-wars² have ravaged the area. At the heart of the violence are well-armed groups of men and children funded by the trade in minerals used in everyday consumer products. These groups have brought enormous suffering upon the local population through their use of forced labor, murder, mutilations, and rape. The violence has caused local health services to erode, resulting in many additional deaths from preventable diseases.³ These groups financially support themselves in a number of ways, but one major source of funding is the control of the mining in, transport in, and export of minerals from the eastern DRC.⁴ Because of the minerals' association with conflict, they have been given the moniker “conflict minerals.”⁵

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street

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1. *Bono's Call to Action for Africa*, TED (Oct. 2006), http://www.ted.com/talks/bono_s_call_to_action_for_africa.html.

2. Jeffrey Gettleman, *Africa's Forever Wars*, 178 FOREIGN POL'Y 73 (2010), available at http://www.foreignpolicy.com/articles/2010/02/22/africas_forever_wars?hidecomments=yes (describing the type of violence spreading across Africa as not war, but “opportunistic, heavily armed banditry”—un-war).

3. Kerry Boyd, *Continuing Crisis in the DRC: The Unheralded Death Toll and Its Implications*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 12, 2000), <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=216&> (citing research by Dr. Les Roberts).

4. GLOBAL WITNESS, “FACED WITH A GUN, WHAT CAN YOU DO?”: WAR AND THE MILITARISATION OF MINING IN EASTERN CONGO 4 (2009) [hereinafter FACED WITH A GUN].

5. Jason Mojica, *Sifting Through the Wreckage of Congo's Conflict Economy*, VICE (Sept. 2011), <http://www.vice.com/vice-news/the-vice-guide-to-congo-1> (noting that minerals are called “conflict minerals” because of the myriad of armed groups that use them to finance their operations, which mainly consist of killing people).

Reform and Consumer Protection Act (the Dodd-Frank Act).⁶ Congress, concerned that conflict minerals are found in many consumer products sold in the United States, passed a provision—section 1502— designed to promote peace and stability in the DRC by, in part, severing the connection between conflict minerals and armed violent groups in the eastern DRC.⁷

While section 1502 represents a step forward, it is a band-aid on an arterial wound. Section 1502 will likely prove insufficient for two reasons: (1) it does not take feasibility into account because it (a) requires implementation too quickly and (b) does not account for either the difficult security situation in the eastern DRC or the problem of smuggling; and (2) in not taking feasibility into account, section 1502 places the heaviest burden on those who that provision ostensibly seeks to protect—the Congolese—by making a de facto embargo on Congolese minerals likely.⁸

To be effective, a system for transparently tracking the mineral supply chain must be implemented not just in the DRC, but in neighboring countries as well. The United States and the international community must work with the government of the DRC and with the African Union (AU) to increase security in the region, thus allowing a transparent system to be put into place. Independent and empowered inspection teams must be allowed to verify the accuracy of the transparency system. The United States and international community must work with the government of the DRC to increase institutional controls over the mining industry, increase transparency within the government of the DRC and the DRC army, and help the DRC crack down on smuggling.

The remainder of this Comment is organized to highlight the immediacy and gravity of the conflict minerals problem. It explains the context in which section 1502 will operate and presents a potential path to successful and effective implementation of section 1502. Section II explains the specific problem that section 1502 seeks to correct: the nexus between the items we use every day and the funding of violent, armed groups through the sale of conflict minerals. Section II also poses the issue in the context of the greater problems surrounding the civil unrest, violence, and humanitarian crisis that are taking place in the eastern DRC. Section III explains the language of section 1502: what it means and how it has been interpreted by the Securities Exchange Commission (SEC). It further explains how the disclosure required by section 1502 can influence consumer and industry behavior and thus the minerals industry in the eastern DRC.

Section IV is broken into five parts. Part A explains the challenges that affected parties face in implementing section 1502. Part B describes a potential

6. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 5301 et seq. (2012)) [hereinafter Dodd-Frank Act].

7. *Id.* § 1502.

8. Laura E. Seay, *What's Wrong with Dodd-Frank 1502?: Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, CENTER FOR GLOBAL DEVELOPMENT (Jan. 2012), available at http://www.cgdev.org/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf.

framework for transparently tagging and tracing conflict minerals. Part C explains how this framework can be implemented in the eastern DRC and neighboring countries as well as answers some of the challenges raised in Part A. Part D explains why, given limited financial and governmental resources, any solution should focus on the most deadly of conflict minerals—gold. Finally, Part E describes the additional efforts the United States and international community should take to ensure that conflict minerals do not fund the violence in the eastern DRC. Section V concludes that while section 1502 is a step in the right direction, the DRC, its neighbors, and the international community have a difficult road ahead if they want to stop the problem of conflict minerals.

II. A HUMANITARIAN CRISIS IN CENTRAL AFRICA

The DRC⁹ is in a region known as the Great Lakes Region (GLR)¹⁰ that, like the DRC, has experienced intense human suffering. To understand how and why the GLR and the eastern DRC in particular have suffered so much over such a long period of time, some recent history¹¹ is required. In October 1990, exiled Tutsi forces from Uganda invaded Rwanda.¹² A peace treaty was signed in 1993, but ended on April 6, 1994 when the plane of Rwanda's president was shot down.¹³ Both sides blamed each other, and over the next 100 days somewhere between 500,000 and 1,000,000 people were killed.¹⁴ By July, an estimated 1,200,000 Hutus from Rwanda had fled to the eastern DRC.¹⁵ Many of the refugees were members of militia groups or former members of the Rwandan Army (FAR).¹⁶ These militia groups and ex-FAR members banded together and came to control the refugee camps.¹⁷ From these camps, Hutu militants launched raids into Rwanda

9. *Democratic Republic of the Congo*, ENCYCLOPEDIA.COM (2008), http://www.encyclopedia.com/topic/Democratic_Republic_of_the_Congo.aspx#3-10142:CongoDemocraticRepublicof-full.

10. INTERNATIONAL CONFERENCE ON THE GREAT LAKES REGION, PACT ON SECURITY, STABILITY AND DEVELOPMENT IN THE GREAT LAKES REGION art. 1 (2006) [hereinafter PACT]. The Great Lakes Region is comprised of Angola, Burundi, Central African Republic, the DRC, Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda, and Zambia. *Id.*

11. This Comment only reviews the history of the past twenty years, although the history of violence in the GLR goes back much further.

12. ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 42 (1999); *Thousands Invade, Rwanda Reports*, N.Y. TIMES, Oct. 3, 1990, at A21.

13. Nalina Lalla, *Rwanda: Crimes Against Humanity*, WOMEN AID INT'L, <http://www.womenaid.org/press/info/humanrights/rwanda%20hr.html> (last visited Jan. 31, 2012).

14. *Rwanda: How the Genocide Happened*, BBC NEWS, Dec. 18, 2008, <http://news.bbc.co.uk/2/hi/1288230.stm>.

15. ETHICS AND SECURITY IN CANADIAN FOREIGN POLICY 187 (Rosalind Irwin ed., 2001).

16. William G. Thom, *Congo-Zaire's 1996-97 Civil War in the Context of Evolving Patterns of Military Conflict in Africa in the Era of Independence*, 19 J. CONFLICT STUD. (1999), available at <http://journals.hil.unb.ca/index.php/jcs/article/view/4358/5015>.

17. STEPHEN JOHN STEDMAN & FRED TANNER, REFUGEE MANIPULATION: WAR, POLITICS, AND THE ABUSE OF HUMAN SUFFERING 96 (2003).

and banded with the Zairian Army to attack Tutsis in eastern Zaire.¹⁸

Between 1996 and 2003, the DRC underwent two civil wars,¹⁹ and the United Nations (UN) authorized a massive peacekeeping operation.²⁰ Between 1998 and 2002, 3.3 million people died as a result of the Second Congo War, making it the most deadly conflict since the end of World War II.²¹ Despite the UN's continued presence and continuing efforts by the international community at achieving peace, violence continues.

The eastern DRC is a patchwork of armed factions whose alliances are fluid. One of these armed factions includes the FARDC, the official army of the DRC²² with about 80,000 ground soldiers.²³ While this sounds substantial, the FARDC is in reality more a coalition of rebel groups.²⁴ Much of the FARDC forces are former rebel groups, integrated into the FARDC.²⁵ The FARDC is also known to have committed many of the same human rights violations that the rebel groups have committed, including rape and murder of civilians.²⁶ The FARDC is responsible for exploiting the DRC's mineral wealth and operates with impunity in areas of North Kivu and South Kivu.²⁷

Another armed group within the DRC includes the FDLR. The FDLR is a militia group, the largest foe of the FARDC, and is made up primarily of ex-FAR

18. *Id.*

19. The first civil war, which took place between October 1996 and May 1997, resulted in the fall of Mobutu Sese Seko and the renaming of Zaire to the Democratic Republic of Congo. The second civil war began in 1998, and though a peace treaty was officially signed in 1999 and UN peacekeeping troops were stationed in the DRC, the war did not officially end until 2003. *A Short History of the Conflict in the Democratic Republic of Congo and the Involvement of NGOs in the Peace Process*, WORLD MOVEMENT FOR DEMOCRACY, <http://www.wmd.org/resources/whats-being-done/ngo-participation-peace-negotiations/history-conflict-democratic-republic> (last visited Feb. 1, 2012).

20. Press Release, Security Council, Security Council Decides to Establish United Nations Observer Mission in Democratic Republic of Congo, U.N. Press Release SC/6766 (Nov. 30, 1999). MONUC has been the largest UN peacekeeping mission to date with over 17,000 peacekeepers. Doug Brooks, *MONUC, Inc., Plan A has not Worked So Well. How About a Privatized Plan B?*, 4 J. INT'L PEACE OPERATIONS 19, 20 (2009).

21. Benjamin Coghlan et al., *Mortality in the Democratic Republic of Congo: A Nationwide Survey*, 367 THE LANCET 44, 44 (2006).

22. *Democratic Republic of the Congo*, AMNESTY INT'L, <http://www.amnesty.org/en/region/democratic-republic-congo/report-2011> (last visited Feb. 1, 2012).

23. *Only Just Staying in One Piece*, THE ECONOMIST, July 2007, available at <http://www.economist.com/node/9557824>.

24. COLIN THOMAS-JENSEN & TARA R. GINGERICH, OXFAM AMERICA, NO WILL, NO WAY: US-FUNDED SECURITY SECTOR REFORM IN THE DEMOCRATIC REPUBLIC OF CONGO 13 (2010) [hereinafter OXFAM AMERICA].

25. INTERNATIONAL CRISIS GROUP, SECURITY SECTOR REFORM IN THE CONGO 12-15 (2006) (describing the integration of numerous armed groups into the FARDC).

26. FACED WITH A GUN, *supra* note 4, at 4, 19, 26 (describing the beating of three civilian miners for losing a hammer).

27. *Id.* at 25-37 (describing the systematic control of mines, mineral transportation, the illegitimate taxation of transportation, and the bribery and collusion of senior military and civilian officials).

forces.²⁸ They have committed numerous human rights violations.²⁹ Their goal is to overthrow the government of Rwanda and until recently were supported by the government of the DRC.³⁰ The CNDP was a rebel group backed by the Rwandan government to protect the Tutsi people living in the eastern DRC.³¹ Mai Mai militias are local defense forces.³² Mai Mai objectives are more or less in line with the DRC government's objectives.³³ The APCLS is a splinter group of a larger Mai Mai group and is allied with the FDLR.³⁴ The Lord's Resistance Army (LRA), more famous for their actions in Uganda, has relocated to the DRC and has launched attacks against villages in the eastern DRC.³⁵

The DRC is known for its natural resources. It is rich in gold, columbite-tantalite (coltan), cassiterite (tin), wolframite (source of tungsten), and other minerals.³⁶ Mines in the DRC are divided into two types: small scale artisanal mines (SSM) and large scale commercial mines (LSM).³⁷ Once mined, minerals are moved via air³⁸ and road to trading centers where *comptoirs*³⁹ sell to mineral traders who sell to smelters and refiners.⁴⁰ The above mentioned armed groups exploit the minerals trade in the eastern DRC by (1) directly controlling mines; (2) extorting payments from miners; and (3) extorting "taxes" as minerals move along

28. *DR Congo: Key People and Parties*, INSIGHT ON CONFLICT, <http://www.insightonconflict.org/conflicts/dr-congo/conflict-profile/key-people-and-parties/> (last visited Feb. 1, 2012).

29. FACED WITH A GUN, *supra* note 4, at 40-42.

30. HUMAN RIGHTS WATCH, "YOU WILL BE PUNISHED," ATTACKS ON CIVILIANS IN EASTERN CONGO 25 (2009).

31. *Id.*

32. *Id.* at 26.

33. *See id.* (stating that the Mai Mai generally fight with the government forces against "foreign invaders").

34. *Id.*

35. FACED WITH A GUN, *supra* note 4, at 20-21.

36. JOHN PRENDERGAST & SASHA LEZHNEV, ENOUGH PROJECT, FROM MINE TO MOBILE PHONE, THE CONFLICT MINERALS SUPPLY CHAIN 1-2 (2009) (describing both the mineral wealth of the DRC and its exploitation).

37. NICHOLAS GARRETT, THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) & ARTISANAL AND SMALL-SCALE MINING (SSM), PRELIMINARY OBSERVATIONS FROM THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC) 6, 16 (2007) (describing the legal basis for SSM and LSM).

38. FACED WITH A GUN, *supra* note 4, at 30. Many minerals are flown out because of the poor quality of the roads. Roads in suitable condition are used as landing strips. The FARDC often supervises and protects these airplanes during loading. *Id.*

39. *Id.* at 54. *Comptoirs* is a French word for trading house. *Id.* Based out of Goma and Bukavu, they sell minerals to international buyers. *Id.* at 54-55.

