

2015

## Promoting World Peace Through the Use of the "Good Book": Implementing Foreign Policy Through the Tax Code

Joshua A. Feinzeig

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

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.* (2015).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol40/iss3/6>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# PROMOTING WORLD PEACE THROUGH THE USE OF THE “GOOD BOOK”: IMPLEMENTING FOREIGN POLICY THROUGH THE TAX CODE

*Whosoever saves a single life, it is as if he saved the entire world.*—Mishnah, Sanhedrin 4:5

## INTRODUCTION

Since Christopher Columbus’s epic 1492 voyage to the New World, we have inhabited an economically interdependent, globalized world. As a result, products we require on a daily basis often originate as bits and pieces gathered from countries all over the globe. Therefore, it is no surprise that raw materials used to manufacture so many mundane products often stem from third-world countries, worlds away from western society. These materials and minerals are found in commonplace electronic devices that people around the world depend upon in their daily routines; these devices sustain lives, assist in the performance of business, provide entertainment, and enhance our days in myriads of ways. However, many source countries that are blessed with the abundance of resources and minerals that are used in assembling our everyday electronic devices are all too often cursed with violent conflict and crushing poverty.

This conundrum is particularly apparent in the Democratic Republic of Congo (“DRC”). The DRC is renowned for its plethora of natural resources.<sup>1</sup> Therefore, one would assume that the country would be thriving. However, the converse has ensued: the people of the DRC are subjected to both unremitting violence<sup>2</sup> and rampant poverty.<sup>3</sup> Counterintuitively, the DRC’s

---

1. *Natural Resource Exploitation and Human Rights in the Democratic Republic of Congo 1993 To 2003*, GLOBAL WITNESS 4 (Dec. 2009), [http://www.globalwitness.org/sites/default/files/pdfs/drc\\_exploitation\\_and\\_human\\_rights\\_abuses\\_93\\_03\\_en.pdf](http://www.globalwitness.org/sites/default/files/pdfs/drc_exploitation_and_human_rights_abuses_93_03_en.pdf) [hereinafter *Natural Resource Exploitation*].

2. Enough Project Team & Grassroots Reconciliation Group, *A Comprehensive Approach to Congo’s Conflict Minerals*, ENOUGH PROJECT 1 (Apr. 2009), <http://www.enoughproject.org/files/Comprehensive-Approach.pdf> [hereinafter *A Comprehensive Approach*].

resource abundance seems to exacerbate both the discord and ensuing atrocities.<sup>4</sup>

Why should the global community care? After all, this is not a world problem. Or is it? The current humanitarian crisis in the DRC is appalling, with thousands dying daily.<sup>5</sup> Members of the international community must be made aware of the tragedy that is occurring in the DRC and support efforts to end the crisis there. Additionally, virtually all consumers have a direct hand in the ongoing crisis, as the minerals that are fueling the conflict<sup>6</sup> are regularly found in components of many commonplace products.<sup>7</sup> Thus, the situation in the DRC is not a Congolese or African issue, but truly a global issue.

In reality, while millions of innocent lives are being lost in the DRC,<sup>8</sup> the global community often looks the other way.<sup>9</sup> Recently, belated efforts both in the United States and across the globe have been put forth attempting to deal with these is-

3. *Rural Poverty in the Democratic Republic of the Congo*, RURAL POVERTY PORTAL, [http://www.ruralpovertyportal.org/country/home/tags/dr\\_congo#](http://www.ruralpovertyportal.org/country/home/tags/dr_congo#) (last visited Dec. 30, 2014).

4. *A Comprehensive Approach*, *supra* note 2. The DRC is considered “the world’s least developed country in terms of life expectancy, education, standard of living and key health indicators.” *The IRC in the Democratic Republic of Congo*, INT’L RESCUE COMMITTEE, [http://www.rescue.org/where/democratic\\_republic\\_congo](http://www.rescue.org/where/democratic_republic_congo) (last visited June 9, 2015). The recent violence has led to the deaths of up to six million people, and even cannibalism has been reported. Owen Jones, *Let’s Be Honest. We Ignore Congo’s Atrocities Because It’s in Africa*, GUARDIAN, Mar. 6, 2015, <http://www.theguardian.com/commentisfree/2015/mar/06/ignore-congo-atrocities-africa-drc-horror>. The violence has left the DRC both impoverished and devastated. *Id.*

5. *Measuring Mortality in the Democratic Republic of Congo*, INTERNATIONAL RESCUE COMMITTEE 2, [http://www.rescue.org/sites/default/files/resource-file/IRC\\_DRCMortalityFacts.pdf](http://www.rescue.org/sites/default/files/resource-file/IRC_DRCMortalityFacts.pdf) (last visited Jan. 8, 2014) [hereinafter *Measuring Mortality*].

6. *A Comprehensive Approach*, *supra* note 2.

7. John Prendergast, *Can You Hear Congo Now*, ENOUGH PROJECT 2–3 (Apr. 1, 2009), <http://www.enoughproject.org/files/Can%20Your%20Hear%20Congo%20Now.pdf>.

8. *Measuring Mortality*, *supra* note 5, at 1.

9. *See, e.g., id.* at 1; *see also* JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS* 5 (2011).

sues.<sup>10</sup> Although in the United States there are currently no bans on using minerals outsourced from the DRC, there is a statute, with regulations promulgated thereunder, that strive to implement transparency requirements regarding the use of minerals originating from the DRC and its surrounding environs.<sup>11</sup> Additionally, around the world, several mechanisms have been implemented to deal with the DRC minerals, including an approach adopted by the United Nations.<sup>12</sup>

This Note explains why the current U.S. legislation and regulations intending to control the flow of the “Conflict Minerals”<sup>13</sup> in the DRC are having the opposite effects of what was intended by the U.S. Congress in enacting such legislation. It also examines global steps that have been taken to alleviate this problem which are triggering a negative outcome as well. The Note further analyzes constitutional challenges faced by current U.S. legislation. Finally, the Note will suggest a different approach to properly regulate the flow of Conflict Minerals.

Part I of this Note briefly outlines the bloodstained history of the DRC and elaborates on how the “Resource Curse”<sup>14</sup> has exacerbated this conflict. Part II examines the history of § 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection

10. See CONFLICT MINERALS—AN EVALUATION OF THE DODD-FRANK ACT AND OTHER RESOURCE-RELATED MEASURES 5–6 (2013), <http://www.oeko.de/oekodoc/1809/2013-483-en.pdf> [hereinafter EVALUATION OF THE DODD-FRANK ACT].

11. *Id.* at 1–2; Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1502, 124 Stat. 1376, 2213–18 (2010) (codified as amended in scattered sections of the U.S. Code).

12. Namely, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. EVALUATION OF THE DODD-FRANK ACT, *supra* note 10. Other approaches include: the Conflict-Free Tin Initiative; the Analytical Fingerprint method; and the Certified Trading Chains initiative. *Id.* Additionally, the European Union has recently begun informal talks with EU-member states to implement a law similar in scope to Dodd–Frank to regulate Conflict Minerals. Shreema Mehta, *EU Votes for Strong Conflict Minerals Regulation* (May 28, 2015), [https://www.earthworksaction.org/earthblog/detail/eu\\_votes\\_for\\_strong\\_conflict\\_minerals\\_regulation](https://www.earthworksaction.org/earthblog/detail/eu_votes_for_strong_conflict_minerals_regulation).

13. “The term conflict mineral means (A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.” Dodd–Frank Wall Street Reform and Consumer Protection Act § 1502, 124 Stat. at 2218.

14. See RICHARD M. AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS 1 (1993).

Act (“§ 1502”)<sup>15</sup> and its implementing regulations promulgated by the Securities and Exchange Commission (“SEC”). It also provides a critique of § 1502 and addresses recent litigation regarding the constitutionality of § 1502. Part III discusses international efforts to control the flow of Conflict Minerals, specifically the United Nations’ approach. This Note concludes with Part IV, which evaluates current approaches and suggests an ideal method of dealing with Conflict Minerals, thereby reducing violence and saving lives.

## I. THE “RESOURCE CURSE” AND ITS IMPACT ON THE DRC

### A. Defining The “Resource Curse”

Regions that have an abundance of natural resources often suffer from poverty, a concept commonly known as the “Resource Curse.” The Resource Curse conundrum is a major issue that challenges current economic scholarship.<sup>16</sup> The hypothesis suggests that there is an inverse association between a country’s economic growth and its endowment with natural resources.<sup>17</sup> Under this thesis, countries blessed with natural resources counterintuitively lag in economic growth behind countries without them.<sup>18</sup> This phenomenon remains a troubling problem facing developing countries, but its cause puzzles scholars and researchers.<sup>19</sup>

Several theories have been advanced to explain the Resource Curse paradox. Early theories explaining this inverse relationship were grounded in economic causes. For example, some scholars hypothesized that the Resource Curse was a result of commodity-price volatility, asserting that the overdependence on a single-export commodity could expose a developing econo-

---

15. Dodd–Frank Wall Street Reform and Consumer Protection Act § 1502, 124 Stat. at 2218.

16. See Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth 2* (Nat’l Bureau of Econ. Research, Working Paper No. 5398, 1995), <http://www.nber.org/papers/w5398>.

17. In the fountainhead study on the Resource Curse phenomenon, economists Jeffrey Sachs and Andrew Warner found that economies with a high proportion of natural resource exports to GDP had lower growth rates during the following years than did other countries with comparable economies. *Id.* at 1.

18. AUTY, *supra* note 14.

19. Sachs & Warner, *supra* note 16.

my to macroeconomic shocks if world prices would shift.<sup>20</sup> Others proposed a theory known as “Dutch Disease,” the concept that a resource boom is bad for other nonbooming sectors, in order to explain this enigmatic occurrence.<sup>21</sup> On the other hand, different researchers attempted to explain this phenomenon based on social causes. These researchers argue that people become lazy when resources are abundant.<sup>22</sup> Conversely, countries lacking abundant natural resources invest in their human resources; i.e. training and education.<sup>23</sup>

However, more recently scholars have advanced a novel explanation for the Resource Curse. Empirical studies were conducted on poorer nations that possessed oil and mineral wealth.<sup>24</sup> These studies revealed that the resource rich countries not only grow slower than resource-poor counter parts and were more likely to suffer from civil wars, but that the oil and mineral wealth by themselves stifled democracy in such countries.<sup>25</sup> Therefore, recent research emphasizes the negative impact of countries possessing significant amounts of natural resources, not just on a country’s wealth, but also on the institutions and mechanisms of the government’s accountability to its

20. Paul Collier, *Primary Commodity Dependence and Africa’s Future*, WORLD BANK 2–3, 9 (Apr. 2012), <http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814045642/Collier-full.pdf>.

