HARVARD INTERNATIONAL LAW JOURNAL — ONLINE
VOLUME 52
ARTICLE SERIES: NOVEMBER 2010

Old and New Governance Approaches to Conflict Minerals: All are Better than One

An article in the series Corporate Accountability in Conflict Zones

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I. INTRODUCTION

This article explores the role of new governance structures that have been utilized to address supply chain–related labor and human rights abuses. More specifically, it examines the utility of multi-stakeholder fora to address such problems. It argues that such multi-stakeholder fora, including multi-stakeholder initiatives, provide a number of advantages when addressing global supply chain–related issues, when compared to traditional command-and-control approaches.

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The article then focuses on the issue of conflict minerals.[1] It describes the role that multi-stakeholder initiatives can play to help address the problem of conflict minerals, and the problem-solving advantages that a mix of actors can bring to the table. The article notes that the composition and focus of such initiatives may vary, and must be carefully formulated if they are to address the challenging issue of conflict minerals. Moreover, although multi-stakeholder approaches are potential mechanisms to help address the problem of conflict minerals, they are not sufficient. Rather, the problem of conflict minerals is a subset of a wider political and economic breakdown, and demands that a complementary and interlocking web of new and old governance approaches be utilized.

The article posits that States, including not only those that are host to conflict minerals, but also concerned members of the international community, must play two critical roles to address conflicts funded by illicit mineral trading. First, they must encourage "new governance" multi-stakeholder approaches to solving the commercial aspects of the conflicts, and they must play a stronger role in such multi-stakeholder initiatives than they typically might. This, however, is not likely to be sufficient. States must take on a second role. The political and economic aspects of conflict mineral-funded warfare demand that States also utilize traditional international governance mechanisms such as imposing sanctions through the United Nations (U.N.); encouraging effective governance in conflict-affected countries; and providing development aid, such as that directed at alternative livelihoods and support of the legal mining sector. In short, the most devolved, non-state-centric forms of new governance, such as multi-stakeholder initiatives, are unlikely to succeed in controlling the sale of conflict minerals, much less ending conflicts, without governments influencing the political situation and building capacity in the state suffering from conflict.

The article tests this theory by examining the Kimberley Process, a multi-stakeholder initiative formed to address conflict diamonds in which governments play a leading role. It also examines the efforts thus far which are aimed at stopping the trade of conflict minerals from the eastern Democratic Republic of the Congo (DRC). It identifies trends towards a multi-stakeholder approach to addressing the trade that funds the conflict. It also notes that this is likely to prove insufficient on its own to address the problem, and highlights the need for governments to undertake more traditional roles.

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[1] The term "conflict minerals" is sometimes used to specifically address the four minerals from the eastern DRC that are believed to fund that conflict. In this article, it is used more broadly, and encompasses other minerals that may fund conflicts, such as diamonds.

II. SUPPLY CHAINS AND NEW FORMS OF GLOBAL GOVERNANCE

The field of corporate social responsibility is replete with examples of "new governance."[2] New governance breaks from "old governance" such as traditional, top-down rulemaking mechanisms, including statutes, detailed administrative rulemaking, and judicial enforcement.[3] New governance is intended to spur private as well as private actors to assume a role in governance, which in practice often involves the government taking on a catalytic or facilitative role.[4] This trend extends beyond national to international law, where "old governance" methods such as treaties and intergovernmental organizations are complemented by novel forms of governance.

Commentators have posited that new governance brings a number of benefits. For instance, it is intended to support flexible rulemaking, because rules are not set in statutory stone. This in turn enables changes to be made to rules as appropriate.[5] New governance structures are also supposed to embrace greater participation, because they can bring together and benefit from the input of a wider set of stakeholders, which should drive better problem solving.[6] New governance also should enhance shared learning across diverse stakeholder groups.[7] New governance structures may be particularly beneficial when it is challenging to utilize more traditional governance mechanisms because of long-standing legal doctrines or because an area has not previously been regulated and therefore presents novel

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[2] *See generally* Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 334 (2009) (discussing the emerging "lex mercatoria" in the area of corporate social responsibility, in which various actors engage in novel forms of rulemaking).

[3] David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 543 (2007).

[4] *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV 342, 344–45 (2004).

[5] Adaptability is a pillar of new governance theory. "Since a basic premise of the governance model is the inevitability and the fertility of change, the new vision is optimistic about uncertainty and doubt. In fact, unlike the traditional regulatory model, governance treats ambiguity as an opportunity rather than a burden to overcome." *Id.* at 395.

[6] *See* Trubek & Trubek, *supra* note 3, at 542.