40. RESOLVE, TRACING A PATH FORWARD: A STUDY OF THE CHALLENGES OF THE SUPPLY CHAIN FOR TARGET METALS USED IN ELECTRONICS 9-10 (2010). The largest buyers were Belgian companies, but there were also Indian, Russian, Chinese, British, and other international buyers; however, these statistics are based on official Congolese numbers and do not include smuggled minerals. FACED WITH A GUN, *supra* note 4, at 59.

their trade routes.⁴¹ The minerals provide the armed groups with a significant source of funding.⁴² Minerals from both LSM and SSM provide sources of funding for armed groups, but SSM are particularly vulnerable because minerals from SSM can potentially pass through many more hands before leaving the country.⁴³

The minerals found in the DRC make their way into everyday household products. They are used in light bulbs,⁴⁴ tin cans,⁴⁵ jewelry, industrial equipment, and especially in consumer electronics.⁴⁶ Half of the tin mined in the eastern DRC ends up in circuit boards.⁴⁷ Cell phones, laptops, video game consoles, printers, digital cameras, and even airbag systems all use conflict minerals, many of which were mined in the eastern DRC.⁴⁸

Despite the official end of the war in 2003,⁴⁹ violence, disease, and starvation continue to kill.⁵⁰ From 2003 to 2007, another 2.1 million people are estimated to have died.⁵¹ In total, from the beginning of the Second Congo War in 1998 to April 2007, 5.4 million people have died in the DRC, 4.6 million of whom died in the eastern five provinces of the DRC.⁵² In addition to the death toll, instances of rape and other sexual violence in the eastern DRC are described as the worst in the world.⁵³ According to Amnesty International, between 1998 and 2004, over 40,000 cases of rape have been identified; however, this number is believed to be far smaller than the actual number of sexual assaults.⁵⁴ And the situation is worsening. In 2008 alone, 15,996 sexual assaults were reported, 65% of which were perpetrated on children.⁵⁵ It is believed that over 200,000 women, including young

41. FACED WITH A GUN, *supra* note 4, at 26-27 (stating that in some instances soldiers are ordered to mine the minerals).

42. DR Congo: UN Experts Outline Sources of Funding for Armed Rebels, UN NEWS CENTRE, Dec. 30, 2011, *available at* <http://www.un.org/apps/news/story.asp?NewsID=40865&Cr=democratic&Cr1=congo>.

43. *Id.*

44. FACED WITH A GUN, *supra* note 4, at 6 (stating that wolframite is used to manufacture light bulbs).

45. *Coltan, Tungsten & Tin*, VERITE, <http://www.verite.org/Commodities/ColtanTungstenTin> (last visited Mar. 25, 2012).

46. PRENDERGAST & LEZHNEV, *supra* note 36, at 9.

47. GLOBAL WITNESS, DO NO HARM, EXCLUDING CONFLICT MINERALS FROM THE SUPPLY CHAIN 6 (2010).

48. Congo Kin, *Coltan: Learning the Basics*, CONFLICT MINERALS: THE TRUTH UNDERLYING THE SYSTEMIC LOOTING OF CONGO (Nov. 25, 2009), <http://conflictminerals.org/coltan-learning-the-basics/>.

49. BENJAMIN COGHLAN ET AL., INTERNATIONAL RESCUE COMMITTEE, MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS 16 (2007).

50. *Id.* at iii.

51. *Id.* at 16.

52. *Id.*

53. Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES, Oct. 7, 2007, at 1.

54. AMNESTY INTERNATIONAL, DEMOCRATIC REPUBLIC OF CONGO, MASS RAPE: TIME FOR REMEDIES 13 (2004).

55. HUMAN RIGHTS WATCH, SOLDIERS WHO RAPE, COMMANDERS WHO CONDONE, SEXUAL VIOLENCE AND MILITARY REFORM IN THE DEMOCRATIC REPUBLIC OF CONGO 14

children, have been raped.⁵⁶ The violence has led to a collapse of social welfare services in the region and, as a result, disease and malnutrition plague the eastern DRC.⁵⁷ Most deaths since the end of the war are not from violence but from preventable diseases and lack of quality food and water.⁵⁸

The international response includes not only the above mentioned UN peacekeeping mission, but also numerous Security Council resolutions over the years calling for armed groups to surrender, for asset freezes, for travel restrictions, for all States to prevent arms supply in the DRC, and for the provision of financial assistance.⁵⁹ Although the international community has been slow to recognize the integral connection between conflict minerals and the violence in the DRC, that may soon change. In 2006, the Great Lakes Region's governments formed the International Conference on the Great Lakes Region (ICGLR)⁶⁰ to promote peace and development in the area and to stop the exploitation of the region's natural resources. The OECD has issued guidance for multinational corporations operating in foreign countries that speaks directly to the problem of conflict minerals.⁶¹ Even the minerals industry has made positive steps towards tackling the problem of conflict minerals.⁶² The United States' response is section 1502: a change-forcing piece of disclosure legislation.

(2009).

56. Kira Cochrane, *The Victims' Witness*, THE GUARDIAN, May 8, 2008, at G16, available at <http://www.guardian.co.uk/film/2008/may/09/women.congo>.

57. Boyd, *supra* note 3.

58. *Id.*

59. S.C. Res. 1596, U.N. Doc. S/Res/1596 (May 3, 2005); S.C. Res. 1804, U.N. Doc. S/Res/1804 (Mar. 13, 2008); S.C. Res. 1807, U.N. Doc. S/Res/1807 (Mar. 31, 2008); S.C. Res. 1857, U.N. Doc. S/Res/1857 (Dec. 22, 2008); S.C. Res. 1896, U.N. Doc. S/Res/1896 (Nov. 30, 2009); S.C. Res. 1807, ¶ 1, U.N. Doc. S/Res/1807 (Mar. 31, 2008) (“[SC] [d]ecides . . . that all States shall take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities, including financing and financial assistance, to all non-governmental entities and individuals operating in the territory of the Democratic Republic of the Congo.”).

60. PACT, *supra* note 10; *Who We Are*, INT'L CONF. ON THE GREAT LAKES REGION (Nov. 25, 2010), <http://www.icglr.org/spip.php?article1>.

61. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 14 (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>; OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 3, 9 (2011) [hereinafter OECD GUIDANCE].

62. See *What is the EITI?*, EITI, <http://eiti.org/eiti> (last visited Mar. 25, 2012) (describing the Extractive Industries Transparency Initiative); *Supplier Code of Conduct*, MOTOROLA, <http://responsibility.motorola.com/index.php/suppliers/scoc/> (last visited Feb. 2, 2012) (describing Motorola's supplier code of conduct); *Human Rights and the Supply Chain*, NOKIA, <http://www.nokia.com/global/about-nokia/people-and-planet/impact/supply-chain/human-rights-and-the-supply-chain/> (last visited Mar. 25, 2012).

Recognizing the difficulty in determining whether coltan from the DRC funds armed groups, Nokia Siemens has in fact effectively embargoed minerals from the DRC by requiring suppliers to assert that the coltan they supply does not come from the DRC. *Id.*

III. SECTION 1502

Section 1502 of the Dodd-Frank Act begins by explaining its purpose: “the sense of Congress that the exploitation and trade of conflict minerals originating in the [DRC] is helping to finance conflict characterized by extreme levels of violence . . . particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation.”⁶³ Section 1502 imposes a number of obligations, but its centerpiece is disclosure.

Disclosure is a form of transparency. Transparency policies, at their most basic level, require actors to disclose information to the public about products, services, or practices in order to achieve a public policy goal.⁶⁴ The goal for giving consumers and investors information about the origin of conflict minerals in a company’s products is that consumers and investors will be deterred from purchasing these products. Consumer and investor purchasing preferences will, in theory, lead producers to use minerals that do not fund armed groups in the DRC and adjoining countries.

This Section is divided into three parts. Part A explains what section 1502 does. Part B explains the SEC’s proposed rules for implementing section 1502. Finally, Part C explains how disclosure will affect consumers’ habits and the metals industry, as well as how the costs of disclosure, mandated by section 1502, should be distributed.

A. Section 1502

Section 1502 mandates four measures to stop the financing of violence by armed groups in the DRC and adjoining areas. It requires: (1) disclosure from securities issuers whose products use conflict minerals, either in the product itself or in its manufacture,⁶⁵ (2) the Secretary of State to submit a strategy to “promote peace and security” in the DRC,⁶⁶ (3) the Secretary of State to create a map showing conflict mineral-rich areas within the DRC and adjoining countries, trade routes, and areas under the control of armed groups,⁶⁷ and (4) regular reports on the effectiveness of disclosure requirements.⁶⁸ This Comment primarily focuses on the first requirement, but the remaining three requirements are helpful both to put the disclosure requirement into context and to explain how it can best be implemented.

Section 1502 defines conflict minerals in two ways. First, “columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives” are explicitly listed as conflict minerals.⁶⁹ Second, “any other mineral or its derivatives determined by the

63. Dodd-Frank Act § 1502(a).

64. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE, THE PERILS AND PROMISE OF TRANSPARENCY* 37-38 (2007).

65. Dodd-Frank Act § 1502(b)-(d).

66. *Id.* § 1502(c)(1)(A).

67. *Id.* § 1502(c)(2)(A)(i).

68. *Id.* § 1502(d).

69. *Id.* § 1502(e)(4)(A).

Secretary of State to be financing conflict in the [DRC] or any adjoining country” are also considered conflict minerals.⁷⁰ While section 1502 is concerned with minerals that directly or indirectly fund armed groups in the GLR,⁷¹ the term “conflict mineral” refers to the type of mineral, not its country of origin nor whether it directly or indirectly financed armed groups.⁷²

Gold, whether mined in Australia or the DRC, is a “conflict mineral” because it is so defined in section 1502.⁷³ However, an issuer that uses gold sourced from Australia, or gold sourced from the DRC that can be shown to not fund armed groups in the DRC or adjoining countries, can label its product as “DRC Conflict Free.”⁷⁴ Armed groups are groups that are listed in annual Country Reports on Human Rights Practices⁷⁵ as having committed serious human rights violations in the DRC or adjoining countries.⁷⁶ Adjoining countries are countries that share a border with the DRC.⁷⁷ For the purpose of simplification, these countries will be referred to jointly for the remainder of this Comment as conflict afflicted conflict mineral countries (CACMCs).

1. Disclosure by Persons

Section 1502(b) amends the Securities Exchange Act of 1934⁷⁸ and requires that, by April 17, 2011,⁷⁹ the Securities and Exchange Commission (SEC) issue regulations requiring certain issuers⁸⁰ to disclose whether conflict minerals are

70. *Id.* § 1502(e)(4)(B).

71. Dodd-Frank Act § 1502(a).

72. *Id.* § 1502(e)(4)(A) (defining “conflict minerals” to include columbite-tantalite, gold, cassiterite, wolframite, and their derivatives without reference to their country of origin). This is likely because minerals trade on a world market, and once smelted, are indistinguishable from minerals mined outside of DRC or adjoining countries. PRENDERGAST & LEZHNEV, *supra* note 36, at 6.

73. Dodd-Frank Act § 1502(e)(4)(A).

74. *Id.* § 1502(b)(1)(D).

75. Foreign Assistance Act of 1961 §§ 116(d), 502(B)(b), 22 U.S.C. § 2151 (2012) (requiring that the Secretary of State submit Country Reports to Congress regarding human rights violations in foreign countries as directed by the Foreign Assistance Act); *see 2009 Human Rights Report: Democratic Republic of the Congo*, U.S. DEP’T OF STATE (2009), <http://www.state.gov/j/drl/rls/hrrpt/2009/eap/135995.htm> (implicating the armed groups listed in Section II, *supra*, including the FARDC).

76. Dodd-Frank Act § 1502(e)(3).

77. *Id.* § 1502(e)(1); *see also* THE WORLD FACT BOOK: DEMOCRATIC REPUBLIC OF THE CONGO, CENT. INTELLIGENCE AGENCY (2009) (showing a map depicting that the DRC is bordered by Rwanda, Burundi, Uganda, Tanzania, the Central African Republic, Republic of the Congo, and Angola).

78. Securities Exchange Act of 1934, 15 U.S.C. § 78m (1934) [hereinafter Exchange Act].

79. Dodd-Frank Act § 1502(b)(1)(A) (“Not later than 270 days after the date of enactment of this subsection, the Commission shall promulgate regulations . . .”). April 17, 2011 is 270 days after the date of the Dodd-Frank enactment—July 21, 2010.

80. *Id.* § 1502(b)(2). Section 1502 applies to certain “persons,” but “persons” refers to issuers required to file reports with the SEC under section 13 of the Exchange Act. *Id.*; *accord* Exchange Act § 78m(h)(8)(E) (detailing the definition of “person” under the Exchange Act).

necessary for their products.⁸¹ Disclosure requirements were to begin with the issuer's first fiscal year after April 17, 2011; however, as of early 2012, the SEC has yet to produce final rules for disclosure.⁸² If conflict minerals are necessary for their products, then an issuer must disclose whether those minerals were obtained from the CACMCs, and what due diligence the issuer undertook to discover the minerals' chain of custody.⁸³ The issuer's due diligence must be inspected by an independent auditor.⁸⁴ Products that do not use minerals that directly or indirectly fund armed groups operating in CACMCs may be labeled "DRC Conflict Free."⁸⁵ An issuer must provide a description of all products that are not "DRC Conflict Free," as well as who conducted the audit, where the conflict minerals were "processed," where the minerals came from, and what efforts were taken to discover the minerals' country of origin.⁸⁶

2. Map and Strategy

The second mechanism in section 1502 requires the Secretary of State to create a strategy "to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products."⁸⁷ The strategy must first create a plan that, working with the DRC's government, neighboring countries, and the international community, promotes peace by "monitor[ing] and stop[ping] commercial activities involving the natural resources . . . that contribute to the activities of armed groups and human rights violations in the [DRC]."⁸⁸ The plan must also "develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving [conflict minerals] . . . to reduce exploitation by armed groups and promote local and regional development."⁸⁹

In addition to the plan to promote peace, the strategy must also include a plan to help those involved in the legitimate trade and use of conflict minerals to ensure that their trade and use does not "directly or indirectly finance armed conflict or result in labor or human rights violations."⁹⁰ Finally, the strategy must describe what measures can be taken against "individuals or entities" whose activities do

81. Dodd-Frank Act § 1502(b)(1).

82. *Id.* § 1502(b)(1)(A); Roundtable Relating to Issues on Conflict Minerals, 76 Fed. Reg. 63,573-01 (Oct. 13, 2011) (stating that the SEC will hold a Roundtable to discuss issues relating to the proposed rulemaking); see also *SEC to Hold Roundtable on Conflict Minerals, Exchange Act Release No. 2011-197*, U.S. SEC. & EXCH. COMM'N (Sept. 29, 2011), <http://www.sec.gov/news/press/2011/2011-197.htm> (announcing that the SEC will hold a public roundtable to discuss rulemaking under section 1502 of the Dodd-Frank Act).

