

Who Starved for that Smartphone?:
Limitations of the SEC's Approach to the
Congoese Conflict Minerals Trade Problem
and the Need for the European Union to Better
Address its Associated Human Rights Abuses

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NOTE

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CONGOLESE CONFLICT MINERALS TRADE
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UNION TO BETTER ADDRESS ITS ASSOCIATED
HUMAN RIGHTS ABUSES

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“One can't have something for nothing. Happiness has got to be paid for.”¹

INTRODUCTION

Of all the conflicts in Africa’s documented history, the Democratic Republic of the Congo (“Congo”) is considered the home of the deadliest conflict thus far.² Though the Congo’s civil war ended in 2002, the humanitarian crisis remains – where dangerous and armed rebel groups routinely engage in rape, torture, exploitation of children, and other harmful activities.³ The conflict in the Congo

1. ALDOUS HUXLEY, *BRAVE NEW WORLD* 170 (1932).

2. See Shannon Raj, *Blood Electronics: Congo’s Conflict Minerals and the Legislation that Could Cleanse the Trade*, 84 S. CAL. L. REV. 981, 984 (2011) (describing the Congo’s conflict among Africa’s documented history).

3. See Marcia Narine, *Emerging Issues in Social Enterprise: From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank’s Act’s Corporate Governance Disclosure Won’t Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 358 (2012) (discussing what devastating occurrences are associated with the Congo’s mineral

covers a wide range of tensions, from internal and regional struggles, to strains over identity, ethnicity, and resources.⁴ In 2010, the United Nations described the conflict in the Congo as one of the worst humanitarian crises in the world.⁵ A significant part of this crisis is the mineral trade and the conflict surrounding it.⁶ The damaging conflict that has existed for decades in the Congo is further exacerbated by the armed forces financing themselves through controlling the country's mineral mines and mining communities.⁷

Because militias and armies in the Congo vie for control over these mines, the struggle for power over these sources of wealth often involves armed violence and human rights abuses that thrive under the country's weak governance framework.⁸ Militias in the Congo extort and implement taxation along different stages of the mineral trade, forcing buyers to pay bribes at roadblocks and border crossings.⁹ The armed forces then use this money to purchase more weapons, further fueling the violence.¹⁰ It has been estimated that armed groups in the Congo were enriched with US\$185 million per year from the mineral trade.¹¹

trade); *see also* Raj, *supra* note 2, at 989-90 (noting the prevalence of rape and sexual torture in the Congo).

4. *See* Raj, *supra* note 2, at 985 (describing the range of conflict within the Congo).

5. *See id.* at 988 (describing the contribution of the mineral trade to the conflict in the Congo).

6. *Id.*

7. *Id.* *See also* Alexandra L. Nelson, *The Materiality of Morality: Conflict Minerals*, UTAH L. REV. 219, 222 (2014) (discussing the violent methods of armed groups used to maintain control over mining communities in the Congo).

8. *See* Joshua A. Feinzeig, *Promoting World Peace Through the Use of the "Good Book": Implementing Foreign Policy Through the Tax Code*, 40 BROOK J. INT'L L. 953, 959 (2015) (discussing the role of armed forces in the mineral trade); David C.W. Wagner, *Breaking the Nexus Between Armed Conflict and Consumer Products: Where's the App For That?*, 26 TEMP. INT'L & COMP. L.J. 103, 130 (2012) (mentioning the weak governance in the Congo); *see also* Karen Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1318 (2012) (noting that mineral resources provide funding for violent militias).

9. *See* Raj, *supra* note 2, at 989 (discussing the militias and their systematic extortion and taxation); *see also* Wagner, *supra* note 8, at 107 (listing extortion techniques of armed groups in the Congo).

10. *See* Raj, *supra* note 2, at 989 (discussing the militias and their systematic extortion and taxation); *see also* Wagner, *supra* note 8, at 107 (listing extortion techniques of armed groups in the Congo).

11. *See* David Smith, *Congo Mines No Longer in Grip of Warlords and Militias, Says Report*, GUARDIAN (June 11, 2014, 1:05 P.M.), <https://www.theguardian.com/world/2014/jun/11/congo-mines-no-longer-grip-warlords-militias-report-enough-project> (discussing the

“Conflict Minerals” are known as minerals mined under conditions of armed conflict and human rights abuses, specifically in the eastern provinces of the Congo.¹² These minerals are tin, tantalum (also known as columbine tantalum or “coltan”), tungsten, and gold, and are sometimes collectively referred to as “3T+G.”¹³ These minerals largely originate from central Africa, particularly the eastern Congo and its neighboring countries, Uganda and Rwanda.¹⁴

Various electronic products are reported to contain Conflict Minerals originating from the Congo and its prevalent mineral trade.¹⁵ Multiple steps are involved before raw minerals like 3T+G make it into the consumer market and electronics.¹⁶ These steps are part of the supply chain, which is a system of all activities, organizations, actors, technology, information, resources, and services that bring raw minerals from its extraction site to the final product for consumers.¹⁷ Though it has been widely reported that many companies, such as technology company giant Apple Inc. (“Apple”), may manufacture

advantages of US conflict mineral legislation); *A Comprehensive Approach to Congo’s Conflict Minerals - Strategy Paper*, ENOUGH PROJECT (Apr. 24, 2009), <http://www.enoughproject.org/publications/comprehensive-approach-conflict-minerals-strategy-paper>; see also Allison M. Blake, *SEC Cannot Clean the Electronics Industry Alone: “Blood Minerals” Mandatory Disclosure Legislation Effective Only If Applied Across the Board*, 39 IOWA J. CORP. L. 395, 398 (providing estimated profits from the mineral trade).

12 See *What are Conflict Minerals*, SOURCE INTELLIGENCE, <https://www.sourceintelligence.com/what-are-conflict-minerals/> (detailing what minerals are commonly considered to be Conflict Minerals).

13. See Conflict Minerals, Exchange Act Release No. 34-67716 §I(A), n.6 (Aug. 22, 2012) [hereinafter SEC Final Rule Release].

14. See Emily Veale, *Is There Blood on Your Hands-Free Device?: Examining Legislative Approached to the Conflict Minerals Problem in the Democratic Republic of Congo*, 21 CARDOZO J. INT’L & COMP. L. 503, 504 (2013) (discussing the origins of conflict minerals).

15. See Feinzeig, *supra* note 8, at 953 (stating that “minerals are found in commonplace electronic devices that people around the world depend upon in their daily routines.”); Narine, *supra* note 3, at 359 (stating that “almost every consumer product that requires electronics uses one of the four regulated minerals collectively known as the “3Ts+G.”); Raj, *supra* note 2, at 989 (discussing different components of electronics often comprised of Conflict Minerals); Veale, *supra* note 14, at 515-16 (detailing the link between the use of electronics and Conflict Minerals).

16. These steps are: extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing, and sale of end product. See *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD PUBLISHING 4 (2d ed. 2013) <https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf> [hereinafter OECD Due Diligence Guidance].

17. *Id.* at 14.

products containing Conflict Minerals, the exact percentage of these products is difficult to quantify because of a lack of transparency within global supply chains.¹⁸ The difficulty of quantifying an exact percentage is likely due to the fact that global supply chains include multiple tiers of suppliers that cannot be easily traced.¹⁹ To illustrate this difficulty, an employee of technology company, Phillips, stated that, “for electronic components, the supply chain can easily be fifty tiers deep,” where many suppliers provide the company with limited or no information regarding its origins.²⁰

Arguably, consumers of products containing these minerals have a “direct hand” in the ongoing crisis in the Congo.²¹ As US Congressman Jim McDermott stated, one of the issues that goes largely unnoticed for a majority of Americans is that no one is thinking of the Congo or Conflict Minerals, yet every cell phone user most likely has Conflict Minerals every time they make a call, “potentially, right next to their ear.”²² Since Conflict Minerals are often key components of many devices, consumers may be financing the conflict surrounding the mineral trade by continuously buying new electronics, particularly smartphones.²³ As previously mentioned,

18. See Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L.J. 419, 431 (2015) (discussing the lack of transparency within global supply chains); see generally OECD Due Diligence Guidance, *supra* note 16, at 14.

19. See Victor Luckerson, *There May Be Conflict Minerals in Your Smartphone*, TIME (June 3, 2014), <http://time.com/2819594/conflict-minerals-apple-google-intel-amazon/> (stating that “because such materials travel through a variety of smelters, manufacturers and distributors before they end up in a phone or laptop, vetting the entire manufacturing line is a difficult, expensive process”); see also Sarfaty, *supra* note 18, at 431-32 (discussing the lack of transparency within global supply chains).

20. Sarfaty, *supra* note 18, at 431-32 (illustrating the difficulty of tracking global supply chains).

21. Feinzeig, *supra* note 8, at 954 (discussing how consumers indirectly fund the conflict mineral trade).

22. Mary Beth Sheridan, *U.S. Financial Reform Bill Also Targets ‘Conflict Minerals’ from Congo*, WASH. POST (July 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072006212.html>. Jim McDermott was a member of the US House of Representatives for the state of Washington from 1989-2017. *Jim McDermott Biography*, CONGRESS.GOV, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000404>.

23. See Ved P. Nanda, *Conflict Minerals and International Business: United States and International Responses*, 20 ILSA J. INT’L & COMP. L. 285, 286 (“Consumer demand for cell phones, laptops, appliances, and jewelry fuels this trade and triggers the conflicts.”); see also Feinzeig, *supra* note 8, at 953 (stating that “minerals are found in commonplace electronic devices that people around the world depend upon in their daily routines”); Narine, *supra* note 3, at 359 (stating “almost every consumer product that requires electronics uses one of the four

the armed groups in the Congo exploit the region's mineral wealth to enrich themselves and maintain control through violent methods.²⁴ With high consumer demand for devices such as smartphones, there is a chance that minerals within electronic devices originated from mines controlled by these dangerous armed groups.²⁵

Each mineral is often found in various products.²⁶ The Congo is the sixth largest manufacturer of tin, which is used as a solder on circuit boards, and produces about twenty percent of the world's tantalum, which is found in cell phones, digital cameras, and portable music players.²⁷ Tungsten is used to make cell phones vibrate, and gold is frequently used in constructing electronics.²⁸ In 2015, it was reported that in the United States alone, nearly two-thirds of its population now owns a smartphone, and fifteen percent of the population ages eighteen to twenty-nine are reported to be heavily dependent on their smartphones for online access.²⁹ Globally, there are approximately 2.6 billion smartphone users.³⁰ By 2020, this number is expected to jump to 6.1 billion.³¹ Total global smartphone shipments were estimated to be 341.5 million in 2016, a one percent increase from the 338 million smartphones shipped in 2015.³² One

regulated minerals collectively known as the "3Ts+G"); Raj, *supra* note 2, at 989 (discussing different components of electronics often comprised of Conflict Minerals); Veale, *supra* note 14, at 515-16 (detailing the link between the use of electronics and Conflict Minerals).

24. See *supra* notes 8-11 and accompanying text.

25. See Nanda, *supra* note 23, at 286 ("Consumer demand for cell phones, laptops, appliances, and jewelry fuels this trade and triggers the conflicts.")

26. See *infra* notes 27-28.

27. See Feinzeig, *supra* note 8, at 959 (discussing the Congo's abundant mineral wealth).

28. Gold is a key source of mineral wealth in the Congo, with armed groups receiving profits as much as US\$88 million annually. See Raj, *supra* note 2, at 989 (discussing how Conflict Minerals are used in electronic devices); Erin Banco, *Is Your Cell Phone Fueling Civil War in Congo?*, ATLANTIC (July 11, 2011), <http://www.theatlantic.com/international/archive/2011/07/is-your-cell-phone-fueling-civil-war-in-congo/241663/> (detailing the purpose of Conflict Minerals in cell phones).

29. Aaron Smith, PEW RESEARCH CENTER, *U.S. Smartphone Use in 2015* (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> (examining the role of smartphones in the United States).