[7] *See* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 526 (2009).

challenges.[8] Finally, increased dialogue between traditionally opposed stakeholders, such as business and civil society, arguably can increase trust.[9]

In new governance, national governments can play a variety of roles. They can act purely as a *catalyst*, using legislation or their persuasive power to prompt the creation of multi-stakeholder initiatives[10] or cause private actors to engage in rulemaking processes, but take no further part in the development of global standards and their enforcement.[11] They can create situations in which new governance mechanisms and law operate in tandem, or *coexist*, without necessarily being mutually dependent.[12] Finally, they can help to develop *co-dependent* systems in which new governance and traditional law are not only complementary, but integrated into a single hybrid system, in which each piece relies on the other, and in which the failure of one leads to the failure of the other, and the goal of the entire enterprise.[13]

This article focuses on new governance structures that involve multi-stakeholder dialogue and rulemaking. When formalized, these are often called "multi-stakeholder initiatives." Such multi-stakeholder approaches are likely to be suited to address human rights issues that arise as a result of globalization, and this article tests their usefulness and their limits.

The Fair Labor Association (FLA) was an early example of such a multi-stakeholder approach to abuses in global supply chains.[14] NGOs launched campaigns against

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[8] On the other hand, some argue that "new governance" models such as multi-stakeholder initiatives are utilized because the political willpower is lacking to address the problems, not because old governance models could not address the problems effectively. *See generally* Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171 (2007).

[9] This last point regarding trust is not made in the literature on new governance. In the author's experience working with and running multi-stakeholder fora, such new governance mechanisms create a robust means for stakeholders with significantly differing opinions to improve their understanding of each other's perspectives and provide better solutions to complex problems as a result.

[10] Multi-stakeholder initiatives consist of groups of stakeholders, typically some combination of NGOs, companies, responsible investors, business associations, or governments. A number exist in the corporate social responsibility space. For a more thorough review of them, see Michael A. Levine, *Corporate Social Responsibility Standards and Monitoring Programs*, *in* INTERNATIONAL CORPORATE PRACTICE 819, 829–831 (Carole L. Basri ed., 2009).

[11] *Cf.* Trubek & Trubek, *supra* note 3, at 539 (giving examples of when formal law is used to mandate a new governance approach).

[12] *See id.* at 543.

[13] The term used here, co-dependence, builds on the definition of transformation given by Trubek and Trubek. *See id.*

[14] The FLA is one of a number of multi-stakeholder initiatives developed to address labor conditions in the apparel industry. Others include the Worldwide Responsible Apparel Production Principles/Program; Social Accountability International; and the Ethical Trading Initiative. Levine, *supra* note 10, at 830–31.

Nike, the Gap, and other well-known apparel brands alleging that the labor practices of their suppliers were unacceptable, and included child labor. Students lobbied their universities to stop selling college paraphernalia linked to companies with alleged labor violations in their supply chains.[15] NGOs did not rely on court cases against these companies because the causal links were too weak,[16] but instead they focused on attacking the reputations of companies for which branding is important.

Rather than legislate, the U.S. government played a key catalytic role, bringing together companies, NGOs, and unions to form the FLA and forge a solution to the problem. President Clinton gathered together these parties at the White House in 1996 and challenged them to take steps to improve working conditions around the world.[17] Although there is no documentation regarding why the U.S. government encouraged a multi-stakeholder approach rather than legislating, it appears that many of the factors that point to the use of new governance mechanisms were present, as is outlined below. The U.S. government soon after stopped playing any significant role in the FLA, leaving it to the management of the companies and NGOs.

The reasons for which new governance mechanisms are believed to be preferable all applied when actors first tried to address human rights abuses in global supply chains in the 1990s, prior to the formation of the FLA. Rapid globalization created intricate supply chains reaching into countries with weak or unenforced environmental and labor standards. Commencing in the 1990s, NGO campaigns attacking the reputations of well-known brands convinced a number of companies to seek ways to improve conditions in their supply chains. These companies, however, were often ill-equipped to do so, as they possessed limited understanding of how to identify and address resultant human rights abuses. International law provides little guidance for companies in the area of human rights, and it is not of sufficient detail to provide implementation guidance for particular industries.[18] Above, it is posited that new

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[15] *See, e.g.*, David Moore, *Speaking with a Unified Voice: Student Consumers Make Targeted Changes*, HUM. RTS. DIALOGUE, Fall 2000, at 10. This article also highlights another labor monitoring initiative, the Worker's Rights Consortium, which was formed by students that did not believe the FLA was sufficiently rigorous. Both continue to exist.

[16] To understand the challenges inherent in such cases, see, for example, Doe I v. Wal-Mart Stores, Inc., No. CV 05-7307 AG (MANx), 2007 WL 5975664 (C.D. Cal. Mar. 30, 2007); Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).

[17] For more information on the role that the U.S. government played in forming the FLA, see *History*, FAIR LABOR ASS'N, http://www.fairlabor.org/about_us_history_a1.html (last visited Nov. 20, 2010).

[18] Human rights law treaties address the human rights duties of States, not companies. These human rights duties are elaborated upon by the U.N. Treaty Bodies, but their statements are typically aimed at States and are not hard law. The U.N. Special Representative on Business and Human Rights noted in 2008 that there is a social expectation that corporations should respect, for example, not infringe upon, human rights and should establish management systems to ensure this, but such guidance is quite recent, non-binding, and remains fairly general. *See* Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Protect,*

governance is beneficial when rules are needed to address a novel or rapidly evolving situation that demands an ability to alter the rules if necessary. Therefore, new governance has been a particularly useful tool when addressing global supply chains and their impacts on human rights.