21. W. M. Corden & J. P. Neary, *Booming Sector and De-Industrialisation in a Small Open Economy*, 92 ECON. J. 825, 841 (1982).

22. See Michael L. Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297, 309 (1999). The societal based theory is based upon the premise that laziness is associated with an abundance of natural resources. *Id.* Thus, when resources are plentiful, society lacks a strong motivational drive toward economic development. *Id.*

23. Dani Rodrik, *The Past Present and Future of Economic Growth* 4 (Glob. Citizen Found., Working Paper No. 1, 2013). For example, the so-called Four Asian Tigers (South Korea, Taiwan, Singapore and Hong Kong) lack indigenous natural resources but have invested in human capital and have seen dynamic economic growth during the twentieth-century. Jamil Nasir, *The Making of an Asian Tiger*, NEWS (Jul. 27, 2013), <http://www.thenews.com.pk/Todays-News-9-192677-The-making-of-an-Asian-tiger>; but cf. Jean-Philippe Stijns, *Natural Resource Abundance and Human Capital Accumulation*, 34 WORLD DEV. 1060 (2006) (asserting that countries with abundant natural resources *do* invest in human capital and education).

24. Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325, 325 (2001).

25. *Id.* at 328.

citizens.<sup>26</sup> This line of theories posits that the Resource Curse is an economic problem triggered by the intricate relationship between numerous political and institutional failures.<sup>27</sup>

### *B. The Democratic Republic of the Congo*

Many resource-rich African countries appear to be affected by the Resource Curse. In these situations, the Resource Curse can often be traced to corruption and violence. In Africa, for example, Nigeria, Algeria, Angola, Egypt, Libya, Sudan, the Republic of Congo and Equatorial Guinea were the top eight oil producers in 2011.<sup>28</sup> Yet in the last decade, violent conflict or authoritarian governments have plagued all of these countries.<sup>29</sup>

The DRC in particular, suffers acutely from the Resource Curse. Located in the heart of Africa, it is the world's eleventh largest country by area<sup>30</sup> and has a substantial supply of natural resources.<sup>31</sup> Its vast natural resources and mineral wealth make it possibly the richest country in the world, with total mineral wealth estimated to be \$24 trillion USD, equal to the Gross Domestic Product ("GDP") of the United States and Europe combined.<sup>32</sup>

Specifically, the DRC has an abundant supply of Conflict Minerals, which is used to produce the metals tin, tantalum, and tungsten, in addition to gold (referred to as "3TG Miner-

26. See, e.g., Alastair Smith, *The Perils of Unearned Income*, 70 J. POL. 780, 790 (2008).

27. See *id.*; see also Jeffrey A. Frankel, *The Natural Resource Curse: A Survey* 15 (Nat'l Bureau of Econ. Research, Working Paper No. 15836, 2010), [http://www.nber.org/papers/w15836.pdf?new\\_window=1](http://www.nber.org/papers/w15836.pdf?new_window=1).

28. Terra Lawson-Remer & Joshua Greenstein, *Beating the Resource Curse in Africa: A Global Effort*, GOOD GOVERNANCE AFR. (August 1, 2012), <http://gga.org/stories/editions/aif-3-africas-natural-resources-if-we-are-so-rich-why-are-we-so-poor/ beating-the-resource-curse-in-africa-a-global-effort>.

29. *Id.*

30. *The World Factbook*, CENTR. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html?countryname=Congo,%20Democratic%20Republic%20of%20the&countrycode=cg&regionCode=afr&rank=11#cg> (last visited Dec. 31, 2014).

31. *Natural Resource Exploitation*, *supra* note 1.

32. M. J. Morgan, *DR Congo's \$24 Trillion Fortune*, AFR. BUS., Feb. 2009, at 52.

als”).<sup>33</sup> For example, the DRC is the sixth largest manufacturer of tin, making an estimated 6 to 8 percent of the world’s supply.<sup>34</sup> Similarly, the DRC produces about 20 percent of the worldwide production of tantalum.<sup>35</sup> Although, the DRC only produces a small portion of the global supply of tungsten and gold, the mining of these minerals is still very profitable and also aggravates violence there.<sup>36</sup>

Yet, although it has such a vast abundance of resources, the DRC is ranked as one of the poorest countries in the world.<sup>37</sup> The DRC had a GDP per capita income of only \$400 USD in 2013<sup>38</sup> and less than 30 percent of its rural population had access to an improved water source.<sup>39</sup> Furthermore, the DRC faces brutal carnage and suffers from decades of conflict; perhaps the world’s deadliest since World War II.<sup>40</sup> Every day, more than a thousand innocent men, women, and children are killed or die of starvation.<sup>41</sup> Since 1998, more than five million people have died; at times, forty-five thousand have perished each month, about half of them young children.<sup>42</sup> The vast majority of people are dying from preventable and treatable indirect conditions such as malaria, diarrhea, pneumonia, and malnu-

33. *Conflict Minerals*, ENOUGH PROJECT, <http://www.enoughproject.org/conflict-minerals> (last visited Dec. 30, 2014) [hereinafter *Conflict Minerals*].

34. *A Comprehensive Approach*, *supra* note 2, at 2.

35. *Id.*

36. *Id.* at 15. For example, although the DRC produces only about 1 percent of the world’s gold supply, *id.*, it still earns armed groups up to \$88 million USD annually. Prendergast, *supra* note 7, at 3.

37. *The Democratic Republic of Congo ECHO Factsheet*, EUR. COMM’N 2 (Sept. 2014), [http://ec.europa.eu/echo/files/aid/countries/factsheets/drc\\_en.pdf](http://ec.europa.eu/echo/files/aid/countries/factsheets/drc_en.pdf). The DRC was ranked second to last in the world in the 2014 Human Development Index and is one of the poorest countries in the world despite having abundant natural resources. *Id.*

38. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (last visited Dec. 31, 2014).

39. *Data*, WORLD BANK, <http://data.worldbank.org/indicator/SH.H2O.SAFE.RU.ZS/countries/CD?display=graph> (last visited Dec. 20, 2014).

40. *Conflict in Congo Deadliest Since World War II, Says The IRC*, INT’L RESCUE COMMITTEE, <http://www.rescue.org/news/conflict-congo-deadliest-world-war-ii-says-irc-3730> (last updated Jun. 22, 2014).

41. *Measuring Mortality*, *supra* note 5.

42. Jones, *supra* note 4.



trition.<sup>43</sup> Furthermore, the DRC remains “the most dangerous place in the world to be [female],”<sup>44</sup> with “the prevalence and intensity of sexual violence against women in eastern Congo” considered “almost unimaginable.”<sup>45</sup> Tragically, on average forty-eight women were raped an hour in 2011.<sup>46</sup>

The unremitting violence and the ensuing humanitarian crisis in the DRC are prime examples of the Resource Curse in action. Not only has resource abundance not improved life in the DRC, it is actually the root cause of much of the misery.<sup>47</sup> The trade in Conflict Minerals is one of the key drivers of the ongoing cycle of discord and violence in the DRC.<sup>48</sup> Furthermore, institutional and political failures, namely corruption, are at the core of this calamity as every year armed groups, often with governmental ties,<sup>49</sup> earn hundreds of millions of dollars by dealing in Conflict Minerals.<sup>50</sup>

Violence in the DRC is driven by militias and armies fighting to obtain power through control over mines that produce Conflict Minerals.<sup>51</sup> Armed groups from the DRC and surrounding countries support themselves through illegitimate trade in Conflict Minerals.<sup>52</sup> Therefore, it is no surprise that a majority of the conflict occurs in the central mining areas of North and

43. *Id.*

44. Prendergast, *supra* note 7, at 1.

45. Stephanie McCrummen, *Prevalence of Rape in E. Congo Described as Worst in World*, WASH. POST, Sept. 9, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/08/AR2007090801194.html>. Margot Wallstrom, a senior U.N. official, has called the DRC “the rape capital of the world” with more than eight thousand women raped during fighting in 2009. *UN Official Calls DR Congo ‘Rape Capital of the World’*, BBC (Apr. 28, 2010), <http://news.bbc.co.uk/2/hi/8650112.stm>.

46. Jones, *supra* note 4.

47. *A Comprehensive Approach*, *supra* note 2.

48. *Id.*

49. *DR Congo: End Illegal Exploitation of Natural Resources*, HUM. RTS. WATCH (Feb. 19, 2006), <http://www.hrw.org/news/2006/02/19/dr-congo-end-illegal-exploitation-natural-resources>.

50. *Conflict Minerals*, *supra* note 33. *See also Corruption Perceptions Index 2014: Results*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2014/results> (last visited Mar. 8, 2015) (ranking DRC 154th out of one hundred seventy-four countries in corruption).

51. *A Comprehensive Approach*, *supra* note 2, at 1.

52. *Id.* at 4.

South Kivu in the DRC.<sup>53</sup> The mining of Conflict Minerals is not limited to the acts of rebel groups; soldiers from the Congolese National Army, and even their commanders, are also involved in the mining.<sup>54</sup>

While pilfering these minerals, rebel groups, as well as the Congolese army, have used forced labor, often in harsh and hazardous conditions and have levied illegal “taxes” on the citizen population.<sup>55</sup> Profits earned by armed groups from the trade of Conflict Minerals were estimated to be in the hundreds of millions of dollars in 2008 alone.<sup>56</sup> Additionally, rebels have employed violence against innocent civilians who attempt to refuse to work for them or in order to compel civilians to surrender the minerals they extract.<sup>57</sup>

Many people are entirely oblivious to the fact that Conflict Minerals can be found in most, if not all of their electronic devices.<sup>58</sup> In fact, if a product has a circuit board, it most likely contains Conflict Minerals that originated in the DRC. For example, tantalum, which is extracted from coltan, a mineral found in major quantities in the DRC, is an important element in creating devices that hold electricity and is commonly found in products such as cell phones, hearing aids, air bags, jet engines, and rockets.<sup>59</sup> Rebels sell the processed coltan to multinational corporations such as Sony, Nokia, and IBM.<sup>60</sup> Fur-

53. *Id.* at 2.