30. Ingrid Lunden, *6.1B Smartphone Users Globally By 2020, Overtaking Basic Fixed Phone Subscriptions*, TECH CRUNCH (June 2, 2015) <https://techcrunch.com/2015/06/02/6-1b-smartphone-users-globally-by-2020-overtaking-basic-fixed-phone-subscriptions/>.

31. See *id.* at 30 (providing number of smartphone users worldwide).

32. See Daniel Eran Dilger, *Strategy Analytics: Apple's iPhone 6s the World's Most Popular Smartphone in Q2*, APPLE INSIDER (Sept. 6, 2016), <http://appleinsider.com/articles/16/09/06/strategy-analytics-apples-iphone-6s-the-worlds-most-popular-smartphone-in-q2>.

glaring example of the pervasiveness of smartphones is the iPhone, manufactured by Apple.³³ As of early 2016, Apple's iPhone remains the top choice by consumers in two of the world's largest smartphone markets: the United States and China.³⁴ Moreover, as of July 2016 total global iPhone sales have reached approximately one billion.³⁵

This Note examines the United States' Conflict Minerals legislation, specifically Section 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), a provision aimed at combating the human rights abuses and conflict associated with the Congolese mineral trade, and compares this provision to a similar forthcoming regulation in the European Union.³⁶ Part I discusses the conflict associated with the Congo mineral trade and the history behind this conflict. Part II details the background behind Section 1502 of the Dodd-Frank Act and analyzes the effects of this provision on the Congo. Part III then reviews the European Union's current Conflict Minerals regulation proposal and the process behind it. Lastly, Part IV argues that the European Union should learn from the shortcomings of Section 1502 when finalizing their own Conflict Minerals regulation. This Part provides

33. See Lance Whitney, *iPhone is Top Phone Brand in US and China*, CNET (Jan. 27, 2016), <https://www.cnet.com/news/iphone-once-again-top-phone-in-us-and-china/> (discussing the Apple iPhone's continuing popularity). It is important to note that Apple now audits 100% of its suppliers for links to conflict minerals. See Emily Chasan, *Apple Says Supply Chain Now 100% Audited for Conflict Minerals*, BLOOMBERG (Mar. 30, 2016), <https://www.bloomberg.com/news/articles/2016-03-30/apple-says-supply-chain-now-100-audited-for-conflict-minerals>. However, one must keep in mind that Apple auditing 100% of its mineral suppliers does not necessarily mean its products are now Conflict Mineral free, which Apple acknowledges and recognizes. See Carly Oboth, *Why It's a Good Thing Apple Isn't Declaring its Products Conflict-Free*, GLOBAL WITNESS (Apr. 11, 2016), <https://www.globalwitness.org/en/blog/why-its-good-thing-apple-isnt-declaring-its-products-conflict-free/> (discussing Apple's Conflict Minerals Report where Apple states “Apple does not believe that Third Party Audit program participation alone is sufficient to label products ‘conflict free.’ Apple believes it has more work to do.”).

34. See Whitney, *supra* note 33 (discussing the Apple iPhone's continuing popularity).

35. See Sam Costello, *How Many iPhones Have Been Sold Worldwide?*, LIFEWIRE (Nov. 3, 2016), <http://ipod.about.com/od/glossary/f/how-many-iphones-sold.htm>; Nick Statt, *1 Billion Apple Devices Are in Active Use Around the World*, VERGE (Jan. 26, 2016), <http://www.theverge.com/2016/1/26/10835748/apple-devices-active-1-billion-iphone-ipad-ios>.

36. The Dodd-Frank Act was passed in the United States as legislation aimed at financial regulatory reform to create a robust foundation for lasting economic growth and job creation in the United States. *Wall-Street Reform: The Dodd-Frank Act*, THE WHITE HOUSE, <https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> (last accessed Oct. 9, 2016).

recommendations on how the European Union can produce a stronger means of combating Conflict Mineral related human rights violations.

I. CONFLICT IN THE CONGO

To better understand the complexities of the conflict behind the mineral trade, Part I provides a brief overview of the history behind Congo's mineral exploitation and its effects. The following also details what fuels the present-day conflict occurring in the Congo. Lastly, the effects of this present-day conflict are discussed and the profitability of the Conflict Mineral industry is estimated.

A. Origins of the Conflict

In the late 19th century, the Congo was victim to brutal colonization by King Leopold II of Belgium.³⁷ Leopold exploited the Congo's natural resources through tyrannical practices, such as widespread slave labor.³⁸ After experiencing pressure from the Great Powers condemning his brutality in the Congo, Leopold transferred control of the Congo Free State to the Belgian government in 1908.³⁹ His profits from his twenty-year exploitation of the Congo were approximately US\$1.1 billion when calculating by today's standards.⁴⁰ In 1960, Belgium accepted the Congo's independence.⁴¹ Shortly thereafter, the Congo's new government faced national mutiny and threats from numerous secession movements.⁴² Cold War tensions fueled the Congo's leadership struggle, with the United States fearing that Prime Minister Patrice Lumumba would break-up the Congo and allow Soviet control of central Africa.⁴³ Supported by the United States and Belgium, Congolese President Joseph Kasavubu

37. *Roots of the Crisis – Congo*, ENOUGH PROJECT, http://www.enoughproject.org/conflict_areas/eastern_congo/roots-crisis (last accessed Oct. 17, 2016) (detailing the background behind the violent conflict in the Congo).

38. *Id.*

39. *Id.*

40. Anne DeVoe, *Carrying A Piece of Congo in Our Pockets: Global Complicity to Congo's Sexual Violence and the Conflict Minerals Trade*, 10 SEATTLE J. SOC. JUST. 463, 472 (2011) (detailing the Congo's long history of conflict).

41. *Roots of the Crisis – Congo*, *supra* note 37.

42. *Id.*

43. *Id.*

dismissed Prime Minister Lumumba, who was arrested and assassinated in 1961.⁴⁴

In 1965, Mobutu Sese Seko ousted President Kasavubu in a coup to gain control of the government, with help from the United States and Belgium.⁴⁵ Seko used the Congo's mineral wealth to fight off rivals, enrich himself and his allies through a system of corruption so severe that the country was soon labeled a "kleptocracy."⁴⁶ Seko also allowed officials to steal so he could avoid paying them.⁴⁷ Three decades later, about 800,000 ethnic Tutsis and moderate Hutus were killed in the Rwandan Genocide by Rwanda's Hutu extremist government.⁴⁸ Those responsible for the genocide fled to the Congo, where Seko allowed them to launch attacks against Rwanda while in the Congo.⁴⁹ Many Hutus from Rwanda who had committed extreme human rights abuses also moved into the Congo, heightening the conflict in the region further.⁵⁰ In 1997, rebels ousted Seko, and Laurent Kabila became president and remained in that position until his assassination by one of his bodyguards.⁵¹ His son, Joseph Kabila, succeeded him eight days later and is the current president.⁵²

44. *Id.*

45. *Id.*; *DR Congo country profile*, BBC (Nov. 15, 2016), <http://www.bbc.com/news/world-africa-13283212>; *The Congo, Decolonization, and the Cold War, 1960–1965*, U.S. Department of State, Office of the Historian, Milestones, <https://history.state.gov/milestones/1961-1968/congo-decolonization>.

46. A kleptocracy is a type of government where a country's ruler uses political power to pilfer the country's resources. See *Roots of the Crisis – Congo*, *supra* note 37; see also Howard W. French, *Anatomy of an Autocracy: Mobutu's 32-Year Reign*, N.Y. TIMES (May 17, 1997), <https://partners.nytimes.com/library/world/africa/051797zaire-mobutu.html>.

47. *Will Kabila Go?*, ECONOMIST (Dec. 12, 2015) <http://www.economist.com/news/middle-east-and-africa/21679750-war-weary-citizens-are-scared-joseph-kabila-may-not-retire-gracefully-will>.

48. *The Democratic Republic of the Congo: A Short Timeline*, RAISE HOPE FOR CONGO, <http://www.raisehopeforcongo.org/content/democratic-republic-congo-short-timeline> (providing historical timeline of significant events in the Congo) (last accessed Nov. 6, 2016); *DR Congo: Chronology*, HUM. RTS. WATCH (Aug. 21, 2009) https://www.hrw.org/news/2009/08/21/dr-congo-chronology#_War (detailing extensive chronology of significant events in the Congo). The Hutus and Tutsis are African ethnic groups. See *Hutu and Tutsi History*, HUM. RTS. WATCH (1999), <https://www.hrw.org/reports/1999/rwanda/Geno1-3-09.htm>.

49. *Roots of the Crisis – Congo*, *supra* note 37.

50. Katherine D. Van Marter, *Between a Rock and a Hard Place: The Unintended Consequences of the Conflict Minerals Rule*, 24 TUL. J. INT'L & COMP. L. 291, 293 (discussing the beginnings of the conflict in the Congo).

51. *Roots of the Crisis – Congo*, *supra* note 37.

52. *Id.*

B. The Conflict Behind “Conflict Minerals”

Although the Seko’s reign in the Congo ended nearly a decade ago, the exploitation of the mineral trade is still prevalent today.⁵³ The vast majority of the Congo’s mineral resources is located in its Eastern region, which is currently controlled by four armed groups.⁵⁴ The four groups are: (1) Forces Democratiques de Liberation du Rwanda (“FDLR”), (2) Congres national pour la defense du peuple (“CNDP”), (3) Forces Armees de la Republique Democratique du Congo (“FARDC,” or the Congolese National Army), and (4) various Mai Mai militias.⁵⁵ Of these groups, the FARDC are considered “official forces,” while the FDLR and Mai Mai militias are considered the “rebel groups.”⁵⁶

The FDLR, an ethnic Hutu militia, is considered one of the most feared groups, and is known to ally with smaller militias and the Congolese army.⁵⁷ UN investigators have connected the FDLR to various attacks in the eastern Congo region.⁵⁸ According to UN investigators, the attacks in the eastern Congo are linked to competition between the FDLR and other groups over the mineral trade and control over the mineral mines.⁵⁹

Pursuant to a March 2009 peace deal with the Congolese government, the CNDP integrated its forces with FARDC.⁶⁰ The peace deal provided for the transformation of the CNDP to a political party integrated with FARDC, in exchange for the release of the

53. See generally Tom Burgis, *Dodd-Frank’s Misadventures in the Democratic Republic of the Congo*, POLITICO MAG. (May 10, 2015), <http://www.politico.com/magazine/story/2015/05/dodd-frank-democratic-republic-of-congo-117583>; Lauren Wolfe, *How Dodd-Frank is Failing the Congo*, FOREIGN POL’Y (Feb. 2, 2015), foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/.

54. Veale, *supra* note 14, at 512-13 (discussing armed groups implicated in the crisis within the Congo).

55. *Id.*

56. *The Eastern Congo*, COUNCIL ON FOREIGN REL., [http://www.cfr.org/congo-democratic-republic-of/eastern-congo/p37236#/> \(last accessed Oct. 18, 2016\).](http://www.cfr.org/congo-democratic-republic-of/eastern-congo/p37236#/)

57. PETER EICHSTAEDT, *CONSUMING THE CONGO: WAR AND CONFLICT MINERALS IN THE WORLD’S DEADLIEST PLACE*, Prologue (2011).

58. Veale, *supra* note 14, at 513.

59. Veale, *supra* note 14, at 512-13. Democratic Republic of the Congo, Peace Agreement Between the Government and the National Congress for the Defence of the People (CNDP) (Mar. 23, 2009) [hereinafter CNDP Peace Deal].