New governance mechanisms are also supposed to be helpful when the insights and shared learnings of a broad range of stakeholders are required to address a complex or newly identified social problem because new governance tends to foster dialogue.[19] The capacity of old government to address global supply chains through detailed command–and-control mechanisms is arguably limited because regulators do not necessarily have the expertise to devise appropriate rules, nor the resources needed to enforce them in multiple jurisdictions around the world. The campaigns focused on these labor rights abuses highlighted the growing power of civil society and its ability to collect information on human rights issues around the world. In short, civil society not only highlighted the human rights issues but also was the keeper of key data that could help identify where the problems were and how they could be addressed. Enhanced mutual learning through a multi-stakeholder approach was therefore needed to address labor violations in global supply chains.

On a related note, although theorists rarely address this point, multi-stakeholder approaches to rulemaking can help engender trust that is necessary for effective problem solving. NGOs' distrust of companies might cause NGOs to question the steps that companies take on their own. Multi-stakeholder initiatives can help create mutually agreed-upon standards and implementation techniques that civil society can support and industry can realistically implement—as the FLA demonstrated.[20]

Finally, new governance mechanisms are often used when government is unwilling to engage in traditional regulation and legal doctrines are unlikely to adequately address the problem. This use of new governance is not due to its inherent benefits but rather is due to a lack of political will. In addition, civil society is more likely to embrace new governance mechanisms, and in particular multi-stakeholder initiatives, when legal doctrines are unlikely to advance its cause. It is very challenging to hold end-user, name brand companies that fall under U.S. jurisdiction legally liable for

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Respect and Remedy: a Framework for Business and Human Rights, ¶ 54, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

[19] One author notes that new governance may hold particular promise in "new areas of regulation, that is, issues or industries that have not previously been subject to regulation, perhaps because they did not exist." Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 598 (2010).

[20] For further exploration of how new governance can be designed to enhance its legitimacy, see Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009).

human rights violations occurring several steps away in their supply chain.[21] Our legal system's definition of the corporate entity is too limited to fully account for the global reach of companies.[22] As a result, human rights NGOs utilized new governance mechanisms such as multi-stakeholder initiatives to address concerns about global supply chains.

The FLA was in many respects a success, and showed that the potential of multi-stakeholder initiatives to address labor abuses in global supply chains was more than theoretical.[23] Together, the parties engaged in flexible rulemaking, developing detailed labor standards for factories that could be improved and adjusted over time. Their complementary knowledge helped inform the standards. NGOs brought an understanding of labor rights and the problems that, in fact, existed in factories, while companies were able to contribute their more sophisticated understanding of supply chains and what approaches were feasible. The parties also provided a means for enforcement and mutual assurance by authorizing independent auditors that all parties could agree upon and presumably trust.[24]

This form of new governance also enhanced mutual learning and trust. One could ask why the companies could not simply develop their own supply chain–due diligence systems. First, as previously noted, multiple perspectives may have improved the systems. Second, even when companies develop adequate supply chain due diligence, NGOs may remain critical if they do not understand that system and the rationale behind it. The FLA built relationships between formerly antagonistic NGOs and companies. NGOs continue to play a watchdog role but are more likely to discuss supply chain problems with FLA members rather than immediately shifting

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[21] Plaintiffs have attempted to hold companies liable for labor violations in their supply chains in a few cases with limited success. See *supra* note 16 for examples of cases.

[22] Note that U.S. law, in theory, could hold corporations responsible for violations occurring in their suppliers' operations. However, at the moment, it does not generally do so, since they are separate corporate entities. In fact, it is challenging for plaintiffs to demonstrate that parent companies are liable for the acts of their subsidiaries, much less suppliers. Plaintiffs generally utilize theories of secondary liability such as agency, aiding and abetting, and corporate veil piercing to establish parent company liability for the acts of a subsidiary. For a case that draws upon a wide array of theories of secondary liability, see, for example, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

[23] In its early days, the FLA was not without controversy. Some students and labor unions felt that it was dominated by corporations, and formed a parallel organization called the Workers Rights Consortium. *See* Steven Greenhouse, *Students Urge Colleges to Join a New Anti-Sweatshop Group*, N.Y. TIMES, Oct. 20, 1999, http://www.nytimes.com/1999/10/20/us/students-urge-colleges-to-join-a-new-anti-sweatshop-group.html. A number of prominent civil society organizations chose, however, to remain engaged in the FLA and have contributed to its credibility.

