Towards Stability in the Democratic Republic of Congo-The Dodd-Frank Act's Strengths and Weaknesses

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“[D]eveloping countries must be able to reap the benefits of international trade.” - Anna Lindh, former Swedish Minister of Foreign Affairs.

Towards Stability in the Democratic Republic of the Congo – The Dodd-Frank Act’s Strengths and Weaknesses

Rebecca N. Sells*

I. INTRODUCTION

When people hear the Democratic Republic of the Congo (herein Congo or DRC), unsurprisingly images of the “heart of darkness,” poverty, and despair arise. The Congo has been in a state of conflict even before gaining independence. Although the international war involving rebel groups and various African militias, which killed millions starting in 1996, was thought to be the height of Congo’s despair, the eastern part of the country continues to suffer from ongoing conflicts with rebel leaders controlling the region and using violent tactics, such as rape, to maintain power. Fueling the war is the growing need for precious minerals located in the region. International response to the crisis has come in many forms, including traditional aid. Yet more recently, foreign nations, including the United States, have looked at how legislation can help stop the violence. Unfortunately, the proposed legislation often has unforeseen or unintended consequences that arguably do more harm than good.

I will argue this is the case for the Dodd-Frank Act, Section 1502, which took effect in 2013.† The main summary of the legislation is as follows:

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† Rebecca Sells is a 2014 JD candidate at Seattle University School of Law. She received her BA in International Relations from University of California, Davis. Prior to law school, she spent a year in Africa working with a nonprofit agency and traveling through 13 countries. She would like to extend a special thanks to the many people who have
Issuers with conflict minerals that are necessary to the functionality or production of a product manufactured by such person to disclose annually whether any of those minerals originated in the Democratic Republic of the Congo or an adjoining country. If an issuer’s conflict minerals originated in those countries, Section 13(p) requires the issuer to submit a report to the Commission that includes a description of the measures it took to exercise due diligence on the conflict minerals’ source and chain of custody.2

More simply, the Act requires US companies to report if their products contain “conflict minerals”3 obtained from the DRC or other neighboring countries.4 If the products do contain conflict minerals, the company must report what steps were taken to ensure that the minerals were not obtained via means that continue the conflict in the DRC.5 There are no repercussions if a company uses conflict minerals—the hope is that the consumers will be diligent and avoid these products.6

Although those behind the Dodd-Frank Act had good intentions, the actual implications of the legislation have been overwhelmingly negative.7 Not only has the legislation been made extremely weak due to lobbyists and private interests, but it also has already had harmful effects on the

2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
By examining the legislation, its impact, and its potential alternatives, this paper will aim to combine legal analysis with a comprehensive discussion on what is necessary to stabilize the region. While others have discussed which American laws should change to address the conflict, this article will argue that such reporting measures are too weak, do not address the root problems, and, therefore, are ineffective in curing the violence in the DRC. Instead, I will present a variety of considerations that the United States and other nations should explore in order to create a legitimate, stable system of mineral exports while addressing the root problems fueling the crisis.

In order to present a comprehensive understanding of the factors contributing to the violence in the DRC, I will begin with a brief history of the region. Following this will be a discussion on the conflict minerals themselves, including what minerals are mined, what they are used for, and how they are extracted and exported to become part of a finished product. With the background material covered, I will then move on to what forms of aid have been given, what types of legislation have been enacted to address the issues within the DRC, and why they have or have not worked. This leads to a discussion of the Dodd-Frank Act, including how it originated and the changes it has gone through to gain the support necessary to enact the legislation. A critical lens will be used to examine the realistic consequences and benefits of the legislation in the DRC and discuss the weaknesses within the text that, much due to lobbyists, promise little liability for corporations absconding from the reporting process. Lastly, a prescriptive element will be offered, whereby I present a variety of considerations that must be explored in developing a plan to stabilize the region and end the violence that has killed so many.

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8 Seay, supra note 7, at 15.
II. HISTORY OF THE DRC

Recorded history of the territory making up the DRC spans back thousands of years, but for purposes of this paper only the history from colonization forward will be discussed. The first recorded discovery of the DRC by Europeans was in 1482 when a Portuguese explorer, Diogo Cao, discovered the region and made relations with a local king.9 Through the sixteenth and seventeenth centuries, the Congolese welcomed the European missionaries and traders.10

In the mid-1800s, Belgium’s King Leopold II went about planning how he could gain control of the region and plunder its resources for his personal wealth.11 Leopold obtained more than 400 signed treatises with Congolese leaders and was able to have the DRC allocated to him during the 1884 Berlin Conference, which carved the continent into pieces for the European nations. 12 Leopold subsequently established the Congo Free State and named himself as Head of State.13 Over the next quarter of a century, Leopold used brutal tactics to obtain resources and export them to Europe. It is estimated that 13 million Congolese were killed or worked to their death under Leopold’s reign, while millions of others suffered physical deformities due to the tactics used to control the people and obtain resources.14

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9 SCOTT F. BOBB, HISTORICAL DICTIONARY OF DEMOCRATIC REPUBLIC OF THE CONGO (Zaire) 2 (Scarecrow Press 1999).
10 Id. at 3.
11 Id.
12 Id. For more information on the Berlin Conference see GEORGE MARTELLI, LEOPOLD TO LUMUMBA: A HISTORY OF THE BELGIAN CONGO 1877-1960, 97–107 (1962).
13 BOBB, supra note 9, at 4.
14 Michela Wrong, Belgium Confronts Its Heart of Darkness, THE INDEPENDENT (Feb. 23, 2005), http://www.independent.co.uk/news/world/europe/belgium-confronts-its-heart-of-darkness-6151923.html. Examples of the brutality include the chopping off of hands if the rubber quota was not met. With the constant plundering of the land, the resources sought became scarcer and Leopold’s tactics became more brutal. See ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1999).
Although many of the atrocities were shielded from Europeans, reports of the conditions did escape in the early part of the new century and resulted in Belgium taking control over the Congo in 1908, therein forming the Belgium Congo. In 1959, riots erupted in the Congo amidst Africa’s uprising against colonial control. Belgium held on until June 30, 1960, when it handed over control to the Congolese.

Patrice Lumumba became the first prime minister of the newly formed state but was assassinated in 1961. Power struggles for the prime minister position occurred until 1965 when Joseph Mobutu seized power. Mobutu would rule for a long time with little success—he named the country Zaire and attempted to bring in foreign investments that ultimately failed.

The DRC made international headlines during the Rwandan Genocide in 1994 when the Tutsi ethnic minority sought refuge across the DRC border. After several years, most of the Tutsis returned back to Rwanda, while approximately 100,000 stayed in the DRC and aligned with DRC Tutsis. Unhappy with Mobutu’s rule, the Tutsis gained support from neighboring countries and advanced on Kinshasa, the capital city. Through a series of political maneuvers Mobutu was ridded of his power in 1997 and was

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15 BOBB, supra note 9, at 4.
16 Id. at 5.
17 Id. at 6.
18 Id. at 6–7. The assassination is believed to have been supported by both the United States and Belgium. Lumumba, in trying to stabilize the region, sought help from outside countries, and when he was refused help by the United States, he contacted the Soviet Union. In the height of the Cold War, the United States feared the country would align with the Soviets, therein justifying the assassination. Georges Nzongola Ntalaja, Partice Lumumba: The Most Important Assassination of the 20th Century, THE GUARDIAN (Jan. 17, 2011, 5:39 AM), http://www.guardian.co.uk/global-development/poverty-matters/2011/jan/17/patrice-lumumba-50th-anniversary-assassination.
19 BOBB, supra note 9, at 8.
20 Id. at 8–13.
21 Id. at 17.
22 Id. at 18.
23 Id. at 17–18.
replaced with Laurent Kabila, who subsequently renamed Zaire the Democratic Republic of the Congo.24

Although reports of violence and mass murders by the Tutsis occurred prior to Kabila’s reign, violence continued to expand after Kabila was accused of corruption for appointing his staff as members of the government.25 Anti-Kabila rebel groups were formed, supported by Rwanda, Uganda, and Burundi.26 Angola, Zimbabwe, and Namibia sent troops to counter the rebels and support Kabila.27 War broke out. In 1999 it was reported that 20 armed rebel groups were active in the DRC with an estimated 5.4 million Congolese dying between 1998 and 2008 as a result of the war.28

In 2001, while the war was raging, a bodyguard assassinated Kabila.29 Kabila’s son, Joseph Kabila, subsequently took power.30 Shortly thereafter, the young Kabila attempted to break a peace agreement, obtaining promises from both the Rwandan and Ugandan governments stating that they would withdraw their troops from the DRC.31 Unfortunately, the