60. See CNDP Peace Deal, *supra* note 59; Veale, *supra* note 14, at 514.

CNDP's former members captured by the Congolese government.⁶¹ However, this agreement has done little to diminish the conflict in eastern Congo.⁶² The same rebel units within the CNDP still occupy the same territory, yet now they are under the façade of government.⁶³ Though FARDC was established to end violence in the Congo, various warlords incorporated their men in FARDC in name only, maintaining divided command structures, rather than a unification of the various rebel groups as mandated by the peace deal.⁶⁴

C. Tangible Effects of the Conflict

As previously mentioned, the violence surrounding the mineral trade has intensified conflict already present in the Congo for decades.⁶⁵ The mineral trade has funded armed groups who have heightened human rights abuses in the Congo for years.⁶⁶ The armed groups responsible for violently fighting over mineral mines are also considered responsible for the civilian-directed violence.⁶⁷ In addition to extorting and implementing taxation at roadblocks and border crossings, forcing mineral buyers to pay bribes at roadblocks and border crossings, and using this money to purchase more weapons, armed groups in local mining areas control the population through the methods of kidnap and rape.⁶⁸

61. *DR Congo Government, CNDP rebels 'sign peace deal'*, AGENCE FRANCE-PRESSE (Mar. 23, 2009), available at http://www.spacedaily.com/reports/DR_Congo_government_CNDP_rebels_sign_peace_deal_999.html; Michael Deibert, *Congo peace deal was doomed to failure*, GUARDIAN (Nov. 21 2012), <https://www.theguardian.com/world/2012/nov/21/congo-m23-deal-goma>.

62. Veale, *supra* note 14, at 514.

63. *Id.*

64. *Id.*; *DR Congo Government, CNDP rebels 'sign peace deal'*, *supra* note 61.

65. See *supra* Section I.A; Brian Stuart Silverman, *One Mineral at a Time: Shaping Transnational Corporate Social Responsibility Through Dodd-Frank Section 1502*, 16 OR. REV. INT'L L. 127, at 133-34 ("The D.R. Congo has been mired in conflict for the better part of the last two decades.")

66. *Conflict Minerals*, GLOBAL WITNESS, <https://www.globalwitness.org/en/campaigns/conflict-minerals/#more> (last accessed Oct. 18, 2016).

67. Silverman, *supra* note 65, at 134 (discussing the violence within the Congo's mining communities; see also Narine *supra* note 3, at 381 (detailing the conflict Congolese civilians are often subjected to).

68. Harry D. Gobrecht, *Technically Correct: Using Technology to Supplement Due Diligence Standards in Eastern D.R. Congo Conflict Minerals Mining*, 2011 U. ILL. J.L. TECH. & POL'Y 413, 418 (2011); see also Raj, *supra* note 2.

One of the most devastating elements of the conflict is the ongoing rape epidemic.⁶⁹ In 2010, a study estimated that around 1.8 million Congolese women have been victims of rape.⁷⁰ Most of the perpetrators in the eastern Congo region are said to be government soldiers or militia fighters, and some have been reported to be Congolese police.⁷¹ Rape is considered pervasive in this region because of the Congo's corrupt court system, and perpetrators are often confident they will suffer no consequences.⁷² Although the Congolese parliament reformed the country's rape laws in recent years, some have doubted its effectiveness since prosecuting rape not a high priority as it is expensive and time-consuming.⁷³ Because perpetrators are often the armed forces or rebel groups who depend on mineral wealth to make a profit, the rape epidemic is strongly associated with the mineral trade.⁷⁴ Sexual violence and rape are considered "common tools" used by these armed groups to preserve control and power over mining communities.⁷⁵ Government corruption is rampant in the region, so much so that the Congo's security forces are unable to adequately protect communities from armed forces "poorly disciplined, ill equipped, and the worst abusers of human rights in the [Congo]."⁷⁶

69. See Eichstaedt, *supra* note 57, Chapter 5 (discussing the rape epidemic in the Congo); McDermott Bill, *infra* note 97, at §2.

70. See Nelson, *supra* note 7, at 222 (discussing the violent methods of armed groups used to maintain control over mining communities in the Congo).

71. See Narine *supra* note 3, at 377 (listing the common perpetrators of rape in the Congo); see also Eichstaedt, *supra* note 57, Chapter 5 (discussing the rape epidemic in the Congo).

72. See Narine *supra* note 3, at 377 (listing the common perpetrators of rape in the Congo); see also Eichstaedt, *supra* note 57, Chapter 5 (discussing the rape epidemic in the Congo).

73. See Narine *supra* note 3, at 377 (listing the common perpetrators of rape in the Congo); see also Eichstaedt, *supra* note 57, Chapter 5 (discussing the rape epidemic in the Congo).

74. See Eichstaedt, *supra* note 57, Chapter 5 (discussing the rape epidemic in the Congo); see also Narine, *supra* note 3, at 381 (discussing the conflict over minerals, "[r]ebels loot, pillage, rape, and murder innocent civilians for a host of complex reasons, including for their minerals").

75. See Nelson, *supra* note 7, at 222 (discussing the violent methods of armed groups used to maintain control over mining communities in the Congo).

76. *Id.*

Another devastating element of the conflict in the Congo is the gruesome child labor in the region.⁷⁷ Although the region has made strides towards the improvement of child labor conditions by implementing a UN-backed action plan to end the recruitment and use of child soldiers, Congolese children still engage in harrowing forms of child labor—the mining of Conflict Minerals.⁷⁸ Mining often involves sifting, cleaning, sorting, working underground, transporting, carrying heavy loads, use of mercury and explosives, and digging in the production of different minerals.⁷⁹ Children are described to be the most vulnerable to mine owners who do not want to pay for workers.⁸⁰ Rather, mine owners or managers will exploit children's hunger by offering a single meal for mining work, or promising the fun of adventure.⁸¹ Children are also preferred as miners because their smaller bodies enable them to go down narrow, yet dangerous mining shafts.⁸²

II. DODD-FRANK'S SECTION 1502

The United States has taken measures to address the ongoing conflict related to the mineral trade through comprehensive

77. According to the US Department of Labor's 2015 report on child labor in the Congo, the penalties for forced or compulsory child labor do little to deter armed forces from forcing children to engage in dangerous labor. The US Department of Labor lists various child labor laws in the Congo. Some relevant to the discussion of children mining conflict minerals are: (1) *Minimum Age of Work* is 16 under Article 6 of the Labor Code; Article 50 of the Child Protection Code (75, 76); (2) *Minimum Age for Hazardous Work* is 18 under Article 10 of the Ministerial Order Establishing the Conditions for Children's Work (77); (3) *Prohibition of Hazardous Occupations or Activities for Children* under Articles 28–35 of Ministerial Order on Working Conditions for Women and Children; Articles 10–15 of the Ministerial Order Establishing the Conditions for Children's Work; Article 26 of the Mining Code (77-79); and (4) *Prohibition of Forced Labor* under Articles 2 and 3 of the Labor Code; Articles 53 and 187 of the Child Protection Code; Articles 16 and 61 of the Constitution; Article 8 of the Ministerial Order Establishing the Conditions for Children's Work (59, 75-77). Congo's Child Protection Code established a penalty of one to three years imprisonment and small fines for forced child labor, while the Ministry of Mines drafted a code calling for a punishment of five to ten years for forced child labor in mining sites. Off. of Child Lab., Forced Lab., and Hum. Trafficking, U.S. Dep't of Labor, *Findings on the Worst Forms of Child Labor* (2015) [hereinafter USDOL Report].

78. USDOL Report, *supra* note 77.

79. *Id.*

80. ZORBA LESLIE ET AL., THE CONGO REPORT: SLAVERY IN CONFLICT MINERALS 12 (2011) (detailing the several types of slavery within the Congo's mines).

81. *Id.*

82. *Id.*

legislation. First, this Part describes the United States' early attempts at formulating Conflict Mineral legislation. Next, this Part examines the United States' final version of Conflict Minerals legislation, Section 1502 of the Dodd-Frank Act, the reasons behind why the US Securities and Exchange Commission ("SEC") was ultimately chosen as its enforcer, and which alternative agencies that many believe may be better equipped to enforce Section 1502. Lastly, this Part analyzes the effects of this provision on the Congolese people.

A. The United States Approach: Disclosure

The touchstone of Section 1502 is disclosure, as evidenced by Congress' focus on disclosure as a remedy to the Conflict Minerals problem.⁸³ This section discusses the background behind Section 1502, and the various pieces of legislation preceding this provision. Additionally, this section reviews different suggestions addressing the Conflict Minerals problem, along with the effects of Section 1502 on the Congo and its people.

1. Early Attempts at Addressing the Conflict Minerals Problem

Then-US Senator Barack Obama introduced the DRC Relief, Security, and Democracy Promotion Act of 2006 ("2006 Congo Act"), later signed into law by President Bush.⁸⁴ The 2006 Congo Act established United States policy objectives addressing various humanitarian, social and economic development concerns in the Congo.⁸⁵ The 2006 Congo Act also provided potential consequences for any country "meddling" in the Congo.⁸⁶ Here, the Secretary of

83. See Dodd-Frank Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213-18 (2010).

84. See Democratic Republic of Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-457, §1502(a), 120 Stat. 3384 (2010) [hereinafter 2006 Congo Act]; see also Narine, *supra* note 3. George W. Bush was the 43rd president of the United States. See *George W. Bush Biography*, <http://www.biography.com/people/george-w-bush-9232768>. President Bush signed the 2006 Congo Act into law during his second term of presidency. During this time, President Obama was senator for the state of Illinois. See *Barack Obama Biography*, <http://www.biography.com/people/barack-obama-12782369>.

85. See 2006 Congo Act, *supra* note 84; see also Narine, *supra* note 3, at 381.

86. See Armin Rosen, *The U.S. Ally That Brings Violence to the Congo and Gets Away With It*, ATLANTIC (Jul. 13, 2012), <http://www.theatlantic.com/international/archive/2012/07/the-us-ally-that-brings-violence-to-the-congo-and-gets-away-with-it/259777/>; see also 2006 Congo Act, *supra* note 84.

State is authorized to withhold assistance made available under the Foreign Assistance Act of 1961 if the Secretary determines a country in question appears to play a hand in destabilizing the Congo.⁸⁷

Non-governmental organizations (“NGO”) continually pressured officials to enact legislation to address the conflict in the Congo.⁸⁸ Many NGOs believed that by raising awareness of the connection between mineral mining, consumer electronic products, and the ongoing violence in the Congo, it would give rise to socially responsible investors and companies.⁸⁹ Because the 2006 Congo Act did not center on the conflict surrounding the Congo mineral trade, legislators in Congress pushed for legislation that specifically addressed this problem.⁹⁰

In 2009, former Kansas Senator Sam Brownback introduced the Congo Conflict Minerals Act of 2009 (“Brownback Bill”).⁹¹ The Brownback Bill proposed that the SEC amend Section 13 of the Securities Exchange Act of 1934 (“Exchange Act”) to require companies whose products may contain Conflict Minerals to publicly disclose this information.⁹² In a section entitled “Sense of Congress on Assistance for Affected Communities,” the Brownback Bill also called for increased assistance to the Congolese affected by the conflict—medical treatment, humanitarian relief, rehabilitation services, and psychological assistance.⁹³ This bill suggested that

87. See 2006 Congo Act, *supra* note 84; see also Rosen, *supra* note 86.

88. Narine, *supra* note 3, at 384 (discussing the advocacy of NGOs regarding conflict mineral legislation).

89. See *id.*

90. See 2006 Congo Act, *supra* note 84; Narine, *supra* note 3, at 384 (discussing the advocacy of NGOs regarding conflict mineral legislation).

91. See Congo Conflict Minerals Act, S. 891, 111th Cong. (2009) [hereinafter Brownback Bill]; see also Narine, *supra* note 3. Samuel Brownback served as a US senator for two terms (1996-2011). He is now governor of the state of Kansas. See *Governor Sam Brownback*, KAN. OFF. OF THE GOVERNOR, <http://www.governor.ks.gov/about-the-office/governor-sam-brownback> (last accessed Oct. 18, 2016).