[24] The FLA Charter creates criteria for independent external monitors. *See generally* FAIR LABOR ASS'N, CHARTER DOCUMENT (2009), http://www.fairlabor.org/images/AboutUs/flacharter_october2009.pdf.

into campaign mode.[25] This leads to the sharing of information that can allow faster solutions to problems, in line with the aims of new governance. Companies involved in the FLA or similar initiatives are often far ahead of their peers in terms of their willingness to be transparent in reporting, arguably because their civil society counterparts pushed them to be and they learned that transparency regarding their practices can bring benefits via enhanced trust.[26]

Although the impacts of the FLA and other apparel-related multi-stakeholder initiatives have arguably been positive,[27] multi-stakeholder initiatives are not always preferable to statutory or judicial mechanisms. Nevertheless, assuming that they are constructed in a way that makes their members accountable, they provide a potentially effective means to address supply chains that extend across the globe through a multitude of corporate forms.[28]

III. OLD AND NEW GOVERNANCE APPROACHES TO CONFLICT DIAMONDS—CO-DEPENDENT APPROACHES

It is argued above that multi-stakeholder initiatives can serve as a fairly effective means to address human rights issues in global supply chains. When they are used to address conflict minerals, limited experience thus far suggests that governments either tend to or must play a more significant role in such initiatives.[29] They act as more

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[25] Nike's participation in auditing schemes such as the FLA, combined with its own internal monitoring mechanisms, has led NGOs to engage in dialogue with Nike when they identify concerns. *See generally* Aaron Bernstein, *Nike's New Game Plan for Sweatshops*, BUSINESSWEEK, Sept. 20, 2004, http://www.businessweek.com/magazine/content/04_38/b3900011_mz001.htm.

[26] For instance, beginning in 2005, Nike has publicly reported on the locations and addresses of all of its direct suppliers, which number in the hundreds. *See generally* Campaigns: Stop Nike Sweatshops, http://www.educatingforjustice.org/stopnikesweatshops.htm (last visited Nov. 6, 2010). The Gap—also an early target of reputational attacks related to labor issues in its supply chain and a member of the Ethical Trading Initiative— reports the number of violations of its Code of Vendor Conduct and the geographical location of the supplier factories in which they occur for each of the 700 requirements in its Code of Vendor Conduct. *See* generally *Supply Chain—Data*, GAP INC., http://www.gapinc.com/GapIncSubSites/csr/Goals/SupplyChain/SC_COVC_Violations_I_Data.shtml (last visited Nov. 20, 2010).

[27] The FLA was a success in terms of bringing together previously antagonistic stakeholders to work towards a common cause. There is evidence that the monitoring required by such multi-stakeholder initiatives produces some improvements in labor practices, although more research is needed in this area. *See generally* Richard M. Locke, Fei Qin & Alberto Brause, *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 INDUS. & LAB. REL. REV. 3 (2007).

[28] Support for host government labor departments would likely further improve the labor situation.

[29] The U.N. Special Representative on Business and Human Rights has suggested that governments should take steps to address the roles of their national businesses in conflict

than catalysts to support the formation of such initiatives, and instead help run them, playing a key role in rulemaking. Furthermore, such initiatives may involve—directly or indirectly—a combination of old and new governance functions that are arguably *co-dependent*, meaning that both are needed for success.

The government role is also heightened in other ways. When dealing with conflict minerals, multi-stakeholder initiatives remain useful but potentially insufficient on their own. Rather, governments also need to take on more traditional roles outside the multi-stakeholder initiative, such as pushing for resolution of political impasses, providing development aid, supporting disarmament and reintegration of rebel forces, addressing trade law–related reasons for conflict minerals trading, and so on. In sum, conflict situations may demand not only multi-stakeholder approaches in which new and old governance functions are locked in co-dependent roles but also governments fulfilling their traditional roles outside the multi-stakeholder arena. Exactly how these layers of governance are arranged can vary, but in a general sense, a government-supported multi-stakeholder approach combined with states acting in their traditional roles seems most likely to effectively address conflict minerals and the disputes that they fund.

This is evident when one considers the case of conflict diamonds, which burst into the public consciousness in the late 1990s, as stories of brutal diamond-driven wars entered the Western media. Conflict or "blood" diamonds are rough diamonds used by rebel groups to finance conflicts.[30] The campaigns against conflict minerals were, to some degree, reminiscent of the campaigns against apparel companies in the 1990s for labor violations in their often highly complex supply chains.

Civil society groups seeking to address these conflicts were forced to find creative tactics, as those directly involved in the looting and sale of the minerals were often neither sensitive to reputational campaigns nor subject to U.S. jurisdiction. Those involved in conflict mineral extraction are not necessarily large, Western multinationals and may be less sensitive to reputational attacks. In other instances, mining is artisanal, and therefore there is no formalized company involved in mining that can be targeted. In either instance, it is less likely that advocates can find a jurisdictional hook to bring the company—or individuals—into U.S. courts. In addition, those involved in human rights abuses might be rebel or army groups, which are challenging to prosecute if they cannot be caught.[31] Therefore, advocacy groups

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zones, suggesting that taking such measures may acquire a legal basis as part of the human rights duties of states. Special Rep. of the Secretary-General on the issue of human rights and transnational corporations and other business entities, *supra* note 18, ¶ 48.

[30] The Kimberley Process Certification Scheme defines them as: "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments." Kimberley Process Certification Scheme 3 (2000), http://www.kimberleyprocess.com/download/getfile/4 (last visited Nov. 20, 2010).