24 Id. at 18.
25 Id. at 19–20.
26 Id. at 20.
27 Id.
28 This is a highly disputed figure. The International Rescue Committee published its number of 5.4 million dying from “war-related causes.” Special Report: Congo, INTERNATIONAL RESCUE COMMITTEE http://www.rescue.org/special-reports/special-report-congo-y. But other agencies have criticized this number, saying that many of the deaths would have occurred without the war due to common illness and disease. See DRC Congo War Deaths ‘Exaggerated’, BBC (Jan. 20, 2010, 6:51 PM), http://news.bbc.co.uk/2/hi/africa/8471147.stm.
30 Id.
31 Id. Although they did go about pulling back troops, both Uganda and Rwanda were found via the UN to delay their withdrawal in an attempt to obtain minerals. Id.
prospect of peace did not last long—by 2004 Rwandan rebels were wreaking havoc in the East.32

To this day, many rebel groups continue to control parts of the DRC.33 Although UN Peacekeepers and other aid groups have been in the DRC for many years attempting to calm the situation and provide support for innocent civilians, the violence continues to take its toll.34 It is estimated that 45,000 Congolese die every month, mostly from lack of food, preventable illness, and other consequences of war.35 Many of the Congolese who are not killed by the conflict are subjected to heinous crimes,

33 Jeffery Gettleman, Congo Slips into Chaos Again as Rebels Gain, N.Y. TIMES (Nov. 25, 2012), http://www.nytimes.com/2012/11/26/world/africa/as-rebels-gain-congo-again-slips-into-chaos.html?_r=0. In November 2012, the eastern city of Goma was taken by rebels. Goma is the epicenter for the aid industry in the east. I visited Goma in July 2010, and was amazed to see the expansive aid network, complete with lavish housing developments for aid workers and upscale restaurants. Id. It is not only rebel groups that control the trade and cause violence in the DRC. The Congolese army is corrupt and often perpetrates crimes. The problem has been made worse by the integration of rebel groups into the army. Because of the serious violations, the UN had to sever their relationship with the army. This problem raises the complex issue of how to ensure civilian safety and secure the supply chain if those hired to protect the system are actually endangering it. Congo Jeffery Gettlemen, Army Helps Rebels Get Arms, U.N. Finds N.Y. TIMES, Nov. 25, 2009, http://www.nytimes.com/2009/11/25/world/africa/25congo.html?_r=0.
34 Why international aid has been unable to end the violence in the DRC is a complex topic, worthy of its own article. Several of the biggest factors include the type of war being fought by the rebel groups, including the use of “bush” tactics whereby they move around the region terrorizing civilians and destroying infrastructure as they go. Much of the aid industry is focused on providing basic necessities to civilians, including food and healthcare and is not looking at the long-term stability of the region. For an in-depth discussion on ways in which international support fails to successfully aid Africa, see DAMBISA MOYO, DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY (2010). It should be acknowledged here that I in no way intend to discredit those agencies providing short-term aid to the region; I simply want to acknowledge that there is a difference between aid agencies aimed at providing short-term relief, and those focusing on long-term stability.
including rape and other forms of sexual assault.\textsuperscript{36} Rebel groups, some backed by neighboring countries, show no intent of ending the conflict.\textsuperscript{37}

While financial gain from the precious minerals is one reason for the violence, many argue the mineral trade is a symptom of the crisis and not a cause.\textsuperscript{38} This argument is based on the fact that not all mines are points of controversy; many mines are operated peacefully.\textsuperscript{39} That the mineral trade is not the sole cause of the violence raises the point that even if the trade can be made secure and stable, it will not stop the violence within the DRC. Therefore, other issues causing the violence must be addressed in creating an effective response.

The issue of land rights is also a reason for the violence and is a common problem within Africa as a whole. Land is disputed because “customary, informal and statutory land-tenure systems ‘overlap’ geographically, in the sense that a certain parcel of land might be claimed by different actors under different systems.”\textsuperscript{40} The land disputes are fought fervently because,

\textsuperscript{36} Jeffery Gettleman, \textit{Congo Study Suggest a Higher Rate of Rape in Congo}, \textsc{N.Y. Times} (May 11, 2011),\textsc{http://www.nytimes.com/2011/05/12/world/africa/12congo.html}. The Eastern part of the DRC is thought to have the highest rate of rape in the world. \textit{Id.} Estimates put the number of rapes at 2 million, with a rape said to occur every minute. \textit{Id.} Rape is used as a weapon of war to instill fear and gain control of civilians by rebels. \textit{Id.} Many of the crimes against civilians are perpetrated by the Congolese army, who, while under the control of the government, are notorious for unethical and violent behavior, corruption, and a failure to follow orders. \textit{Id.}

\textsuperscript{37} The past five years in the DRC have been marked by complex power struggles and attempts at peace negotiations with intervening foreign aid groups. \textit{See Democratic Republic of Congo}, \textsc{BBC}, (Feb 5, 2013, 12:48 AM), \textsc{http://www.bbc.co.uk/news/world-africa-13286306}.

\textsuperscript{38} George Fominyen, \textit{Mineral Certification: The Path to End Congo’s Violence?}, \textsc{ALERTNet} (May 6, 2011 6:56 PM), \textsc{http://m.trust.org/alertnet/news/mineral-certification-the-path-to-end-congos-violence/}.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} Chris Huggins, \textit{Land, Power and Identity, Roots of Violent Conflict in DRC}, 5 (Int’l Alert, Nov. 2010) \textsc{available at} \textsc{http://www.internationalalert.org/sites/default/files/publications/201011LandPowerIdentity.pdf}. 

\textsc{Seattle Journal for Social Justice}
while land is essential for livelihood, “it is also bound up very strongly with issues of ‘identity and power.’”\textsuperscript{41} 

Ethnic tension is another reason for the violence.\textsuperscript{42} While ethnic tension existed in the DRC prior to the Rwandan genocide, tension rose when Ugandans and Rwandans entered the DRC following the genocide.\textsuperscript{43} The ethnic tension is tied to economic status and political power and is complicated by the sheer multitude of ethnic groups in the region.\textsuperscript{44} While a full discussion on ethnic tension is unnecessary for this paper, it should be noted that rebel groups generally do not have members from multiple ethnic groups.\textsuperscript{45}

Two other corresponding causes of the violence that must be noted are the lack of legitimate economic opportunity and government. Without economic opportunities to provide income, many Congolese are pushed towards the violence as a means to provide for themselves and their families. Without a functioning government to enforce laws, there are no repercussions for their actions.

While many of the general causes of the violence are due to the complexity of the situation, the specific reasons for the violence, such as what land is fought over by what groups, are largely unknown. The impact of not understanding the “full picture” of the situation will be discussed throughout this paper.

\begin{footnotes}
\footnote{\textit{Id.}} \footnote{\textit{Background: The Congo Conflict, PEACEBUILDINGDATA.ORG, http://www.peacebuildingdata.org/drc/congo-conflict (last visited Oct. 11, 2013).}} \footnote{\textit{Id.}} \footnote{\textit{Id.}} \footnote{\textit{Id.}} \footnote{\textit{Id.}}
\end{footnotes}
Source: A Map of the DRC, The World Factbook

CONGO, DEMOCRATIC REPUBLIC OF THE, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html (last visited Nov. 9, 2013) (Exhibit A: Map of the DRC. Note that Kinshasa lies on the western part of the country, while the present day conflict is mainly in the east on the Rwandan and Ugandan border, around the city of Goma).
III. MINERALS: A FACTOR BEHIND THE VIOLENCE

The DRC is extremely rich in natural resources. Besides timber and rubber, the DRC contains, among others, diamonds, gold, tin, tungsten, and tantalum (herein coltan).47 The following table displays estimates of gold, tin, tungsten, and coltan located in the DRC.

<table>
<thead>
<tr>
<th></th>
<th>Amount estimated to be produced in DRC annually</th>
<th>Percent of world production within DRC</th>
<th>Common Uses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tin</td>
<td>24,000 metric tons.</td>
<td>6-8%</td>
<td>Solders, tin plates, chemicals.</td>
</tr>
<tr>
<td>Tungsten</td>
<td>1,300 metric tons.</td>
<td>2-4%</td>
<td>Tools, alloy, tungsten steel.</td>
</tr>
<tr>
<td>Coltan</td>
<td>155 metric tons.</td>
<td>15-20%</td>
<td>Capacitors for cell phones, automobiles, computers, and other electronics.</td>
</tr>
<tr>
<td>Gold</td>
<td>6.5 tons.</td>
<td>Unknown</td>
<td>Jewelry, coins, electronics.</td>
</tr>
</tbody>
</table>

Source: The Business of a Better World48

Although the four minerals listed in the chart are the focus of the Dodd-Frank Act, the most fascinating mineral is coltan, a mineral unknown to many. Coltan is essential for electronics and is used in capacitors, which are

47 Because the Dodd-Frank Act only includes tin, tungsten, coltan and gold, the many other resources found in the DRC will not be discussed.
needed for nearly every electronic item. Put simply, cell phones and other electronics would not be able to function without coltan.