92. Narine, *supra* note 3. The Exchange Act is US legislation that gives the SEC the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation’s securities self-regulatory organizations (SROs). See *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/about/laws.shtml#secexact1934>.

93. The Brownback Bill specifically lists solutions as: “(1) to provide medical treatment, psychological support, and rehabilitation assistance for survivors of sexual and gender-based violence; (2) to provide humanitarian relief and basic services to people displaced by violence; (3) to improve living conditions and livelihood prospects for artisanal miners and mine

Congress task the United States Agency for International Development (“USAID”) with expanding its programs to help Congolese communities adversely affected by the mineral trade.⁹⁴ Additionally, the Brownback Bill suggested that Congress work with other countries to: (1) increase protection and services for communities in the eastern Congo at risk of human rights violations associated with the mineral trade, particularly women and girls; (2) strengthen the management and trade of natural resources in the Congo; and (3) improve conditions and livelihood prospects of miners and mine workers.⁹⁵ Though the Brownback Bill garnered some support, including that of then-Senator Hillary Clinton who believed there was connection with mineral mining and human rights abuse, the Brownback Bill did not pass.⁹⁶

Later in 2009, Congressman Jim McDermott introduced the Conflict Minerals Trade Act (“McDermott Bill”).⁹⁷ Upon returning to central Africa in 2007 after serving as a medical officer over twenty years prior, McDermott was shocked by the overwhelming presence of human rights abuses in the Congo.⁹⁸ Similar to the Brownback Bill, the McDermott Bill aimed to address human rights abuses associated with the Congolese mineral trade.⁹⁹ The McDermott Bill also outlined similar solutions to the human rights abuses with a section entitled “Sense of Congress on Assistance for Affected Communities,” tasking USAID with expanding their programs and calling on to Congress to work with other countries to achieve these ends.¹⁰⁰ One

workers; and (4) to alleviate poverty by reconstructing infra-structure and revitalizing agricultural production.” Brownback Bill, *supra* note 91.

94. Brownback Bill, *supra* note 91.

95. *Id.*

96. Narine, *supra* note 3, at 386. Secretary Clinton was senator for the State of New York, US 67th Secretary of State, and 2016 US Presidential Nominee for the Democratic Party. See *Hillary Clinton Biography*, <http://www.biography.com/people/hillary-clinton-9251306> (last accessed Oct. 18, 2016).

97. Conflict Minerals Trade Act, H.R. 4128, 111th Cong., 1st Session (2009) [hereinafter McDermott Bill].

98. Ben Protess, *Dodd-Frank Strays Far From Street*, N.Y. TIMES (July 14, 2011), <http://query.nytimes.com/gst/fullpage.html?res=980DE4DA153DF937A25754C0A9679D8B63>.

99. See Brownback Bill, *supra* note 91 (discussing the promotion of peace and security within the Congo and solutions to eradicate the conflict); see also McDermott Bill, *supra* note 97 (discussing the promotion of peace and security within the Congo and solutions to eradicate the conflict).

100. McDermott Bill, *supra* note 97.

difference between the Brownback Bill and the McDermott Bill regarding assistance measures is that the McDermott Bill also specifically focused on child labor and alleviating its negative effects, while the Brownback Bill did not.¹⁰¹ Also, unlike the Brownback Bill, there were no SEC disclosure requirements in McDermott's Conflict Minerals legislation.¹⁰² Rather than amending the Exchange Act, the McDermott Bill sought to prohibit the import of certain products containing Conflict Minerals, and imposed penalties under Section 592 of the Tariff Act of 1930 ("Smoot-Hawley Tariff Act").¹⁰³ Various NGOs supported the McDermott Bill, but ultimately it did not pass.¹⁰⁴

2. SEC: US Congress' Agency of Choice for Disclosure

Ultimately, the SEC was tasked with enforcing the United States' Conflict Minerals regulation.¹⁰⁵ The SEC maintains that its mandate or mission is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."¹⁰⁶ The US Supreme Court noted it has repeatedly declared that the fundamental purpose of the Exchange Act is to implement a philosophy of *full disclosure*.¹⁰⁷ Moreover, Congress has also stated that honest markets cannot exist without honest publicity, and that manipulation and dishonest practices in the market flourish on mystery and secrecy.¹⁰⁸ Disclosure of material company information is considered important from the reasonable investor's perspective.¹⁰⁹ What is material to a reasonable investor depends upon the significance that the reasonable

101. *Id.*

102. McDermott Bill, *supra* note 97; Brownback Bill, *supra* note 91.

103. H.R. 4128, 111th Cong. (2009).

104. Narine, *supra* note 3, at 387 (discussing the advocacy of NGOs regarding conflict mineral legislation).

105. See SEC Final Rule Release, *supra* note 13, at §VI(I)(A).

106. *What We Do*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/about/whatwedo.shtml> (last accessed Oct. 18, 2016) [hereinafter SEC, *What We Do*] (describing the Agency's objectives and what the Agency does to achieve these objectives).

107. *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) ("Underlying the adoption of extensive disclosure requirements was a legislative philosophy: 'There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.'")

108. *Id.*

109. See *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

investor would place on the withheld or misrepresented information.¹¹⁰

In the Final Rule promulgated pursuant to Section 1502 and Section 13(p) of the Exchange Act, the SEC briefly explains why Congress chose its office as the ultimate enforcer for Conflict Mineral regulation to curb the Congo mineral trade.¹¹¹ Congress aimed to mitigate the armed conflict associated with the mineral trade and believed Conflict Minerals disclosure use may reduce funding for armed groups fighting over mineral mines.¹¹² Congress had hoped, ultimately, that this type of disclosure would diminish and eventually eradicate the conflict in the Congo.¹¹³ One of the co-sponsors for Section 1502 noted that such a provision would enhance transparency and help American consumers and investors inform their decisions when doing business with companies that may use Conflict Minerals.¹¹⁴

3. Possible Alternatives to the SEC

Some parties have argued that expanding the SEC's duties beyond its congressional mandate may cause more harm than good, especially in the arena of foreign policy.¹¹⁵ As mentioned, the SEC is largely tasked with work involving disclosure within the financial sector and enforcement of laws preventing financial abuse.¹¹⁶ Those who are against tasking the SEC with enforcement duties outside of

110. *Basic*, 485 U.S. at 240 (stating “[a]s we clarify today materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information”) It has also been noted that the SEC’s “spin” on this materiality standard focuses on matters that “have affected, or will affect, a company’s profitability and financial outlook.” Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1434 (2002).

111. See SEC Final Rule Release, *supra* note 13.

112. See *id.*

113. See *id.*

114. See *id.*

115. See Karen E. Woody, *Securities Laws as Foreign Policy*, 15 NEV. L.J. 297, 301-02 (2014) (discussing the disadvantages of tasking the SEC with work outside of its expertise); Veale, *supra* note 14, at 527 (discussing why the SEC should not be a vehicle for promoting of social and foreign policy goals). See also *Should the SEC Expand Nonfinancial Disclosure Requirements?*, *supra* note 110 (“As such, some have criticized the SEC for making an “awkward lurch into foreign policy” and forgetting that “[its] role is not to advise investors about what would be good for them - let alone the United States - but simply to insist that companies disclose all material facts about their activities.”)

116. See SEC, *What We Do*, *supra* note 106; Woody, *supra* note 115.

the financial industry believe that both the SEC and financial investors are at risk for harm, and that it is likely the SEC will not have sufficient resources or time to work towards the goals for which it was actually created.¹¹⁷ For these reasons, the following discussion focuses on several suggested alternatives to combating the conflict associated with the mineral trade in the Congo.¹¹⁸ Moreover, agencies mentioned in both the Brownback Bill and the McDermott Bill are examined as possible alternatives to the SEC.

Because of the existing procedures of using the US Customs and Border Protection (“Customs”) to inspect conflicted resources like blood diamonds, it has been argued that Customs should be tasked with the inspection of other conflict resources, like minerals.¹¹⁹ Customs reviews all diamond import documentation, flags rough diamonds for review, and enters shipment information into a database.¹²⁰ One of the primary missions of Customs is to “enhanc[e] the Nation’s global economic competitiveness by enabling legitimate trade.”¹²¹ Through Customs, Congress may have an opportunity to address the Conflict Minerals problem instead of expanding the SEC’s mandate to address an issue the SEC “lacks precedence in confronting or capacity to handle effectively.”¹²²

It has also been suggested that using Tax Codes to address the Conflict Minerals problem may be a better fit than tasking the SEC with solving this issue.¹²³ First, this proposal suggests to fully ban sourcing Conflict Minerals, and calls for a universally accepted

117. See Woody, *supra* note 115, at 301 (stating that the SEC and financial investors are losing out in two ways: “(1) by losing the opportunity that the proper agency (i.e., one with the particular expertise and resources) and its experts would achieve the goal in a more efficient and more successful way; and (2) by reducing the ability of the mis-tasked agency to do its best with the proper tasks it should be accomplishing”).

118. See Feinzeig, *supra* note 8 (discussing Tax Codes as an alternative); see also Veale, *supra* note 14, at 520 (discussing Customs as an alternative to detecting Conflict Minerals in products).

119. See Raj, *supra* note 2. Blood diamonds are rough, uncut diamonds sold to fund the brutal civil wars of Angola and Sierra Leone. See Aryn Barker, *Blood Diamonds*, TIME (Aug. 2015), <http://time.com/blood-diamonds/>.

120. See US Government Accountability Office, GAO-06-978, *Conflict Diamonds: Agency Actions Needed to Enhance Implementation of the Clean Diamond Trade Act 2* (2006), at 18, <http://www.gao.gov/new.items/d06978.pdf>; see also Raj, *supra* note 2, at 1000.

121. *About CBP*, U.S. CUSTOMS & BORDER PROTECTION, www.cbp.gov/about (last accessed Oct. 18, 2016).

122. Raj, *supra* note 2, at 1021.

123. See Feinzeig, *supra* note 8 (discussing Tax Codes as an alternative).

certification system, similar to the type that Customs uses to root out blood diamonds coming into the United States.¹²⁴ Next, this proposal suggests providing tax benefits to companies that purchase conflict-free minerals.¹²⁵ These tax benefits would be similar to those given to taxpayers who buy a home for a first time, or rely on person and dependency exemptions.¹²⁶ The proposal recognizes such incentivizing methods may not have been appropriate in prior years.¹²⁷ However, it has been noted that the US Congress has transformed the Tax Code as a means to implement government policy and social reform.¹²⁸ Other examples include the Earned Income Tax Credit, empowerment-zone credit, and child-care credit.¹²⁹

One US agency that has been seemingly overlooked to resolve the Conflict Minerals problem is USAID, as both the Brownback Bill and the McDermott Bill had suggested.¹³⁰ USAID works to end extreme global poverty and empower various nations and communities in need to realize their potential.¹³¹ The core of USAID's mission is its commitment to work as partners with these nations and communities to promote sustainable development.¹³² USAID strives for empowerment and support through collaboration, rather than strong imposition.¹³³ Before providing assistance to a certain country, USAID employs a Conflict Assessment Framework, which is a systematic process that analyzes and prioritizes the

124. *Id.* at 983.

125. *Id.* at 986.

126. *Id.* at 986.

127. *Id.*

128. See Feinzeig, *supra* note 8 (discussing Tax Codes as an alternative); Susannah Camic Takh, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. LEGIS. 67, 68 (2013) (discussing the social policy benefits of using Tax Codes through the Internal Revenue Service "IRS" to benefit potentially marginalized groups).

129. See Feinzeig, *supra* note 8, at 986.

130. See Brownback Bill, *supra* note 91, at §6(a) (discussing Sense of Congress on Assistance for the Congo through USAID); see also McDermott Bill, *supra* note 97, at §5(a), (discussing Sense of Congress on Assistance for the Congo through USAID).

131. *Who We Are*, USAID, <https://www.usaid.gov/who-we-are> (last accessed Oct. 18, 2016).