54. *Faced With a Gun What Can You Do?*, GLOBAL WITNESS 5 (July 2009), [http://www.globalwitness.org/sites/default/files/pdfs/report\\_en\\_final\\_0.pdf](http://www.globalwitness.org/sites/default/files/pdfs/report_en_final_0.pdf) [hereinafter *Faced With a Gun*].

55. *Id.*

56. *A Comprehensive Approach*, *supra* note 2, at 3.

57. *Faced With a Gun*, *supra* note 54.

58. *Id.* The media coverage also has not adequately portrayed the ongoing atrocities in the DRC. STEARNS, *supra* note 9, at 5. Even the New York Times—one of the few American papers with extensive coverage on the African conflicts—gave Darfur four times the coverage it gave Congo in 2006, despite that the rate of war-related Congolese deaths was nearly ten times the rate in Darfur and up to six million deaths have been recorded since 1998 as a result of the Congolese government’s failure to meaningfully control or govern its territory. *Id.*

59. *Coltan Facts*, FRIENDS OF THE CONGO, [http://www.friendsofthecongo.org/pdf/coltan\\_facts.pdf](http://www.friendsofthecongo.org/pdf/coltan_facts.pdf) (last visited Dec. 29, 2014) [hereinafter *Coltan Facts*] (Coltan is short for columbite-tantalite. *Id.* When refined, coltan becomes metallic tantalum. *A Comprehensive Approach*, *supra* note 2, at 3).

60. *Coltan Facts*, *supra* note 59.

thermore, tin that originates in the DRC is used as a solder on circuit boards,<sup>61</sup> while tungsten is used to make cellphones vibrate.<sup>62</sup> Finally, gold extracted in the DRC is regularly used in the production of electronics and, of course, is a popular component in jewelry.<sup>63</sup>

### C. DRC Conflict History

Conflict has been part of the DRC's character in various forms for generations. Although battles over resources have not always been the sole point of contention, they have contributed to the hostility and continue to do so.<sup>64</sup> The bloody history of the DRC dates back to 1885, when King Leopold II of Belgium claimed the Congo as his "personal fiefdom."<sup>65</sup> He made a fortune exploiting the Congo's rubber supplies during the "rubber boom."<sup>66</sup> Leopold set up a system of slave labor where his sadistic subordinates killed or maimed hundreds of thousands, while millions of others died from starvation or from disease.<sup>67</sup> It is estimated that half the population of the Congo was wiped out at that time.<sup>68</sup> Soon thereafter, King Leopold was pressured by international human-rights activists to relinquish his ruthless reign, and he handed the country over to Belgium.<sup>69</sup> Although the Belgians established a more elaborate government, they too focused on mineral extraction and not on Congolese development.<sup>70</sup> In 1960, Belgian colonial rule finally ended after a suc-

---

61. Prendergast, *supra* note 7, at 2.

62. *Id.* at 3.

63. *Id.*

64. *A Comprehensive Approach*, *supra* note 2, at 1.

65. Anup Shah, *The Democratic Republic of Congo*, GLOBAL ISSUES, <http://www.globalissues.org/print/article/87> (last updated Aug. 21, 2010). Leopold established the Congo Free State, his own private enterprise, turning the local inhabitants into slaves to harvest rubber and ivory for his personal benefit. ADAM HOCHSCHILD, *KING LEOPOLD'S GHOST* 159–61 (1998).

66. HOCHSCHILD, *supra* note 65.

67. Shah, *supra* note 65. It was the official policy to cut off hands to enforce the rubber quota. HOCHSCHILD, *supra* note 65, at 165.

68. *Id.* at 233. According to these estimates, the population dropped by about ten million people during the Leopold period and its immediate aftermath. *Id.*

69. STEARNS, *supra* note 9, at 8.

70. *Id.*

cessful nationwide independence movement.<sup>71</sup> However, chaos quickly returned in a period known as the Congo Crisis.<sup>72</sup> In 1971, Joseph Mobutu, a former sergeant in Belgium's colonial army, commenced ruling the country, changing its name to Zaire.<sup>73</sup> Mobutu was initially a popular leader, fostering national unity and culture.<sup>74</sup> Eventually, Mobutu became increasingly paranoid and distrustful of the government and army and ultimately cannibalized his own institutions and infrastructures.<sup>75</sup>

Since decolonization and independence, the Congo has experienced a series of political calamities that in 1996 led to the start of what is known as the First Congo War.<sup>76</sup> The reasons for the war were multifaceted, but they were partially based on various governments' interests in overthrowing Mobutu.<sup>77</sup> Ultimately, the ailing Mobutu was ousted and replaced by Laurent-Desire Kabila, a former rebel leader.<sup>78</sup> Kabila subsequently renamed the country the Democratic Republic of Congo.<sup>79</sup>

The Second Congo War broke out in August 1998 for many of the same reasons as the First Congo War.<sup>80</sup> Kabila held the

71. *Roots of the Crisis*, ENOUGH PROJECT 1, [http://www.enoughproject.org/files/pdf/crisis\\_roots\\_congo.pdf](http://www.enoughproject.org/files/pdf/crisis_roots_congo.pdf) (last visited Mar. 8, 2015).

72. See Lawrence S. Kaplan, *The United States, Belgium, and the Congo Crisis of 1960*, 29 REV. POL. 239, 239–41 (1967).

73. STEARNS, *supra* note 9, at 7.

74. *Id.*

75. *Id.*

76. EVALUATION OF THE DODD-FRANK ACT, *supra* note 10, at 14. In 1994, the civil war in neighboring Rwanda escalated and almost one million Hutus and Tutsis were murdered at the hands of the Hutu militia and army. STEARNS, *supra* note 9, at 8. In his bid to become a regional power broker, Mobutu severely angered neighboring countries by hosting more than ten different foreign armed groups in his territory. *Id.* Consequently, in 1996, a regional coalition led by Angola, Uganda, and Rwanda joined to overthrow Mobutu. *Id.*

77. STEARNS, *supra* note 9, at 8. See EVALUATION OF THE DODD-FRANK ACT, *supra* note 10, at 14.

78. *Roots of the Crisis*, *supra* note 71, at 2.

79. *Congo: Colonial Period to Present*, WASH. POST, <http://www.washingtonpost.com/wp-srv/inatl/longterm/congo/timeline.htm> (last visited Mar. 10, 2015).

80. See Herbert Weiss, *The Second Congo War and Its Consequences*, AM. DIPL. (Aug. 2000), [http://www.unc.edu/depts/diplomat/AD\\_Issues/amdipl\\_16/weiss/weiss\\_congo4.html](http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_16/weiss/weiss_congo4.html). After the short hiatus, a second insurrection backed by Rwanda and

presidency until his assassination in January 2001, and his son, Joseph Kabila, was then declared ruler of the DRC.<sup>81</sup> In 2002, a peace agreement was negotiated with several rebel groups.<sup>82</sup> Nevertheless, violence and terror continued to dominate the DRC.<sup>83</sup> Despite extensive diplomatic efforts, including a 2009 peace accord,<sup>84</sup> the brutal fighting carries on to this day, with great suffering and the loss of innocent lives.<sup>85</sup> Thus, the hope for permanent peace in the DRC remains elusive.<sup>86</sup>

The current crisis in the DRC illustrates and reflects the historical pattern of conflict in the area. As outlined above, Conflict Minerals currently play a key role in the ongoing conflict. In response, mechanisms have been introduced to govern the flow of Conflict Minerals, both in the United States and abroad.

---

Uganda challenged the regime, and in August 1998, war broke out again after President Kabila attempted to gain independence from regional supporters and moved to remove Rwandan elements from his government. *Roots of the Crisis*, *supra* note 71, at 2. A ceasefire agreement was signed in Lusaka in July 1999. *Id.*

81. *Roots of the Crisis*, *supra* note 71.

82. See Peace Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Rwanda on the Withdrawal of the Rwandan Troops from the Territory of the Democratic Republic of the Congo and the Dismantling of the ex-FAR and Interahamwe Forces in the Democratic Republic of the Congo, July 30, 2002, 41 I.L.M. 1053.

83. *Id.*

84. DEMOCRATIC REPUBLIC OF THE CONGO, PEACE AGREEMENT BETWEEN THE GOVERNMENT AND LE CONGRES NATIONAL POUR LA DEFENSE DU PEUPLE (CNDP) (Mar. 23, 2009), [http://peacemaker.un.org/sites/peacemaker.un.org/files/CD\\_090323\\_Peace%20Agreement%20between%20the%20Government%20and%20the%20CNDP.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/CD_090323_Peace%20Agreement%20between%20the%20Government%20and%20the%20CNDP.pdf).

85. *Measuring Mortality*, *supra* note 5. The United Nations has been present in the DRC deploying a twenty-thousand strong peacekeeping force known as the Mission in the Democratic Republic of the Congo ("MONUC"). *Roots of the Crisis*, *supra* note 71. But the bloodshed continues as MONUC has been unable to contain the violence fomented at the hands of both the Congolese army and rebel militias. *Id.*

86. See *Congo-Kinshasa: Even Harder Times Ahead for Displaced in DR Congo*, ALL AFR. (Dec. 3, 2013), <http://allafrica.com/stories/201312041456.html> ("[W]ith so many other armed militias in the eastern DRC, peace remains elusive.").

## II. THE U.S. APPROACH TO REGULATING CONFLICT MINERALS

The United States has recently led the way in adopting legislation that attempts to encourage peace in the DRC by regulating the flow of Conflict Minerals.<sup>87</sup> The following section tracks the legislative history of the law and criticizes the U.S.'s approach. The section also explains why the adopted legislation may in fact be exacerbating the situation.

### *A. The Congo Conflict Minerals Act and § 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection Act*

To “promote peace and security in the DRC,”<sup>88</sup> Senator Sam Brownback introduced the Congo Conflict Minerals Act (“CCMA”) on April 23, 2009.<sup>89</sup> The CCMA was structured as a securities-based regulatory system for the Conflict Minerals trade, which intended to target the trade of Conflict Minerals in the DRC.<sup>90</sup> Although the CCMA was never passed in its entirety, many of its key provisions were adopted as part of the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).<sup>91</sup> In 2010, Dodd-Frank was passed “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial

---

87. See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1502, 124 Stat. 1376, 2213–18 (2010) (codified as amended in scattered sections of the U.S. Code).