[31] For instance, the International Criminal Court issued an arrest warrant for Joseph Kony, leader of the Lord's Resistance Army, in 2005. Prosecutor v. Joseph Kony, Case No. ICC-

began to target Western multinational corporations sensitive about their reputations, the supply chains of which potentially incorporated conflict minerals from countries including Sierra Leone and Angola.

To some degree, the solutions utilized to address conflict diamonds are similar to those used to limit labor violations in the supply chains of apparel companies. Some of the factors that may prompt the creation a multi-stakeholder initiative are present: the area is new to regulators; highly complex; challenging to understand even with the input of multiple stakeholders with varied expertise; and not easily addressed through court cases. However, approaches to conflict minerals tend to be more complex and necessarily must draw more heavily on the traditional capacities and coordinating powers of governments.

Concern among governments as well as civil society, jewelers, and diamond producers led to the creation of a multi-stakeholder initiative called the Kimberley Process, which specifically addresses conflict diamonds. Notably, the U.N. General Assembly helped develop this "new governance" solution by passing a resolution calling for an international certification system for rough diamonds, meaning that states acted in a catalytic role.[32] Although the Kimberley Process is, like the FLA, a multi-stakeholder initiative, its structure is quite different from other multi-stakeholder initiatives focused on ethical supply chains because governments play a larger role in the Kimberley Process. The Kimberley Process includes NGOs and industry associations as observers, but the formal "participants" consist of 49 members, representing 75 countries, with the European Community and its Member States counting as an individual participant.[33] Why were governments involved in creating a system to track and certify diamonds? Why did they assume a central role in the initiative, and did they have to do so?

At first blush, it seems that the means to address conflict minerals would be similar to that utilized for the apparel industry because both involve complex supply chains spread across the globe. In other words, it initially seems that NGOs and companies could engage in standard setting backed up by audits, with minimal government involvement, akin to the FLA. Yet this is not entirely accurate.

02/04-01/05, Warrant of Arrest, ¶ 48 (Sept. 27, 2005), *available at* http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf. He has yet to be apprehended, despite the attempts of multiple nations to capture him.

[32] *See, e.g.*, G.A. Res. 57/302, U.N. Doc. A/RES/57/302 (Apr. 15, 2003); G.A. Res. 56/263, U.N. Doc. A/RES/56/263 (Mar. 13, 2002); G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Dec. 1, 2000). For more history on the initiative, see *Background*, KIMBERLEY PROCESS, http://www.kimberleyprocess.com/background/index_en.html (last visited Nov. 20, 2010).

[33] *See generally* KIMBERLEY PROCESS, http://www.kimberleyprocess.com/ (last visited Nov. 20, 2010).

The mineral supply chain is a more open system and subject to minerals illicitly leaking across unmonitored borders in West Africa with relative ease.[34] Such minerals typically have high value compared to their size and weight and thus are easy to smuggle. States that border conflict zones often benefit from the exploitation of conflict minerals, with their nationals helping to mine or transit mineral resources. This simply is not an issue with the apparel industry, where clothes move through quite clearly demarcated supply chains.[35]

This means that states bordering on conflict zones must be convinced that it is not in their interest to allow minerals from conflict zones to be smuggled across their borders. Diplomacy and political buy-in therefore becomes supremely important. Conflict diamonds do not simply require auditing a factory, but instead demand a political decision by governments not to allow trade with certain countries or rebel groups. For instance, the Kimberley Process is intended to close an open trading system through the use of a government-operated certification regime.[36] Any diamonds that are not certified as to origin are supposed to be blocked from the global market. Only countries that can keep conflict diamonds out of their supply chains are, in principle, supposed to be part of the Kimberley Process, meaning that non-participants lose access to global markets.[37] The potential loss of access to the global market creates an incentive for governments to stop smuggling from neighboring rebel groups. Governments that previously tolerated or encouraged such traffic should, in theory, be convinced that rebel groups are now damaging their national economies.

The Kimberley Process operates on multiple layers, drawing on old and new governance mechanisms. In addition to the government-run certification program, it includes a voluntary industry scheme that consists of a system of warranties that

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[34] *See, e.g.*, U.N. Group of Experts on the Democratic Republic of the Congo, Rep., transmitted by letter dated July 9, 2004 from the Coordinator of the Group of Experts on the Democratic Republic of the Congo addressed to the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004), ¶ 38, U.N. Doc. S/2004/551 (July 15, 2004), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC S2004551.pdf (describing the leakage of DRC conflict minerals to Uganda and other neighboring states).

[35] Apparel supply chains are more complex if one attempts to take into account the very start of the supply chain. Tracing back to cotton farms adds a layer of complexity, which the FLA and similar organizations initially did not address because they were focused on sweatshop labor in factories.

[36] The World Trade Organization issued a waiver for the Kimberley Process, which otherwise could be seen as a barrier to trade. *See generally Agreement Reached on WTO Waiver for "Conflict Diamonds,"* WTO NEWS, Feb. 26, 2003, http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm.