83. Dodd-Frank Act § 1502(b)(1)(A).

84. *Id.* § 1502(b)(1)(A)(i).

85. *Id.* § 1502(b)(1)(D).

86. *Id.* § 1502(b)(1)(A)(ii).

87. *Id.* § 1502(c)(1)(A).

88. *Id.* § 1502(c)(1)(B)(i)(I).

89. Dodd-Frank Act § 1502(c)(1)(B)(i)(II).

90. *Id.* § 1502(c)(1)(B)(ii).

support armed groups and/or human rights violations.⁹¹

Section 1502's third mechanism requires the Secretary of State to create and make available to the public a map showing the mineral-rich areas, conflict mineral trade routes, and "areas under the control of armed groups in the [DRC] and adjoining countries."⁹² Mines in the armed group controlled areas will be designated "Conflict Zone Mines."⁹³ The map must use data from multiple public sources and must be updated every 180 days.⁹⁴ Maps produced pursuant to section 1502(c) are available on the State Department's website.⁹⁵

3. Effectiveness Report

Finally, section 1502 requires the Comptroller General of the United States to submit a baseline report, an effectiveness report, and an auditing report. The baseline report must be filed within one year, and annually thereafter, and must assess "the rate of sexual and gender-based violence in war-torn areas of the [DRC] and adjoining countries."⁹⁶ The effectiveness report must report the measured success of the disclosure requirements of section 1502(b) and on any difficulties the SEC has encountered in implementing the disclosure requirements.⁹⁷ The report should review issuers covered by section 1502 and whether their minerals came from CACMCs.⁹⁸ Finally, the report should assess the accuracy of the private audits required under section 1502(b)(1)(A)(i).⁹⁹ The most recent report can be found on the U.S. Government Accountability Office's website.¹⁰⁰

B. SEC Proposed Rules

The SEC's proposed rules define more precisely who is required to disclose their minerals' origin and what must be in that disclosure.¹⁰¹ In their proposed

91. *Id.* § 1502(c)(1)(B)(iii).

92. *Id.* § 1502(c)(2)(A)(i).

93. *Id.* § 1502(c)(2)(B).

94. *Id.* § 1502(c)(2)(C).

95. *Humanitarian Information Unit Products*, U.S. DEP'T OF STATE, <http://hiu.state.gov/Products/Forms/Products%20By%20Region.aspx> (last visited Mar. 18, 2012).

96. Dodd-Frank Act § 1502(d)(1).

97. *Id.* § 1502(d)(2).

98. *Id.* § 1502(d)(2)(C).

99. *Id.* § 1502(d)(3).

100. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-702, THE DEMOCRATIC REPUBLIC OF CONGO: INFORMATION ON THE RATE OF SEXUAL VIOLENCE IN WAR-TORN EASTERN DRC AND ADJOINING COUNTRIES (2011), available at <http://www.gao.gov/assets/330/320957.pdf>.

101. See *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. AND EXCH. COMM'N, <http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml#07-12-12> (last visited Mar. 18, 2012) (stating that the SEC is working with interested parties and plans to provide a final rule in the first half of 2012). At the time of writing, the rules are still "proposed."

rules, the SEC has created a three-step process.¹⁰² The first step is for issuers to determine if they are subject to section 1502.¹⁰³ An issuer is a “person described” and subject to section 1502 if “conflict minerals are necessary to the functionality or production of a product manufactured by such person.”¹⁰⁴ The terms necessary and manufacture are ambiguous and the general scope of the law could be interpreted to be anywhere from very broad to narrow. Accordingly, the SEC has proposed some clarification in their rules.

The SEC acknowledges that the language is ambiguous and that the law could be meant to apply only to regularly reporting, large domestic companies on one end of the spectrum, or given the intent of the law, even to non-reporting companies on the other.¹⁰⁵ While an argument can be made that section 1502 should not apply to foreign companies or smaller reporting companies, the SEC proposes that the law should “apply to domestic companies, foreign private issuers, and smaller reporting companies,” but only to companies that issue reports under section 13(a) or section 15(d) of the Securities and Exchange Act of 1934.¹⁰⁶

Section 1502 only applies to manufacturers.¹⁰⁷ The SEC declined to define manufacture, but, in analyzing the language of the statute, it has determined that section 1502 applies both to issuers who directly manufacture products *and* to issuers who contract with another for the manufacturing of products.¹⁰⁸ Contracting to manufacture also includes retailers who sell generic products bearing their own brand or a brand they have established.¹⁰⁹ The SEC has proposed that mining companies who are also issuers, including gold miners, should fall under section 1502.¹¹⁰

The SEC does not define necessary, but it does define the scope. If a conflict mineral is necessary in the actual product in any amount, then that product falls within the definition of section 1502.¹¹¹ However, naturally occurring trace amounts of a conflict mineral will not make an otherwise non-qualifying product fall under the definition.¹¹² Even if the conflict mineral is not in the final product, if it is intentionally used or is necessary for the production process of the product, then the product will fall under the definition.¹¹³ However, if the conflict mineral is only in the tools or machines used to produce the product, then the product will not fall under the definition.¹¹⁴

102. Conflict Minerals, 17 C.F.R. pts. 229, 249 (proposed Jan. 28, 2011) [hereinafter SEC Rules], available at <http://www.sec.gov/rules/proposed/2010/34-63547.pdf>.

103. *Id.* at 9.

104. Dodd-Frank Act § 1502(b)(2)(B).

105. SEC Rules, *supra* note 102, at 12-15.

106. *Id.* at 14-15.

107. *Id.* at 17; Dodd-Frank Act § 1502(b)(2)(B).

108. SEC Rules, *supra* note 102, at 17-19.

109. *Id.* at 20.

110. *Id.* at 21.

111. *Id.* at 24.

112. *Id.*

113. *Id.*

114. SEC Rules, *supra* note 102, at 24.

If an issuer determines that it is a “person described,” then it moves to the second step of the three-step process. The issuer must make a “reasonable country of origin inquiry” to determine whether the conflict minerals used in the products or manufacture under step one came from the DRC or adjoining countries.¹¹⁵ If after this reasonable inquiry the issuer determines that the minerals it uses did not come from the DRC or an adjoining country, then the issuer must disclose this information in its annual report and must post the information on its website.¹¹⁶ The issuer is also “required to disclose in the body of its annual report the reasonable country of origin inquiry it undertook to determine that its conflict minerals did not originate in the DRC countries and maintain reviewable business records to support its determination.”¹¹⁷ If an issuer determines that its product’s conflict minerals did not directly or indirectly finance armed groups in the DRC or adjoining countries, then it may label its product “DRC Conflict Free.”¹¹⁸

The SEC does not define a reasonable country of origin inquiry.¹¹⁹ However, the SEC does say “the reliability of any inquiry would be based solely on whether the information used provides a reasonable basis for an issuer to be able to trace the origin of any particular conflict mineral it uses.”¹²⁰ Under this rule, issuers are precluded from determining that there is simply “no evidence” or that an exhaustive search is “unreasonable” and that they have therefore determined their minerals are conflict free.¹²¹ If an issuer determines that the minerals used did come from the DRC or adjoining countries, or if the issuer is unable to determine that the minerals *did not* come from the DRC or adjoining countries, then the issuer must submit in its annual report what steps it took to identify the source and chain of custody of the mineral.¹²²

Relating to the performance of an issuer’s chain of custody due diligence, the SEC sets a higher standard than in the determination of whether minerals originate from the DRC or adjoining countries.¹²³ And, as stated above, while the SEC does not define what steps are required for this inquiry, issuers must disclose in their reports what steps they took and whether they comport with “nationally or internationally recognized standards or guidance of supply chain due diligence.”¹²⁴ An issuer who is unable to determine whether its minerals came from the DRC or adjoining countries must submit the same information as an issuer whose minerals came from a conflict region, but may include additional information specifying

115. *Id.* at 27.

116. *Id.* at 28.

117. *Id.* at 27-28.

118. Dodd-Frank Act § 1502(b)(1)(D).

119. Conflict Minerals, 75 Fed. Reg. 80,948, 80,956 (proposed Dec. 23, 2010), *available at* <http://www.sec.gov/rules/proposed/2010/34-63547fr.pdf>.

120. *Id.*

121. *Id.*

122. *Id.* at 80,957.

123. *Id.* at 80,956.

124. *Id.* at 80,961.

that it is merely unable to determine their minerals' country of origin.¹²⁵

A disclosure report must include a description “with the greatest possible specificity” of the products that are not “conflict free”—i.e., products that use, or were manufactured with, minerals that may have directly or indirectly financed armed groups in the DRC and adjoining countries—their country of origin, and, if possible, the point of origin (mine, if possible) of the mineral.¹²⁶ The chain of custody investigation must be independently audited by a private sector auditor and, if found to be unreliable, will not be considered sufficient for the purposes of fulfilling the statute.¹²⁷

The SEC has also issued special rules for recycled and scrap conflict minerals because, in general, the origin of these minerals will be very difficult to determine.¹²⁸ Issuers using recycled minerals can submit in their report that the minerals are conflict free.¹²⁹ However, they must still include in their report what steps they took to determine that the conflict minerals were recycled or scrap.¹³⁰ Recycled minerals are “reclaimed end-user or post-consumer products” not “partially processed, unprocessed, or . . . byproduct from another ore.”¹³¹

Termination of disclosure requirements is provided for if and when it is determined that the violence in the DRC has subsided, but in no case may disclosure requirements end before five years from the enactment of the Act.¹³²

C. How Disclosure Induces Behavioral Changes

As stated above, the central idea behind section 1502's disclosure requirements is that such disclosure will inform investors and consumers.¹³³ To understand whether the disclosure requirements in section 1502 will work, an understanding for how transparency policies work is needed. Transparency policies can be broadly divided into right-to-know policies and targeted transparency policies.¹³⁴ Right-to-know transparency policies are exactly that: they require organizations to disclose information to improve awareness of an organization's activities, finances, and decision-making.¹³⁵ Targeted transparency policies aim to

125. Conflict Minerals, 75 Fed. Reg. at 80,961.

126. *Id.*; Dodd-Frank Act § 1502(b)(1)(A)(i)-(ii).

127. Dodd-Frank Act §§ 1502(b)(1)(A)(i), 1502(b)(1)(C).

128. Conflict Minerals, 75 Fed. Reg. at 80,963.

129. *Id.*

130. *Id.*

131. *Id.* *But cf.* Lisa Reisman, *Loophole in Conflict Minerals Law Creates Opportunity for Scrap Dealers*, METALMINER (Feb. 24, 2011), <http://agmetalmminer.com/2011/02/24/loophole-in-conflict-minerals-law-creates-opportunity-for-scrap-dealers/> (“[S]crap traders have found profitable ways to skirt the new Dodd-Frank Conflict Mineral Law.”).

132. Dodd-Frank Act § 1502(b)(4).

133. *See supra* text accompanying notes 64-65.

134. *See* FUNG, GRAHAM & WEIL, *supra* note 64, at 15-16 (identifying the evolution of targeted transparency policies from the more basic right-to-know policies).

135. *See id.* at 15-16, 28 (stating that, initially, right-to-know policies are aimed “to inform the public about the workings of government” and “create a more informed public”).

affect specific aspects of an organization.¹³⁶ By providing the public with specific information, targeted transparency policies seek to influence public action.¹³⁷ Section 1502 is a targeted transparency initiative because it seeks to influence consumers' and investors' choices by compelling issuers to provide them with information. The goal is to change the issuers' behavior—i.e., the purchase of minerals that may fund armed groups in the eastern DRC.

To be successful, targeted transparency policies must provide users with a comprehensive set of information.¹³⁸ Overly complex sets of information are of little use to most users.¹³⁹ Information must not only be readily understandable, but must also be easy to incorporate into a user's decision-making process without imposing too many costs (economic or otherwise).¹⁴⁰ Beyond clarity and facility, information must enable an actual choice.¹⁴¹ Section 1502 requires issuers to disclose information in an annual report. While a savvy investor may readily understand the information contained in the report, many investors will not,¹⁴² and certainly the annual report will have little effect on a consumer's purchase at the local electronics store. Information must therefore be distilled in such a way that the average investor or consumer can easily discern whether a company's products fund armed groups in the eastern DRC.

The "DRC Conflict Free" label is one way this can be effectuated. Companies whose products are found to be conflict free after proper due diligence can label their products as such. Consumers can then easily check a product's label and see whether it contributed to conflict in the DRC.

The label is a powerful tool for effectuating section 1502 because it gives companies a means of differentiating themselves and gaining a market advantage by offering consumers an easy choice.¹⁴³ The conflict free label can and should be supplemented with additional marketing to maximize the advantage to complying companies. Similar mechanisms should be devised for informing investors.

136. *Id.* at 28.

137. *See id.* at 40 (stating targeted transparency policies aim alter behavior in specified ways). Examples of targeted transparency programs include star-based crash test ratings, or color coded threat level warnings. These programs have the specific aim of trying to influence people to buy safer cars and be more cognizant of suspicious behavior. *Id.*

138. *See id.* (stating the purpose of providing the user with comprehensible information is to allow them to "make more informed and more socially beneficial decisions.").

139. *See id.* at 55 (stating that the information must be comprehensible if it is to become "embedded" in a user's decision making process.).

140. FUNG, GRAHAM & WEIL, *supra* note 64, at 55.

141. *See id.* at 56 ("[A]dditional information won't help users who believe they have few meaningful choices to make.").