88. S. 891, 111th Cong. § 1 (2009).

89. *Id.* The Congo conflict has been raised as an issue in the United States Congress for a number of years. During the 109th Congress, then Senator Barak Obama, among others, cosponsored S. 2125, the Democratic Republic of Congo Relief, Security, and Democracy Promotion Act of 2006, which states:

The National Security Strategy of the United States, dated September 17, 2002, concludes that “[i]n Africa, promise and opportunity sit side-by-side with disease, war, and desperate poverty. This threatens both a core value of the United States preserving human dignity and our strategic priority combating global terror. American interests and American principles, therefore, lead in the same direction: we will work with others for an African continent that lives in liberty, peace, and growing prosperity.”

S. 2125 109th Cong. § 101 (2006).

90. S. 891.

91. Dodd–Frank Wall Street Reform and Consumer Protection Act § 1502.

system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."<sup>92</sup>

Buried in the voluminous Dodd–Frank is § 1502 entitled, "Disclosure Relating to Conflict Minerals Originating in the Democratic Republic the Congo," which promotes a very different goal.<sup>93</sup> Unlike other provisions of Dodd–Frank, § 1502 is not a financial regulation. Rather, it is Congress's response to the continuing humanitarian crisis in the DRC and its attempt to deal "with the exploitation and trade of Conflict Minerals originating in the Democratic Republic of the Congo, [which] is helping to finance conflict characterized by extreme levels of violence in the Democratic Republic of the Congo."<sup>94</sup>

Section 1502 amended § 13 of the Securities and Exchange Act of 1934<sup>95</sup> by specifically directing the SEC to promulgate regulations requiring companies to annually disclose whether the tin, tantalum, tungsten, and gold that such companies use in the manufacturing of products originated in the DRC or an adjoining country.<sup>96</sup> If a company does in fact manufacture or contract to manufacture products that are not DRC conflict free, the disclosing party is further required to submit a Conflict Minerals Report to the SEC.<sup>97</sup> This report requires descriptions of the steps taken to exercise due diligence on the source and chain of custody of the minerals. The required steps include an independent audit of the report, which describes the facilities used to process the minerals, the minerals' country of origin, and the efforts made to determine the mine from which the minerals came or location of origin.<sup>98</sup> In addition to being required to make these disclosures to the SEC, reporting companies are also required to make this information available to the public on the reporting company's website.<sup>99</sup>

---

92. *Id.* pmb1.

93. Dodd–Frank Wall Street Reform and Consumer Protection Act § 1502.

94. *Id.*

95. *Id.*; 15 U.S.C. § 78m(p) (2012).

96. 15 U.S.C. § 78m(p)(1)(A).

97. *Id.*

98. *Id.*

99. *Id.*; 15 U.S.C. § 78m(p)(1)(E). The rule does not require that companies place any type of label or disclosure on products. Conflict Minerals, 77 Fed. Reg. 56,274, 56,323 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p–1, 249b).

Important to note is what § 1502 neglects to do. Section 1502 fails to prohibit public companies from using Conflict Minerals in the manufacture of their products. Instead, it attempts to curb the exploitation and trade of Conflict Minerals merely through “name and shame” tactics by requiring companies to provide disclosures about their use of Conflict Minerals.<sup>100</sup> The U.S. Congress hoped that the reputational damage engendered by such a disclosure in annual reports would act as a deterrent to consumers.<sup>101</sup>

### *B. Critique of § 1502*

Although § 1502 only constitutes a fraction of Dodd-Frank, its impact is far reaching and a source of contention. During the rulemaking process, the SEC received more than thirty thousand comment letters.<sup>102</sup> Due to industry pushback against the proposed regulations mandated by § 1502, the SEC delayed publishing rules to accompany § 1502 for over a year.<sup>103</sup> At long last, on August 22, 2012, the SEC issued final regulations to implement § 1502.<sup>104</sup>

The execution of § 1502 has received a great deal of attention and criticism.<sup>105</sup> First among these criticisms, is that the implementation of § 1502 has resulted in a de facto embargo on

100. See Karen E. Woody, *Conflict Minerals Legislation: The SEC'S New Role as Diplomatic and Humanitarian Watchdog*, 81 *FORDHAM L. REV.* 1315, 1344 (2012).

101. *Id.*

102. FINANCIAL SERVICES COMMITTEE MAJORITY COMMITTEE STAFF, MEMORANDUM ON THE UNINTENDED CONSEQUENCES OF DODD-FRANK'S CONFLICT MINERALS PROVISION 2 (May 16, 2013) [hereinafter UNINTENDED CONSEQUENCES MEMO], [http://financialservices.house.gov/uploadedfiles/052113\\_mpt\\_memo2.pdf](http://financialservices.house.gov/uploadedfiles/052113_mpt_memo2.pdf).

103. *Implementing the Conflict Minerals Provision: The Cost of Business as Usual*, GLOBAL WITNESS (Aug. 20, 2012), [http://www.globalwitness.org/sites/default/files/library/The\\_Cost\\_of\\_Business\\_as\\_Usual.pdf](http://www.globalwitness.org/sites/default/files/library/The_Cost_of_Business_as_Usual.pdf).

104. *SEC Adopts Rule for Disclosing Use of Conflict Minerals*, U.S. SECURITIES AND EXCHANGE COMM'N (Aug. 22, 2012), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171484002#.VL7ihkFf-ZM>.

105. See, e.g., Tim Worstall, *My Nomination For Worst Law Of The Year: Dodd Frank On Conflict Minerals*, *FORBES* (Dec. 25, 2012), <http://www.forbes.com/sites/timworstall/2012/12/25/my-nomination-for-worst-law-of-the-year-dodd-frank-on-conflict-minerals/>.



DRC-sourced minerals.<sup>106</sup> Second, it is contended that the SEC was not the appropriate governing body for the task of regulating Conflict Minerals.<sup>107</sup> Third, recent litigation has presented U.S. constitutional challenges to § 1502.<sup>108</sup> Finally, the legislation leaves the implementation of U.S. foreign policy in the hands and whims of corporations and not in the hands of governmental authorities.<sup>109</sup>

### 1. De Facto Embargo

The foremost criticism of § 1502 is the consequential de facto embargo on all DRC-sourced minerals.<sup>110</sup> Critics point out that in order to avoid the risk of tainting their reputation by funding African warlords, many companies withdrew their trade with the DRC and began purchasing their minerals from other viable alternatives, even before the law came into effect.<sup>111</sup> These companies apparently felt that instead of sifting through the numerous requirements of the new law, they would seek readily available alternative sources for their supplies. Additionally, in September 2010, DRC's President Kabila established a temporary ban on all mining in the Kivu and Maniema provinces.<sup>112</sup> Although the specific reason for the ban is uncertain, what does seem certain is that President Kabila would not have instituted the ban if § 1502 had not been implemented.<sup>113</sup>

---

106. See *infra* Part II.B.1

107. See *infra* Part II.B.2

108. See *infra* Part II.B.3.

109. See *infra* Part II.B.4.

110. Laura E. Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* (Ctr. for Glob. Dev., Working Paper No. 284), <http://www.cgdev.org/content/publications/detail/1425843>.

111. *Id.* See also Michael J. Kavanagh, *Congo Tin Sales Tumble 90 Percent as Companies Avoid Conflict Minerals*, BLOOMBERG (May 23, 2011), <http://www.bloomberg.com/news/2011-05-23/congo-tin-sales-tumble-90-percent-as-companies-avoid-conflict-minerals.html>.

112. *DR Congo Bans Mining in Eastern Provinces*, BBC NEWS (Sept. 10, 2010), <http://www.bbc.co.uk/news/world-africa-11269360>.

113. Laura Seay lays out several theories explaining why President Kabila instituted the ban. See Seay, *supra* note 110. Two of the theories are premised on the fact that President Kabila acted in response to the impending implementation of § 1502. *Id.* The first theory argues that the reason for the ban was to undermine the success of § 1502. *Id.* The second theory argues that the reason for the ban was to give Kabila's troops an opportunity to militarize previously nonmilitarized mines before § 1502 went into effect. *Id.*

The de facto embargo of trade with the DRC has had devastating economic consequences on an already impoverished and conflict-torn country.<sup>114</sup> In fact, in many ways the legislation is having the opposite effect than the law intended by further impoverishing the people of the DRC. This de facto embargo has unsurprisingly led to the halting of legitimate mining production,<sup>115</sup> and, in turn, has caused mass unemployment.<sup>116</sup> There have been reports of children being forced to drop out of school because their parents could not afford to pay their minimal tuition, and other tales of mothers giving birth at home because they could not afford the meager \$20 USD fee for a maternity clinic.<sup>117</sup> Furthermore, the de facto embargo may actually be aggravating the violence by fostering an increase in the illegal and fraudulent trade of Conflict Minerals.<sup>118</sup> Finally, unemployed miners have been forced to join armed groups out of desperation.<sup>119</sup> Thus, it is apparent that the law is having the reverse effect in the DRC than was intended. Ironically, the more the law achieves its ultimate goal, the more this calamitous situation holds true.

## 2. SEC as Regulator

Section 1502 requires the SEC, the agency normally charged with policing America's financial markets, to issue regulations requiring firms using Conflict Minerals to investigate and dis-

114. *Id.*

115. *Id.*

116. Sudarsan Raghavan, *How a Well-Intentioned U.S. Law Left Congolese Miners Jobless*, WASH. POST, Nov. 30, 2014, [http://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2\\_story.html](http://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html).

117. David Aronson, *How Congress Devastated Congo*, N.Y. TIMES, Aug. 7, 2011, [http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html?\\_r=0](http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html?_r=0).

118. EVALUATION OF THE DODD-FRANK ACT, *supra* note 10, at 4.

119. Heather Murdock, *New Law Aims to Halt Sale of Conflict Minerals from Congo*, VOICE AM. (Apr. 17, 2011), <http://www.voanews.com/content/new-law-aims-to-halt-sale-of-conflict-minerals-from-congo-120079359/157912.html>.

John Kanyoni, president of North Kivu Exporters Association, says that hundreds of thousands of people are now out of work, and continued unemployment will only further drive the conflict. *Id.* He further states, "Their mission of fighting against the violation of human rights will be putting people in situation [sic] where they will be jobless. And most probably those who will be jobless could join the armed groups." *Id.*

close the origin of those minerals. The SEC's stated mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."<sup>120</sup> However, in contrast to other provisions of Dodd-Frank and acts generally falling under the purview of the SEC, § 1502 is not a financial regulation. Despite this precedent, the SEC was nevertheless charged with the daunting task of regulating Conflict Minerals, a task seemingly out of the agency's normal line of duty.