Unsurprisingly, the development of the cell phone industry and other electronics has increased the demand for coltan. Coltan garnered international attention in the early 2000s during the rapid increase in consumption of electronics; coltan prices went up ten-folds in fear of a shortage of the precious mineral.\textsuperscript{49} The price increase fueled a global fear that electronics would increase in price or become unavailable.\textsuperscript{50} Although the price of coltan decreased, spikes continue to occur.\textsuperscript{51}

The process by which coltan, gold, tungsten, and tin are extracted is a complex byproduct of the continuing conflict and disarray. While some of the minerals are extracted from large mines, many are initially extracted by artisanal miners—miners who do not use or use minimal, mechanical tools and extract minerals on a small scale.\textsuperscript{52} Once extracted, the minerals are transferred between sales agents, trading houses, exporters, and traders.\textsuperscript{53}


\textsuperscript{50} Id.


\textsuperscript{52} BSR, \textit{supra} note 48, at 5. Thirteen large mines and over 200 small mines have been documented in the DRC. The Congolese government does not recognize the legitimacy of most of these artisanal mines, and, therefore, the process is carried out illegally. This subjects the miners to exploitation by rebel groups because the miners cannot seek government support or protection. Id. The extraction of the minerals is a dangerous process. With no safety restrictions, many miners are injured or killed. The environmental impact of mining should also be mentioned. Unlike regulated mines with environmental restrictions, the artisanal miners are not subject to such, and therein are able to proceed in whatever manner they see fit, with no consideration of the long or short term impact to the environment. These impacts include deforestation and water pollution. Id. at 9–10.

\textsuperscript{53} See id. at 13.
Before leaving the DRC, the minerals may have exchanged hands more than a dozen times and been mixed with minerals from other mines. With so many exchanges, it is unsurprising that upon exportation most minerals are of an unknown origin, leaving the buyer completely unaware of the specific mine from which the minerals were extracted.

Although the minerals are normally exported to Asia—where they are processed into goods to be sold worldwide—it is important to discuss East Africa’s role in the trade. Countries like Rwanda and Uganda have little to no natural stock of the minerals discussed but still derive a substantial profit from the exportation of these minerals. The profit is a result of illegal exportation of the minerals. For example, Uganda, which shares a border with the DRC, is said to traffic gold from the DRC and export millions of dollars worth of it to the United Arab Emirates and other countries. Unsurprisingly, because of the large financial gain at stake, many of these East African countries are financially supporting the rebel groups within the DRC.

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54 Id.
55 Id.
57 BSR, supra note 48, at 8.
58 Id. at 8. For example, Tanzania is believed to support an arms dealer that aids one of the rebel groups in the DRC. Donovan, supra note 63. Likewise, both Uganda and Rwanda have been documented as providing financial, along with military support, in the region. But see Comments of William M. Ngeleja, Minister of Energy and Minerals, United Republic of Tanzania, Release No. 34-63547; File No. S7-40-10 (May 23, 2011) (claiming, “Tanzania has, at no point, sought to pursue any strategic or self-interested objectives in the DRC. Furthermore, the United Republic of Tanzania has consequently managed to avoid direct involvement in the conflict around DRC”).
A. Rebel Control of the Mineral Trade and Congolese Civilians

With such a complex process of exportation and lack of stability in the DRC, rebel groups are able to obtain tremendous financial wealth from the trade, thus allowing them to fund their violent tactics. There are two main methods for which the rebel groups are able to obtain profits from the minerals. The first is by controlling the mines directly and renting the space out to the miners, who in turn pay the rebels with money or minerals. The second is where the rebels do not control the mines but impose an illegal tax on the minerals during the exportation process.

Pierre Englebert explains a detailed account of rebel control over mining:

[Actors, like rebel groups or chieftaincies, may also be able to tax people, but they cannot do so legally and must resort to force or popular legitimacy in order to manage levies on the income and assets of people in the regions they control . . . . The Congolese rebel organization RCD, for example, raised its own taxes in the areas it controlled between 1998 and 2003, in addition to servicing established Congolese taxes. It also set up its own monopsony for the purchase of [coltan] . . . , which alone was allowed to market coltan from diggers, in exchange for a monthly tax of $1 million . . . . Yet, many of these rebel taxes remain predicated on physical control or on claims to sovereignty by the rebels. In general, they take place at specific physical locations, like ports of entry, where control can be more easily exercised . . . . In addition, rebels make great use of the local remnants of sovereign state institutions in their strategies of extraction. The RCD, for example, mainly collected taxes through existing regional state agencies, free-riding on their enduring sovereign nature.]

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59 See BSR, supra note 48, at 5 (estimating that between 75 percent and 95 percent of financing came from taxation of minerals).
60 Id. at 5.
61 Id. A recent report found that 12 of the major mines and over half of the 200 artisanal mines were controlled directly by rebel groups. Id.
62 Id.
It is estimated that in 2008 alone, the rebel groups obtained over $185 million because of the mineral trade, thereby allowing them to purchase more weapons and continue the violence.64

Although the mining and exportation process has caused continued violence in the region, many Congolese rely economically on the mineral trade. At least one million people rely on the mineral trade as a source of revenue, while the World Bank estimates, “10 million Congolese (16 percent of the population) in total are in some way dependant [sic] on the artisanal mining industry in the country.”65 As will be seen further in this article, any legislation that impacts the mining sector has and will continue to substantially impact the Congolese civilians.

IV. LEGISLATION IN RESPONSE TO THE CRISIS

A. The DRC’s Approach

In an effort to stabilize the region and legitimize the mineral trade, the Congolese government has made numerous attempts to create legislation. For example, “the DRC’s Mining Law of 2002 require[d] community consultations, disclosure of contract terms by both companies and the government, and revenue transparency through adherence to EITI guidelines.”66

But while attempts have been made by the Congolese government to stabilize the region and legitimize the trade, there are various reasons why they have not succeeded. Lack of transparency and corruption are two of the key problems that have hindered the process. The DRC ranked 160 out of

65 BSR, supra note 48, at 5.
178 in the 2012 Transparency International Corruption Perception Index.\textsuperscript{67} Many politicians act in their own interest, while government agents have been known to illegally tax the mining operations in the DRC and justify those acts based on a lack of government-supplied income.\textsuperscript{68}

Another reason the government has failed to stabilize the trade via legislation is that the government has not protected the trade routes themselves.\textsuperscript{69} Even if transparency initiatives were effective and revenue was documented, there is no guarantee that purchasers would stop obtaining minerals from rebel groups controlling the supply chain.\textsuperscript{70} Regardless of what peace initiatives are put into place, if the trade routes continue to be used in the same manner they presently are, purchasers will continue to finance the rebel groups.

In September 2010, the Congolese government implemented a mining ban in the rebel territory.\textsuperscript{71} Given that the ban was implemented when the Dodd-Frank Act was being finalized, it is uniformly believed to have been a response to the Act.\textsuperscript{72} Many gave credit to Kabila, arguing it was a good sign that the government was willing to take financial losses in order to stabilize the region.\textsuperscript{73}

Although the 2010 ban was hailed by many as a positive step, it raises important considerations about the impact of legislation.\textsuperscript{74} When Kabila and


\textsuperscript{68} See Clementine Burnley, \textit{Natural Resources Conflict in the Democratic Republic of the Congo: A Question of Governance?}, 12 \textsc{Sustainable Dev. Law \\& Pol’y} 7, 8 (2011).

\textsuperscript{69} BSR, \textit{supra} note 48, at 13.

\textsuperscript{70} Seay, \textit{supra} note 7, at 15.

\textsuperscript{71} DR Congo Bans Mining in Eastern Provinces, \textsc{BBC} (Sep. 11, 2010), available at \url{http://www.bbc.co.uk/news/world-africa-11269360}.

\textsuperscript{72} See Seay, \textit{supra} note 7, at 15.

\textsuperscript{73} E.g. Anne DeVoe, \textit{Carrying a Piece of Congo in Our Pockets: Global Complicity to Congo’s Sexual Violence and the Conflict Minerals Trade}, 10 \textsc{Seattle J. for Soc. Just.} 463, 465 (hailing “President Kabila’s temporary ban [as] a positive step towards policy reform on conflict minerals”).

\textsuperscript{74} E.g., \textit{id}.
his military were enforcing the mining ban, it was the Congolese civilians who suffered the most. It is estimated that during the ban one to two million artisanal miners were out of work. As Professor Laura Seay points out, when one considers that each of these miners has roughly five to six dependents, the Act “inadvertently and directly negatively affected up to five to twelve million Congolese civilians.” The loss of income increased rates of hunger, disease, and death.

At the same time, the ban failed to achieve the goal of decreasing the control of the trade by rebel groups because nothing was done to remove the rebels. Instead, the groups stayed in place or advanced their efforts by expanding their smuggling routes and diversifying their exports. The ban lasted until March 2011.