132. *Mission, Vision, Values*, USAID, <https://www.usaid.gov/who-we-are/mission-vision-values> (last accessed Oct. 18, 2016).

133. See *id.*

dynamics of peace, conflict, stability, and instability.¹³⁴ This assessment helps USAID with strategies, developing policies, and programs to effectively prevent, mitigate, and manage conflict dynamics in a given country.¹³⁵

Most notably, USAID has provided the Congo with assistance since the country's independence.¹³⁶ To date, USAID and the Office of US Foreign Disaster Assistance provided US\$38 million in humanitarian assistance for the Congo.¹³⁷ This assistance was in response to the Congo's population displacement, yellow fever outbreak, deteriorating road conditions, and other complex emergencies.¹³⁸

4. Current US Conflict Minerals Legislation and Regulation

The Dodd-Frank Act was passed with a number of "sleepier provisions" that went undetected by most investors, one of them being Section 1502.¹³⁹ Just as the Brownback Bill had suggested in 2009, Section 1502 amended Section 13 of the Exchange Act.¹⁴⁰ Labeled as the "name-and-shame" law, Section 1502 does not outlaw the sourcing of minerals from the Congo, but rather "aims to provide transparency to consumers and investors so that they can make informed choices about the companies with which they choose to do business."¹⁴¹ Section 1502 tasked the SEC with promulgating rules requiring issuing companies to disclose whether their product contains or may contain Conflict Minerals originally from the

134. *Conflict Assessment Framework: Assessment Grade*, USAID (2002), http://pdf.usaid.gov/pdf_docs/pnady739.pdf.

135. *Id.*

136. *DRC History*, USAID, <https://www.usaid.gov/democratic-republic-congo/history> (last accessed Oct. 18, 2016).

137. *DRC – Complex Emergency*, USAID (Aug. 2, 2016), https://www.usaid.gov/sites/default/files/documents/1866/drc_ce_fs03_08-02-2016.pdf.

138. *Id.*

139. Narine, *supra* note 3, at 388. Congress passed the Dodd-Frank Act to address financial regulatory reform in 2010 in response to the financial crisis beginning in 2008. Narine, *supra* note 3, at 387. "Sleepier provisions" are defined as provisions which garner little congressional or public attention at the time of enactment, but have a significant impact after enactment. Madeline June Kass, *A Least Bad Approach For Interpreting ESA Stealth Provision*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 427 (2008).

140. See SEC Final Rule Release, *supra* note 13.

141. Narine, *supra* note 3, at 351.

Congo.¹⁴² Section 1502 amended the Exchange Act by including a new section, Section 13(p).¹⁴³

According to the SEC, in enacting the Conflict Minerals Statutory Provision, Congress intended to support the humanitarian goal of combating the violent conflict in the Congo, which is funded in part by the exploitation of the mineral trade by armed groups in the region.¹⁴⁴ When detailing Rule 13p-1's background, the SEC places emphasis on ending the emergency humanitarian crisis, stating that the legislative history surrounding Section 1502 and earlier legislation reflects Congress' motivation to further support the end of human rights abuses linked to the Conflict Minerals trade in the Covered Countries.¹⁴⁵ The SEC refers to the Congo and its adjoining countries as "Covered Countries."¹⁴⁶ Adjoining countries may refer to Angola, Burundi, Central African Republic, Rwanda, South Sudan, Tanzania, Uganda, or Zambia.¹⁴⁷

The SEC also notes that parts of Section 1502 convey that Congress' intention behind passing this provision was to promote peace and security.¹⁴⁸ Specifically, Section 1502(d)(2)(A) states that two years after the 2010 enactment of the Dodd-Frank Act and annually after that, the Comptroller General of the United States shall submit to the relevant congressional committee a report including an "assessment of the effectiveness" of Section 1502 in promoting peace and security.¹⁴⁹ By enacting Section 1502, the SEC also noted that Congress intended to reduce funding for the armed groups

142. Dodd-Frank Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 2213-2218 (2010).

143. See SEC Final Rule Release, *supra* note 13.

144. SEC Final Rule Release, *supra* note 13, at § I(A).

145. *Id.* According to the SEC, "Covered Countries" refers to both the Congo and its adjoining countries. Section 1502(e)(1) of the Dodd-Frank Act defines "adjoining country" as a country sharing an internationally recognized border with the Congo.

146. SEC Final Rule Release, *supra* note 13, at n.8.

147. Nanda, *supra* note 23, at 288.

148. SEC Final Rule Release, *supra* note 13; Dodd-Frank Act, Pub. L. No. 111-203, § 1502(d)(2)(A), 124 Stat. 2213-2218 (2010) (stating that two years after enactment of the Act and annually thereafter, "the Comptroller General of the United States shall submit to the appropriate congressional committees a report that includes" an "assessment of the effectiveness" of the Conflict Minerals Statutory Provision "in promoting peace and security" in the Covered Countries).

149. SEC Final Rule Release, *supra* note 13, at n.13.

contributing to the strife in the Congo, thus “put[ting] pressure on such groups to end the conflict.”¹⁵⁰

The SEC announced the release of Rule 13p-1 and Form SD to implement Section 13(p), effective November 13, 2012.¹⁵¹ To streamline the disclosure process, the SEC provided a three-step plan to ensure proper compliance with due diligence and disclosure requirements for Rule 13p-1 and Form SD.¹⁵² The first step involves determining who must comply with Section 1502.¹⁵³ This step is satisfied if a company (1) is an issuer that files reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act and (2) manufactures products containing Conflict Minerals necessary for the product’s main functions or necessary for the production of this product, or alternatively, contracts to manufacture such products.¹⁵⁴ If both conditions are met, a company should move on to the next step.¹⁵⁵

The second step of proper compliance requires completing a reasonable country of origin inquiry.¹⁵⁶ The SEC does not provide detailed guidance regarding the completion of this inquiry.¹⁵⁷ As long as the inquiry is made in good faith and reasonably designed to determine whether any of the Conflict Minerals originated in the Covered Countries or are from recycled or scrap sources, the reasonable country of origin inquiry requirement is satisfied.¹⁵⁸ After making a reasonable country of origin inquiry, issuers may not need to proceed with the final step of this plan.¹⁵⁹ Rather, their disclosure obligations may be limited to specific items on the SEC’s new Form

150. *Id.* at § I(A); Narine, *supra* note 3, at 388.

151. SEC Final Rule Release, *supra* note 13, at § V(A).

152. McKay S. Harline, *Can we Make Them Obey? U.S. Reporting Companies, Their Foreign Suppliers, and the Conflict Minerals Disclosure Requirements of Dodd-Frank*, 35 *NW. J. INT’L L. & BUS.* 439, 444 (2015).

153. SEC Final Rule Release, *supra* note 13, at § II(B); *see also* Harline, *supra* note 152.

154. The SEC lists domestic companies, foreign private issuers, and smaller reporting companies as issuers that are subject to this provision. SEC Final Rule Release, *supra* note 13, at § II(B)(1)(c); *see also* Securities Exchange Act of 1934 § 13(p)(2), 15 U.S.C. § 78a (1934).

155. SEC Final Rule Release, *supra* note 13, at § II(B); *see also* Harline, *supra* note 152, at 444 (discussing the SEC’s Conflict Mineral regulation requirements).

156. SEC Final Rule Release, *supra* note 13, at § II(B); *see also* Harline, *supra* note 152, at 444 (discussing the SEC’s Conflict Mineral regulation requirements).

157. Harline, *supra* note 152, at 445.

158. SEC Final Rule Release, *supra* note 13, at § II(D).

159. *Id.*; *see also* Harline, *supra* note 152, at 446 (discussing the SEC’s Conflict Mineral regulation requirements).

SD.¹⁶⁰ If, however, a company determines that the Conflict Minerals may have originated from one of the Covered Countries, then the issuer must move to the third and final step.¹⁶¹

During this final step, an issuer must submit a report describing what measures the issuer has taken to exercise due diligence on the minerals' source chain of custody if an issuer's products contained Conflict Minerals originating from the Covered Countries.¹⁶² Instead of simply filing a Form SD, companies whose products may contain Conflict Minerals from the Covered Countries would also need to file a much more detailed report, known as the "Conflict Minerals Report."¹⁶³ Issuers are required to exercise due diligence regarding the source and chain of custody of the Conflict Minerals in their products.¹⁶⁴ The SEC recommends that issuers follow a nationally or internationally recognized due diligence framework.¹⁶⁵ The SEC recognizes the Organisation for Economic Co-operation and Development ("OECD") Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas ("OECD Due Diligence Guidelines") as an international framework for mineral supply chain disclosure and bases much of their Rule on these guidelines.¹⁶⁶ The Conflict Minerals Report must also include an independent private sector auditor report as well as a description of products that have not found to be "DRC Conflict Free" or "DRC Conflict Undeterminable."¹⁶⁷

Following the decision in *National Association of Manufacturers, et al. v. SEC*, the SEC provided further guidance regarding compliance with Rule 13p-1 and Form SD.¹⁶⁸ The SEC no longer requires companies to describe its products as "DRC conflict free," "having not been found to be 'DRC conflict free'" or "DRC

160. See Harline, *supra* note 152, at 446 (discussing the SEC's Conflict Mineral regulation requirements).

161. SEC Final Rule Release, *supra* note 13, at § II(D).

162. Securities Exchange Act of 1934 § 13(p)(1)(A)(i), 15 U.S.C. § 78a (1934).

163. SEC Final Rule Release, *supra* note 13, at § II(E).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *National Ass'n of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2014); Keith F. Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*, U.S. SEC. & EXCH. COMM'N (Apr. 29, 2014), <https://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541681994>.

conflict undeterminable” in its Conflict Minerals Report on their website.¹⁶⁹ For products that are not described as conflict free, companies must disclose smelter and/or refiners that processed the minerals, the country or origin (if known), and their efforts to determine the mine or location of origin of these minerals.¹⁷⁰

5. Section 1502’s Effects on the Congo

In 2009, the Congo’s mineral wealth was estimated to total US\$24 trillion.¹⁷¹ Today, the estimated value of the Congo’s mineral wealth remains the same, with the conflict in the Congo continuing.¹⁷² Mining and extraction make up about twenty-two percent of the Congo’s GDP.¹⁷³ Since Section 1502 has been implemented, there is an ongoing debate whether the Rule has served its purpose in combating the conflict associated with mineral mining in the Congo.¹⁷⁴ Those who consider Conflict Mineral regulation to be effective in following its objectives note that prior to Section 1502’s passage, few companies made the extra effort to audit the source of the minerals in their products.¹⁷⁵ Supporters of Conflict Minerals regulation also note the significant improvements in the transparency of corporate supply chains, and though there are still active Conflict Mineral mines present in the Congo, supporters noted a decrease in the number of these mines in the Congo.¹⁷⁶ They also believe that Conflict Minerals provision has created a “strong market incentive”

169. See Higgins, *supra* note 168.

170. Dynda A. Thomas, *SEC Conflict Minerals Rule Legal Challenge is Over – But Not for Good*, THE NAT’L L. REV. (Apr. 12, 2016), <http://www.natlawreview.com/article/sec-conflict-minerals-rule-legal-challenge-over-not-good>.

171. M.J. Morgan, *DR Congo’s \$24 Trillion Fortune*, 350 AFR. BUS. 52 (Feb. 2009).

172. *Global Conflict Tracker*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/violence-in-the-democratic-republic-of-congo> (last accessed Oct. 18, 2016).

173. *Id.*

174. See Katherine D. Van Marter, *Between a Rock and a Hard Place: The Unintended Consequences of the Conflict Minerals Rule*, 24 TUL. J. INT’L & COMP. L. 291, 302-04 (2015) (discussing the advantages and disadvantages of Section 1502).

175. *Id.* at 302 (discussing companies who implemented industry-wide auditing systems prior to the enactment of Section 1502).