[37] *Eliminating Conflict Diamonds*, DIAMONDFACTS.ORG, http://diamondfacts.org/conflict/eliminating_conflict_diamonds.html#kim (last visited Nov. 20, 2010).

accompany each step of the supply chain.[38] Although industry developed the system of warranties scheme, the scheme continues to evolve and improve due to concerns that NGOs involved in the Kimberley Process have expressed about its efficacy.[39]

Because the supply chain of conflict minerals exists in a potentially "open" system, controlling that supply chain is different from targeting the supply chains of other industries and requires the use of traditional government functions. Therefore, in the case of conflict diamonds, old governance did not simply lay dormant but rather plays a key role in the multi-stakeholder initiative. In fact, the Kimberley Process certification scheme depends on it. Namely, the customs departments of member countries are supposed to ensure the effective functioning of the certification system, creating a system that covers the globe as industry never could on its own.

The Kimberley Process is arguably an example of a co-dependent system consisting of old and new, mutually dependent governance mechanisms. Its multi-layered system denotes the benefits of multi-stakeholder approaches and mutual learning when addressing supply chain challenges. The certification scheme, an example of new governance, was developed with the participation and expertise of NGOs and companies as well as governments. Those stakeholders continue to have a seat at the table of Kimberley Process meetings, and to exert considerable pressure on the direction that the initiative takes.[40] In addition, the industry's system of warranties acts as a backup to the government certification scheme. Nevertheless, governments are, probably necessarily, in a far more active role than the United States assumed when it catalyzed the formation of the FLA. Conflict minerals cannot be addressed unless governments draw upon their traditional national government functions, such as customs inspections. The certification scheme's quality would falter without industry's input and pressure from NGOs, but its implementation would not occur without governments acting in their traditional roles as well.

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[38] *Id.*

[39] For more information on NGO critiques of the diamond industry's schemes, and some of the changes that have been made over time, see *The Diamond Industry*, GLOBAL WITNESS, http://www.globalwitness.org/pages/en/the_diamond_industry.html (last visited Nov. 20, 2010).

[40] For instance, Global Witness called for a negotiated resolution to exploitation of diamond mines in Zimbabwe in November 2010. *Conflict Diamond Scheme Must Resolve Zimbabwe Impasse*, GLOBAL WITNESS, Nov. 5 2010, http://www.globalwitness.org/library/conflict-diamond-scheme-must-resolve-zimbabwe-impasse. Soon after, the Kimberley Process and the Zimbabwean government came to an agreement that makes Zimbabwe's export of diamonds contingent on its compliance with the Kimberley Process, which follows Global Witness's recommendations. *Crisis Averted by Last-Minute Deal on Zimbabwe Diamonds, but Campaigners Warn that Biggest Test Lies Ahead*, GLOBAL WITNESS, July 15, 2010, http://www.globalwitness.org/library/crisis-averted-last-minute-deal-zimbabwe-diamonds-campaigners-warn-biggest-test-lies-ahead.

Although the strong role of states in the Kimberley Process is key to its success, the fact that governments hold much of the decision-making power in the Kimberley Process potentially limits the organization's ability to act nimbly and effectively and respond to new challenges, which are assumed benefits of new governance structures. This is because the Kimberley Process is arguably overly politicized. Civil society organizations regularly critique the governments involved for failing to sanction countries that are not effectively managing smuggling or are failing to prevent uncertified artisanal diamonds from entering their exports.[41] Not surprisingly, governments are slow to criticize one another, a problem seen consistently in the U.N. system.[42] In addition, governments must move decisions through large bureaucracies, which makes them slower to react.

Although the Kimberley Process is imperfect, it is credited with reducing the percent of conflict diamonds reaching the international market from four to one percent.[43] It provides a mechanism for consistent collective action that utilizes the strengths of governments—political clout and the ability to control trading systems. Furthermore, it benefits from the expertise of both NGOs and companies. Pressure from NGOs involved in the process also helps the standards continue to grow and evolve and ensures that they are followed.

Governments played another key role in addressing conflict diamonds, and, here, they stepped into their classic governance functions. They issued U.N. sanctions targeting the perpetrators of international crimes, froze their assets, and forbade arms shipments to them.[44] They created the Special Court for Sierra Leone to adjudicate

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[41] *See*, *e.g.*, *Credibility of Kimberley Process on the Line, Say NGOs*, IRIN, http://www.irinnews.org/Report.aspx?ReportId=84949.

[42] *See generally* Ian Smillie, *Rough Business: Diamonds and Conflict*, INST. FOR HUM. RTS. & BUS., Sept. 14, 2010, http://www.institutehrb.org/blogs/guest/rough_business_diamonds_and_conflict.html. NGOs also are calling for the mandate of the Kimberley Process to be expanded to address minerals mined in militarized areas where gross human rights abuses occur. *See id.* Specifically, they have called for the Kimberley Process to sanction Zimbabwe because its military has taken over the Marange diamond fields, and allegedly has engaged in mass human rights abuses there. *See* James Melik, Diamonds: *Does the Kimberley Process Work?*, BBC, June 28, 2010, http://www.bbc.co.uk/news/10307046. Under traditional Kimberley Process definitions, these diamonds are not "conflict diamonds" because they are not exploited by rebel groups, but rather the "legitimate" government. The Kimberley Process reflects the difficult truth that conflict minerals cannot be controlled without a strong government role, but governments are also self-interested and highly politicized, meaning that, as joint decision-makers, they may drift towards the lowest common denominator.