Two schools of thought exist regarding mining bans. The first has a negative view towards them, believing that, whether done by the Congolese government or outside states exporting the minerals, banning conflict minerals will not work. It is argued that imposing a blanket ban will cause the civilian populations dependent on the mineral trade to suffer but will not impact the rebel groups substantially because, instead of exporting the minerals through the banned territories, the groups will make efforts to export the minerals through other areas of the DRC or neighboring countries. This occurred during the 2010 ban.

Even if only minerals obtained via conflict are banned, issues still arise because it is nearly impossible to trace a product that has changed hands so

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75 Seay, supra note 7, at 15.
76 Id.
77 Id. at 16.
78 Id. at 16.
80 BSR, supra note 48, at 12.
81 Id.
82 Id. at 16.
many times. The problem is complicated by the fact that the mines are not regulated, and so the traceability essentially fails from the start. Those in favor of a mining ban acknowledge that it is difficult to differentiate between legitimate minerals and those mined illegally and, therefore, argue that a blanket ban should be put in place until the region is stabilized.\footnote{Id. at 12.} Supporters argue that a “temporary, carefully-implemented ban” could work if “coupled with large-scale regional assistance and probably managed through international institutions” as “part of a solution” with “the ultimate goal [being] to develop effective, verifiably conflict-free sourcing from the region, in collaboration with industry, NGO and other efforts.”\footnote{See id. But at the same time it is argued that a “temporary, carefully-implemented ban” could work if “coupled with large-scale regional assistance and probably managed through international institutions” as “part of a solution” with “the ultimate goal [being] to develop effective, verifiably conflict-free sourcing from the region, in collaboration with industry, NGO and other efforts.” Id.} Although this sounds like a simple solution, it would not only be ineffective for the reasons listed above, but it would also be very damaging to the well-being of the Congolese. The “regional assistance” proposed by the supporters would be nearly impossible to provide given that millions of people rely on the trade, and many of those people live in remote regions.

B. Other International Policies Attempted

Regional programs have been developed to stabilize the situation in the DRC. The Organization for Economic Cooperation and Development ("OECD") designed auditing guidelines for mineral processors.\footnote{Burnley, supra note 68, at 10.} The International Conference of the Great Lakes “committed to a regional certification mechanism, which provides a clear procedure and adequate records of mineral origins."\footnote{Id. It is questionable whether neighboring countries’ efforts are made in good faith. Id. Neighboring countries have a strong incentive not to stabilize the region due to the substantial profits that many of them make from the mineral trade. Id. Stabilization would
worked to increase “due diligence, traceability, and certification processes for tin through the Tin Supply Chain Initiative.”87 Unsurprisingly, each of these programs has battled over issues “relating to cost, implementation, monitoring, human capacity, and resource gaps.”88

Outside of Africa, efforts have been made to create traceability regulations and schemes. One such scheme is PROMINES, a collaborative effort between the DRC government, the World Bank, and industry members that aims to regulate and strengthen the mining sector.89 While PROMINES is a different approach designed by those involved in the mineral trade, it has been “largely ignored and/or confused with the mess surrounding” the Dodd-Frank Act.90

V. US RESPONSE TO CONFLICT MINERALS – THE DODD-FRANK ACT

Over the past decade, global awareness regarding the use of minerals that finance the Congolese violence has increased substantially. This is in part due to the accessibility of information via the Internet, but the efforts of nonprofit groups and reporters have had a substantial impact as well.91

There has been a push to decrease or abolish the use of conflict minerals in American products because of the growing concern over the conflict in

decrease these governments’ incomes and the personal profits politicians obtain from the trade. See BSR, supra note 48, at 8.
87 Burnley, supra note 68, at 10.
88 Id. See also Seay, supra note 7, at 20.
89 Seay, supra note 7, at 20.
90 Id. A long discussion of other international responses to the crisis, including those by individual corporations, countries, and international organizations, could be included here. Due to the focus of this paper, however, the discussion will skip this and instead focus solely on US efforts.
91 Examples of groups seeking to raise awareness regarding the conflict include The Enough Project, which is headed by John Prendergast, former advisor to Condoleezza Rice and award-winning activist. This group aims to raise awareness and seek sustainable change in the DRC. See, e.g., Enough Project, http://www.enoughproject.org/ (last visited Nov. 4, 2013). Likewise, news agencies, particularly those such as BBC and the New York Times, have critically discussed the issue in various articles.
One of the initiatives, House Bill 4128, sought to prevent "articles made wholly or in part with components containing conflict minerals from facilities that have not been audited in accordance with [the legislation]" from being imported. The Bill would have subjected companies to audits and required that all products be marked with the contained mineral’s country of origin. This drastic blanket approach ultimately failed.

A. What the Dodd-Frank Act Entails

The latest attempt to stabilize the region is the Dodd-Frank Consumer Protection Act, signed into law by President Barack Obama on July 21, 2010. The Act was designed to address many of the economic pitfalls that led to the recent financial crisis. But buried within the Act is Section 1502, which is allegedly aimed at securing peace and stability within the DRC. The opening text of the section states the following:

It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to

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92 Conflict Minerals Trade Act, H.R. 4128, 111th Cong. (2009). As will be discussed below, many corporations have sought to oppose the abolition of conflict minerals because it would mean that there would be higher input costs from products obtained elsewhere for legitimate prices. Id.
93 Id at § 7(b).
94 Id at § 6(c)(2)(B)(v).
95 For reasons discussed previously, a blanket ban would not likely have been effective in reducing the violence in the region and would have made it difficult to trace where the minerals originated and if they were truly conflict free.
97 Id.
98 Id at § 1502.
The subsequent provisions describe what is to be enforced. The main thrust of the text is that any companies using conflict minerals—which for purposes of this legislation are tin, tungsten, coltan, and gold—in their products are required to report whether the minerals originated from the DRC or “adjoining countries” if the conflict minerals are “necessary to the functionality or production of the product.” Products that are “conflict free” are described as “not contain[ing] conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country” and are not subject to the legislation. But if the minerals within the product did originate in one of the specified countries, the company must report to the Securities and Exchange Commission (SEC) what efforts were made “to exercise due diligence on the source and chain of custody of such minerals.”

The report must include “[t]he measures taken to exercise due diligence[,] . . . includ[ing] an independent private sector audit of the report that is conducted in accordance with standards established by the Comptroller General of the United States.” Each report requires a description of the products manufactured or contracted to be manufactured that are not “DRC conflict free,” the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to

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99 *Id* at § 1502(a).
100 Conflict Minerals, *supra* note 1, at 56, 293. Issuers must comply with the final rule for the calendar year beginning January 1, 2013, with the first reports due May 31, 2014. Conflict Minerals, *supra* note 1. “Adjoining countries” only includes those sharing a geographical border with the DRC. Therefore, countries such as Kenya and Tanzania who export the minerals do not require labeling.
101 *Id.* at 56, 322.
102 *Id.* at 56, 329.
103 *Id.* at 56, 274.
determine the mine or location of origin.\textsuperscript{104} After formulating a report the issuer must make it “available to the public on its Internet Web site.”\textsuperscript{105}

Essentially, Section 1502 requires a process of self-reporting whereby those companies providing products containing “conflict minerals” are required to submit a report if it is believed that any of the minerals originated in the DRC or neighboring countries. The report, which is subject to a private audit, must discuss what efforts were made to ensure that the minerals did not contribute to the ongoing conflict and were legitimately mined and exported. Upon disclosing that the products contain conflict minerals from the DRC or surrounding region, the company must then make such information available to the public via their company website. The flowchart in Appendix A shows the process with which companies are to proceed.\textsuperscript{106}

VI. WEAKENING OF THE LEGISLATION DUE TO CORPORATE LOBBYISTS AND OTHER INFLUENCES

Although American legislation aimed at improving the conditions within Africa is undoubtedly a positive step towards the acknowledgement of an interdependent economic world and the impact the United States has on the Congolese crisis, the actual text of the legislation, the changes made during the legislative process, and the legislation’s ultimate impact (both thus far and in the future) must be critically analyzed. The first piece of this section will look at changes made to the legislation during its creation and the significant loopholes because of these changes. Next, the broader problems with the Act will be explored. Finally, the Act’s impact in the DRC will be examined.

\textsuperscript{104} Id. at 56, 275.
\textsuperscript{105} Id. at 56, 274.
\textsuperscript{106} Id. at 56, 283.
A. The Exclusion of Mining Issuers Reduces the Effectiveness of the Act and Places an Additional Burden on Reporting Companies

In the original draft of the legislation, mining issuers\textsuperscript{107} were considered to be manufacturers and were thus subject to the reporting rules.\textsuperscript{108} This requirement has now been changed so that mining issuers need not report unless they “also engage in manufacturing.”\textsuperscript{109}

Lobbying by the National Mining Association (herein the “Association”) was likely a substantial reason for the exclusion.\textsuperscript{110} The Association argues that issuers are not perpetuating the violence in the DRC because they have “secure supply chains.”\textsuperscript{111} The Association also argued that Congress has not intended to include issuers as manufacturers based on a plain reading of the statute, previous versions of the applicable section, and legislative statements.\textsuperscript{112}

In excluding issuers, the Commission referred to the prior versions of the Conflict Mineral Statutory Provisions, which defined issuers to be anyone engaged in “the commercial exploration, extraction, importation, exportation or sale of the covered minerals.”\textsuperscript{113} The Commission reasoned

\textsuperscript{107} A mining issuer is one that “engages in the commercial development” of minerals. Development includes the “exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity.” Conflict Minerals, Securities Act Release No. 34-63547 (Dec. 23, 2010), available at http://www.sec.gov/rules/proposed/2010/34-63547.pdf.