176. *Dodd-Frank 1502 Law: Impact on Conflict Minerals Trade in Congo*, ENOUGH PROJECT (Sept. 22, 2015), www.enoughproject.org/news/dodd-frank-1502-law-impact-conflict-minerals-trade-congo.

by reducing the market for non-traceable minerals.¹⁷⁷ The shrinking of this market occurred as a consequence of the decrease in pricing for minerals not certified as “conflict-free.”¹⁷⁸ The pricing for minerals not certified as “conflict-free” ranges between thirty and sixty percent less than minerals that are certified through sourcing programs.¹⁷⁹ The differential in pricing has made the trade in 3T+G minerals less attractive for some armed groups fueling the conflict in the Congo.¹⁸⁰

Additionally, Bisie, one of the world’s largest and most profitable tin mines is now largely demilitarized.¹⁸¹ Bisie generated hundreds of millions of dollars for armed groups responsible for the conflict in the Congo.¹⁸² It has also been reported that over sixty percent of the tantalum mines in Rubaya, Rwanda (one of the Covered Countries) are conflict-free. Bosco “Terminator” Ntaganda, a prominent warlord who previously derived major revenue from these tantalum mines has surrendered to the International Criminal Court.¹⁸³

In 2014, the International Peace Information Service found that seventy percent of Conflict Mineral mines surveyed across the Eastern Congo were no longer controlled by armed forces.¹⁸⁴ The International Conference on the Great Lakes Region now runs an emerging certification mechanism, validating numerous mines in the Congo as conflict-free.¹⁸⁵ As of June 21, 2015, 141 mines in the Congo were validated as conflict-free by teams comprised of UN

177. Nicholas Webb et al., *Conflict Minerals & the Law*, 72 *BENCH & B. MINN.* 26 (2012).

178. *Id.*

179. *Id.*

180. See *Dodd-Frank 1502 Law: Impact on Conflict Minerals Trade in Congo*, *supra* note 176.

181. Fidel Bafilemba et al., *The Impact of Dodd-Frank and Conflict Minerals Reforms on Eastern Congo’s Conflict*, ENOUGH PROJECT (June 2014), <http://www.enoughproject.org/files/Enough%20Project%20-%20The%20Impact%20of%20Dodd-Frank%20and%20Conflict%20Minerals%20Reforms%20on%20Eastern%20Congo%E2%80%99s%20Conflict%20June2014.pdf>.

182. *Dodd-Frank 1502 Law: Impact on Conflict Minerals Trade in Congo*, *supra* note 176.

183. *Id.*

184. *Id.*

185. *Id.*

officials and Congolese civil society, business, and government representatives.¹⁸⁶

While many support Conflict Minerals regulation and its objectives for the Congo, its adjoining countries, and Conflict Mineral mining, there have also been many critics who argue that the Conflict Minerals provision causes more harm than good.¹⁸⁷ In September 2014, seventy academics, researchers, journalists, and advocates published an open letter criticizing Section 1502, arguing that the provision “fundamentally misunderstands the relationship between minerals and conflict,” that internal UN assessments show that eight percent of the Congo’s conflicts are linked to mineral mining, and that specific motivations for the conflict differ across the various armed groups within the region.¹⁸⁸

Critics also note the adverse effects of the law on the Congolese miners themselves.¹⁸⁹ Malaysia Smelting, a company known as one of the world’s largest producers of tin, stopped purchasing minerals from the Congo entirely.¹⁹⁰ Similar to other companies in Malaysia Smelting’s position, Malaysia Smelting feared being seen as a Conflict Minerals user, and did not believe it could determine which minerals were conflict-free, leading to their halt in mineral purchases from the Congo.¹⁹¹ In 2012, it had been estimated that between five and twelve million Congolese civilians were inadvertently and directly negatively affected by Section 1502.¹⁹² Before Dodd-Frank passed, miners sold a kilogram of tin for about US\$7, but now miners only get about US\$4 for a kilogram of tin despite the global market price averaging at about US\$22 per kilogram in 2015.¹⁹³ Because

186. *Id.*

187. See Van Marter, *supra* note 174, at 302-04 (discussing the advantages and disadvantages of Section 1502).

188. Lauren Wolfe, *How Dodd-Frank is Failing the Congo*, FOREIGN POL’Y (Feb. 2, 2015), foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/.

189. See *id.*; Laura E. Seay, *What’s Wrong with Dodd-Frank*, CTR. FOR GLOBAL DEV., 1502 (Jan. 2012), http://www.cgdev.org/sites/default/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf (discussing weaknesses of Section 1502 and its effects).

190. Wolfe, *supra* note 188.

191. *Id.*

192. Seay, *supra* note 189.

193. Sudarsan Raghavan, *How a well-intentioned U.S. law left Congolese miners jobless*, WASH. POST (Nov. 30, 2014), <https://www.washingtonpost.com/world/africa/how-a-well->

many Congolese depend on the money they receive as miners to support their livelihoods, the miners who are out of work often cannot feed their families or afford medical treatment.¹⁹⁴ Moreover, the lack of earnings for these miners seemingly produces a domino effect on their village's economy.¹⁹⁵ Without earning a living, many local markets, shopkeepers, and seamstresses are also earning significantly less.¹⁹⁶

Lack of transparency is also a significant issue in the due diligence efforts required by Section 1502.¹⁹⁷ There have been cases of mining officials selling certification tags at US\$20, which are then used to label "dirty" tin as "conflict-free."¹⁹⁸ Mine officials only earn about US\$60 a month, so they are considered "easy to bribe."¹⁹⁹ Emmanuel Ndimubanzi, the head of North Kivu's mining division recently stated that there were no mines tagging the output of their minerals, so buyers had no way of identifying the minerals' origins.²⁰⁰ The lack of tagging runs counter to Section 1502's objective of certification of the minerals' origins.²⁰¹

III. THE EUROPEAN UNION'S APPROACH: IN-PROGRESS

Reacting to the steps the United States took in combating the conflict associated with the mineral trade, the European Union decided to embark on similar regulation of its own. First, this Part reviews how the European Union planned to address the Conflict Minerals issue from their end. Next, this Part reviews the European

intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html.

194. Seay, *supra* note 189, at 15.

195. *Id.*

196. *Id.*

197. Wolfe, *supra* note 188.

198. *Id.*

199. *Making Congolese Tin 'Conflict-Free'*, DEUTSCHE WELLE (Oct. 4, 2014), <http://www.dw.com/en/making-congolese-tin-conflict-free/g-17550932>. Tags are part of the "bag-and-tag" system used in certification systems throughout the Congo to tag which minerals are "conflict-free." See Aaron Hall and Sasha Lezhnev, *Coming Clean: A Proposal for Getting Conflict Minerals Certification on Track*, ENOUGH PROJECT (Nov. 2013) at 1-2.

200. Tom Burgis, *Dodd-Frank's Misadventures in the Democratic Republic of the Congo*, POLITICO MAG. (May 10, 2015), <http://www.politico.com/magazine/story/2015/05/dodd-frank-democratic-republic-of-congo-117583>.

201. See *supra* Section II.A.5.

Union's proposed Conflict Minerals regulation, and briefly describes the European Commission's efforts in aiding the Congo.

A. The European Union's Response to the United States' Conflict Minerals Legislation

In October 2010, soon after Dodd-Frank's passage, the European Parliament ("Parliament") passed a resolution calling upon the European Union to draft similar legislation to Section 1502.²⁰² The following year, the European Commission ("Commission") then announced its intention to improve transparency in the minerals supply chain and aspects of due diligence.²⁰³ The European Union had been actively involved in an OECD initiative to address the Conflict Minerals problem.²⁰⁴ This initiative resulted in the OECD Due Diligence Guidelines, which provided a due diligence measures framework for companies whose products may contain Conflict Minerals.²⁰⁵ Like the United States, the European Union recognizes the OECD Due Diligence Guidelines as an international framework for disclosure of the use of Conflict Minerals.²⁰⁶

Between March and June 2013, the European Union embarked on a public consultation to obtain interested parties' views on a potential EU initiative for responsible sourcing of minerals coming from conflict-affected and high-risk areas.²⁰⁷ The European Union then undertook further in-depth consultations and an impact assessment of the possible enactment of Conflict Minerals regulation.²⁰⁸ The following year, the Parliament's development committee produced a report on promoting development through responsible business practices, specifically examining the role of

202. European Commission, EU Draft Regulation, 2014/0059 (2014), [hereinafter Commission Draft Regulation].

203. *Id.* at 3.

204. *Id.* at 2

205. *Id.*

206. *Id.*; see OECD Due Diligence Guidance, *supra* note 16.

207. The European Union consulted stakeholders or people concerned by the topic of the consultation. *Public consultation on a possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas*, EUROPEAN COMMISSION, http://trade.ec.europa.eu/consultations/?consul_id=174.

208. *Proposed EU regulation on conflict minerals: commentaries & media coverage*, BUS. & HUM. RTS. CTR., <https://business-humanrights.org/en/conflict-peace/conflict-minerals/proposed-eu-regulation-on-conflict-minerals-commentaries-media-coverage> (last accessed Oct. 10, 2016).

extractive industries in developing countries.²⁰⁹ The report stressed the need for an European Union regulation that required companies using minerals and other resources originating from conflict-affected areas to perform due diligence in accordance with the OECD Due Diligence Guidelines.²¹⁰ The Parliament also suggested in its report that draft Conflict Minerals regulation “be comparable with the obligations under the Dodd-Frank Act, so that when fulfilling European Union obligations on responsible sourcing companies automatically fulfill the obligations under United States legislation.”²¹¹

B. The European Commission’s Proposed Conflict Minerals Legislation

The Commission is the European Union’s politically independent executive arm, solely responsible for drafting European legislation proposals and implementing the decisions of Parliament and the Council of the European Union.²¹² In March 2014, the Commission released a draft regulation establishing a self-certification system for importers of Conflict Minerals and other metals.²¹³ The proposed regulation establishes a system for supply chain due diligence self-certification intended to fight the conflict associated with the mineral trade in affected countries.²¹⁴

According to the Commission, the regulation is designed to “curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold” and provide “transparency and certainty as regards [to] the supply practices of importers, smelters and refiners sourcing from conflict-affected and

209. *Report on promoting development through responsible business practices, specifically the role of extractive industries in developing countries*, EUROPEAN PARLIAMENT (Feb. 19, 2014), www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0132+0+DOC+PDF+V0//EN, at 13.

210. *Id.*

211. *Id.*

212. European Union, *European Commission*, EUROPA.EU, http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm (last accessed Oct. 11, 2016).

213. Press Release, European Commission, EU proposes responsible trading strategy for minerals from conflict zones (Mar. 5 2014), http://europa.eu/rapid/press-release_IP-14-218_en.htm.

214. Commission Draft Regulation *supra* note 202, at 4.

high-risk areas.”²¹⁵ Unlike Section 1502, this proposed regulation is a voluntary framework for companies in the European Union who choose to be self-certified as “responsible importers.”²¹⁶

The proposed regulation mandates that the responsible importer of minerals or metals must clearly communicate to suppliers and the public its supply chain policy for the minerals and metals potentially sourced from conflict-affected and high-risk areas.²¹⁷ Responsible importers are also expected to model its supply chain policy standards against the OECD Due Diligence Guidelines.²¹⁸ The proposed regulation requires the responsible importer to structure its internal management system to maintain supply chain due diligence by assigning responsibility to senior staff to supervise this process, and maintain records for at least five years.²¹⁹ Moreover, the responsible importer is also expected to operate a “chain of custody” system to trace the origins of the minerals through the supply chain.²²⁰ This chain of custody system must be supported by documentation describing the mineral, name and address of its supplier, country of origin, quantities, and if it is determined that the minerals did come from conflict-affected and high-risk areas, the mine of mineral origin, locations where the mineral was traded, and processed and taxes and fees paid.²²¹

The responsible importer is also required to identify and assess the risks in its mineral supply chain and take the necessary steps to prevent and/or mitigate these risks.²²² The proposed regulation imposes third-party obligations on the responsible importer, requiring the responsible importer to perform audits through independent third-party audits similar to requirements under Section 1502.²²³ The

215. *Id.* at 4. The Commission also states “this Regulation . . . is designed to provide transparency and certainty as regards the supply practices of importers, smelters and refiners sourcing from conflict-affected and high-risk areas.”