Furthermore, the SEC is not readily qualified to carry out implementation of the law.<sup>121</sup> SEC Chairman Mary Schapiro testified before Congress that "it was unusual for the SEC to promulgate and enforce regulations under prescriptive laws that require specialized knowledge of the mineral trade in the DRC."<sup>122</sup> Moreover, the SEC lacks both the expertise and funding to conduct studies on the impact of § 1502 on the Congolese and U.S. Businesses.<sup>123</sup> Consequently, the SEC has made vital decisions without proper assessments.<sup>124</sup> Accordingly, it is apparent that the SEC is likely the wrong vehicle to implement any significant change in human rights violations in the DRC as it is simply out of the agency's scope and mandate.<sup>125</sup>

### 3. Constitutional Challenge to §1502

As previously illustrated, the SEC's final rule promulgating § 1502 has been controversial. It is estimated that the effects of § 1502 are far reaching, in that it impacts at least six thousand of all publicly traded companies in the United States,<sup>126</sup> while

---

120. *How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/whatwedo.shtml> (last updated June 10, 2013).

121. *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcomm. on Monetary Pol'y and Trade*, 113th Cong. 9 (2013) (statement of Mvemba Phezo Dizolele, visiting Fellow, Hoover Institution on War, Revolution and Peace).

122. UNINTENDED CONSEQUENCES MEMO, *supra* note 102.

123. *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcomm. on Monetary Pol'y and Trade*, 113th Cong. 9.

124. *Id.*

125. *Id.*

126. *Dodd-Frank Section 1502 and the SEC's Final Rule*, ERNST AND YOUNG, [http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/Conflict\\_minerals\\_Dodd\\_Frank\\_Section](http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/Conflict_minerals_Dodd_Frank_Section) (last visited Dec. 30, 2014).

having an implementation price tag in the billions of dollars.<sup>127</sup> As a result, it is not surprising that there have been numerous legal challenges contesting various provisions of § 1502.

In *National Association of Manufacturers v. S.E.C.*,<sup>128</sup> the U.S. Chamber of Commerce and the Business Roundtable challenged § 1502 on numerous grounds.<sup>129</sup> In one of its chief arguments, the plaintiffs contended that § 1502 violated the First Amendment because it required companies to publish their Conflict Minerals disclosure on their own websites.<sup>130</sup> The plaintiffs argued that the disclosure requirements improperly compelled “burdensome and stigmatizing speech” in violation of the First Amendment.<sup>131</sup>

Ordinarily, strict scrutiny is the appropriate standard of review applied to challenges to laws that significantly abridge a fundamental right such as free speech.<sup>132</sup> However, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public*

127. The National Association of Manufacturers estimated the costs between \$9 and \$16 billion USD, *Conflict Minerals*, NAT'L ASS'N OF MFRS, <http://www.nam.org/Issues/Trade/Conflict-Minerals.aspx> (last visited Dec. 31, 2013), while the SEC has estimated that compliance would likely initially cost companies \$3 to \$4 billion USD, and more than \$200 million USD annually, *Conflict Minerals*, 77 Fed. Reg. 56,274, 56,334 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p-1, 249b).

128. *Nat'l Ass'n of Mfrs. v. SEC*, 956 F. Supp. 2d 43 (D.D.C. 2013). The National Association of Manufacturers, the U.S. Chamber of Commerce and the Business Roundtable initially filed their action in the U.S. Court of Appeals for the District of Columbia Circuit to review the legality of the Conflict Minerals Rule and § 1502. *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 53. Since the D.C. Circuit determined in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C.Cir. 2013), that it did not have initial jurisdiction over a direct challenge to a different SEC rule issued under Dodd-Frank, *id.* at 1333, the plaintiffs moved to transfer the case to the U.S. District Court for the District of Columbia and the Circuit Court granted that request. *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 53.

129. *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 46.

130. *Id.* at 73; 15 U.S.C. § 78m(p)(1)(E). Additionally, plaintiffs argued that § 1502 was arbitrary and capricious under the Administrative Procedure Act. *Nat'l Ass'n of Mfrs.*, 956 F. Supp. 2d at 54. However, the court held that § 1502 did not violate the Administrative Procedure Act. *Id.* at 56.

131. *Id.* at 73.

132. *Strict Scrutiny*, BLACK'S LAW DICTIONARY (10th ed. 2014). Under strict scrutiny, the government must establish that it has a compelling interest that justifies and necessitates the law in question. *Id.*

*Service Commission of New York*<sup>133</sup> applied a test commonly recognized as intermediate scrutiny to laws restricting commercial speech.<sup>134</sup> Additionally, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*<sup>135</sup> the court held that compelled disclosures to protect consumers against deception required only rational basis scrutiny, thus creating another exception.<sup>136</sup> The circuits are split as to the appropriate level of scrutiny when the *Zauderer* exception (i.e. compelled disclosures to prevent consumer deception) does not apply. The D.C. Circuit determined that the *Central Hudson* intermediate standard applied if *Zauderer* did not, even when compelled speech and not a restriction of speech was at issue.<sup>137</sup> In con-

---

133. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

134. *Id.* at 566. Under intermediate scrutiny, the government must establish that the law in question substantially advances an important government objective. *Intermediate Scrutiny*, BLACK'S LAW DICTIONARY (10th ed. 2014). Although the Supreme Court initially held that the First Amendment did not protect commercial speech, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Supreme Court granted commercial speech limited protection in 1975, *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975). A few years later, the *Central Hudson* court articulated a four-pronged test, which has since been recognized as intermediate scrutiny, to evaluate the constitutionality of government regulation of commercial speech. 447 U.S. at 566. At issue in *Central Hudson* was the constitutionality of a New York law that prohibited promotional advertising by utility companies. *Id.* at 558-60. To pass muster under the *Central Hudson* intermediate scrutiny test, the government must establish that the law in question substantially advances a government interest and that it is not more extensive than necessary. *Id.* at 566.

135. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

136. *Id.* at 651. Under rational basis review, a law will be upheld by a court so long that it has a reasonable relationship to the attainment of a legitimate governmental interest. *Rational-Basis Test*, BLACK'S LAW DICTIONARY (10th ed. 2014). The *Zauderer* court was faced with a challenge to the constitutionality of the Disciplinary Rules of the Ohio Code of Professional Practice forbidding attorney deception in regard to a misleading advertisement. *Zauderer*, 471 U.S. at 636. In *Zauderer*, the court articulated an exception to the general First Amendment analysis and instead applied a rational basis standard. *Id.* at 651. Under the *Zauderer* rational basis test, factual and uncontroversial disclosures are permissible if they are "reasonably related to the State's interest in preventing deception of consumer" so long as the requirements are not "unjustified or unduly burdensome." *Id.*

137. *See R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1211 (D.C. Cir. 2012). In *R.J. Reynolds Tobacco*, the court considered a challenge to a tobacco labeling requirement. *Id.* at 1211. The court concluded that

trast, both the Sixth Circuit<sup>138</sup> and the Seventh Circuit<sup>139</sup> have held that the strict scrutiny standard applied rather than the *Central Hudson* intermediate standard, if *Zauderer* did not. These seemed to hold that *Central Hudson* only applied to regulations that restrict commercial speech, not to ones which compel speech.<sup>140</sup>

In *National Association of Manufacturers*, the District Court held that the constitutionality of §1502 was removed from the *Zauderer* rational basis standard.<sup>141</sup> The court stated that

---

the labels were not subject to review under *Zauderer*, but notably, the court did not apply strict scrutiny. *Id.* at 1217. Rather, in the absence of the *Zauderer* exception, the court examined the label requirement using *Central Hudson's* intermediate scrutiny standard and found that the warnings violated the First Amendment. *Id.* at 1222.

138. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 554 (6th Cir. 2012) (“If a commercial-speech disclosure requirement fits within the framework of *Zauderer* and its progeny, then we apply a rational-basis standard. If it does not, then we . . . apply strict scrutiny.”).

139. *See Entm’t Software Ass’n v. Blagojevicg*, 469 F.3d 641, 651–52 (7th Cir. 2006) (analyzing whether strict scrutiny or the *Zauderer* test applies to compelled commercial speech and not considering whether intermediate scrutiny should be applied); *see also Nat’l Ass’n of Mfrs. v. SEC*, 956 F. Supp. 2d 43 at 77, n. 26 (D.D.C. 2013) (quoting *Discount Tobacco City*). In *Discount Tobacco City*, the court also considered a challenge to a tobacco labeling requirement. *Disc. Tobacco City*, 674 F.3d at 520–22. Notably, instead of applying the *Central Hudson* intermediate standard like the District Court, *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 532 (W.D. Ky. 2010), the Sixth Circuit applied the *Zauderer* rational basis test. *Disc. Tobacco City*, 674 F.3d at 561. The court then determined that the government satisfied the rational basis burden. *Id.* at 569. *Discount Tobacco City* demonstrates that strict scrutiny applies when commercial speech disclosure requirements do not fit within the *Zauderer* framework. *Id.* at 554.

140. Commentators have articulated that the reason the circuits are in disagreement is because “The [Supreme] Court has not specified how broadly *Central Hudson* applies. It is unclear whether it applies only to the situation addressed in *Central Hudson*—where a law restricts speech—or whether it is a default framework for commercial speech that applies generally, save rare instances.” Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL’Y & L. 205, 218 (2011).