\textsuperscript{108} Conflict Minerals, supra note 1, at 56, 292.

\textsuperscript{109} Id. at 56, 280.

\textsuperscript{110} Comments of National Mining Association to Securities Act Release No. 34-63547, (Dec. 23, 2010), available at http://www.sec.gov/comments/s7-40-10/s74010-393.pdf. (“Indeed, publicly-traded mining issuers, with their largely integrated and secure supply chains, were never identified in the legislative process as a cause or contributor to the problem of armed conflict in the DRC region…”).

\textsuperscript{111} Id.


\textsuperscript{113} Conflict Minerals, supra note 1, at 56, 293 (internal quotation marks omitted).
that because the language had been removed, it was an intentional substantive change to the legislation.114

Those in favor of including issuers argue that a potential pitfall of the exclusion is that other companies relying on issuers’ information regarding the status of the minerals now cannot do so, thus making it harder for companies to adhere to the Act and identify whether their minerals are conflict free.115 Similar to this is the argument that, from a practical standpoint, it would make more sense to address the issue from the point of origin before the minerals are exported abroad. By excluding mining issuers, the Commission reduced the burden on the mining issuers but heightened the burden on the other companies required to report under the Act. The task of determining whether the minerals are conflict free would have been easier if they were labeled at the start when they were extracted.

B. The Exclusion of Minerals from Scrap and Recycled Sources Creates Line Drawing Problems and Creates an Opportunity for Products to be Mislabeled

In the proposed text of the legislation, the Act included minerals from recycled and scrap sources.116 As the text stood:

[A]n issuer with conflict minerals that originated from recycled or scrap sources would have been required to disclose in its annual report, under the “Conflict Minerals Disclosure” heading, that its conflict minerals were obtained from recycled or scrap sources and that it furnished a Conflict Minerals Report regarding those recycled or scrap minerals. Also, under the proposed rules, an issuer would have been required to state that its products

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114 Id. at 56, 293.
116 Conflict Minerals, supra note 1, at 56, 329.
containing or produced with recycled or scrap minerals in the Conflict Minerals Report were considered “DRC conflict free.” In addition, such an issuer would have described the measures taken to exercise due diligence in determining that its conflict minerals were recycled or scrap and obtain an independent private sector audit of that report.117

Several concerns resulted from the proposed reporting of recycled goods. First was the fear that the requirement would detour companies from using recycled sources, therein decreasing the reuse of products and increasing the amount of usable products in landfills.118 Second was the concern regarding the difficulty in tracing where the minerals had originally been obtained.119 The National Mining Association emphasized that “the focus of such an inquiry should be the ‘recycled source/origin,’ or point at which the conflict mineral reentered the supply chain after being recycled, not the point at which the recycled conflict mineral was originally mined.” 120 This particular focus would reduce the burden on the companies who would otherwise struggle with discovering the origin points. Third was the argument that armed groups in the DRC are profiting from newly-mined minerals via taxation and control over the mines, and not from the reuse of the goods containing conflict minerals was another argument.121

Not all lobbyists pushed to exclude minerals from scrap and recycled sources outright. Some lobbyists pushed to change the definitions of recycled and scrap minerals and sources.122 Other lobbyists suggested that

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117 Id. at 56, 329–56, 330.
118 Id. at 56, 330.
119 Id.
121 Conflict Minerals, supra note 1, at 56, 332.
122 Id. at 56, 331. See also Comment of Karen Savala, President, Semiconductor Equipment and Materials International (SEMI) Americas, Release No. 34-63547; File No. S7-40-10 (Feb. 15, 2011) (stating: “if those minerals are reclaimed end-user or post-consumer products but would not consider those minerals “recycled” if they are partially processed, unprocessed, or a byproduct from another ore.” Further stating: “a conflict mineral or a conflict mineral derivative that is within, or has been reclaimed from, a used
companies not be subject to the Act if a majority of the minerals came from recycled or scrap sources. Many others presented different definitions for recycled and scrapped sources.

After the proposals were made, a concrete definition of recycled and scrap materials was adopted pursuant to the Organization for Economic and Cooperation Development definition. For purposes of the Act, “conflict minerals are considered to be from recycled or scrap sources if they are from recycled metals, which are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing.” Further, “recycled metal includes excess, obsolete, defective, and scrap metal materials that contain refined or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold.” Lastly, “minerals partially processed, unprocessed, or a byproduct from another ore [are] not … included in the definition of recycled metal.”

The reporting measures for recycled and scrap metals are now such that if a manufacturer inquires and has reason to believe that the minerals may not be from recycled or scrap sources, then “it must exercise due diligence.” If a manufacturer is unable to determine whether the minerals are from a recycled or scrap source, then a Conflict Minerals Report is required. But
if manufacturers do believe that they have used recycled or scrap minerals, they are not required to submit a Conflict Minerals Report and instead must “disclose how they have determined that sources are genuine scrap recycled.”130 The intent of such a disclosure is to avoid “laundering” new minerals to label them as recycled.131

It is unclear what oversight will be provided to ensure that companies accurately disclose their sources. Given that there are enormous costs associated with this legislation, there is an incentive to misrepresent new minerals as scrap and recycled.132 If little or no oversight is provided, then new minerals could intentionally be excluded from reporting.133 Therefore, it is unclear if the intent behind the disclosure—to stop laundering—will be effective.

The potential for unintentional wrongful disclosures is also a concern. American companies could potentially purchase minerals from other parts of the world, such as China or India, believing them to be scrap or recycled. Companies who purchase these minerals from “recyclers” will likely be unable to tell if they are recycled or scrap or have just been made to appear as such. These minerals could in turn be reported as “conflict free.”

131 Id. at 2.
132 Conflict Minerals, supra note 1, at 56, 334. “[I]t is likely that the initial cost of compliance is approximately $3 billion to $4 billion, while the annual cost of ongoing compliance will be between $207 million and $609 million.” Id.
133 Although companies are subject to auditing, if the risk of being “caught” is low and the cost of accurately reporting high, companies may untruthfully report. This risk is true throughout the Act and is a byproduct of the self-reporting scheme.
C. The “Necessary to the Functionality” Requirement is not Clearly Defined and Allows Companies to Determine Whether Their Products are Subject to the Act

Companies are required to subject themselves to the rules of the Act if the conflict minerals are “necessary to the functionality or production of the product.”\(^{134}\) Upon review and during the comments period, many questions were raised regarding what constituted “necessary.” In the final version of the Act, there is no definition.\(^{135}\) Instead, “guidance regarding the interpretation of these phrases” is given.\(^{136}\) Regarding the functionality requirement, the legislation states what a company should consider:

(a) Whether a conflict mineral is contained in and intentionally added to the product or any component of the product and is not a naturally-occurring by-product; (b) whether a conflict mineral is necessary to the product’s generally expected function, use, or purpose; or (c) if a conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.\(^{137}\)

If a product fits under one or more of these categories, then the company is required to follow the reporting process.\(^{138}\) The text of these parameters was intentionally left broad so as to allow companies to determine whether they are within the scope of the legislation.\(^{139}\)

The concern with the flexible language is that companies may incorrectly find that the minerals are not necessary to the functionality of their products. Whether done intentionally or unintentionally, the misclassifying of the product as not containing minerals “necessary to the functionality” reduces any potential positive impact the legislation may have.

\(^{134}\) Conflict Minerals, supra note 1, at 56, 293.

\(^{135}\) Id. at 56, 295.

\(^{136}\) Id.

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) Id.
D. The Exclusion of Conflict Minerals Used for Production of Goods Reduces the Effectiveness of the Act

Initial drafts of the legislation required that companies be subject to the legislation if the conflict minerals were “necessary to the … production.”\(^{140}\) This would have included companies using machinery or products containing conflict minerals in the manufacturing of products. The language was changed in the final bill, which now states that “the conflict mineral must be contained in the product” to subject it to the reporting requirements.\(^{141}\)

As it stands, a manufacturer should consider “whether a conflict mineral is contained in the product and intentionally added in the product’s production process.”\(^{142}\) This includes “the production process of any component of the product; and whether the conflict mineral is necessary to produce the product.”\(^{143}\)

Many groups argued that the requirement of reporting goods made with the help of conflict minerals, but which did not actually contain them, would have substantially broadened the legislation.\(^{144}\) They further argued that the burden placed on companies to discover which equipment contained conflict minerals would have been extensive. The Association Connecting Electronic Industries made all of these arguments during the review process.\(^{145}\) In addition, the company noted that reporting on the production “may be unnecessarily duplicative, as any issuer manufacturing tools or machinery would be required to comply with the proposal if

\(^{140}\) Id. at 56, 296.