142. *See* ABT SRBI, MANDATORY DISCLOSURE DOCUMENTS TELEPHONE SURVEY 23 (2008), available at <http://www.sec.gov/pdf/disclosuredocs.pdf> (finding almost half of those polled believe the language used in annual reports was difficult to understand, and over half believed the annual reports to not be user friendly).

143. Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 294 (1997) (discussing "eco-labels" as a method of informing consumers and thereby influencing the market).

Consumer and investor advocacy groups as well as non-governmental organizations (NGOs) are crucial in serving as translators of complex sets of information into understandable quanta useful for making informed decisions.¹⁴⁴

IV. IMPLEMENTING SECTION 1502

Why has section 1502 brought both praise and criticism from human rights groups, government officials, rock stars, and the metals industry?¹⁴⁵ The reason is that while section 1502 holds great potential to affect the problem of conflict minerals, it also creates a whole new set of challenges for issuers, the metals industry, and CACMCs.

This Section is broken into four parts. Part A defines the challenges created by section 1502. Part B proposes a framework for implementing section 1502: a transparent supply chain record. Part C discusses the steps that must be undertaken to implement a transparent supply chain record in CACMCs. Part D explains why, if a thorough conflict mineral transparency scheme cannot be executed, efforts should at least attempt to reign in the effect of gold in funding armed groups. Finally, Part E briefly discusses the additional steps that the United States and the international community can take to give section 1502 a better chance of succeeding.

A. Challenges

1. Challenges for Issuers

Requiring issuers to know where the conflict minerals in their products came from may not sound complicated, but it is a problem of extraordinary scale. Minerals pass through many hands before the end user purchases them.¹⁴⁶ A mineral supply chain involves miners, mineral consolidators, *negociants*, *comptoirs*, traders, smelters, and manufacturers.¹⁴⁷ In performing their due

144. See Dara O'Rourke, *Citizen Consumer*, BOSTON REVIEW (Nov./Dec. 2011), http://www.bostonreview.net/BR36.6/ndf_dara_orourke_ethical_consumption.php (discussing the effectiveness of NGOs in bringing to light environmental and labor issues for consumers).

145. See *Congo's Mineral Question*, GLOBAL POLITICS BLOG (Nov. 26, 2010), <http://www.global-politics.co.uk/blog/2010/11/26/congos-mineral-question/> (describing the praise of NGOs for section 1502, as well as negative implications); Hester Serebrin, *Bono Sings Praises of Dodd-Frank's Hidden Provisions*, THE GREEN MIEN BLOG (Sept. 21, 2010), <http://greenmien.knowledgemosaic.com/2010/09/21/bono-sings-praises-of-dodd-franks-hidden-provisions/> (describing the praise of U2's Bono for section 1502); Dominic Johnson, *Killing the Economy in the Name of Peace?: The New US "Conflict Minerals" Legislation for the DRC*, POLE INSTITUTE (July 19, 2010), <http://pole-institute.org/site%20web/echos/echo138.htm> (describing negative consequences of section 1502 and complaints by industry groups).

146. OECD GUIDANCE, *supra* note 61, at 14.

147. ITRI, ITRI TIN SUPPLY CHAIN INITIATIVE, DISCUSSION PAPER (ver. 2) 5 (2009) [hereinafter iTSCi Discussion Paper]. Most mining in eastern DRC is artisanal (small scale). *Id.* Mineral consolidators and *negociants* perform a similar function. *Id.* at 4. *Negociants*, French for a merchant who consolidates small offerings and offers them under his own label, consolidate the many small offerings of artisanal miners for sale to *comptoir*. *Id.* at 10. There may be multiple

diligence, an issuer will have to go back from the point of their purchase and determine at every point of sale, consolidation, or transit across multiple continents whether the mineral came from or transited through a CACMC.¹⁴⁸ If issuers are unable to determine that a mineral did *not* originate or transit from a CACMC, then their required diligence becomes even more stringent.¹⁴⁹ Thorough due diligence may eventually require an assessment of on-the-ground conditions in a CACMC country to ensure that the mines from which their minerals come, and the trade routes on which their minerals travel, are not being exploited by armed groups.¹⁵⁰

Issuers come in all shapes and sizes,¹⁵¹ and some will be better suited than others to perform rigorous due diligence, either because of the nature of the issuer, or because of the nature of its product.¹⁵² Some companies are multinational in nature, with a wealth of experience in supply chain management. Others have little experience outside of the United States. Regardless of their market position or technical expertise, all affected issuers will need to state whether the metals in their products came from the GLR.

Some companies, such as Apple, rely on statements from their suppliers that products are conflict free.¹⁵³ However, such statements will not be sufficient to comply with section 1502.¹⁵⁴ Because minerals from CACMCs once smelted are forensically indistinguishable from those originating in non-CACMCs, there is no

consolidators or *negociants* between the mine and the *comptoir*. *Comptoirs* sell to mineral traders who sell to smelters and refiners. *See id.* at 6-7 (explaining supply chain roles).

148. *See* Conflict Minerals, 75 Fed. Reg. at 80,961 (“[An issuer must] use due diligence regarding the supply chain determinations in their Conflict Minerals Report.”).

149. *Id.* at 80,961-62.

150. *See* OECD GUIDANCE, *supra* note 61, at 21 (explaining that the proposals put forth by the OECD “will not tolerate any direct or indirect support to non-state armed groups through the extraction, transport, trade, handling or export of minerals.”).

151. *Compare* General Electric Company, NEW YORK STOCK EXCHANGE, <http://www.nyse.com/about/listed/ge.html> (last visited Mar. 19, 2012) (large corporation), with Tiffany Co, NEW YORK STOCK EXCHANGE, <http://www.nyse.com/about/listed/tif.html> (last visited Mar. 19, 2012) (mid-size corporation).

152. *See infra* text accompanying notes 270-75 (discussing the difficulties that some issuers may face in using due diligence); Jill Radloff, *Update on OECD Conflict Minerals Project*, DODD-FRANK.COM (Nov. 29, 2011), <http://dodd-frank.com/update-on-oecd-conflict-minerals-project/> (stating GE is participating in pilot implementation of OECD Guidelines); PATRICK DORSEY, PRESS RELEASE NO. 2010-135: SEC INITIATIVES UNDER THE DODD-FRANK ACT 2 (2010), *available at* <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-17.pdf> (explaining effects Dodd-Frank will have on Tiffany & Co.).

153. Hilary Howard, *Steve Jobs Statement on Conflict Minerals*, N.Y. TIMES (June 30, 2010), <http://kristof.blogs.nytimes.com/2010/06/30/steve-jobs-statement-on-conflict-minerals/> (discussing an e-mail from Steve Jobs in which he states that Apple relies on suppliers to ensure that their products do not contain conflict minerals).

154. *Cf.* Conflict Minerals, 75 Fed. Reg. at 80,956 (stating that an issuer is not relieved of filing a Conflict Mineral Report when it simply finds “no evidence” that their minerals came from the DRC or adjoining countries because “[s]uch an allowance might encourage issues to conduct poorly planned or executed inquiries”). This certainly implies that mere statements from suppliers without documentary support will be insufficient to comply with section 1502.

post-purchase test that an issuer can perform to determine a mineral's country of origin.¹⁵⁵ For these reasons, issuers will likely rely on the metals industry to share the due diligence burden.¹⁵⁶

Issuers also face the challenge of having to perform this due diligence very quickly. As originally written, issuers were required to make their conflict mineral disclosure in their first fiscal year after April 17, 2011.¹⁵⁷ However, as previously mentioned, as of early 2012 the SEC has yet to promulgate final rules. The SEC's restraint indicates the difficulty of the problem, and highlights Congress's less than perfect foresight.

2. Challenges for the Metals Industry

While many actors in the metals industry are not directly liable under section 1502, they will nonetheless be affected by it. Conflict mineral legislation, and section 1502 in particular, can have the effect of popularizing the issue of conflict minerals.¹⁵⁸ Issuers who are required to report whether their products are conflict free will want to highlight their compliance in order to gain good publicity.¹⁵⁹ But increased publicity will affect the non-labile metals industry as well. Until recently, THAISARCO, a world leader in tin production, sourced cassiterite from the DRC, but it has since ceased doing so because of bad publicity.¹⁶⁰

In addition to public pressure, many issuers may decide that, either because of the complexity of the due diligence or because of time constraints, they will only buy from suppliers who can guarantee their minerals are conflict free.¹⁶¹ This pushes some of the responsibility off onto the metals industry, but the metals industry is in a better position to know the circumstances of the metals it sells.¹⁶²

155. PRENDERGAST & LEZHNEV, *supra* note 36, at 6.

156. *Id.*

157. Sarah A. Altshuller & Gwendolyn W. Jaramillo, *The SEC's Delayed Rule-Making and Implications for Corporate Conflict Minerals Reports*, CORPORATE SOCIAL RESPONSIBILITY AND THE LAW BLOG (Jan. 16, 2012), <http://www.csrandthelaw.com/2012/01/articles/conflict-minerals/the-secs-delayed-rulemaking-and-implications-for-corporate-conflict-minerals-reports/>.

158. See e.g., Intel "Conflict Minerals" Protest, FACEBOOK, <http://www.facebook.com/event.php?id=113916618650457> (last visited Jan. 28, 2012) (organizing a protest, demanding that Intel support a non-watered down version of the Conflict Minerals Trade Act, originally introduced by Representative McDermott of Washington and Senator Brownback of Kansas); see also *Web Search Interest: "Conflict Minerals," Worldwide, 2004-Present*, GOOGLE INSIGHTS FOR SEARCH, <http://www.google.com/insights/search/?hl=en#q=%22conflict%20minerals%22&cmpt=q> (last visited Jan. 28, 2012) (showing a marked increase in Google searches for the term "conflict minerals" since the passage of section 1502 in July 2010).

159. See *supra* text accompanying footnote 142-43.

160. Joe Bavier, *Thaisarco Suspends Congo Tin Ore Purchases*, REUTERS AFRICA (Sept. 18, 2009), <http://af.reuters.com/article/investingNews/idAFJJOE58H09S20090918>.

161. See Altshuller & Jaramillo, *supra* note 157 (stating that, if Dodd-Frank is issued in the next several months, issuers will be required to issue their first reports by mid-2013); Conflict Minerals, 75 Fed. Reg. at 80,956-57. (stating that issuers must list steps taken to determine chain of custody of minerals even if issuer cannot determine whether the minerals are conflict free).

162. See PRENDERGAST & LEZHNEV, *supra* note 36, at 6 (stating that after ore is refined it becomes impossible to distinguish the source of the ore).

As stated above, once smelted, minerals from CACMCs and non-CACMCs are indistinguishable, so smelters can help issuers by knowing, before they smelt their minerals, whether they come from CACMCs.¹⁶³

One challenge will therefore be ensuring the industry can stand behind their transparency scheme.¹⁶⁴ Companies within the metals industry must be able to report reliably that the minerals they say are conflict free actually are conflict free. But the biggest challenge for the metals industry will be implementing a formal, traceable transparency scheme in an area where mining and the mineral industry is largely informal.¹⁶⁵ Many of the middlemen between the mine and the *comptoir* are not even literate.¹⁶⁶ For both of these challenges, the governments of CACMCs will be critical.¹⁶⁷

3. Challenges for CACMCs

The largest potential effects of section 1502 are likely to be on the governments and economies of the countries of the GLR. Section 1502 does not mandate that issuers purchase their minerals from the CACMCs; rather, it requires only that issuers make the effort to determine whether their products fund armed groups in CACMCs.¹⁶⁸ This could undermine the success of section 1502. Faced with the extreme difficulty of complex due diligence and disclosure, many companies may decide that their safest bet is to not purchase minerals from the CACMCs at all.¹⁶⁹

John Kanyoni, head of the North Kivu exporters association, has even said that section 1502 amounts to a de facto embargo on minerals from the GLR.¹⁷⁰ ITRI, a tin industry group,¹⁷¹ has stated that, while section 1502's intentions are noble, its effect may actually be to increase the exploitation of minerals in CACMCs if these countries are unable to assure issuers that their minerals are

163. *Id.*

164. *Id.*

165. See iTSCi Discussion Paper, *supra* note 147, at 4 (explaining the need to improve due diligence in tin supply chains which will be hampered by funding and limited resources).

166. *Id.* at 7.

167. See *id.* (stating a government body will be necessary to monitor mine sites and concentrate shipments).

168. Dodd-Frank Act § 1502(b).

169. *US Financial Regulation Bill May Lead to African Minerals Trade Embargo*, ITRI (July 16, 2010), http://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=994&Itemid=177.

170. *Id.*; see also ITRI, URGENT REQUIREMENT FOR END USER FUNDING TO ADDRESS CONFLICT MINERAL CONCERNS (2011), *available at* http://www.itri.co.uk/index.php?option=com_mtree&task=att_download&link_id=49721&cf_id=24/ (stating that regulations similar to section 1502 that require due diligence have the effect of an embargo on African nations in the mineral trade).

171. See ITRI, DELIVERING THE FUTURE OF TIN (2010), *available at* http://www.itri.co.uk/index.php?option=com_mtree&task=att_download&link_id=49622&cf_id=24/ (explaining purpose of ITRI).

conflict free.¹⁷² Given that up to 20% of the population of the DRC may be economically dependent on the mineral trade,¹⁷³ an embargo would be disastrous. The countries of the GLR have the most to gain from a successful decoupling of the minerals trade and human rights abuses.¹⁷⁴ They also have the most to lose should the effort fail, and for this reason it is critical that the governments of the GLR be engaged in the process of making mineral due diligence feasible for issuers.