[43] *Conflict Diamonds*, DIAMONDFACTS.ORG, http://www.diamondfacts.org/conflict/ (last visited Nov. 20, 2010). It is unclear how much of this reduction is due to the Kimberley Process and how much is due to the end of specific conflicts, such as the one in Sierra Leone.

[44] For a list of U.N. Sanctions issued against Sierra Leone during the diamond-funded conflict there, see *Security Council Resolutions Concerning the Situation in Sierra Leone pursuant to*

the cases of those responsible for international crimes in the context of that conflict, which helped limit the resurgence of war criminals to power by placing them behind bars.[45] In addition, the governments used diplomatic means to coerce the parties to the conflicts to reach a political resolution. After conflict was diminished, governments from around the world contributed to the development of war-destroyed countries in West Africa. In sum, governments pursued their international "old governance" functions.

The Kimberley Process fits within these much broader international machinations as a helpful and innovative means to limit the funding for the rebel groups, but to suppose that the Kimberley Process by itself could have addressed the conflicts is a dubious assumption. The approach to conflict diamonds thus supports the premise that conflict minerals require two layers of action, both with a significant role for governments. First, multi-stakeholder fora are needed to devise innovative mechanisms to prevent the funding of violence through conflict minerals, and states may need to play more significant roles in such multi-stakeholder initiatives. Second, governments must step into their traditional international roles, thus addressing the roots of the conflict, through mechanisms such as diplomacy, demobilization of fighters, economic development, and support for changes to the trade and minerals regimes of conflict-affected states.

IV. CONFLICT MINERALS FROM THE DEMOCRATIC REPUBLIC OF THE CONGO: EVOLVING APPROACHES

The complementary old and new governance mechanisms utilized to address conflict diamonds offer potential lessons for the global approach to conflict minerals emanating from the DRC. This section traces developments to date regarding DRC conflict minerals. It considers the roles of new and old forms of governance, and highlights the steps that still need to be taken. It is unlikely that the approach to DRC conflict minerals will look precisely the same as that used for conflict diamonds, but there are parallels and hints of what could be done better at the moment.

Resolution 1132 (1997), U.N., http://www.un.org/sc/committees/1132/resolutions.shtml (last visited Nov. 20, 2010).

[45] For instance, the Special Court for Sierra Leone indicted Charles Taylor, the former President of Liberia, who is blamed for the conflict in Sierra Leone. He had gone into exile in Nigeria before he was arrested. For more information, see *The Prosecutor vs. Charles Ghankay Taylor*, THE SPECIAL CT. FOR SIERRA LEONE, http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx (last visited Nov. 6, 2010). For information on the political implications of Taylor's arrest, see Craig Timberg, *Liberia's Taylor Found and Arrested*, WASH. POST, Mar. 30, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879_pf.html.

The conflict in the eastern DRC is, at least in part, about control of resources.[46] Whether the impetus for the most recent civil war was economic or political in nature—or both—remains debated, but control over minerals allows certain armed groups to maintain access to weapons and gives them an economic reason to refuse to surrender their arms.[47] Armed groups profit from the mineral trade by exercising direct control of mines and taxing their daily production, utilizing forced labor to conduct mining activities, taxing along mineral trade routes, and being involved in the illegal exportation of minerals. These forces have been associated with gross human rights violations.[48]

In a familiar pattern, civil society groups searching for new pressure points to address the conflict and the role that minerals play in it began to campaign against well-known electronics companies whose supply chains potentially include minerals from the eastern Congo.[49] These minerals follow a complex path through multiple middlemen in the eastern DRC, across the border to Rwanda and Uganda, to smelter facilities in Asia, and, allegedly, eventually to large electronics companies in the United States and Europe.[50] These end-user companies are so far removed from the armed groups trading in conflict minerals that lawsuits against them would have little chance of success. They are, nevertheless, highly susceptible to reputational attacks.

The conflict minerals issue in the DRC seems to lend itself to the same multi-stakeholder, new governance approaches that have been used to address other human rights abuses in supply chains. Surprisingly, this has been very slow to emerge. Rather than the executive branch bringing together diverse entities into a multi-stakeholder initiative, the U.S. Congress turned to regulation. The Conflict Minerals

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[46] For further discussion of the role that resources can play in internal conflicts and whether they provide causation for the conflict, see generally Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War*, 56 OXF. ECON. PAP. 563 (2004).

[47] For the argument that resources play a key role in the DRC conflict, see Nadira Lalji, *The Resource Curse Revised*, HARV. INT'L REV., Fall 2007, at 37.

[48] GLOBAL WITNESS, FACED WITH A GUN, WHAT CAN YOU DO? 5 (July 2009), http://www.operationspaix.net/IMG/pdf/Golbal_Witness_War_Militarisation_of_Mining_Eastern_Congo_2009-07-22_.pdf [hereinafter *Faced with a Gun*].