\(^{141}\) Id. at 56, 297.

\(^{142}\) Id. at 56, 295.

\(^{143}\) Id.

\(^{144}\) See id. at 56, 297.

conflict minerals are necessary for the functionality of the tool or machine.”  

While the exclusion of production products not containing conflict minerals themselves simplifies the legislation and reduces double counting, it weakens the effect of the legislation. If companies that use conflict minerals in their tools and equipment purchase the tools from companies that are not required to report, such as foreign companies, then the conflict minerals within the equipment are never subject to the Act. Arguably, including goods used in production would have broadened the legislation and been outside of the original scope, but it would have better helped achieve the legislature’s objective.

E. The Exclusion of Generic Goods Allows Companies to Escape Reporting Requirements

Initially, the Act stated that an “issuer that does not manufacture a product itself but that has ‘any’ influence over the product’s manufacturing” would be “considered to be contracting to manufacture that product,” and therefore made to follow the reporting procedures. During the comments period, many concerns were raised regarding companies who sell generic goods produced by other companies but sold under the store’s labels. Those in favor of excluding companies selling generics, including Target, Lowe’s, J.C. Penney, Costco, and Wal-Mart, were able to weaken the legislation and relieve themselves of such responsibility.

As it stands, companies limiting themselves to the following are absolved from reporting:

146 Id. at 6.
147 Conflict Minerals, supra note 1, at 56, 291.
148 Id. 56, 290.
149 Jessica Hozer, Wal-Mart, Target Avoid Mineral Rules, WALL STREET JOURNAL ONLINE (Aug. 22, 2012, 8:26 PM), http://online.wsj.com/article/SB10000872396390444082904577605630361858586.html (noting some of the generic goods which contain conflict minerals include tin cans of food, light bulbs, and clothing items, including shoes).
(a) Specifying or negotiating contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, such as training or technical support, price, insurance, indemnity, intellectual property rights, dispute resolution, or other like terms or conditions concerning the product, unless the issuer specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product; or

(b) Affixing its brand, marks, logo, or label to a generic product manufactured by a third party; or

(c) Servicing, maintaining, or repairing a product manufactured by a third party. ¹⁵⁰

It is unclear what “exercising a degree of influence” includes. The original proposed language included “any influence.”¹⁵¹ This was determined to be too broad, while the commentator’s proposal for “substantial influence” was deemed to be too narrow.¹⁵² But the lack of clear parameters for “any influence” is apt to cause problems and errors in reporting because, just like other language within the Act, it allows companies to mistakenly or intentionally misclassify their products.

Beyond unclear language is another potential loophole: non-reporting companies (those outside of the United States) can supply generic goods to retailers. In turn, retailers will be able to sell the “American” goods while avoiding legislation and associated costs. Not only does this potential loophole encourage overseas production, but it also decreases the potential effect of legislation.

¹⁵⁰ Conflict Minerals, supra note 1, at 56, 291.
¹⁵¹ Id. at 56, 291.
¹⁵² Hozer, supra note 149.
VII. BROADER ISSUES WITH THE DESIGN OF THE ACT

Beyond specific concerns regarding definitions, inclusions, exclusions, and loopholes, many broader concerns are raised regarding the implications of the Act. Among others, these concerns include the issue of self-reporting, the delay in implementing the Act, the costs in implementing the Act, and how it will impact the American economy. This section discusses these concerns and whether they are legitimate or unwarranted. First though, it is necessary to consider the Kimberley Process when analyzing the Act and its potential implications.

The Kimberley Process, the international response to the illegal diamond trade, requires that governments certify their diamonds as conflict free before exporting them to be processed.153 Each exporting and importing country that is participating in the process must follow set guidelines.154 The program has been met with mixed success, with supporters erroneously arguing that it ended wars in Sierra Leone and Angola.155

While the process has not ended wars or the illegal diamond trade, it has had some success in holding countries accountable for their imports and exports and making consumers aware that diamonds fuel conflicts.156 These successes support some prospect of similar legislation dealing with conflict minerals having an impact, but still not solving the root problems fueling the crisis. However, it is important to remember when comparing the Act with the Kimberley Process that 75 countries currently participate in the Process.157 The Act will have just one. Therefore, if limited success has

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154 The Kimberley Process, supra note 153.
155 See Seay, supra note 7, at 22–23 (detailing the nature of the wars in these areas).
156 Seay, supra note 7, at 22–23.
157 The Kimberley Process, supra note 153.
been met with a global program, a much smaller success can be expected from the Act.

A. Self-Reporting Will Inevitably Lead to Inconsistent Reporting and Companies Intentionally Excluding Products Containing Conflict Minerals from the Reporting Process

A common theme throughout this paper is the issue of self-reporting. As explained previously, the legislation requires that the company, and not an outside regulator, report whether the products fall within the scope of the legislation. Undoubtedly this process creates less work in terms of government oversight because the company, and not a government-hired analyst, can determine if the product falls within the scope of the legislation. But self-reporting may raise the risk that companies will dishonestly classify their products as outside the scope of the Act.158

The Securities and Exchange Commission (SEC), the agency responsible for implementing and monitoring the reporting, has explained that it will impose standard penalties for non-compliance “such as fines and other SEC enforcement actions to which firms that violate SEC regulations may be subject.”159 But to actually detour companies from untruthfully classifying their products, the potential consequences (such as liability or fees) must outweigh the risk. Simply put, if no one is penalized for misrepresentation, or if the fees are too low compared to the costs of adhering to the legislation, then companies may be motivated to wrongly classify their products. A standardized approach used by a trained outside source would be costly, but it would reduce the chance of abuse and create a more consistent system.

158 The incentive to find products to be outside of the scope of the legislation comes as financial savings, and also a savings of company time in tracing the minerals and reporting to the SEC.
B. The Delay in Implementation and Exclusion of Minerals Already within the Supply Chain Prior to the Specified Date Delays any Positive Impact of the Act and Allows for the Stockpiling of Minerals

Due to lobbyists, the Act now allows a transition period for companies to implement the new system of regulation over time. For larger companies the period is two years and for smaller companies the period is four years.\textsuperscript{160} During the transition period, companies may report their products as “conflict undeterminable” if, after conducting a country of origin inquiry, they are “unable to determine if their conflict minerals financed or benefited armed groups” in the relevant countries, or if

\begin{quote}
[A]fter [the company’s] reasonable country of origin inquiry, … they had a reason to believe that their necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources and the information they gathered as a result of their subsequently required exercise of due diligence failed to clarify the conflict minerals’ country of origin, whether the conflict minerals financed or benefited armed groups in those countries, or whether the conflict minerals came from recycled or scrap sources.\textsuperscript{161}
\end{quote}

Many lobbyists argue that the transition period is necessary because it allows companies more time to develop their reporting and tracing system, therein allowing them to pursue a less costly approach than if the transition were immediate.\textsuperscript{162} But the transition period will undoubtedly delay any positive impact the Act does have.

Of greater concern is the date that minerals within the supply chain are subject to the reporting requirement. The original draft of the Act did not address minerals within the supply chain, but the final version of the Act was changed to exclude minerals within the supply chain prior to January

\begin{footnotes}
\item[160] Conflict Minerals. supra note 1, at 56, 309.
\item[161] Id.
\item[162] Id.
\end{footnotes}
Although the delay was arguably logistically necessary, it has serious consequences. The largest is the issue of stockpiling conflict minerals.

While tracing stockpiles would likely prove more difficult than tracing recently mined minerals, the change to the legislation allows companies to plan their extraction and exportation to reduce the burden imposed by the legislation. With the change, companies are motivated to extract as many minerals as possible and either smelt them or move them to a country not covered by the legislation, such as Kenya. This allowance for stockpiled minerals to escape reporting provides an incentive to pursue a “mad-dash” for the minerals. Such a scramble is apt to increase violence over the access to the minerals and to create increased environmental harm as more mines are excavated at a faster pace.