B. Framework for a Transparent Supply Chain Record

As explained above, tracing the custody of a purchased mineral will be difficult. What the industry needs is an efficient way to trace minerals that places the greatest responsibility on those (1) in the best position to know the circumstances surrounding a particular mineral's origin and (2) actually in a position to ensure compliance with any traceability program. Both ITRI and the Organization for Economic Co-operation and Development (OECD) have proposed solutions.¹⁷⁵ ITRI's tracing program is strictly for cassiterite, but could be applied to other minerals, and it is based on on-the-ground experience working with the mineral trade in the eastern DRC.¹⁷⁶ The OECD's recommendations are more generalized and more removed from the actual situation in the eastern DRC because they are designed to work in a number of conflict afflicted countries.¹⁷⁷ Both of these proposals are analyzed in light of the political and security situation in the eastern DRC and the GLR.¹⁷⁸ Informing both of these proposals is the Kimberley Process set up in 2003 to combat the problem of "blood diamonds."¹⁷⁹

1. ITRI Tin Supply Chain Initiative

In 2009, ITRI, a trade body for the tin industry, devised a three-phase plan for

172. ITRI, URGENT REQUIREMENT FOR END USER FUNDING TO ADDRESS CONFLICT MINERAL CONCERNS, *supra* note 170 (stating that if the GLR mining industry is ostracized by U.S. issuers, minerals will continue to be sold, but will take less legitimate routes).

173. iTSCi Discussion Paper, *supra* note 147, at 5.

174. See BSR, CONFLICT MINERALS AND THE DEMOCRATIC REPUBLIC OF CONGO: RESPONSIBLE ACTION IN SUPPLY CHAINS, GOVERNMENT ENGAGEMENT AND CAPACITY BUILDING 1 (2010), available at http://www.bsr.org/reports/BSR_Conflict_Minerals_and_the_DRC.pdf (stating that there is a need to sever the link between the mineral trade and armed conflict in the DRC).

175. iTSCi Discussion Paper, *supra* note 147; OECD GUIDANCE, *supra* note 61.

176. iTSCi Discussion Paper, *supra* note 147, at 4-6.

177. OECD GUIDANCE, *supra* note 61, at 12.

178. See *id.* at 8 (stating that the report was created while "recognizing governments, international organizations and companies . . . contribute to ensuring trade and investment in natural resources is beneficial to society" and recognizing exploitation of natural resources occurs in conflict areas); iTSCi Discussion Paper, *supra* note 147, at 3 (stating proposed due diligence procedure will implement Security Council Resolutions and will make sure trade does not support illegal armed groups).

179. *The Kimberly Process*, GLOBAL WITNESS, <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds/kimberley-process> (last visited Jan. 29, 2012).

creating a transparent supply chain in the eastern DRC.¹⁸⁰ Phase one introduced documentary evidence into the supply chain from *comptoirs* to the smelter.¹⁸¹ This phase was accomplished quickly and relatively easily because many of the institutional controls were already in place.¹⁸²

Phase two seeks to extend documentary evidence back to the mine.¹⁸³ This phase is not yet complete and poses many difficulties.¹⁸⁴ Phase two envisions affixing security tags with tracking codes on every bag of minerals at its point of origin (the mine).¹⁸⁵ Certificate of Provenance would also accompany each shipment.¹⁸⁶ Shipments will be combined at various points in the supply chain.¹⁸⁷ When this occurs, the unique codes will also be consolidated.¹⁸⁸ This system is set up to reduce what ITRI considers an otherwise unmanageable paper trail.¹⁸⁹ Congolese governmental bodies will regulate and monitor the implementation and enforcement of documentary evidence.¹⁹⁰ ITRI also recommends an independent organization comprised of knowledgeable NGOs and mining specialists to monitor the project for the first three years.¹⁹¹ Phase three introduces a system of performance standards to ensure that the system set up in phase one and two complies with general standards of good corporate governance.¹⁹²

2. OECD Guidance

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provide information to companies who wish to ensure their use of minerals is not tied to a number of serious human rights abuses.¹⁹³ The OECD's guidance is voluntary, but it is

180. iTSCi Discussion Paper, *supra* note 147, at 4.

181. *Id.* at 7.

182. *Id.*

183. *Id.* at 4.

184. *Id.* at 10-11 (stating that there are difficulties of funding, implementing, and tracking. Furthermore, paper certificates pose problems because of the quantity of paper evidence it would produce, and because paper certificates would likely be lost, destroyed or tampered with).

185. *Id.* at 11-12 (showing examples of security tags and codes).

186. iTSCi Discussion Paper, *supra* note 147, at 4.

187. *Id.* at 11.

188. *Id.*

189. *Id.* at 10-11.

190. *Id.* at 10 (suggesting that the Service d'Assistance et d'Encadrement des Small Scale Mines (SAESSCAM), the government agency in charge of artisanal mining, should track mineral flow from the mines to the *comptoirs*).

191. *Id.* at 18.

192. iTSCi Discussion Paper, *supra* note 147, at 7.

193. OECD GUIDANCE, *supra* note 61, at 12. Serious abuses are defined as: "i. torture, cruel, inhuman and degrading treatment; ii. any forms of forced or compulsory labour, which means work or service which is extracted from any person under the menace of penalty and for which said person has not offered himself voluntarily; iii. the worst forms of child labour; iv. other gross human rights violations and abuses such as widespread sexual violence; v. war crimes or other serious violations of international humanitarian law, crimes against humanity or

illustrative of how a responsible supply chain framework could function.¹⁹⁴ The OECD Guidance is designed to stop the support, directly or indirectly, of *non-state* armed groups¹⁹⁵ through the conflict mineral trade.¹⁹⁶ The IGCLR has approved the OECD Guidance.¹⁹⁷

The OECD Guidance is risk-based—companies sourcing minerals from higher risk areas are expected to exert a greater level of due diligence than companies sourcing from lower risk areas.¹⁹⁸ The Guidance also recognizes that not every position in the supply chain is equal, and some positions offer a greater ability to perform due diligence. Therefore, the OECD breaks down the supply chain into two groups: upstream companies and downstream companies.¹⁹⁹ Upstream companies include all the actors from the mine to the smelter or refiner.²⁰⁰ Downstream companies are all the companies who use conflict minerals after they have been smelted or refined.²⁰¹ This separation “reflects the fact that internal control mechanisms based on tracing minerals in a company’s possession are generally unfeasible after smelting, with refined metals entering the consumer market as small parts of various components in end products.”²⁰²

The OECD recommends that upstream companies cooperate to set up an internal control system over minerals that pass through their hands. Mineral shipments should be traceable, and a record of the chain of custody should be kept,

genocide.” *Id.* at 20-21.

194. *See id.* at 9 (recommending countries follow the OECD Guidance).

195. *Id.* at 12; *see* S.C. Res. 1807, 1857, 1896, *supra* note 59 (all recognizing the link between illegal exploitation of natural resources and conflict in the DRC). OECD Guidance references relevant security council resolutions to describe non-state armed groups under sanction. OECD GUIDANCE, *supra* note 61, at 21 n.3; *see, e.g.*, S.C. Res. 1807, *supra* note 59, ¶¶ 9, 13(e) (describing “[i]ndividuals operating in the Democratic Republic of the Congo and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement” as individuals under sanction). But Security Council resolutions seemingly include FARDC as an armed group under sanction. *See, e.g.*, S.C. Res. 1896, *supra* note 59 (naming FARDC as an armed group). There is a question then as to whether the OECD Guidance would apply to the FARDC. *See* STEPHEN L. KASS, LETTER REGARDING FILE NUMBER S7-40-10, SECTION 1502 OF THE DODD-FRANK ACT, NEW YORK CITY BAR: COMMITTEE ON INTERNATIONAL HUMAN RIGHTS 4 (Jan. 31, 2011), *available at* <http://www.nycbar.org/pdf/report/uploads/20072054-CommentsonSection1502oftheDodd-FrankAct.pdf> (arguing why FARDC should be considered an ‘armed group’ within the meaning of the OECD).

196. *See* OECD GUIDANCE, *supra* note 61, at 22 (stating that support is broadly defined and includes extortion or illegal taxes of intermediaries).

197. *Id.* at 3.

198. *Id.* at 12.

199. *Id.* at 32.

200. *Id.*

201. *Id.* at 33.

202. OECD GUIDANCE, *supra* note 61, at 33; *see also* PRENDERGAST & LEZHNEV, *supra* note 36, at 6 (“These countries should insist that verifiable documentation accompanies the minerals, documenting the chain of custody to ensure that they are conflict free, and that they have been legally taxed by the Congolese authorities.”).

preferably in electronic format.²⁰³ Downstream companies, in *their* due diligence, should review the due diligence of the smelters and refiners. If the downstream companies determine that the upstream companies' due diligence and supply chain record are in compliance, then they should be able to rely on that record.

The Guidance creates a "five-step framework for risk-based due diligence."²⁰⁴ Step one emphasizes a culture of transparency within companies and directs companies to collect information regarding both legal and illegal payments made during transport and export.²⁰⁵ International concentrate traders and mineral re-processers should make transparency part of the exporters' contractual obligation and should pass information collected from local mineral exporters to downstream users.²⁰⁶ Smelters and refiners are given similar guidance and asked to compile gathered information in an electronic database.²⁰⁷ Downstream companies are recommended to incorporate the information provided by smelters and refiners into their supply chain due diligence.²⁰⁸

Step two recommends that companies "identify and assess risk in the supply chain"²⁰⁹ and have a system whereby certain risks generate red flags that trigger more stringent due diligence.²¹⁰ Risks include the direct or indirect support of armed groups, but also the risk of human rights violations by contracted security, the risk of corrupt officials or mineral handlers in incorrectly passing on information about mineral shipments, and the risk created where there are limited tools for implementing or enforcing due diligence.²¹¹ When analyzing the OECD Guidance, it becomes apparent that the risks associated with artisanal mining are more numerous and more problematic than those associated with large-scale mining because of the increased number of hands through which the minerals pass.

Step three recommends that companies create a strategy to respond to the risks identified in step two.²¹² The OECD Guidance recommends that companies use what leverage they have over suppliers to minimize risks.²¹³ Step four

203. OECD GUIDANCE, *supra* note 61, at 38.

204. *Id.* at 17.

205. *Id.* at 17, 29.

206. *Id.* at 38.

207. *Id.*

208. *Id.* at 39.

209. OECD GUIDANCE, *supra* note 61, at 18.

210. *Id.* at 33. Red flags are divided into two categories: origin & transport red flags, and supplier red flags. *Id.* Mineral origin and transport red flags arise when minerals come from, or are transported through, conflict afflicted or high-risk areas. *Id.* A red flag may also arise when minerals supposedly come from a country does not have large reserves of the mineral, or when the mineral originates in a known transit country. *Id.* Supplier red flags arise when upstream actors have an interest in companies that operate in a conflict afflicted, high-risk, or transit country, or a country with small reserves, or where an upstream actor is known to have sourced from one of those countries within the past twelve months. *Id.* at 33-34.

211. *Id.* at 35 (providing a flow chart showing the many ways that a transparent supply chain is put at risk).

212. *Id.* at 18.

213. *Id.*

recommends that smelters' and refiners' supply chain due diligence be audited by an independent third party.²¹⁴ The audit should compare the smelters' and refiners' due diligence against the principles in the OECD Guidance.²¹⁵ The OECD Guidance says that auditors should confer with authorities and organizations in the country of origin to determine whether the information provided by suppliers, smelters, and refiners is accurate.²¹⁶ The OECD Guidance recommends that local exporters give auditors access to all local exporter documentation and records concerning a mineral's supply chain and "[f]acilitate safe access to [an] on-the-ground assessment team."²¹⁷ Other actors in the supply chain should allow auditors access to documentation and records. Step five recommends that companies then report their due diligence policies and practices.²¹⁸

3. The Kimberley Process as an Example

The trade of conflict minerals used to support violence in the DRC is roughly analogous to the use of proceeds from the sales of diamonds to finance civil wars in Africa.²¹⁹ In 2000, the UN commissioned the Fowler Report, which pointed out specific individuals, companies, and African and European countries who had violated UN sanctions and diamond trading regulations.²²⁰ The report detailed the link between the illegal diamond trade and violence in the third world.²²¹ The result of this report was UN Security Council Resolution 1295 and the establishment of the Kimberley Process.

The Kimberley Process is an import-export scheme that requires all participating countries to design internal controls to ensure conflict diamonds are not included in diamond shipments, either imported or exported. Diamonds must be shipped in tamper-resistant containers and must have attached a Kimberley Process Certificate (KPC), verifying that the container has no conflict diamonds. Independent auditors from buying companies may inspect shipments. Participating countries should only export diamonds to other participating countries. In addition, buyers and sellers of diamonds must give a warranty on all shipments that, to their

214. *Id.* at 19.

215. OECD GUIDANCE, *supra* note 61, at 47.

216. *Id.* at 49.

217. *Id.*

218. *Id.* at 19.

219. *See generally Fact #15*, DIAMONDFACTS.ORG, http://diamondfacts.org/facts/fact_15.html (last visited Feb. 1, 2012) ("An estimated 65% of the world's diamonds come from African countries."); *Fact #2*, DIAMONDFACTS.ORG, http://diamondfacts.org/facts/fact_02.html (last visited Feb. 1, 2012) (stating that pre-Kimberly Process diamond sales, which financed the civil war, were estimated at 4%); GLOBAL WITNESS, A ROUGH TRADE 3-4 (1998) (stating that the National Union for the Total Independence of Angola (UNITA) party sold diamonds on the international market, taking in at least U.S. \$3.72 billion and using the proceeds to continue a civil war in which over 500,000 people died).

220. U.N. Panel of Experts on Violations of Security Council, Rep., transmitted by letter dated March 10, 2000 from the Chairman of the Security Council Comm. established pursuant to resolution 864 (1993) concerning the situation in Angola addressed to the President of the Security Council, U.N. Doc. S/2000/203 (Mar. 10, 2000).

221. *Id.*

knowledge or on the guarantee provided by the supplier, the shipment is free of conflict diamonds. According to the diamond industry, conflict diamond sales have been reduced to less than 1% of annual sales.²²²

4. Challenges in Implementing a Transparent Supply Chain Record

Both the OECD Guidance and the ITRI recommend some form of record that follows minerals as they move from mine to smelter, albeit in different formats. For the remainder of this Comment, this record is referred to as a transparent supply chain record (TSCR). The OECD Guidance relies on corporations to install and oversee a TSCR. The OECD Guidance recognizes that there will be different degrees of input depending on an actor's position in the supply chain. The expectation is that the input will be practical and insightful.