141. *Nat’l Ass’n of Mfrs. v. SEC*, 956 F. Supp. 2d 43, 77 (D.D.C. 2013). The question remained, however, which standard to apply: plaintiffs’ counsel argued that either the strict scrutiny standard applied or, alternatively, the regulation at least survived intermediate scrutiny. *Id.* Although the SEC urged the court to apply the rational basis standard articulated in *Zauderer*, the court noted that the SEC’s counsel had already conceded that the § 1502 disclosures did not aim to prevent misleading or deceptive speech. *Id.* The

although other courts, namely the Sixth Circuit<sup>142</sup> and the Seventh Circuit,<sup>143</sup> apply strict scrutiny when a case falls outside the *Zauderer* exception, the D.C. District has “rejected this dichotomous approach,”<sup>144</sup> and instead in “evaluating the constitutionality of compelled commercial speech, any ‘burdens imposed . . . receive a lower level of scrutiny from courts.’”<sup>145</sup> The District Court stated that after finding *Zauderer* inapplicable, they were bound to apply the *Central Hudson* intermediate scrutiny standard.<sup>146</sup>

Based on the *Central Hudson* intermediate scrutiny analysis, the District Court held that the Conflict Minerals disclosure requirement was constitutional.<sup>147</sup> Therefore, in July 2013, the court upheld the Conflict Minerals Rule in full and rejected the industry groups’ argument that § 1502 violated companies’ First Amendment rights.<sup>148</sup>

The District Court’s decision was immediately appealed to the D.C. Circuit.<sup>149</sup> On April 14, 2014, a divided D.C. Circuit Court held that the SEC’s rule violated the First Amendment “to the extent the statute and rule require regulated entities to report to the SEC and to state on their website that any of their products have ‘not been found to be DRC conflict free.’”<sup>150</sup> More specifically, the court held that the final rule failed the third prong of the *Central Hudson* test, which requires that the government show that the restriction is “narrowly tailored.”<sup>151</sup> The court stated that the SEC failed to explain why the alter-

---

District Court therefore held that the SEC’s concession rendered *Zauderer* rational basis review inapplicable. *Id.*

142. *See supra* note 138 and accompanying text.

143. *See supra* note 139 and accompanying text.

144. *Nat’l Ass’n of Mfrs.*, 956 F. Supp. 2d at 77.

145. *Id.* (citing *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1217 (D.C. Cir. 2012)). After finding *Zauderer* inapplicable, the D.C. Circuit applied the *Central Hudson* intermediate scrutiny standard. *Id.*

146. *Nat’l Ass’n of Mfrs.*, 956 F. Supp. 2d at 77.

147. *Id.* at 82.

148. *Id.*

149. *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014).

150. *Id.* at 373 (alteration in original) (internal quotation marks omitted). In so concluding, the Court of Appeals specifically noted that there was no “First Amendment objection to any other aspect of the conflict minerals report or required disclosures.” *Id.* at 370 n.8.

151. *Id.* at 373.

natives to regulating speech that were suggested by the plaintiffs would be less effective.<sup>152</sup>

In a startling development in July of 2014, the D.C. Circuit in *American Meat Institute v. USDA*,<sup>153</sup> an *en banc* D.C. Circuit overruled the *National Association of Manufacturers* Circuit Decision to the extent that the court held that the *Zauderer* ex-

152. *Id.* As an alternative to the SEC's rule requiring companies to describe their products as "conflict free," the plaintiff suggested that either companies could use their own language to describe their products or the government could create a list of products it believes are affiliated with the Congo War. *Id.* at 372. In its analysis, however, the court did not decide whether to apply strict scrutiny or the *Central Hudson* intermediate scrutiny test since the Conflict Minerals disclosure requirement did not even survive the *Central Hudson* intermediate standard. *Id.* The court simultaneously with its issuance of this decision, ordered the Clerk to "withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing *en banc*." Order Withholding Issuance of Mandate at 1, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014) (No. 13-5252), available

at [http://www.srz.com/files/upload/Conflict\\_Minerals\\_Resource\\_Center/Order\\_to\\_Withhold\\_Issuance\\_of\\_the\\_Mandate.pdf](http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/Order_to_Withhold_Issuance_of_the_Mandate.pdf). On May 29, 2014, the SEC filed a petition for rehearing or rehearing *en banc* pending the decision in *American Meat*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*). The SEC explained its reasoning for its request as follows:

As both the majority and concurring opinions recognized, however, shortly before the panel opinion in this case was issued, the Court granted *en banc* rehearing in *American Meat Institute v. United States Department of Agriculture*, No. 13-5281, to consider whether rational basis review can apply to compelled disclosures even if they serve interests other than preventing deception. Argument was held in that case on May 19. Because the *en banc* court's decision in *American Meat Institute* may affect the important constitutional questions addressed by the panels First Amendment ruling in this case, we respectfully request that the court hold this case for potential panel rehearing or rehearing *en banc* once that decision is issued.

Petition of the Securities and Exchange Commission for Rehearing or Rehearing *En Banc* Pending the Decision in *American Meat Institute v. USDA* at 1–2, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. May 29, 2014) (No. 13-5252).

153. *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014). In *American Meat*, the D.C. Circuit found that U.S.D.A. regulations mandating detailed country of origin labeling for meat products were constitutional, *id.* at 27, and held that the *Zauderer* rational basis test applied to compelled disclosure requirements, even when such requirements do not target consumer deception as in *Zauderer*, *id.* at 22.



ception could not apply to purely factual disclosures imposed for reasons other than consumer deception.<sup>154</sup> In *American Meat*, a case involving the constitutionality of United States Department of Agriculture (“U.S.D.A.”) regulations requiring country of origin labeling for meat products, based on First<sup>155</sup> and Second<sup>156</sup> Circuit precedent, the court held that the *Zauderer* exception swept more broadly than the interest of remedying deception alone.<sup>157</sup> Therefore, the court declared that the *Zauderer* rational basis standard of review could be applied to purely factual disclosure requirements—even when the government’s interest for imposing such disclosures are for reasons other than the prevention of consumer deception.<sup>158</sup>

Based on this holding, the court granted a rehearing of the *National Association of Manufacturers* decision by the original appellate panel to determine if the framework set out in *American Meat* would affect the Conflict Minerals disclosure requirement.<sup>159</sup> Specifically, the court ordered the parties to submit briefs illustrating how the *American Meat* holding would impact the constitutionality of the Conflict Minerals disclosure regulation, and what was meant by “purely factual and uncontroversial information” as used in *Zauderer*.<sup>160</sup> Seemingly, if it were determined by the appellate panel that the information required to be disclosed pursuant to §1502 were “purely factual and uncontroversial,” the *Zauderer* rational basis review standard would apply to the Conflict Mineral disclosure regulation, unlike what the court originally determined.

---

154. *Id.*

155. *See* Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005) (Torruella, J.).

156. *See* N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009).

157. *Id.*

158. *Id.*

159. Nat’l Ass’n of Mfrs. v. SEC, No. 13-5252, 2014 U.S. App. LEXIS 21753 (D.C. Cir. Nov. 18, 2014). In the November 2014 order that was issued with the order granting the panel rehearing, the Circuit Court deferred the previously filed petition that sought rehearing *en banc*. Order Withholding Issuance of Mandate at 1, Nat’l Ass’n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014) (No. 13-5252), available at [http://www.srz.com/files/upload/Conflict\\_Minerals\\_Resource\\_Center/Order\\_to\\_Withhold\\_Issuance\\_of\\_the\\_Mandate.pdf](http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/Order_to_Withhold_Issuance_of_the_Mandate.pdf).

160. *Am. Meat Inst. v. USDA*, 760 F.3d 18, 21 (2014) (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

On August 18, 2015, in a strongly worded split decision, the same three judge Circuit Court panel reaffirmed its April 2014 decision and rejected the SEC's argument that the *Zauderer* rational basis review standard applied.<sup>161</sup> The court held that § 1502's requirement to describe products as having "not been found to be 'DRC conflict-free'" is compelled speech that violates the First Amendment.<sup>162</sup> The court concluded: "Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so."<sup>163</sup> However, the court left open the ability for the SEC to petition the D.C. Circuit for a rehearing *en banc* of the August 18 decision.<sup>164</sup> On October 2, 2015, the SEC did in fact petition the D.C. Circuit for a rehearing *en banc*.<sup>165</sup>

---

161. *Nat'l Ass'n of Mfrs. v. SEC*, 2015 U.S. App. LEXIS 14455, at \*14 (D.C. Cir. Aug. 18, 2015). It is important to note that the court only struck down § 1502's mandatory disclosure requirement. The remainder of § 1502's provisions were unaffected and remain good law. Thus, the SEC's order, issued after the 2014 D.C. Circuit Court decision staying the effective date of compliance for the challenged portions of the rule, currently remains in effect. Order Issuing Stay, In the Matter of Exchange Act Rule 13p-1 and Form SD, SEC Release No. 72079 (May 2, 2014). However, the core elements of the rule, such as the reporting requirements and supply chain due diligence, must nevertheless be complied with. *Id.*

162. *Nat'l Ass'n of Mfrs.*, 2015 U.S. App. LEXIS 14455, at \*33. The majority added a new ground for its decision: even under a more deferential standard, the government's interest in lessening the conflict in the DRC was not advanced by the rules. *Id.* at \*15-16.

163. *Id.* at \*32-33.

164. The D.C. Circuit Court in an order issued simultaneously with the August 18, 2015 ruling, ordered that the petitions filed in November of 2014 be dismissed as moot, but the court ordered a new period for petitioning for an *en banc* review to run from the entry of the judgment accompanying the *National Association of Manufacturers* opinion filed on August 18, 2015. Order, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. Aug. 18, 2015) (No. 13-5252).

165. Petition of the Securities and Exchange Commission for Rehearing *En Banc*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, (D.C. Cir. Oct. 2, 2015) (No. 13-5252). If the D.C. Circuit agrees to rehear the case *en banc* it would likely take the court at least another twelve months to issue a decision. See Barbra A. Jones, *Uncertainty Continues for the SEC's Conflict Minerals Reporting Regime After D.C. Circuit Confirms First Amendment Violation* (Aug. 28, 2015), <http://www.gtlaw.com/portalsresource/lookup/wosid/contentpilot-core-401->

Based on the D.C. Circuit Court's holding that § 1502 is at least partially unconstitutional and the circuit split in regard to the proper standard to apply to non-deceptive compelled commercial speech,<sup>166</sup> the viability of the disclosure provisions of § 1502 is still an issue very much in doubt<sup>167</sup> and thus is ripe for Supreme Court intervention.

#### 4. United States' Foreign Policy Objectives of Stopping World Terror and Promoting Human Dignity Should Not Be Determined by the Whims of Corporations

Section 1502 states that in enacting this legislation, Congress intended to end the violence in the DRC, which is financed in large part by the exploitation and trade of Conflict Minerals.<sup>168</sup>

---

28012/pdfCopy.name=/Uncertainty%20Continues%20for%20SEC's%20Conflict%20Minerals%20Reporting%20Regime.pdf.