163 "The final rule considers conflict minerals to be “outside the supply chain” only in the following instances: After any columbite-tantalite, cassiterite, and wolframite minerals have been smelted; after gold has been fully refined; or after any conflict mineral, or its derivatives, that have not been smelted or fully refined are located outside of the Covered Countries.” Conflict Minerals. supra note 1, at 56, 280. Lobbying efforts included that of the National Mining Association, which, in attempts to weaken the legislation, argued, “[a]s previously noted by NMA, depending on the point in the supply chain, conducting due diligence on the source of existing stockpiles or inventories of conflict minerals could be challenging if not impossible. Therefore, the final rule should either exempt existing stockpiles from reporting requirements, or allow for extra flexibility in regard to this type of disclosure. Furthermore, any stockpiles of minerals that pre-date the effective date of the new rules should be completely exempt from reporting requirements. However, should a manufacturer or company contracting to manufacture a product wish to voluntarily include stockpiled minerals in their initial disclosure or Conflict Minerals Report, they should be permitted to do so.” ELIZABETH M. MURPHY, NAT’L MINING ASS’N, NATIONAL MINING ASSOCIATION ADDITIONAL COMMENTS ON THE SECURITIES AND EXCHANGE COMMISSION’S PROPOSED RULE IMPLEMENTING SECTION 1502 (CONFLICT MINERALS) OF THE DODD FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, 15 (Nov. 1, 2011), available at http://www.sec.gov/comments/s7-40-10/s74010.shtml.
C. The SEC’s is not Suited to Implement and Monitor Legislation Concerning Issues in the DRC

The SEC is charged with implementing and monitoring the Act. The SEC’s mission is “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.” While the monitoring of US companies is within the sphere of the SEC’s mission, arguably the monitoring of an international humanitarian crisis is not. Jeffrey W. Rubin, leader of the American Bar Association’s securities regulation committee, recently stated, “The SEC has three principal statutory mandates: investor protection, capital formation and fair and efficient markets,” and “[n]one of these are mentioned in 1502 of Dodd-Frank.”

The fear is that broadening the scope of the SEC’s duties will engage the agency in international humanitarian issues. Such a role not only increases the burden on the SEC, but also presents a risk that the steps taken by the SEC may not be in the best interest of the DRC. This is because the SEC was created for and is focused on US security, and the SEC employees do not understand the full extent of the crisis or the impact the legislation will have on the DRC.

Those in favor of SEC control argue that the SEC has authority over the corporations that are involved; therefore, the legislation is not overreaching. This argument is sound—the SEC does have control over the corporations impacted by the Act. But the argument fails to address the

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165 Id.
166 Id.
168 Id.
169 Id. Adam M. Kanzer, managing director and general counsel for New York-based Domini Social Investments LLC, acknowledged that, “We’re in a globalized economy where you can’t ignore things anymore.” Id.
concern that a national agency focused on US companies and the economy is now in a position to influence complex international humanitarian issues.

D. The Act gives International Companies an Economic Advantage

One outcome of the Act is that it gives foreign companies an economic advantage. Once the Act is implemented, US companies will either seek the minerals from other regions or pay the costs incurred when adhering to the reporting requirements.

If US companies purchase minerals elsewhere, the Act will fail to achieve the legislative intent of curbing the crisis in the DRC. While US companies buy elsewhere, foreign companies will take over the demand for their portion of the minerals. Not only does this fail to positively impact the situation in the DRC, but it also has the potential to negatively impact it because the worst offenders in the exportation of conflict minerals, all Asian companies, will likely buy a portion of the minerals previously purchased by US companies.  

If US companies continue to use minerals subject to the Act, they will be forced to bear the costs incurred to adhere to the Act while foreign companies will not. While no concrete figures exist, various estimates show that the costs will be substantial. The SEC’s analysis found that “after analyzing the comments and taking into account additional data and information, [they] believe it is likely that the initial cost of compliance is approximately $3 billion to $4 billion, while the annual cost of ongoing compliance will be between $207 million and $609 million.” Those within the affected industries insist that this estimate falls short of actual costs. For example, IPC, Association Connecting Electronics Industries (a

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170 For a rating of company diligence on avoiding conflict minerals, see Conflict Minerals Company Ranking, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/conflict-minerals-company-rankings (last visited Feb. 27, 2013). At the bottom of the list are companies such as Nintendo, HTC, Sharp, Nikon, and Canon. These companies are not listed in the US, and therefore are not required to adhere to the legislation.

171 Conflict Minerals, supra note 1, at 56, 335.
trade association in the electronics industry), calculated “median due diligence burdens in excess of $65,000 (USD) per company in the first year.”^172 IPC then added $170,000 for the “estimated costs for tracking software, additional staff, training, legal expenses, and third party audits.”^173 But it also estimated that for “printed circuit board (PCB) and electronic manufacturing services (EMS) companies along with their suppliers, the estimated cost impact of due diligence is estimated at roughly 279 million dollars in the first year alone, with ongoing annual costs expected to be around 165 million dollars.”^174 The National Association of Manufacturers also estimated the implementation costs for US industry, “asserting that it will more likely be between $9-16 billion.”^175

Part of the difficulty in estimating the likely cost is the unknown number of companies which will fall under the scope of the legislation. Competitive Enterprise Industries, a non-profit public policy organization that specializes in regulatory issues, commented to the SEC that

While the Commission estimates the rules will apply to approximately 6,000 companies, the actual number of companies subjected to their repercussions is likely much higher. Lawrence Heim of Elm Consulting Group International estimates at least 12,000 companies will be affected by the rules, reasoning that

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^173 Id. at 3–4.
^174 Id. at 2. The costs originate in the form of additional scrutiny required of a company’s supply chains, as well as the expenses of compiling a Conflict Minerals Report in the event a company cannot verify the absence of conflict minerals in its products. These reports require companies to detail their due diligence efforts with regard to their supply chains, and must be vetted by an independent private-sector auditor. The burden on businesses will be significant.
^175 Id.

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many suppliers may not be directly subject to the rules but
nevertheless affected by the compliance efforts of issuers.176

But even without accurate figures, the fact remains that many companies
will be impacted at a substantial cost. Although there is no free solution to
attaining peace in the DRC, the high price to be paid by US companies
could not come at a worse time with the financial crisis. The costs of
abiding by the Act is only made more frustrating when one considers that
the humanitarian impact is likely to be minimal at best.

E. The Act Results in Unintended Mining Bans which Harm Civilians

The mining ban implemented by Kabila in 2010 left thousands of
Congolese involved in the mineral trade out of work, the repercussions of
which were felt by their families and their communities. However, Kabila
was not the only one to implement a ban as a result of the Act. Shortly after
the ban was lifted in March 2011 and Dodd-Frank was about to be
implemented, the Malaysia Smelting Company stopped accepting DRC
minerals after being put under pressure from a watchdog group, the
Electronic Industry Citizenship Coalition.177 Having bought up to 80
percent of its tin from the DRC, the MSC’s embargo was devastating to the
DRC civilians.178

The responses from Kabila and MSC emphasize the need for the US to
have a global understanding of the complex problem surrounding the
situation in the DRC. The legislation is not simply a US response that will
only affect US corporations—it affects the Congolese civilians,
international companies, and many countries connected to the DRC. Given

176 Id. at 4–5.
177 Seay, supra note 7, at 14. “The EICC created a tracing scheme for smelters that
requires corporations to show their ores to be conflict free, and most companies were to
work through a tin industry group called ITRI to ensure their minerals were appropriately
tagged as being conflict-free. This tracing scheme went into effect on April 1, 2011.
However, MSC could not guarantee that all of its minerals would be ITRI-tagged and so
stopped purchasing minerals from D.R. Congo.” Id.
178 Id.
the response from Kabila and MSC, it appears that the US either did not understand the likelihood of bans resulting from the Act or did not fully comprehend how the bans would impact the DRC. The consequences of this lack of foresight have been substantial.

VIII. PROPOSED SOLUTIONS AND CONCLUDING THOUGHTS

The Act has shown that the United States recognizes that it is not a singular cell, but part of a large web where its actions impact remote areas of the world. What the lawmakers failed to acknowledge, or did not care enough to explore, is how complex that web is or how the Act will impact, and has impacted, others.

The Act has oversimplified the situation in the DRC, with the proponents believing that the requirements of the Act will reduce the illegitimate mineral trade and thus reduce or extinguish the violence in the DRC. But as has been shown throughout this article, the Act is unlikely to positively affect the DRC. The ban will not stop the mineral trade—any US companies that go elsewhere to purchase their minerals will simply be replaced with foreign companies. Nor will the ban reduce the violence or address the militias and rebels that control the region. Instead of focusing on the causes of the violence, including land rights, lack of government, lack of economic opportunity, and ethnic tension, the Act simplifies the crisis to be based only on minerals. And as the Act fails to better the situation in the DRC, US companies will struggle to adhere to complex and expensive reporting requirements.

While this article has discussed a wide variety of considerations connected to the Act and teased out the individual aspects of the legislation that make it weak or ineffective, the general goal of this piece is to provide lawmakers and the aid industry with an understanding of how legislation aimed at bettering a situation can have negative and unintentional impacts. Based on the complex situation in the DRC, I would argue that no US legislation would effectively end, or even substantially curb, the violence in
the region. The problem must be addressed in the DRC, with companies and countries involved in the region either through trade or politics. But even if the general idea behind the Act of US companies self-reporting would have been effective, the final version would have failed to accomplish its goals because the lobbyists’ efforts resulted in countless loopholes and weakening of the original legislation.