216. *Id.* at 5. The Commission defines “responsible importer” as one who “chooses to self-certify according to the rules set out in this Regulation” and “self-certification” as “the act of declaring one’s adherence to the obligations relating to management systems, risk management, third-party audits and disclosure as set out in this Regulation.”

217. *Id.* at Art. 4(a) and 4(b).

218. *Id.* at Art. 4(b).

219. *Id.* at Art. 4(c).

220. *Id.* at Art. 4(f).

221. *Id.*

222. *Id.* at Art. 5.

223. *Id.* at Art. 6.

independent third-party audits must include an audit of the importer's activities, processes, and systems used to implement the mineral supply chain due diligence policies.²²⁴

By March 31st of each year, responsible importers are expected to submit to the relevant Member State documentation certifying conformity with the obligations provided by the proposed regulation, independent-third party audit reports, and disclosure of information learned about the origin of minerals used during the previous year, “publicly report[ing] as widely as possible, including on the internet and on an annual basis on its supply chain due diligence policies and practices for responsible sourcing.”²²⁵

C. The European Union's Path to Implementing Conflict Minerals Legislation

Soon after the Commission released its proposed Conflict Minerals regulation, critics were quick to note its weaknesses and inevitable ineffectiveness to prevent financing of conflict in the Congo and other affected countries.²²⁶ Sophia Pickles, a spokeswoman for the campaigning group Global Witness stated that because of the proposed regulation's voluntary nature, the proposal is “tantamount to the EU saying that it's ok for companies to choose not to behave responsibly,” undermining the duty to “protect human rights, which is well-established under international law.”²²⁷ Moreover, Pickles noted that there is already a voluntary due diligence framework in place—the OECD Due Diligence Guidelines.²²⁸

Many critics believed that the Commission's proposed regulation would fail to put the European Union at the same level of

224. *Id.*

225. *Id.* at Art. 7.

226. See Press Release, Global Witness, Proposed EU Law Will Not Keep Conflict Resources Out of Europe, Campaigners Warn (Mar. 5, 2014), <https://www.globalwitness.org/en/archive/proposed-eu-law-will-not-keep-conflict-resources-out-europe-campaigners-warn/> [hereinafter Global Witness Press Release]; Arthur Nelsen, *EU drafts conflict minerals law, with opt-in clause*, EURACTIV (Mar. 4, 2014), <http://www.euractiv.com/section/development-policy/news/eu-drafts-conflict-minerals-law-with-opt-in-clause/>.

227. Global Witness Press Release, *supra* note 226.

228. *Id.*

responsible sourcing standards as their US competitors.²²⁹ Instead of raising the bar on responsible sourcing standards, critics argue that a voluntary due diligence scheme to track the origin of minerals may threaten international standards and weaken the objectives for responsible mineral sourcing.²³⁰ Many also contend that by limiting the proposed regulation to importers of these minerals, the Commission has failed to influence the behavior of companies that market and import finished products possibly containing Conflict Minerals.²³¹ Companies that would be affected by the Commission's proposed regulation would be those placing raw minerals on the market (i.e., smelters), and not include companies who import assembled products like cellular phones, which may already contain Conflict Minerals.²³²

In 2015, a year after the Commission's release of its proposed Conflict Minerals regulation, Parliament voted in favor of a mandatory certification system for importers of Conflict Minerals and manufacturers of products that may contain Conflict Minerals.²³³ Lawmakers in the Parliament proposed last minute amendments calling for a mandatory monitoring system from conflict-affected areas like the Congo, Colombia and Afghanistan.²³⁴ The amendments passed by a vote of 378 to 300, with eleven abstentions.²³⁵

In June 2016, EU lawmakers, Member States and the Commission provisionally agreed upon a proposed Conflict Minerals regulation and planned to formally adopt these regulations within the

229. *Id.*

230. *Id.*

231. *Id.*

232. Nelsen, *supra* note 226.

233. Dynda A. Thomas & Kate Stokes, *European Parliament Votes In Favor of Mandatory Certification System for Importers of Conflict Minerals and Disclosure by Downstream Companies Certification System for Importers of Conflict Minerals and Disclosure by Downstream Companies*, CONFLICT MINERALS LAW (June 12, 2015), www.conflictmineralslaw.com/2015/06/12/european-parliament-votes-in-favor-of-mandatory-certification-system-for-importers-of-conflict-minerals-and-disclosure-by-downstream-companies/.

234. Cécile Barbière, *Parliament Votes For Tougher Conflict Minerals Regulation*, EURACTIV.FR (May 21, 2015), www.euractiv.com/section/development-policy/news/parliament-votes-for-tougher-conflict-minerals-regulation/.

235. *Id.*

coming months.²³⁶ Currently, there are no new drafts available, however it has been reported that the European Union plans to implement mandatory due diligence procedures, requiring disclosure for direct importers of minerals from conflict-affected and high-risk areas.²³⁷ A distinction between this provisionally agreed-upon regulation and the United States' is that the European Union's regulation would cover all conflict regions worldwide, and is not limited to the Congo and its adjacent countries.²³⁸ Smaller businesses, such as dentistry practices, that trade in minerals would be exempt from this due diligence and disclosure requirement.²³⁹ Electronics manufacturers would not have a due diligence obligation, but would be asked to voluntarily disclose the details of their mineral sourcing.²⁴⁰

D. The European Commission's Humanitarian Aid and Civil Protection

Unlike the United States, it is not entirely clear which EU agency would enforce their regulation, and thus there have not been many suggested agency alternatives.²⁴¹ There is, however, an agency

236. Joseph Ataman, *EU Agrees on Measures Regulating Conflict Minerals*, WALL ST. J. (June 16, 2016), <http://www.wsj.com/articles/eu-agrees-on-measures-regulating-conflict-minerals-1466103065>.

237. Jen De Ruyt et al., *Agreement in Principle Announced for EU Regime on Conflict Minerals*, NAT. L. REV. (June 27, 2016), <http://www.natlawreview.com/article/agreement-principle-announced-eu-regime-conflict-minerals>.

238. Stephen Gardner, *EU Provisionally Agrees on Conflict Minerals Law*, BLOOMBERG BNA (June 16, 2016), <http://www.bna.com/eu-provisionally-agrees-n57982074302/>.

239. Martin Banks, *Conflict minerals: EU accused of prioritising profit over people*, PARLIAMENT MAG. (June 23, 2016), <https://www.theparliamentmagazine.eu/articles/news/conflict-minerals-eu-accused-prioritising-profit-over-people>.

240. At a briefing in Parliament, Nele Meyer of Amnesty International, stated, "The decision leaves companies that import minerals in their products entirely off the hook. It's a half-hearted attempt to tackle the trade in conflict minerals which will only hold companies importing the raw materials to basic checks." Iverna McGowan, head of Amnesty International's European institutions office, added, "The EU has international obligations to protect human rights but went only half way to meet them. EU investors and consumers still won't have any certainty that the companies they deal with are behaving responsibly. This law will change little too little." Banks, *supra* note 239.

241. See Commission Draft Regulation, *supra* note 202 ("Any importer of minerals or metals within the scope of the Regulation may self-certify as responsible importer by declaring to a Member State competent authority that it adheres to the supply chain due diligence obligations set out in this Regulation.")

in the European Union with similar duties to USAID.²⁴² The European Commission has an office dedicated to providing countries in need with humanitarian aid and relief, though the office does not directly address how Conflict Minerals play a role in the Congolese humanitarian crisis.²⁴³ The Directorate-General for European Civil Protection and Humanitarian Aid Operations (“ECHO”) is responsible for ensuring rapid and effective delivery of EU relief assistance through humanitarian aid and civil protection.²⁴⁴ ECHO recognizes that the Congolese humanitarian crisis is both complex and long-standing.²⁴⁵ ECHO acknowledges that the crisis stems from constant fighting in the Congo, leading to the displacement of Congolese individuals, looting and violent acts like rape, kidnapping, and forced child labor.²⁴⁶ ECHO provides the Congo with shelter, water, food, sanitation facilities, and medical services to the displaced Congolese and responding to the needs of returning refugees.²⁴⁷ ECHO faces problems with accessing remote parts of the Congo to provide help because of poor infrastructure and lack of security.²⁴⁸ The Commission operates a dedicated humanitarian air service called “ECHO Flight” and helicopters, which transport humanitarian personnel and supplies to remote areas in the Congo where access by road is impossible or unsafe.²⁴⁹

IV. IMPROVING UPON SECTION 1502’S SHORTCOMINGS

This Part argues that US Conflict Mineral legislation is not enough to combat the human rights abuses in the Congo. Here, the shortcomings of the US Conflict Mineral legislation are discussed. Additionally, this Part details what the European Union should ideally improve upon when finalizing their own Conflict Minerals regulation.

242. See *About EU Humanitarian Aid and Civil Protection*, European Commission, http://ec.europa.eu/echo/who/about-echo_en (last accessed Oct. 11, 2016).

243. *Id.*

244. *Id.*

245. *Democratic Republic of the Congo*, EUROPEAN COMMISSION, ec.europa.eu/echo/where/sub-saharan-africa/congo_en (last accessed Oct. 11, 2016).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

A. Do Not Task a Securities Commission with Combating Human Rights Violations

First, the European Union should focus on which office in its government is best suited to enforce Conflict Minerals regulation.²⁵⁰ As well-intentioned as the drafters of Section 1502 may have been, the end result of the provision and the rules that followed may not have actually helped the Congo and its victims as seamlessly as advocates convey.²⁵¹ Although there has been a reduction in active Conflict Mineral mines in the Congo, the effects of these armed forces and Section 1502 on the Congolese people themselves require more attention.²⁵² As a reminder, the SEC's mission is to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."²⁵³ When thinking about the SEC, the fight against human rights abuses is presumably not the first topic that surfaces in one's mind.²⁵⁴ Rather, the SEC is best known for its work with the *financial* sector and enforcement of laws preventing financial abuse.²⁵⁵

Investors may consider the use of Conflict Minerals as material information in making investment decisions, since public perception of the armed conflict could negatively affect a company's profits.²⁵⁶ Therefore, at the most basic level, it is easy to see why the SEC could be an appropriate agency for the job.²⁵⁷ It requires the disclosure of the use of Conflict Minerals in a company's manufactured products,

250. See De Ruyt et al., *supra* note 237 and accompanying text (indicating that the European Union has not chosen a specific agency or office to enforce Conflict Mineral regulation).

251. See *supra* Section II.A.5 (discussing Section 1502's effects on the Congo).

252. See *id.*

253. See SEC Final Rule Release, *supra* note 13 (describing the Agency's objectives and what the Agency does to achieve these objectives).

254. See *supra* notes 114-16 and accompanying text (discussing critics of the SEC going beyond its congressional mandate).