166. See Jones, *supra* note 165. Some other circuits do not seem to follow the expansive approach adopted by the D.C. Circuit in *American Meat* (as well as the First Circuit in *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) and the Second Circuit in *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009)). See, e.g., *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640-41 (6th Cir. 2010) (holding that the *Zauderer* exception narrowly applies to inherently or potentially misleading speech and not mandatory factual disclosures). Therefore, they would likely hold that the low-bar test set out in *Zauderer* does not apply to Conflict Minerals since it is uncontested that consumer deception is not an issue in the required Conflict Mineral disclosures. This difference in views would likely result in a circuit split if that the D.C. Circuit were to adopt the expansive approach of *American Meat* in regard to Conflict Minerals in a rehearing of the case *en banc*. Furthermore, in the absence of the *Zauderer* exception, other circuits, namely the Sixth and Seventh Circuit, see *supra* notes 138 and 139 and accompanying text, would likely default to the strict scrutiny test, and would not utilize the *Central Hudson* intermediate scrutiny exception as the District Court did in *National Association of Manufacturers*. Based on these premises, it would be a herculean task for a court of appeals other than the D.C. Circuit (or perhaps the First or Second Circuits) to rule that § 1502 does not violate the First Amendment right to free speech, specifically when using the strict scrutiny lens likely advocated by the Sixth and Seventh Circuit.

167. First, since the circuits are split on the interpretation of *Zauderer* and its progeny, if the D.C. Circuit were to rehear the case *en banc* or if the constitutionality of § 1502's disclosure requirements were heard by a different circuit, such court may reach a very different conclusion and uphold the disclosure requirements' constitutionality. See Jones, *supra* note 165. Second, it remains unclear whether the flaw in the disclosure provision was a result of the language of § 1502 or of the SEC's rule. *Id.*

168. Dodd-Frank § 1502(a) provides as follows:

Similarly, the legislative history in previously proposed statutes dealing with Conflict Minerals, makes clear that Congress's intent in adopting § 1502 was to both further America's interest in stopping global terror and to promote its core value of preserving human dignity.<sup>169</sup> The "name and shame" mechanism employed by § 1502, however, leaves the implementation of American foreign policy to the caprice of corporations. Ergo, if a corporation finds it profitable to purchase Conflict Minerals and does not mind being stigmatized, it can continue to openly purchase Conflict Minerals from the DRC with no repercussions, so long as it reports such purchases to the SEC and lists them on the company website. What follows is that United States' foreign-policy goals of stopping world terror and promoting human dignity in the DRC are subject to the whims of corporations.

Juxtapose the current implementation of American foreign policy regarding a nuclear-armed Iran: In 2010, Congress passed the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 ("CISAD")<sup>170</sup> which extended the American economic sanctions on Iran in order to pressure Iran to end its nuclear weapons program. The statute provides a clear directive prohibiting American companies from conducting certain enumerated transactions with Iran.<sup>171</sup> Under the CISAD, the embargo of Iran is not a matter of choice that could be freely ignored, but rather is a clear mandate from Congress.<sup>172</sup> Similarly, the proper way to implement the United States' core foreign policy of ending terror and promoting human rights in the DRC is by directly enacting legislation to prohibit trade in Conflict Minerals.

---

It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo particularly sexual- and gender- based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13 (p) of the Securities and Exchange Act of 1934, as added by subsection (b).

169. *See supra* notes 87 and 88 and accompanying texts.

170. Comprehensive Iran Sanctions, Accountability and Divestment Act, Pub. L. 111-195, 124 Stat. 1312 (2010).

171. *See id.* § 103.

172. *Id.*

### III. GLOBAL RESPONSE TO THE CONFLICT MINERAL CRISIS

#### A. Due Diligence Guidance

In addition to the approach adopted by the United States under § 1502, there have been several other initiatives presented to regulate the flow of Conflict Minerals.<sup>173</sup> In 2004, the United Nations Security Council appointed a group of experts (“Group of Experts”) to issue reports to the United Nations concerning various issues relating to the DRC.<sup>174</sup> In November of 2010, the Group of Experts issued guidelines as to how importers, processing industries, and consumers of DRC mineral products are to exercise due diligence and not purchase Conflict Minerals.<sup>175</sup> The U.N. Security Council consequently adopted Resolution 1952 in support of these recommendations.<sup>176</sup> In order to implement Resolution 1952, the Organisation for Economic Cooperation and Development (“OECD”)<sup>177</sup> published the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (“Guidance”).<sup>178</sup> The Guidance “provides detailed recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices”<sup>179</sup> and is to be utilized by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas.<sup>180</sup> It is considered one of the only international frameworks of-

---

173. EVALUATION OF THE DODD-FRANK ACT, *supra* note 10.

174. Established by S.C. Res. 1533, ¶ 10 (Mar. 12, 2004).

175. S.C. Res. 596, (IX), ¶¶ 356-69 (Nov. 29, 2010).

176. S.C. Res. 1952, ¶ 7 (Nov. 29, 2010).

177. Founded in 1960, the OECD is a thirty-four-country international economic organization that aims to stimulate economic progress and world trade. *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Jan. 25, 2015).

178. OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (2d ed. 2013), <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf> [hereinafter OECD DUE DILIGENCE GUIDANCE].

179. *Guidelines for Multinational Enterprises: OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD, <http://www.oecd.org/corporate/mne/mining.htm> (last visited Jan. 1, 2015).

180. *Id.*

ferred to aid companies to comply with their due diligence reporting requirements.<sup>181</sup>

The OECD five-step approach includes the following steps: step one calls for the strengthening of due diligence skills, internal systems, and record keeping;<sup>182</sup> step two asks for the undertaking of a risk assessment of mines, transportation routes, points where minerals are traded, and suppliers;<sup>183</sup> step three calls on downstream companies to evaluate and respond to risks in order to prevent or mitigate adverse effects;<sup>184</sup> step four calls for participation in audit programs;<sup>185</sup> finally, step five calls for the compilation of annual reports on due diligence efforts exerted.<sup>186</sup>

### *B. Critique of the United Nations and OECD Recommended Approach*

On its face, the U.N. and OECD approach is similar to the approach adopted by the United States under § 1502. Both call for transparency in mineral supply chains, essentially to avoid the purchase of Conflict Minerals. However, the U.N. and OECD approach does not go as far as requiring companies to publicize whether they use Conflict Minerals, as is required by § 1502. Another key difference is that the U.N. and OECD approach is not statutory in character, while § 1502 is. Therefore, an essential problem with the U.N. and OECD approach is that it is merely voluntary in nature.<sup>187</sup> It is simply a recommendation which has no “teeth” and therefore has limited impact.

Furthermore, the U.N. and OECD approach, like § 1502, only focuses on the negative, i.e. companies are mandated not to purchase Conflict Minerals. These approaches inadvertently triggered a de facto embargo on the DRC and contributed to the further destruction of its economy.<sup>188</sup> None of the approaches dealing with the Conflict Mineral crisis provides any incentive for companies to actually purchase conflict-free minerals and to invest in the DRC.

181. *Id.*

182. OECD DUE DILIGENCE GUIDANCE, *supra* note 178, at 72.

183. *Id.* at 78.

184. *Id.* at 99.

185. *Id.* at 106.

186. *Id.* at 111.

187. *Id.* at 16.

188. *See supra* Part II.B.2; *see also* Seay, *supra* note 110.

#### IV. A NEW APPROACH USING TAX CODES TO PROMOTE WORLD PEACE

As detailed in previous sections, the current approach being utilized by the United States in its attempt to deal with the Conflict Mineral crisis is having an undesirable economic impact on the DRC,<sup>189</sup> is conceptually flawed,<sup>190</sup> and is subject to U.S. constitutional challenges.<sup>191</sup> The approach advanced by the United Nations and the OECD similarly contributed to the de facto embargo of the DRC and also lacked any power to compel companies to comply with their recommendations. Therefore, this Note proposes an alternative and more dynamic, proactive approach to dealing with the Conflict Minerals crisis in order to help promote peace in the DRC. Unlike the previous methods advanced, this method focuses on providing industry with both “carrots” as well as “sticks” when faced with making purchase decisions of minerals from the DRC.

The proposal entails two steps. First, participating countries would prohibit any company conducting business in their respective country from purchasing Conflict Minerals. This would require the establishment of a universally accepted certification mechanism verifying that the commodity would in fact be a bona fide Conflict-Free Mineral.<sup>192</sup> Second, world governments would actively promote the purchase of certified conflict-free minerals by providing meaningful tax and other economic incentives for the purchase of conflict-free minerals. This innovative approach would have the direct effect of reducing the purchase of Conflict Minerals and consequently reducing funding to the combatants in the DRC. Furthermore, it also would help stimulate the economic health of the DRC by providing meaningful tax incentives for businesses around the world to procure conflict-free minerals from the DRC, rather than from other countries helping eliminate the de facto embargo currently in effect on the DRC.

---

189. *See supra* Part II.B.1.

190. *See supra* Parts II.B.2 and II.B.4.

191. *See supra* Part II.B.3.

192. Conflict-Free Minerals are defined as “products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.” 15 U.S.C. § 78m(p)(1)(A)(ii).

### A. *Prohibiting the Purchase of Conflict Minerals and the Adoption of a Certification Mechanism for Conflict-Free Minerals*

Under this proposal, governments around the world would be required to enact legislation prohibiting domestic industry from purchasing Conflict Minerals from the DRC. In combination with the prohibition, such statutes would encourage the purchase of Conflict-Free Minerals. A universally accepted certification system would be necessary to accomplish this task. To date, certification systems have been used in other industries, such as regulating the flow of so-called “blood” diamonds,<sup>193</sup> as well as to measure the environmental impact of certain products.<sup>194</sup>

For example, diamonds of participating countries are currently certified using the Kimberley Process Certification Scheme, a joint industry, government, and civil-society project that curtails the trade of “conflict” or “blood” diamonds, which are rough diamonds used by rebel movements to fund wars against lawful governments and human-rights abuses.<sup>195</sup> Although the Kimberly Process has not entirely stopped the violence, it has made notable achievements in reducing the hostilities.<sup>196</sup>

A prototype of a conflict-free mineral certification system has already been put into place. The system, known as the Regional Certification Mechanism (“RCM”), was developed by Partnership Africa Canada<sup>197</sup> to track and certify mineral supply

193. *The Kimberley Process*, GLOBAL WITNESS, <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds/kimberley-process> (last visited Jan. 1, 2015) [hereinafter *The Kimberley Process*].