However, the OECD Guidance does not give enough consideration to the difficulty of implementing a TSCR in a CACMC where security is poor. It also does not consider the difficulty of executing a long and weighty paper trail in an area such as the eastern DRC.

The ITRI's solution of consolidating security tags and Certificates of Provenance at various points along a supply chain will be useful for managing the paper trail and bureaucracy inherent in a TSCR program, but neither the OECD Guidance nor the ITRI tin supply chain address the very real problem of smuggling. One way minerals can be smuggled is for bags to be lightened along the way. To avoid this, bags should be made as tamper-proof as practical, and tampering with bags should be visibly evident. Where tampering is detected, it should be noted on the TSCR. Repeated tampering should raise red flags for international buyers.

Another way minerals are smuggled is by never declaring them in the first place. What never makes it onto the record cannot be missed. Therefore, a thorough inventory of mines, especially SSM in the eastern DRC, should be accomplished, noting their monthly average output. This establishes a baseline. Deviation from the baseline should trigger a red flag and an investigation.

Whatever TSCR program is put into place, it will have to be monitored, updated, and properly regulated. As successful as the Kimberley Process claims to be, it has been criticized for failing to curb smuggling and for failing to be properly regulated.²²³ A conflict minerals TSCR will also fail if the underlying problems of poor physical security, corruption, and weak governance are not dealt with concomitantly.

222. *Fact #2, supra* note 219.

223. *Credibility of Kimberley Process on the Line, Say NGOs*, IRIN, <http://www.irinnews.org/Report.aspx?ReportId=84949> (last visited Feb. 1, 2012) (quoting Ian Smillie, an architect of the Kimberley Process, in his resignation letter: "when regulators fail to regulate, the system they were designed to protect collapse. . . . I feel that I can no longer in good faith contribute to a pretense that failure is success").

C. Implementing a Transparent Supply Chain Record in Conflict Afflicted Conflict Mineral Countries

Even a perfect TSCR will not sever the connection between conflict minerals and their exploitation by armed groups in CACMCs if the TSCR is not implemented in those conflicted afflicted countries. As pointed out above, if a TSCR is too burdensome or proves infeasible, then issuers may choose to only buy minerals from non-CACMCs. Conflict minerals will still be mined and sold from the eastern DRC, but the potential for one of the world's largest and most influential consumer electronics market to effect change in the eastern DRC will have been lost. The goal of section 1502 is not merely to sell DRC conflict free products, but actually to defund the armed groups operating in the eastern DRC.

This Comment suggests a three-pronged approach to implementing a successful TSCR in the CACMCs. The first prong is for CACMCs to pass uniform and legally binding legislation implementing a TSCR program. The second prong is to increase physical security at the mines, along the trade routes, and at the border. The third prong is to perform frequent, random, and unannounced inspections at various points from the mine to the smelter. All three goals present considerable challenges, but all three are necessary to ensure that section 1502 severs the tie between commercial products and the funding of armed groups in the eastern DRC without inducing the mineral industry to abandon minerals mined in the eastern DRC.

What should also be obvious is that any solution must be regional.²²⁴ Section 1502 covers minerals from not just the DRC, but from adjoining countries as well.²²⁵ A regional solution will require the mining industry and governments from CACMCs to work together to implement a TSCR. It will require a commitment, not just by the United States, but also by the entire international community, to eradicate the link between conflict minerals and armed groups operating in CACMCs. There must be a sustained and increased military presence not only by the FARDC, but also by the AU and UN. In addition, there should be legislation similar to section 1502 passed in other important markets. Finally, there must be an understanding that the only solution is a long-term solution.

1. Uniform TSCR Standards in CACMCs

To implement an effective TSCR, there must be legally binding obligations on the mining industry. To implement it regionally, there must be legislation in all of the CACMCs. This legislation should be uniform.

Rather than passing legislation, the DRC's response to the conflict minerals has been to ban mining in three provinces of the eastern DRC: Maniema, North

224. Dodd-Frank Act § 1502(e)(1) (describing the ways in which section 1502 affects the GLR region, not just eastern DRC); *see generally* Dana Michael Hollywood, *It Takes a Village . . . or at Least a Region: Rethinking Peace Operations in the Twenty-First Century, The Hope and Promise of African Regional Institutions*, 19 FLA. J. INT'L L. 75 (2007).

225. Hollywood, *supra* note 224, at 153.

Kivu, and South Kivu.²²⁶ Banning mining theoretically gives the government the breathing room it needs to remove both the FARDC and non-state armed groups currently exploiting minerals.²²⁷ However, the government has been unable to enforce the ban,²²⁸ and the ban has also had the unintended consequence of slowing progress by the ITRI to tag and trace cassiterite mined in the region.²²⁹ After six months, the government of the DRC has indicated it may soon phase out the ban.²³⁰ This, frankly, has been time wasted.

The DRC must enact legislation immediately that implements a tagging and tracing system similar to the system proposed above and as informed by the EITI and OECD Guidance.²³¹ It should work with other regional governments to introduce legislation in those countries as well. The ICGLR has shown a commitment to solving the problem of conflict minerals regionally. In an effort to promote their mining industry, Rwanda stated in 2009 that it wanted to join the EITI.²³² Rwanda has made efforts to introduce a TSCR in some of their mines in a pilot program in which the DRC participated until the mining ban was put in place.²³³ At this point, however, a pilot program will not suffice. An industry-wide program must be put in place, and it must be made enforceable by law. Problems identified by ITRI must be corrected.²³⁴

226. *DR Congo Bans Mining in Eastern Provinces*, BBC, <http://www.bbc.co.uk/news/world-africa-11269360> (last visited Feb. 1, 2012).

227. *See Kabila Decides to Ban Mineral Trade: Why?*, KIVU KWETU (Sept. 26, 2010), <http://kivu-kwetu.blogspot.com/2010/09/kabila-decides-to-ban-mineral-trade-why.html> (describing the move by President Kabila and questioning its motives).

228. Bahati Jacques, *Army Disobeys President's Ban on Mining in Eastern Congo*, AFRICAN FAITH & JUSTICE NETWORK (Jan. 28, 2011), <http://afjn.org/focus-campaigns/promote-peace-d-r-congo/30-commentary/928-army-disobeys-presidents-ban-on-mining-in-eastern-congo.html>; FACED WITH A GUN, *supra* note 4, at 29, 53 (describing the government's 2008 attempt to ban mining and explaining that the ban was short-lived because of lack of enforcement and because locals complained that the airplanes flying minerals out were the same planes that flew food and supplies in, so therefore the ban was stopping the food shipments).

229. *Tin and Tantalum Industries Target 31st March 2011 for Full Implementation of iTSCi Conflict Mineral Tagging*, ITRI (Nov. 8, 2010), http://www.itri.co.uk/pooled/articles/BF_NEWSART/view.asp?Q=BF_NEWSART_321354; *US Conflict Minerals Law Could Push Prices Higher – Analysts*, MINING WEEKLY (Feb. 4, 2011), <http://www.miningweekly.com/article/conflict-minerals-law-could-push-prices-higher---msci-esg-2011-02-04>.

230. *DR Congo Ban May Be Phased Out*, ITRI (Feb. 9, 2011), http://www.itri.co.uk/pooled/articles/BF_NEWSART/view.asp?Q=BF_NEWSART_322342.

231. *See supra* text accompanying notes 193-218.

232. GOVERNMENT OF RWANDA, MINISTRY OF NATURAL RESOURCES, A REVISED RWANDAN MINING POLICY 34 (2009).

233. ITRI, TECHNICAL CHALLENGES ENCOUNTERED & SOLUTIONS DEVELOPED IN THE iTSCi PILOT PROJECT IN SOUTH KIVU I (2010).

234. *Id.* ITRI describes many of the challenges encountered during its pilot program in eastern DRC (terminated when the mining ban was instituted). Some problems, such as the mixing of tagged and non-tagged minerals at the *comptoirs* are due to the incomplete nature of the program. Other problems, such as inaccurate scales and tearing bags are problems that can be fixed immediately. Other problems such as insufficient numbers of regulators and irregularities

The governments of the GLR must work with the metals industry to craft and pass legislation quickly that requires the tagging and tracing of all conflict minerals mined within their borders. There must also be crosschecks ensuring that any minerals that pass into their country were tagged in the export country. These laws should be uniform across the borders. It makes little sense for exporters, customs officials, and industry actors to comply with multiple TCSR schemes. Uniform standards are potentially more difficult to implement as they require greater cooperation among the ICGLR governments, but uniformity is critical. Non-uniform standards will lead to confusion and create opportunities for the tag and trace record to be compromised.

Implementing this legislation will be difficult. There are technical and practical problems of crafting and passing legislation quickly. There are also endemic problems: government and military officials are themselves entangled in the exportation of minerals from the GLR.²³⁵ There is widespread collusion and corruption between these officials and exporting companies, non-state armed groups, and international buyers.²³⁶ Given the lack of transparency in the eastern DRC, the weak governance, and the financially vested interests, it is wishful thinking to expect the local stakeholders (the mine operators, the exporting companies, or the violent groups currently exploiting the minerals) to be the prime movers behind any reform in the mineral industry.²³⁷

However, section 1502 is a change-forcing piece of legislation. Countries will comply or be ostracized by U.S. issuers, as well as by those with legitimate mining interests. Uniform standards, made enforceable through legislation in all of the CACMC countries, are a good first step. Because of the endemic problems of corruption and collusion, however, legislation in CACMCs is not a cure-all.

with their pay can be fixed, but will likely require foreign aid. Still other problems such as corruption and lack of oversight are endemic and are precisely the problems that a tag and trace program seek to fix. *Id.* at 2-6.

235. FACED WITH A GUN, *supra* note 4, at 30-37 (describing the systematic control of mines, the illegitimate taxation of mineral shipments, and the bribing and profit sharing with military officials and local and national civilian officials).

236. U.N. Group of Experts on the Democratic Republic of Congo, transmitted by letter dated Nov. 23, 2009 from the Chairman of the Security Council Comm. established pursuant to resolution 1533 (2004) concerning the Democratic Republic of Congo addressed to the President of the Security Council, ¶¶ 125, 127-30, 142-63, U.N. Doc S/2009/603 (Nov. 23, 2009) [hereinafter Group of Experts Letter]. FDLR and Mai Mai groups in N. Kivu have allied to exploit gold reserves. *Id.* Operating in N. Kivu is a company called Glory Minerals, an exporting company. The company is fully authorized to operate in the DRC and export gold. *Id.* Mr. Kabila Kakule, a government official in the N. Kivu town of Butembo is directing all small traders to sell their gold to Glory Minerals for export. *Id.* Mr. Kakule, in an email, assured a Belgian gold refining company that the gold being sold to them was not from areas controlled by FDLR and Mai Mai groups, even though the U.N. Group of Experts has established that Glory Minerals does source gold from FDLR controlled areas. *Id.* In addition, Glory Minerals often travels to Kampala, Uganda and Dubai, UAE to sell gold. In a similar fashion, gold from S. Kivu that comes from FDLR and FRF controlled regions is smuggled into Burundi and sold international buyers, particularly in Dubai. *Id.*

237. *See, e.g., id.* ¶¶ 133-41 (explaining that gold is smuggled from N. Kivu villages through Kampala and onto Dubai).

2. Increasing Physical Security on the Ground in the Eastern DRC

“Peacekeeping is not a job for soldiers, but only a soldier can do it.” – Dag Hammerskold²³⁸

While the overarching goal of a TSCR is to “eliminate the capacity of natural resources to feed war and insecurity,”²³⁹ the problem of implementing a TSCR in the eastern DRC to some extent presents a catch 22. The absence of strong political and civil institutions, the inability of Kinshasa to maintain a strong presence in the eastern DRC,²⁴⁰ and the collusion between the *comptoirs*, the military, the armed groups, and other elements within all the GLR countries create an ideal atmosphere for the exploitation of resources in the eastern DRC that fund armed groups.²⁴¹ At the same time, the presence of the armed groups makes implementing a TSCR program difficult. While it is nearly impossible to create peace and stability in the eastern DRC without stopping the armed groups, it is likewise nearly impossible to stop the armed groups without increasing, to some extent, the stability and transparency of the region so that a TSCR program can be implemented and a major source of funding can be cut off.

A top priority, therefore, must be to regain some physical security in the region so that the rule of law can have effect. Mines and trade routes must be demilitarized. They must then be monitored and protected, both from the FARDC and from non-state armed groups.²⁴² Trade routes must be vigilantly patrolled. Border security must be tightened to prevent the overland flow of conflict minerals.²⁴³ Customs officials must be better trained to detect illegal shipments. And, to the extent feasible, the government of the DRC must maintain better control of their airspace to avoid smuggling by plane. The map mandated by section 1502 could prove useful in setting priorities for the government of the DRC and for continuing foreign aid. How exactly these goals should be met is outside of the scope of this Comment, but continued foreign assistance is an essential element. While ultimate responsibility must lie with the states themselves,²⁴⁴ CACMCs can benefit greatly from training, funding, and military and civilian

238. DEP’T OF THE ARMY, FM 100-23 PEACE OPERATIONS 1 (1994) (quoting Former U.N. Secretary General Dag Hammerskjöld).

239. Peter Uvin, Andre Bourque, & Craig Cohen, *Regional Solutions to Regional Problems: The Elusive Search for Security in the African Great Lakes*, 29 FLETCHER F. WORLD AFF. 67, 75 (2005).

240. FACED WITH A GUN, *supra* note 4, at 53 (explaining that the FARDC has actually prevented SAESSCAM (the government agency that monitors artisanal mines) officials from entering mines, and that some mining officials have given up regulating the mines, either out of fear, or hopelessness); SPYROS DEMETRIOU & SALAMAH MAGNUSON, STRENGTHENING UNITED STATES FOREIGN POLICY IN THE DEMOCRATIC REPUBLIC OF THE CONGO, 23 (2010) [hereinafter ECI White Paper].

241. FACED WITH A GUN, *supra* note 4, at 26.

242. Group of Experts Letter, *supra* note 236, ¶ 378(8).

243. *Id.* ¶ 378(5).