255. See *supra* note 114 (discussing the SEC's traditional role as enforcer in the financial industry).

256. See *supra* note 109 and accompanying text (discussing the importance of materiality in information for investors).

257. See *supra* Section II.A (discussing the purpose of disclosure and its importance in the US Conflict Mineral legislation and regulation).

which is conceivably material information that could adversely affect an investor's stake in a company.²⁵⁸

However, the SEC explicitly pointed out that Congress' intention in passing Section 1502 was to support the "humanitarian goal" of combating the violent conflict in the Congo, partially financed by the exploitation of trade minerals by armed groups, and to "promote peace and security."²⁵⁹ As an agency whose mission is to protect investors and facilitate capital formation, the SEC is not as well-versed in the mineral trade and fighting human rights as other offices and agencies may be.²⁶⁰ Moreover, it is also interesting to note that Section 1502 was considered a Dodd-Frank sleeper provision.²⁶¹ Perhaps its drafters intended for this to be so as congressional or public attention before enactment might have gutted the provision altogether.²⁶²

Customs may be one agency that could be better equipped to deal with the Conflict Minerals trade issue.²⁶³ As an agency tasked to root out blood diamonds, it is possible that their blood diamond inspection procedures could serve as a model when inspecting products for Conflict Minerals.²⁶⁴ Alternatively, the IRS may also be the better choice as a deterrent for the use of Conflict Minerals by various corporations.²⁶⁵ By providing corporations with a tax benefit for avoiding Conflict Minerals altogether, this benefit could quite possibly condition many companies to conduct thorough due diligence before using certain minerals in their products.²⁶⁶

258. *See supra* note 109 and accompanying text (discussing the importance of materiality in information for investors).

259. *See* SEC Final Rule Release, *supra* note 13 (discussing Congress' intention behind combating the conflict in the Congo associated with the mineral trade).

260. *See supra* notes 114-16 and accompanying text (discussing critics of the SEC going beyond its congressional mandate of financial regulation).

261. *See* note 139 and accompanying text (describing sleeper provisions).

262. *See id.* (defining sleeper provisions as provisions that garner little attention before enactment). Drafters may have intended for Section 1502 to go unnoticed because of its extensive requirements on corporations who use Conflict Minerals.

263. *See supra* notes 117-21 and accompanying text. These sources provide alternative government agencies that may better address the Conflict Minerals problem – i.e. Customs and the IRS. Because blood diamonds are associated with dangerous conditions much like Conflict Minerals, perhaps looking to current Customs procedures for detecting blood diamonds can be used for Conflict Minerals as well.

264. *See id.*

265. *See supra* notes 122-28 and accompanying text.

266. *See id.*

Although both Customs and the IRS may be much better choices for enforcing Section 1502, both agencies, much like the SEC, are not traditionally known to deal directly with human rights issues.²⁶⁷ In conjunction with either Customs or the IRS, USAID may finally address Congress' concerns with promoting peace and prosperity in the Congo.²⁶⁸ Since USAID has already worked closely with the Congo by providing millions of dollars of humanitarian relief, tasking USAID to also focus on victims of the Conflict Mineral trade may better alleviate the adverse effects of the armed conflict and corporations moving their mineral business elsewhere.²⁶⁹ One suggestion might be for the USAID to collaborate with the Congolese to implement a more transparent supply chain.²⁷⁰ Because the USAID strives for empowerment without imposition, the USAID could help diminish the conflict in the mineral trade by sending investigators to examine the tiers of extraction, transport, handling, trading, processing, smelting, refining, and alloying in the supply chain.²⁷¹ Once glaring issues such as abusive labor conditions are identified in the different tiers of the supply chain, USAID investigators can advise the appropriate government agencies and recommend more funding to implement a system to eradicate these conditions.²⁷²

The SEC's purpose is to protect investors and facilitate capital formation.²⁷³ Adding the responsibility of overseeing Conflict Mineral supply chain due diligence may overwhelm an agency that is likely not experienced enough to meet Congress' objectives in the first place.²⁷⁴ Congress has seemingly broadened the SEC's mission beyond investor protection and capital formation.²⁷⁵ If Congress will go so far as to broaden or alter the SEC's mission, perhaps it should

267. *See supra* Section II.A.3.

268. *See* SEC Final Rule Release, *supra* note 13 (discussing Congress' intention behind combatting the conflict in the Congo associated with the mineral trade).

269. *See supra* Section II.A.3.

270. *See supra* notes 16-20 and accompanying text.

271. *See id.*

272. *See supra* Section II.A.3.

273. *See* SEC Final Rule Release, *supra* note 13 (describing the Agency's objectives and what the Agency does to achieve these objectives).

274. *See supra* notes 114-16 and accompanying text (discussing critics of the SEC going beyond its congressional mandate of financial regulation).

275. *See id.*

directly address the Conflict Minerals issue rather than burden the SEC.²⁷⁶

The European Union should avoid tasking a securities commission with the implementation of Conflict Minerals regulation as well.²⁷⁷ The European Union may look into creating a special commission in addressing the Conflict Minerals problem, which could be a combination of two different agencies working in tandem.²⁷⁸ The European Union could task their customs agency with monitoring the source of incoming minerals, which may have similar procedures in rooting out blood diamonds.²⁷⁹ Another alternative would be placing more monetary penalties through their tax agency.²⁸⁰ If the European Union decides to take either route, it should bear in mind that these offices should work in conjunction with ECHO.²⁸¹

B. Human Rights: There is More the European Union Can and Should Do

Currently, the European Union is still in the process of finalizing their version of a Conflict Minerals regulation.²⁸² The European Union can learn a great deal from the United States' missteps of tasking a securities commission with a critical human rights issue.²⁸³ In light of the European Union's pending regulation, the Parliament and the Commission must focus on what should be the real objective behind Conflict Minerals regulation in any nation: protecting human rights in conflict-affected countries.²⁸⁴

276. *See id.*

277. *See id.*

278. *See supra* Section II.A.3. These sources are used for comparative purposes, providing the basis for suggestions in addressing the Conflict Minerals problem and shortcomings of current procedures tackling this issue.

279. *See supra* notes 117-21 and accompanying text.

280. *See supra* notes 122-28 and accompanying text.

281. *See supra* notes 237-35 and accompanying text.

282. *See* notes 232-36 and accompanying text (discussing the forthcoming EU Conflict Mineral regulation).

283. *See supra* notes 186-93 and accompanying text.

284. *See supra* Section II.A.4 (discussing Congress's intention in passing Section 1502: supporting the "humanitarian goal" of combating the violent conflict in the Congo and to "promote peace and security.")

Even if the European Union's forthcoming Conflict Minerals regulation is passed in the near future, reports have indicated it still does not adequately address the humanitarian aspect of this Note's argument.²⁸⁵ In fact, if recent reports hold true, the current version of their Conflict Minerals regulation is problematic since it seems to only require direct importers of minerals to disclose sources, while electronics companies are left off the hook and may disclose at their discretion.²⁸⁶ Therefore, the European Union should focus on better tackling disclosure issues and human rights if they decide to rework their Conflict Minerals regulation after its passage.²⁸⁷

One suggestion may be to follow the steps of the Brownback Bill and McDermott Bill, both of which called for increased assistance to the Congolese by facilitating medical treatment, humanitarian relief, rehabilitation services, and psychological assistance, among others.²⁸⁸ Drafting a provision providing this type of assistance and funding for individuals in affected countries addresses the humanitarian goal that the US Congress had in mind when passing Section 1502.²⁸⁹

Both USAID and ECHO are already deeply involved with providing humanitarian assistance and relief to the Congo.²⁹⁰ The European Union should try to expand ECHO's responsibilities and provide more focus on the victims of the Conflict Mineral trade.²⁹¹ Admittedly, such a measure would increase costs to the government. However, if the overarching goal is to help victims of violence and armed conflict, this goal is seemingly within the reach of what ECHO strives for: the provision of humanitarian aid and civil protection to countries in need.²⁹² Since ECHO is familiar with the Congo and its conflict, the office should try to broaden its reach over countries affected by conflict associated with mineral trade.²⁹³ Like the

285. *See supra* notes 232-36 and accompanying text (discussing the forthcoming EU Conflict Mineral regulation).

286. *See id.*

287. *See generally supra* Section II.A.4.

288. *See supra* Section II.A.1.

289. *See supra* Section II.A.4.

290. *See supra* Sections II.A.3 and III.D.

291. *See supra* Section III.D (describing ECHO's purpose and its current responsibilities).

292. *See id.*

293. *See id.*

Brownback Bill suggested, ECHO should increase protection and services for communities adversely affected by the mineral trade, strengthen the actual management and trade of natural resources, and improve conditions and livelihood prospects of mineral miners.²⁹⁴ Additionally, ECHO should resemble the McDermott Bill by also focusing on alleviating child labor abuse and providing protections for these children.²⁹⁵ Perhaps, ECHO can try to help the Congo and other affected countries develop a procedure where only individuals of a certain age are allowed to work as miners.²⁹⁶ Although the Congo does have laws in place limiting labor to children over the age of sixteen, and dangerous labor to children over the age of eighteen, the penalties in place for violating these provisions are inadequate.²⁹⁷ ECHO should focus on advising government offices tasked with enforcing Conflict Mineral regulation.²⁹⁸ Perhaps ECHO can suggest that EU government officials meet with Congolese government officials to discuss strengthening the punishment for those who violate child labor laws.²⁹⁹

CONCLUSION

In today's world, where churning out profit for shareholders often takes priority, the adverse effects of these moneymaking business practices are often overlooked.³⁰⁰ As evidenced by failed Conflict Minerals bills, the eventual passage of Section 1502 of the Dodd-Frank Act, and the current EU regulation process, many individuals are no longer able to turn a blind eye to financing practices that fuel violence and lead to death.³⁰¹ Legislation focusing on the situations that enable this conflict has had some beneficial effects such as an increase in corporate transparency, the decrease in sales of minerals not certified to be conflict free, and the

294. *See supra* Section II.A.1.

295. *See id.*

296. *See supra* note 77 and accompanying text (discussing the child labor laws in the Congo, the Congo's moderate improvement in combatting forced child labor, and suggestions regarding increasing imprisonment penalties for those who force children to work in dangerous conditions).

297. *See id.*

298. *See id.*

299. *See id.*

300. *See supra* Section II.A.5.

301. *See supra* Introduction and Section I.C.

demilitarization of armed forces said to contribute to the conflict in the Congo.³⁰²

Because electronic devices, especially smartphones, are as pervasive today as pay phones were decades ago, it is of great importance to be a responsible consumer.³⁰³ Otherwise, there may be a chance your smartphone is comprised of minerals mined under devastating conditions, whether it be in the Congo or other countries affected by similar conflict.³⁰⁴ It is difficult to be responsible without transparency from the companies that sell these products.³⁰⁵ Without proper disclosure, the cycle of unknowingly funding armed forces facilitating violence within conflict-affected countries will only continue.³⁰⁶ Fortunately, there has been a movement towards more disclosure to avoid fueling conflict in other countries, as seen with United States' Section 1502 provision and the European Union's efforts towards creating a similar provision in their arena.³⁰⁷

However, our society is still far from meeting the humanitarian goal of dispelling the conflict in conflict-affected countries.³⁰⁸ It sends a powerful message that the United States and the European Union are taking steps to combat human rights violations, but there is still more that needs to be done.³⁰⁹ US Conflict Minerals regulation seemingly neglects the individuals it was meant to protect.³¹⁰ The European Union can remedy this misstep by drafting its own version of Conflict Minerals regulation with affected individuals in mind, and perhaps the United States will follow suit to improve its own current regulation.

302. *See supra* Section II.A.

303. *See* Introduction (discussing the link between Conflict Minerals in smartphones as many devices contain minerals that may have originated from the Congo, thus giving rise to the possibility of indirectly financing the dangerous conflict).

304. *See id.*

305. *See id.*

306. *See id.*

307. *See supra* Parts II and III (examining the United States' Conflict Mineral legislation and regulation and the European Union's pending Conflict Mineral regulation).

308. *See supra* Section II.A.5 (discussing the disadvantages of Section 1502 in the Congo and its effects on the miners).

309. *See supra* Parts II and III (examining the United States' Conflict Mineral legislation and regulation and the European Union's pending Conflict Mineral regulation).

310. *See supra* notes 192-196 and accompanying text; *see also supra* note 249 (discussing Congress' intention in passing Section 1502: supporting the "humanitarian goal" of combatting the violent conflict in the Congo and "promot[ing] peace and security.")