194. For example, the EU Ecolabel is a voluntary labeling scheme that identifies “products and services that have a reduced environmental impact throughout their life cycle, from the extraction of raw material through to production, use and disposal.” *EU Ecolabel*, EUR. COMMISSION, [ec.europa.eu/environment/ecolabel/information-and-contacts.html](http://ec.europa.eu/environment/ecolabel/information-and-contacts.html) (last updated May 19, 2015).

195. *Conflict Diamonds*, GLOBAL WITNESS, <http://www.globalwitness.org/campaigns/conflict/conflict-diamonds> (last visited Mar. 9, 2015).

196. *The Kimberley Process*, *supra* note 193.

197. *ICGLR Regional Certification Mechanism for Conflict Minerals*, PARTNERSHIP AFR. CAN., <http://www.pacweb.org/en/regional-certification> (last visited Apr. 15, 2015). Partnership Africa Canada is a nonprofit organization that “undertakes investigative research, advocacy, and policy dialogue on issues pertaining to conflict, natural resource governance, and human rights



chains.<sup>198</sup> The RCM has been approved by the intergovernmental organization International Conference on the Great Lakes Region (“ICGLR”).<sup>199</sup> The RCM system consists of four overlapping layers of protection. First, the RCM calls for chain of custody tracking from mine site to export.<sup>200</sup> Second, it calls for the tracking of the flow of minerals by means of the ICGLR database.<sup>201</sup> Third, it calls for regular, independent, third-party audits on all aspects of the mineral supply chain.<sup>202</sup> Finally, it calls for the establishment of an independent, mineral-chain auditor who is charged with ensuring compliance.<sup>203</sup>

The United States and other governments should not only support the certification system approach, but they should also incorporate it into a new legislation and statutes. This approach would remove the monitoring burden currently placed upon individual companies to track the sources of the minerals

---

in Africa.” *PAC’s Work*, PARTNERSHIP AFR. CAN., <http://www.pacweb.org/en/about-us/pac-work> (last visited Apr. 15, 2015).

198. The mechanism was formerly adopted in December 2010 by the International Conference on the Great Lakes Region. Int’l Conference on the Great Lakes Region [ICGLR], *Lusaka Declaration on the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region*, para. 5 (Dec. 15, 2010), <http://www.oecd.org/corporate/mne/47143500.pdf>. The OECD Guidelines were intended to “assist and complement the development and implementation of comprehensive certification schemes, such as the [RCM].” See OECD DUE DILIGENCE GUIDANCE, *supra* note 178, at 15.

199. ICGLR is an intergovernmental organization consisting of countries in the African Great Lakes Region, namely Angola, Burundi, the Central African Republic, the Republic of Congo, the DRC, Kenya, Uganda, Rwanda, Sudan, Tanzania, and Zambia. *Background*, ICGLR, <http://www.icglr.org/index.php/en/background> (last visited Jan. 1, 2015). In November 2006, ICGLR member-countries signed a protocol against the illegal exploitation of natural resources. Pact on Security, Stability, and Development in the Great Lakes Region art. 9, Dec. 14–15, 2006, 46 I.L.M. 175. To implement the protocol, the ICGLR launched the Regional Initiative against the Illegal Exploitation of Natural Resources (“RINR”). *Regional Initiative against the Illegal Exploitation of Natural Resources*, ICGLR, <http://www.icglr.org/index.php/en/natural-resources> (last visited Jan. 1, 2015).

200. *Briefing Note on the ICGLR Regional Certification Mechanism*, PARTNERSHIP AFR. CAN. 3 (June 2012), [http://www.pacweb.org/Documents/icglr/PAC\\_Briefing\\_Note\\_on\\_the\\_ICGLR\\_Regional\\_Certification\\_Mechanism\\_June\\_2012.pdf](http://www.pacweb.org/Documents/icglr/PAC_Briefing_Note_on_the_ICGLR_Regional_Certification_Mechanism_June_2012.pdf).

201. *Id.* at 5.

202. *Id.*

203. *Id.* at 6.

they use in their businesses. Having a governmentally-approved organization certifying the bona fides of conflict-free minerals would simplify the process and remove any doubts as to whether a company's purchase may have violated the proposed Conflict Minerals statute. This approach would also have cost-saving benefits to individual companies, as the majority of the expenses would be assumed by the certification system itself.<sup>204</sup>

### *B. Incentivizing the Purchase of Conflict-Free Minerals*

In order to promote the purchase of conflict-free minerals, the United States and other countries must take initiative and offer incentives in the form of tax benefits or other economic incentives to companies that purchase certified conflict-free minerals. Although such a concept may not have been deemed appropriate in the United States just a few years ago,<sup>205</sup> over the last thirty years, U.S. Congress has transformed the Tax Code<sup>206</sup> from being solely a revenue raising instrument into a vehicle used to implement government policy and social reform.<sup>207</sup> Since 1986, Congress has amended the Tax Code to give taxpayers money for doing what it perceived to be the right thing in the form of exclusions from income, deductions from income, nonrefundable credits against tax liability, or refundable credits against tax liability.<sup>208</sup> For example, the Earned Income Tax Credit has become the federal government's greatest anti-poverty undertaking.<sup>209</sup> Furthermore, many new social initiatives have since been enacted by Con-

---

204. It should be noted that in *Nat'l Ass'n of Mfrs.*, one of the plaintiffs' arguments concerned the high costs associated with implementation of § 1502. *Nat'l Ass'n of Mfrs. v. SEC*, 956 F. Supp. 2d 43, 59-60 (D.D.C. 2013). Specifically, the plaintiffs argued, albeit unsuccessfully, that "the Commission arbitrarily underestimated some aspects of the Rule's costs." *Id.* at 59-61.

205. The United States Constitution grants Congress "the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare." U.S. CONST. art. I, § 8. Until recently, tax scholarship permitted use of the tax code for activity that predominantly raised revenue, not activity that primarily regulated or promoted social policy. Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 68 (2013).

206. 26 U.S.C. (1986).

207. Tahk, *supra* note 205, at 71-74.

208. *Id.* at 69-71.

209. *Id.* at 70.

gress that involve providing credits and refunds to taxpayers for doing what Congress believes to be the right thing, such as the empowerment-zone credits,<sup>210</sup> child-care credits,<sup>211</sup> the first-time homebuyer credit,<sup>212</sup> and the personal and dependency exemptions.<sup>213</sup> This new attitude toward the Tax Code has also recently been apparent in the Affordable Care Act of 2010.<sup>214</sup> Therefore, it is undoubtedly appropriate to use the Tax Code as a tool to implement the United States' foreign policy of combating terrorism, as well as the promotion of peace and the protection of the human rights of the people of the DRC.

Furthermore, the use of tax incentives as a vehicle to engineer social change was promoted by the United Nations Council on Human Rights in its adoption of the Guidelines on Extreme Poverty and Human Rights ("GEPHR").<sup>215</sup> The GEPHR states in detail that:

States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfillment of human rights.<sup>216</sup>

---

210. See 26 U.S.C. § 1396 (2006).

211. See 26 U.S.C. § 21 (2006); see also 26 U.S.C. § 24 (2006) (amended 2015).

212. See 26 U.S.C. § 36 (2010).

213. See 26 U.S.C. 151(b)–(c) (2006).

214. Patient Protection and Affordable Care Act, Pub. L. 111–148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the Internal Revenue Code and 42 U.S.C.). Tahk explains this new concept:

The Affordable Care Act marks the latest and most significant step in this structural transformation. Four tax provisions—the premium assistance credit, the small business credit, the individual mandate and the employer mandate—are the primary planks of the health care reform package. All of these take the form of tax code sections and the IRS is responsible for administering them.

Tahk, *supra* note 205, at 71.

215. Special Rapporteur on Extreme Poverty and Human Rights, *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/21/39 (Jul. 18, 2012).

216. *Id.* ¶ 96.

The GEPHR's call for the use of tax policy, among other methods, to reduce poverty and promote human rights signifies the world's endorsement of using tax policy to facilitate world peace.<sup>217</sup>

## CONCLUSION

Undoubtedly, the drafters of the current initiatives to reduce conflict in the DRC had noble intentions when formulating their strategies. However, not only have such initiatives proven to be insufficient in achieving their goal of ameliorating the humanitarian crisis in the DRC, they are actually contributing to it. Therefore, a different strategy must be adopted.

A new approach that would encourage doing good by utilizing tax codes of countries around the world to help those suffering in the DRC would foster multiple benefits. The obvious benefit is that there would be a reduction of the sale of Conflict Minerals, thereby reducing funding of rebel activity. At the same time, this new strategy would help eliminate the current de facto embargo on DRC-sourced minerals, keeping conflict-free mines open and stimulating the economy of the DRC. Additionally, in adopting this proposal, governing bodies would be enacting a robust statute that would specifically prohibit the purchase of Conflict Minerals by companies doing business in such a country. This would remedy the voluntary nature of the U.N.'s and the OECD's recommendations, as well as eliminate the constitutional and enforcement ambiguities surrounding § 1502.

Since our society is benefitting daily from products that contain Conflict Minerals, this is not just a Congolese or African issue, but rather a global issue, warranting a global response. Therefore, all beneficiaries must address such atrocities by amending legislation to more effectively combat it. Members of the global community must act now. Across the world, countless lives are needlessly lost to the violence and corruption fostered by the purchase and dealings in Conflict Minerals every day that we wait. If beneficiaries address such atrocities through amending current legislation and forcing companies to act as proposed in this Note, untold lives can be saved . . . and

---

217. *See id.*

“[w]hosoever saves a single life, it is as if he saved the entire world.”<sup>218</sup>

*Joshua A. Feinzeig\**

---

218. Mishnah, Sanhedrin 4:5.

\* B.A., Fairleigh Dickinson University (2011); J.D., *magna cum laude*, Brooklyn Law School (2015). I would like to thank my friends and family for their love and support. First and foremost, I must thank my dear parents, Sima and Jacob, for their steadfast devotion, unwavering faith, and constant encouragement. No words can adequately express my gratitude. I am also grateful to my old friend Sam Weber for inspiring me to write this Note. Finally, I would like to thank the staff of the *Journal* for all their efforts in the preparation and publication of this Note, as well as each of my professors who have touched my life throughout law school and my academic career. All errors or omissions are my own.