244. U.N. Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, ¶ 68, U.N. Doc. A/63/677 (Jan. 12, 2009).

capacity building.²⁴⁵

First, the FARDC cannot alone reduce the influence of armed groups in the eastern DRC, not least because they *are* one of the armed groups doing the exploiting.²⁴⁶ While the FARDC is part of the problem, as the national military, it must also be part of the solution. The situation is currently beyond what can be expected of civilian controls. Civil servants do not react well to threats of violence. A well trained military under the control of legitimate civilian leadership can. But there is an obvious conflict with demilitarizing mines and trade routes and then placing the military in charge of monitoring the demilitarization. The FARDC will need help. Foreign assistance has proven to be effective.²⁴⁷ The international community should continue to provide technical support in the form of training and guidance.²⁴⁸ Assistance should be contingent on cooperation by the DRC government in improving transparency within the FARDC and government agencies.²⁴⁹ Help should come from three actors: the UN, the AU, and the United States.

The UN's commitment to its peacekeeping mission, MONUSCO,²⁵⁰ must be reaffirmed.²⁵¹ MONUSCO has been important in protecting civilians and overseeing elections and peace accords.²⁵² It can be instrumental in training the FARDC as well as monitoring elections.²⁵³ Once mines and trade routes are demilitarized, MONUSCO should help the FARDC ensure those areas remain demilitarized.²⁵⁴ But while the UN is fully capable of monitoring the peace with so called "chapter VI and a half"²⁵⁵ actions, it is less capable of making peace through

245. *Id.* ¶¶ 11, 25, 65 (stressing the effectiveness of training military and police units on human rights abuses, the need for building the state capacity to respond to human rights violations by encouraging participation among civil groups, regional organizations, and private industry, and the need to support the AU so that it may be a more effective force for peace).

246. *See supra* text accompanying notes 24-27.

247. *See* ECI White Paper, *supra* note 240, at 26-27 (describing how international aid in cooperating with the government of the DRC has contributed to the demobilization and reintegration of a significant number of combatants, and has helped rebuild the infrastructure and social services within eastern DRC).

248. Group of Experts letter, *supra* note 236, ¶ 375(5); ECI White Paper, *supra* note 240, at 47-53.

249. ECI White Paper, *supra* note 240, at 47-48.

250. S.C. Res. 1925, ¶ 1, U.N. Doc. S/RES/1925 (May 28, 2010) (deciding that MONUC should be renamed to MONUSCO).

251. *Id.* ¶ 2 (MONUSCO's mandate ends on June 30, 2011).

252. ECI White Paper, *supra* note 240, at 25.

253. *U.N.: DRC Elections Marred by Violence*, UNITED PRESS INTERNATIONAL, http://www.upi.com/Top_News/Special/2012/03/20/UN-DRC-elections-marred-by-violence/UPI-47931332265642 (last visited Apr. 30, 2012) (noting that the highly contested 2011 presidential elections were marked with violence by the Congolese military and that the results of the election are questioned by Western leaders).

254. *See* S.C. Res. 10299 ¶ 17, U.N. Doc. S/RES/10299 (June 28, 2011) (calling on MONUSCO to carry out spot checks and regular visits to mining sites, trade routes, and markets).

255. *Honouring 60 Years of United Nations Peacekeeping*, UNITED NATIONS, <http://www.un.org/events/peacekeeping60/60years.shtml> (last visited Feb. 23, 2011) (quoting former U.N. Secretary General Dag Hammarskjöld).

armed intervention.²⁵⁶ Rather, the UN must follow up on its commitment to promote peace by supporting regional organizations.²⁵⁷

The regional organization *potentially* best suited for increasing physical security in the DRC is the AU.²⁵⁸ Not only has the AU committed itself to increasing security in the eastern DRC,²⁵⁹ but it is better suited to confront the cultural issues at work in the GLR.²⁶⁰ Recognizing the regional nature of the conflict, the AU should, with the support of the UN, launch a humanitarian intervention mission in the eastern DRC.²⁶¹ The mission should support the FARDC's efforts to remove non-state armed groups from the region, either by integrating armed groups into the FARDC or by disarming them.²⁶² However, like the FARDC, the AU does not have the capacity to suppress armed groups in the eastern DRC by itself.²⁶³ Effective AU action will require a far greater commitment by the international community to fund, equip, and train the AU.²⁶⁴

256. Thomas G. Weiss, *Overcoming the Somalia Syndrome—“Operation Rekindle Hope?”*, 1 GLOBAL GOVERNANCE 171, 175 (1995).

257. United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 9, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) (resolving to provide more resources for conflict prevention, peacekeeping, peace-building, etc., and to “strengthen cooperation between the United Nations and regional organizations”).

258. INT’L CONFERENCE ON THE GREAT LAKES REGION, REGIONAL PROGRAM OF ACTION FOR PEACE AND SECURITY, PROJECT 1.1.1, DISARMAMENT AND REPATRIATION OF ALL ARMED GROUPS IN EASTERN DRC 1 (2006) [hereinafter ICGLR PEACE AND SECURITY PROJECT] (explaining that the AU has committed itself to “forcefully disarm[ing] the negative forces in the eastern DRC”); CONSTITUTION OF THE AFRICAN UNION art. 3(f), (h). Under Article 3 of the Constitution of the African Union, two objectives of the AU are to “promote peace, security, and stability on the continent,” and to “promote and protect human rights in accordance with the African Charter on Human and Peoples’ Rights.”

259. See ICGLR PEACE AND SECURITY PROJECT, *supra* note 258, at 5-6. In 2006, the ICGLR set forth a plan for disarming and repatriating armed groups operating in the eastern DRC. The plan required voluntary disarmament, and where that failed, forcible disarmament of rebel groups by the FARDC, the AU, and the U.N. ECI White Paper, *supra* note 240, at 22-23. There has been partial success at integration and voluntary repatriation of armed groups into the FARDC.

260. David. D. Jividen, *It Takes a Region: A Proposal for an Alternative Regional Approach to UN Collective Force Humanitarian Intervention*, 10 USAFA J. LEG. STUD. 109, 130 (2000) (quoting Sabina Lautensach, who wrote that “perhaps a regional organization can cope better with cultural aspects of a dispute because of its close proximity to the issue.”).

261. See ICGLR PEACE AND SECURITY PROJECT, *supra* note 258, at 6 (proposing the launch of a cooperative offensive).

262. OXFAM AMERICA, *supra* note 24, at 13-14. While disarmament and integration is a plausible goal, it must be recognized that simply integrating rebel forces into a corrupt military will not solve anyone’s problem. In addition, the FARDC may already be too large as is. Therefore, concomitant with the integration process, must be a process to reintegrate some soldiers into civil society. Rather, integrated forces as well as FARDC forces must be retrained.

263. ECI White Paper, *supra* note 240, at 43 (noting that the AU is already financially and politically strained by its missions in Darfur and Somalia).

264. *World Must Help Fund, Train African Union Peacekeeping Missions – UN*, UN NEWS CENTRE, <http://www.un.org/apps/news/story.asp?NewsID=32714&Cr=afri+un&Cr1> (Oct. 26, 2009) (calling for AU funding and support).

UN and even AU support, however, must only be temporary.

The U.S. Secretary of State will soon put forth its strategy for addressing the link between conflict minerals and human rights abuses.²⁶⁵ The strategy must help CACMCs “(I) monitor and stop commercial activities involving the natural resources of the [DRC] that contribute to the activities of armed groups and human rights violations . . . and (II) develop stronger governance and economic institutions . . . [to] improve transparency in the cross-border trade . . . [of] natural resources.”²⁶⁶ As explained above, to accomplish this mission, mines, trade routes, and export points must be demilitarizing and monitored.²⁶⁷ Unlike the UN and AU, which will contribute peacekeepers and soldiers to accomplish the mission, the United States should contribute expertise and money.²⁶⁸ The United States is already contributing over one billion dollars per year to aid the DRC.²⁶⁹ That money should be split between creating a professional military that conforms to the rule of law and strengthening the civilian institutions that enforce a TSCR program.

3. A Familiar Approach to Verification

A TSCR is only as good as the information fed into it. However due diligence is accomplished (and one way or another U.S. issuers covered under section 1502 will have to perform due diligence), accuracy and reliability can only be assured if the facts that are reported are verified.²⁷⁰ Without assurances that the information in a TSCR is accurate, a TSCR regime is hollow. The OECD Guidance suggests that upstream companies should create “on-the-ground” assessment teams who can cooperate with local and central governments as well as with civil society and local suppliers.²⁷¹ The OECD Guidance further suggests that the assessment teams

265. *Understanding Conflict Minerals Provisions*, ENOUGH PROJECT, <http://www.enoughproject.org/special-topics/understanding-conflict-minerals-provisions> (last visited Feb. 1, 2012) (outlining the Secretary of State’s strategy deadline).

266. Dodd-Frank Act § 1502(c)(1)(B).

267. *See Honouring 60 Years of United Nations Peacekeeping*, *supra* note 255 (emphasizing the importance of monitoring).

268. *See* Presidential Decision Directive/NSC-25 25, 3 (May 3, 1994), *available at* <http://www.fas.org/irp/offdocs/pdd/pdd-25.pdf> (stating U.S. support for peacekeeping operations by regional organizations); *see also id.* at Annex II. Annex II lists factors for U.S. troop participation in UN peace operations. The situation in the DRC likely does not fit within the parameters enumerated in Annex II.

269. Bureau of African Affairs, *Background Note: Democratic Republic of the Congo*, U.S. DEP’T OF STATE (Sep. 30, 2011), <http://www.state.gov/r/pa/ei/bgn/2823.htm> (“The U.S. Government provided \$306 million in bilateral assistance to the DRC in 2010 to support economic reform and transparency efforts. The United States is also the largest donor to the United Nations stabilization mission in the DRC (MONUSCO), contributing almost one-third of MONUSCO’s \$1 billion annual budget.”).

270. *Trust but Verify: From Transparency to Competitive Advantage*, PWC, at 4, <http://www.pwc.com/us/en/view/issue-13/trust-but-verify-pg4.jhtml> (last visited Feb. 1, 2012) (highlighting the importance of supply chain transparency).

271. *See* OECD GUIDANCE, *supra* note 61, at 37 (establishing system of controls and transparency).

should employ “community-monitoring networks” and should investigate actual conditions at mines, trading houses, and along trade routes.²⁷² This is an unrealistic solution.

The current operating environment is extremely hazardous. Requiring upstream companies to form assessment teams that operate in conflict afflicted zones places a large personnel and financial burden on the companies.²⁷³ Even if some level of security is reinstated in the eastern DRC, assessment teams operating for companies would likely have little incentive to disprove a company’s TSCR. Auditors only ensure that records are properly maintained and that the procedures for operating the supply chain record conform with relevant standards for transparency.²⁷⁴ Though extensive cooperation by local and central governments, mine operators, and exporting companies to ensure compliance would facilitate communication, it would also invite collusion of the exact sort that a TSCR seeks to prevent.²⁷⁵

Another possible solution is state-operated compliance. Such a solution has been proposed in The Guiding Principles for the Implementation of the United Nations “Protect, Respect and Remedy” Framework.²⁷⁶ While this state-centric solution is more traditional, it is self-defeating in conflict-affected areas where governance is weak.²⁷⁷ What is required is a paradigm shift in the way we think about conflict minerals and in how we verify compliance with international human rights.

The trade in conflict minerals has contributed to the deaths of millions of people.²⁷⁸ Are weak controls and fragmented approaches really appropriate? Consider how the world has responded to other deadly instrumentalities. Nuclear

272. *See id.* at 37-38 (collecting and processing information on minerals from conflict-affected and high-risk areas).

273. *See id.* at 46, n.22 (assessing a change in circumstances by taking into account many factors).

274. *See generally* International Organization of Supreme Audit Institutions, THE INTERNATIONAL STANDARDS OF SUPREME AUDIT INSTITUTIONS, PRINCIPLES OF TRANSPARENCY AND ACCOUNTABILITY, available at [http://www.issai.org/media\(794,1033\)/ISSAI_20_E_endorsement_version.pdf](http://www.issai.org/media(794,1033)/ISSAI_20_E_endorsement_version.pdf) (describing auditing principles for “Supreme Audit Institutions”).

275. OECD GUIDANCE, *supra* note 61, at 36 (recommending that companies “put in place an organisational structure and communication processes that will ensure critical information . . . reaches relevant employees and suppliers”). Mine operators or export companies might be made aware of when and where an “assessment” would take place, thus giving them a chance to bring their operations temporarily into compliance. *Id.*

276. *See generally* Special Representative of the Secretary-General, *Guiding Principles for the Implementation of the United Nations ‘Protect, Respect and Remedy’ Framework*, U.N. Doc. A/HRC/14/27, available at <http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf> (by John Ruggie) (draft). The United Nations Human Rights Council endorsed this on June 16, 2011.

277. *See id.* at 15 nn.69-70 (explaining complexities in conflict-affected regions).

278. *See supra* text accompanying notes 49-58.

weapons are governed by the Nuclear Non-Proliferation Treaty (NNPT),²⁷⁹ chemical weapons by the Chemical Weapons Convention (CWC),²⁸⁰ and conventional weapons by the Convention on Certain Conventional Weapons (CCCW).²⁸¹ This Comment does not suggest that conflict minerals are in the same category as nuclear weapons, but rather that, from a humanitarian perspective, the threat presented by conflict minerals is more insidious.²⁸² Nuclear weapons have killed fewer than 300,000 people, a small number relative to the death toll in the GLR as a result of the conflict minerals trade.²⁸³ Conventional weapons are not in the same category as “weapons of mass destruction,” but they are nevertheless regulated for their destabilizing effects.²⁸⁴ The trade in conflict minerals can certainly be described as “destabilizing.”

The weapons conventions comparison shows the emphasis the international community places on inspections compliance.²⁸⁵ Just as effective conflict mineral transparency requires that loss of minerals to smuggling or illegal mining be minimized, the NNPT emphasizes the need to ensure that nuclear materials are fully accounted for.²⁸⁶ Conflict minerals are even more analogous to chemical weapons. The chemical industry is widespread and has many important commercial uses, just like the metals industry. Depending on the types of chemicals involved, the CWC classifies and establishes differing inspection requirements for facilities.²⁸⁷ Classification could also be applied to conflict

279. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169.

280. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter Convention on Chemical Weapons].

281. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *opened for signature* Apr. 10, 1981, 1342 U.N.T.S. 137.

282. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 279, 21 U.S.T. at 483, 729 U.N.T.S. at 169. The preamble to the NNPT provides, “[c]onsidering the devastation that would be visited upon all mankind by a nuclear war.” This language shows that one main reason nuclear weapons have been so heavily regulated is not because of their actual death toll, but because of their potential death toll. The death caused by conflict minerals is not as immediately catastrophic as nuclear weapons, but, qualitatively, is equally catastrophic in terms of death toll over time.

283. John. W. Dower, *The Bombed: Hiroshimas and Nagasaki in Japanese Memory*, 19(2) DIPLOMATIC HISTORY 275, 282 (1995) (providing a high estimate of approximately 300,000 deaths).

284. U.N. Secretary-General, *General and Complete Disarmament: Transparency in Armaments: Report on the Register of Conventional Arms: Report of the Secretary-General*, ¶ 38, U.N. Doc. A/47/342 (Aug. 14, 1992) (recommending expansion of categories of weapons under the convention because of their “destabilizing potential”).

285. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 279, 21 U.S.T. art. 3; Convention on Chemical Weapons, *supra* note 280, arts. 7, 9.

286. Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755, 802 (1994) (“The centerpiece of nonproliferation verification is the accounting of nuclear material produced at each declared facility to detect and prevent any diversion of such materials to illegitimate weapons programs.”).

287. *See* Convention on Chemical Weapons, *supra* note 280, art. 9.

minerals, depending on the risk of the region in which they are mined or the strength of domestic regulatory institutions. CWC inspections come in two types: routine and challenge.²⁸⁸ Routine inspections are scheduled ahead of time, but challenge inspections are initiated by States when they feel another State is not complying with its CWC obligations.²⁸⁹

This Comment suggests that the best way to ensure compliance with any TSCR program is to verify compliance through legally enforceable inspections.²⁹⁰ The nature of the inspections should fall somewhere between routine and challenge inspections. That is, inspections should be routine, but also unscheduled with little prior notice.²⁹¹ Inspectors should be neutral third parties, neither tied to corporations nor ICGLR governments.²⁹² Inspectors should be given full access to inspect mining conditions and records, country export records, and *comptoir* intake records. This Comment does not attempt to determine appropriate penalties for violation of a TSCR program, but violations should be focused on action and scienter.²⁹³ Records of violations should also be made public, both to inform the public and to aid victims in litigation against violators.

A possible argument against inspections of mines and government agencies will be that they violate the DRC's (or any other country that is inspected) sovereignty.²⁹⁴ But the aegis of sovereignty is not absolute,²⁹⁵ and it should be broken when the alternative is the continuation of a humanitarian crisis.²⁹⁶ Section

288. *Id.* arts. 7, 9; Kellman, *supra* note 286, at 813 (noting that one purpose of routine inspections is to verify that “operations conform to national declarations”).

289. Convention on Chemical Weapons, *supra* note 280, art. 9.

290. *See generally* Int'l Atomic Energy Agency [IAEA], *Strengthening the Effectiveness and Improving the Efficiency of the Safeguards System and Application of the Model Additional Protocol*, IAEA Doc. GC(45)/23 (Aug. 17, 2001).

291. *Id.* ¶17 (“Unannounced inspections, because of their unpredictability to a State and a facility operator, not only enhance the Agency’s ability to detect diversion of nuclear material and/or the misuse of a facility but also help to deter any such actions.”).

292. *See supra* text accompanying notes 235-37. Because of the high level of corruption and collusion within the DRC government, DRC agencies are not, at this time, the appropriate bodies to perform inspections. *But see* iTSCi Discussion Paper, *supra* note 147, at 10 (arguing that the government body responsible for ASM, SAESSCAM, should be responsible for verifying a TSCR).

293. For example, if a mine operator tags minerals as conflict free and the subsequent downstream actors have no knowledge of this deception, only the mine operator should be held accountable. However, if downstream actors know or should reasonably be expected to know that a violation is occurring, they should have an obligation to make this knowledge public.

294. *See generally* International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) [hereinafter *The Responsibility to Protect*] (positing that inspections violate state sovereignty).

295. *Id.* ¶ 1.35; Hollywood, *supra* note 224, at 93 (quoting British Foreign Secretary Douglas Hurd: “[T]he division between internal and external policies of a nation is ‘not absolute.’”).

296. *See* International Commission on Intervention and State Sovereignty, *supra* note 294, ¶ 2.25 (describing the emerging principle of humanitarian intervention, despite potential violations of sovereignty, where a nation is unable or unwilling to stop—or is itself a perpetrator of—human

1502 is not paternalistic; rather, it is a call for accountability. When the DRC is able to reliably implement control over its mining industry, routine inspections should come to an end.

D. The Special Problem of Gold

Gold presents a unique problem. The sale of gold dwarfs all other minerals in CACMCs in terms of export quantity and revenue.²⁹⁷ The market for gold is larger than the market for other conflict minerals.²⁹⁸ Because most gold is used to make jewelry,²⁹⁹ and because most jewelry producers are not issuers,³⁰⁰ section 1502's disclosure requirements will likely have a limited effect on gold. Gold, even when mined under the worst humanitarian conditions, will find a buyer.

Understandably, CACMCs resources are limited—as are the international community's.³⁰¹ It will likely prove very difficult, both politically and economically, to implement a fully compliant TSCR program in all the CACMCs with a robust inspection program and increased security at mines, along trade routes, and at the border. Priorities must be named, and because gold is both quantitatively more important to armed groups and qualitatively harder to control once mined, the number one priority should be to monitor the extraction and exportation of gold.³⁰²

Fortunately, while gold has a larger market than other conflict minerals, the buyers of the eastern DRC's gold are mostly known.³⁰³ Legal pressure should be brought to bear on these buyers. The international community should respond to

rights).

297. See Group of Experts Letter, *supra* note 236, at 32-41, 72 (detailing widespread smuggling of gold, valued at \$1.2 billion, far more than DRC's other conflict mineral exports combined).

298. *Demand and Supply Statistics*, WORLD GOLD COUNCIL, http://www.gold.org/investment/statistics/demand_and_supply_statistics/ (last visited Jan. 30, 2012) (showing the increased scale and value of gold consumption worldwide in 2010); U.S. Dep't of the Interior, *Mineral Commodity Summaries 2010*, U.S. GEOLOGICAL SURVEY 66, 110, 162, 176 (2010), <http://minerals.usgs.gov/minerals/pubs/mcs/2010/mcs2010.pdf> (last visited Jan. 30, 2012) (placing the approximate value of 2009 U.S. consumption of gold at \$6.2 billion, columbite-tantalite at \$230 million, and tungsten (wolframite) at \$400 million).

299. *Demand and Supply*, WORLD GOLD COUNCIL, http://www.gold.org/investment/why_how_and_where/why_invest/demand_and_supply/ (last visited Jan. 30, 2012); *Human Consumption of Gold*, ONLY GOLD, <http://www.onlygold.com/tutorialpages/HumanConsumptionFS.htm> (last visited Jan. 30, 2012).

300. Letter from Patrick Dorsey, Senior Vice President, Secretary and Gen. Counsel, Tiffany & Co., to Elizabeth M. Murphy, Sec'y, SEC 3 (Sept. 29, 2010), available at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-17.pdf> ("Most users of gold, and certainly most jewelers, are not 'reporting companies.'").

301. *Sub-Saharan Africa, Peace and Security*, USAID, http://www.usaid.gov/locations/sub-saharan_africa/sectors/cm/index.html (last visited Feb. 1, 2012) (writing about "Conflict in Africa: One of the Most Significant Obstacles to Development").

302. Group of Experts Letter, *supra* note 236, ¶¶ 240-47 (discussing unlicensed control over gold).

303. See *id.* ¶¶ 32-41 (expressing that despite large market for gold, DRC's gold buyers are mostly known).

the crisis and make it illegal for anyone to purchase CACMC gold not fully compliant with a TSCR program. More so than other conflict minerals, gold should be treated as a potentially dangerous instrumentality. Criminal sanctions, with heavy fees, should be applied to buyers who have bought gold not in compliance with a TSCR program. These are extraordinary measures, but the link between CACMC gold and violence is extraordinary.

E. Additional Actions by the United States and the International Community

The above recommendations present the United States and international community with a number of tasks essential to implement a TSCR, but there are additional efforts that should be made by the United States and the international community at large. The role of the United States does not stop with section 1502. The United States should increase funding for institutional control over mining, mineral tagging, and mineral tracing.³⁰⁴ The United States must also recognize that the problem of conflict minerals will not be solved overnight—there must be an understanding that only sustained pressure will stop the flow of blood. Any strategy put forth by the U.S. Secretary of State pursuant to section 1502³⁰⁵ should factor in the need for broader disclosure, and the United States should urge other large markets to follow their lead. The SEC should continue to apply pressure to the governments of CACMCs and metals industry by demanding disclosure, but it should also be flexible with section 1502's implementation.³⁰⁶ Mandating immediate compliance is a recipe for failure where the solution is long-term and outside the control of any one power.

The international community can help in at least four ways. First, large markets such as the European Union,³⁰⁷ China, India,³⁰⁸ and the United Arab Emirates³⁰⁹ should recognize the role they play in funding armed groups in CACMCs. They should enact legislation similar to section 1502 to widen the circle

304. See ECI White Paper, *supra* note 240, at 58 (highlighting where U.S. support is most needed).

305. Dodd-Frank Act § 1502(c)(1) (“Strategy and Map to Address Linkages between Conflict Minerals and Armed Groups”).

306. Letter from Richard Durbin, United States Senator, and Jim McDermott, United States Congressman, to Mary Schapiro, Chairman, United States Sec. and Exchange Comm’n (Oct. 4, 2010), available at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-22.pdf> (explaining a possible SEC strategy for conflict minerals in the DRC).

307. *Electronics*, EUROPEAN COMM’N, <http://ec.europa.eu/trade/creating-opportunities/economic-sectors/industrial-goods/electronics/> (last visited Jan. 30, 2012) (explaining that Europe is one of the world’s largest markets for consumer electronics with annual imports of €229 billion).

308. *India, China Have Strongest Gold Markets: WGC*, COMMODITY ONLINE (Feb. 17, 2011, 14:55 GMT), <http://www.commodityonline.com/news/India-China-have-strongest-gold-markets-WGC-36557-3-1.html> (stating that India and China are the largest markets for gold in the world).

309. Group of Experts Letter, *supra* note 236, ¶ 125 (showing that the majority of gold mined in eastern DRC is sold in the UAE).

of responsibility.³¹⁰ Second, financial support and technical assistance should be given to the respective mining divisions within CACMCs to help enforce the law. This assistance should, however, be contingent on continued improvement by CACMC institutions to increase the rule of law, especially over the military. Third, the international community must make a concerted effort to break up diaspora networks that provide funding for armed groups outside the context of conflict minerals.³¹¹ Finally, if a TSCR program is implemented, smuggling—especially of gold—should be punished with UN sanctions similar to Kimberley Process violations.³¹²

V. CONCLUSION

Section 1502 has potential. Implemented correctly, and supplemented by intelligent foreign assistance by the United States and the international community, section 1502 could help transform the GLR. Transformation starts by accepting responsibility. In some ways, section 1502 does that by recognizing the link between violence in the eastern DRC and consumer products sold in the United States. But acknowledging a link is not enough. The United States must embrace its responsibility to protect civilians from human rights violations, both within and outside its borders.³¹³ Businesses must also accept that, in a globalized world, they too have a responsibility to ensure their actions do not contribute to human rights violations.³¹⁴

Following acceptance comes action. But action must be credible. As has been shown above, without comprehensive support by CACMC governments, the international community, and affected issuers, section 1502 will be counterproductive. A feasible TSCR program must be implemented in the eastern DRC and in neighboring countries. The program must take regional factors such as lack of infrastructure and the effect of SSM into account. The program must be implementable. Implementation will require a renewed and more robust effort to demilitarize mines and their trade pathways and modalities.

Implementation must be credible. Corruption within CACMC governments

310. “*Conflict Minerals*” and *Political Instability in Eastern DR Congo*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/news/en/headlines/content/20101203STO05948/html/Conflict-minerals-and-political-instability-in-eastern-D-R-Congo> (Dec. 8, 2010) (noting that Louis Michel, co-president of the EU-ACP has already requested the EU to pass legislation similar to section 1502).

311. See Group of Experts Letter, *supra* note 236, ¶¶ 90-123, 378 (recommending a “common and coherent approach” to dismantling diaspora networks operating in North America, Europe and Africa, responsible for fund-raising, propaganda, money laundering and coordinating military exercises).

312. See *supra* text accompanying notes 219-22 (describing Kimberley Process).

313. See generally *The Responsibility to Protect*, *supra* note 294 (protecting human rights internationally).

314. John Gerard Ruggie, *Current Development: Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 824 (2007) (noting that corporations are now actors “with the capacity to bear some rights and duties under international law”).

and the mining industry must be combated through training and, more importantly, independent verification. Without verification procedures that are both independent and reliable, armed groups will continue to exploit minerals with the added protection that TSCR mining will be viewed as legitimate.

Finally, the United States must ensure that section 1502 does not operate as a knee-jerk reaction to a publicized problem. The people of the GLR and the United States deserve better. The United States must take steps to ensure that section 1502's disclosure is implemented, but in a way that acknowledges the difficulty of operating in a conflict-affected country.³¹⁵ Should section 1502 create a de facto embargo, as many suggest it will, section 1502 will cause more harm than good, and a "DRC Conflict Free" label will only serve to assuage conscience—cold comfort for the people of the DRC.

315. *See supra* text accompanying notes 96-100 (providing that the effectiveness report should be used as a tool to reveal flaws in both section 1502 and the U.S. strategy towards the DRC).