This raises the question of what will work to stop the violence and end the crisis. Although there is not one clear answer, those who thoroughly understand the crisis and the implications of the proposed solutions of the Act have a multitude of ideas.

A. Invest in Tracing the Mineral Process

Money should be invested to learn how the mineral trade works in its entirety. As previously discussed, the minerals change hands many times before leaving the DRC. Practically no records are kept, and it is nearly impossible for the exporter to know where the minerals have come from or who has handled them along the way because of the complex dynamic between the government, rebels, and miners.

Lawmakers cannot fully and accurately understand the impact that any legislation will have without a full understanding of the process. A tracking method should be put in place to trace the routes that the minerals take. Two options include tracking specific minerals or employing researchers along the routes to record the minerals. While either option would face logistical difficulties, including opposition by those illegally trading, it is necessary to aid in a better understanding of the trade and create a more comprehensive and impactful solution to the crisis.

B. Gain Better Insight into the Rebels

It is difficult to understand the rebel groups’ goals and motivations for resorting to violence. While much of the violence is over land, minerals, and power, there are other considerations that need to be explored.
Villainizing the rebels and engaging in warfare is one option. But another is to initiate dialogue in order to understand what they aim to achieve via their violent means. An open and safe forum without risk of prosecution would enable the rebels to express their demands. This would better allow the DRC government and other aid industries and nations to understand the motivation behind the violence and address the root problems.179

C. Confront Neighboring Countries

As discussed, the mineral trade involves neighboring countries to the DRC. Because the governments of these countries finance the violence and reap the monetary rewards of the trade, they must be considered in developing a peace plan. While the initial goal would be to hold the countries accountable for providing support, care must be taken not to alienate the countries and push them to use military or violent means to maintain their income. A possible solution would be to provide the governments with some profits from the DRC so that they are not enticed to support the militia. While still “exploitation,” the incentive would be a short-term solution that could aid the peace efforts in the DRC.

D. Address Land and Ethnic Disputes

Given that much of the violence is conflict over land and ethnicity, efforts must be made to solve the underlying disputes. A recent New York Times article emphasized the impact of not addressing the ongoing land and

179 Séverine Autesserre, The Only Way to Help Congo, N.Y. TIMES, June. 22, 2012.http://www.nytimes.com/2012/06/23/opinion/the-only-way-to-help-congo.html?pagewanted=1&_r=1&adxnnl=1&adxnnlx=1382596727V%20oFWcHI23HSnZJcuzRhw&. The importance of understanding the rebels’ thought process in creating a sustainable solution is emphasized by recent international events. Id. Over the past few years attention has been focused on the rates of rape and other sexual violence in the DRC. Id. As a result of the attention, the rebels have begun using such violence and attention as a pawn in their schemes. Id. This correlation between rebel action and international attention emphasizes the need to consider the implications of any further actions worldwide, even news reporting. Id.
ethnic disputes, stating “[i]f the international community continues to address the consequences of the violence in Congo rather than its most important causes, it will only add to the death toll.”

Land and ethnic disputes are complex issues with no simple solution and will therefore not be discussed in depth here. But whatever peace initiatives are explored, the land and ethnic disputes must be considered fundamental to the solution.

E. Support Infrastructure and Education

Infrastructure, including roads, water lines, electricity, telecommunications, and educational programs have been long-term goals of many aid organizations and should continue to be. Unlike short-term forms of aid such as food and medicine, the development of infrastructure and places of education create the foundation for long-term stability.

Education is extremely important in reducing poverty because it not only provides people with knowledge, but it also results in increased income and better health, which in turn fuels the economy.

One form of higher education that would directly impact the mineral trade and the local economy would be a program that teaches Congolese how to process the minerals. While normally done in Asia, the processing of the minerals in the DRC would keep more money in the local economy.

Similar to education, infrastructure reduces poverty. Roads, telecommunication networks, hospitals, drains, and other forms of

180 Id.
181 While there is much that could be said about the process and prospect of solving land disputes, for purposes of this article, I raise it as one of many considerations that must be explored to stop the violence.
183 See Infrastructure and Poverty, GLOBAL POVERTY PROJECT, http://www.globalpovery
infrastructure “facilitate[] the basic functions of a society that are necessary to transport resources and people, produce and trade goods, provide essential services and ultimately reduce poverty.”184 With infrastructure in place, people are less focused on their basic needs for survival and are better able to contribute economically to society.185

The biggest problem faced when trying to create infrastructure and education in the DRC is the continued violence. No area of the conflict region is truly safe from rebels. This is evidenced by the fact that in December 2012, the city of Goma, which is the base to most aid agencies, was taken over by rebels.186 If Goma, with such a large aid presence, can be “captured,” one can expect that all other areas are at risk.

IX. CONCLUSION

With the complexity of the crisis there must be a united and comprehensive front. The short-term goal should be to form an international coalition of individuals who can explore the crisis in the DRC and then tease out the factors that must be considered in creating a sustainable solution. Such a coalition must include DRC government officials, miners, rebels, government officials of neighboring and benefitting countries, and aid agencies and corporations involved in the mineral trade.

By including members of the DRC government, the coalition can ensure that the government understands and supports the planned solution. The government members can critically examine any proposals for how they can be implemented through political means.

Other Congolese must also be present at the table. This includes artisanal miners and traders, as well as members of rebel groups. While they may not...
be elected officials or highly educated, these groups do have extensive knowledge of the crisis because they understand what happens on the ground and what the goals and consequences of each action are. These individuals will be able to realistically foresee how the peace process will be accepted and the potential implementation issues when discussing the proposals.

Neighboring governments should also be allowed to contribute to the discussion. Countries such as Rwanda and Uganda have contributed to the violence and also gain substantial rewards from the DRC mineral trade. Therefore, they must be able to voice their interests and concerns to ensure that they support the peace efforts, instead of working against them.

Other countries that reap the benefits of the crisis, specifically those in Asia, Europe, and North America, must also contribute. It is important to understand what peace initiatives these countries will support politically, monetarily, and perhaps physically. A united front is necessary to ensure that countries will not work against peace initiatives in efforts to obtain cheap minerals.

Similar to foreign countries, the aid agencies need to have a voice. The UN and many other agencies have a large presence in the DRC and engage in many different initiatives. It is necessary to ensure that aid agencies are working in support of the legislation and not unintentionally against it.

Lastly, corporations will need to be present. As this paper has discussed, corporations rely heavily on the DRC for their products’ contents. If corporations are not behind the efforts, they could potentially purchase minerals supporting the conflict and hinder the DRC peace initiative. Therefore, whatever policy implemented must have corporate support.

Attaining peace and stability in the DRC is far from hopeless—the violence can be stopped. The Act reveals that the United States understands that it plays a role in the crisis, yet the Act falls short of actually addressing the root causes of the problem. A weak piece of legislation, full of loopholes and designed by those unfamiliar with the crisis, is likely to have...
minimal (if any) success in stopping the violence. Moving forward, a coalition of knowledgeable individuals from around the world must work together to look at the actual causes of the violence and design a DRC-based initiative that can settle the disputes that continue to claim the lives of thousands each month.
APPENDIX A:

START

Does the issuer manufacture or contract to manufacture products?

NO

Rule does not apply

YES

Are conflict minerals necessary to the functionality or production of the product manufactured or contracted to manufactured?

NO

NO

Were the conflict minerals outside the supply chain prior to January 1, 2013?

YES

NO, if newly-mined

NO, if potentially scrap or recycled

Based on a reasonable country of origin inquiry (COI), does the issuer have reasonable basis to believe that the conflict minerals may have originated in the DRC or an adjoining country (covered countries)?

YES

NO, based on the COI, does the issuer have reasonable basis to believe that the conflict minerals were then scrap or recycled?

File a Form SD that describes the issuer’s determination and briefly describes the COI and due diligence measures taken and the results thereof.

NO

Contact due diligence on the source and chain of custody of its conflict minerals following a reasonably designed due diligence measures, if such framework is available for a specific conflict mineral.

NO

In excercising this due diligence does the issuer determine the conflict minerals are not from the covered countries or are from scrap or recycled?

YES

NO

File a Form SD with a Conflict Minerals Report as an exhibit, which includes a description of the measures the issuer has taken to exercise due diligence.

In excercising this due diligence was the issuer able to determine whether the conflict minerals flowed or benefited armed groups?

YES

NO

The Conflict Minerals Report must also include an independent private sector audit report, which expresses an opinion or conclusion as to whether the design of the issuer’s due diligence measures is in conformity with the criteria set forth in the due diligence framework and whether the description of the issuer’s due diligence measures is consistent with the process undertaken by the issuer. Also, includes a description of the products that have not been found to be in DRC Conflict Free, the Bulletin used to process the necessary conflict minerals in these products, the country or region of the minerals, and the efforts to determine the source or location of origin of these minerals with the greatest possible specificity.

END

Source: Conflict Minerals, supra note 1, at 56, 283.