[49] See, for example, The Enough Project's Eastern Congo publications, which focus in part on the role of the private sector. A list of these publications can be found at http://www.enoughproject.org/publications/congo (last visited Nov. 6, 2010). See also Global Witness's publications, which have focused on the role that minerals play in the eastern DRC for years. *Democratic Republic of Congo*, GLOBAL WITNESS, http://www.globalwitness.org/pages/en/democratic_republic_of_congo.html (last visited Nov. 20, 2010).

[50] *See generally* Sasha Lezhnev & John Prendergast, *From Mine to Mobile Phone: the Conflict Minerals Supply Chain*, THE ENOUGH PROJECT (Nov. 10, 2009), http://www.enoughproject.org/files/publications/minetomobile.pdf.

Section of the Dodd-Frank Wall Street Reform and Consumer Protection Act[51] constitutes an important recognition of the gravity of the situation in the DRC, but it is unlikely, by itself, to create any significant change in the human rights situation in the eastern DRC. Rather, it is better understood as a potential catalyst for further, coordinated global action, which has begun to occur—depicting the need for multi-stakeholder agreement on certification or due diligence systems in which all parties have input and confidence.

The bill targets four minerals: cassiterite (a tin precursor), tantalum (also known as coltan), wolframite (a tungsten precursor), and gold.[52] The legislation requires companies reporting to the Securities Exchange Commission (SEC) whose products incorporate these minerals to report regarding whether those products in fact contain conflict minerals.[53] More specifically, it requires companies to disclose annually to the SEC whether any potential conflict minerals originated from the DRC or adjoining countries, and if they did, to describe the due diligence steps that companies took—thus creating an expectation that companies will have in place effective due diligence.[54]

The legislation has a new governance gloss because it does not tell companies how to conduct due diligence. It simply creates an expectation that such due diligence should be "reliable."[55] It likely reflects the lawmakers' realization that they do not have the expertise to delineate in detail what an effective due diligence system looks like in a conflict zone. Although this was a reasonable way to design the legislation, and in line with new governance thinking, it creates uncertainty for companies because if the Comptroller General determines that their forms of due diligence are unreliable, their

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[51] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 12 and 15 U.S.C.) § 1502 [hereinafter Dodd-Frank Act].

[52] *Id.* § 1502(e)(4). These minerals are widely used in products ranging from automobiles to airplane engines to cell phones. Ryan David, *Companies Still in the Dark on Conflict Minerals Law*, LAW360, Aug. 4, 2010.

[53] Note that the bill is somewhat unclearly drafted. Commentators have noted that it is not entirely clear which companies will have to report. *See* David, *supra* note 52.

[54] Conflict free products are defined as products that do not contain minerals that directly or indirectly finance or benefit armed groups in the DRC or an adjoining country. Dodd-Frank Act § 1502(b) (amending 15 U.S.C. 78m by adding new subsection (p)(1)(A)(ii)). The due diligence must include an independent private sector audit that the company certifies. *Id.* (amending 15 U.S.C. 78m by adding new subsections (p)(1)(A)(i) and (p)(1)(B)). The report also must describe products that are not conflict free, and must identify where the minerals were processed and the efforts that the companies took to identify the location of origin. *Id.* (amending 15 U.S.C. 78m by adding new subsection (p)(1)(A)(ii)).

[55] The legislation attempts to address concerns that due diligence processes or independent audits might be ineffective or unreliable. The legislation empowers the SEC to determine that independent audits or other due diligence processes are unreliable, in which case reports that rely on those audits or due diligence systems do not satisfy the reporting requirement of the legislation. *Id.* (amending 15 U.S.C. 78m by adding new subsection (p)(1)(C)).

reporting is invalid.[56] This determination would in turn open them up to NGO campaigns and other sources of reputational risk. NGOs have met industry efforts aimed at establishing effective traceability and certification systems on the ground in the DRC with skepticism thus far, meaning that there is genuine concern that corporate due diligence will be seen as unreliable.[57]

The conflict minerals legislation asks companies to more or less single-handedly cut conflict minerals out of their supply chains, which, if unsupported by other measures, may lead to an unintended de facto ban on minerals from all of the DRC or Central Africa. [58] The de facto ban would arise because it might be simpler for companies to cut minerals from Central Africa out of their supply chains than to prove that they are conflict free. This would have significant human costs because it would put tens of thousands of individuals out of work in the eastern Congo and also would remove a source of income for all their dependents[59] in an area that currently offers few other livelihood options. Unemployed miners might then join armed groups as a means to make a living. Therefore, it is important that legitimate minerals from the DRC, and the region, continue to find a market and that an effective means of due diligence be identified.

However, creating an effective due diligence system to address conflict minerals is especially challenging for a number of reasons. It is unclear which actors are considered to be conflict actors.[60] It is highly challenging to gather information

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[56] *Id.*

[57] Industry groups have created a certification system that would tag minerals at their source and provide a chain of custody from point of origin to the smelter. *See generally ITRI Tin Supply Chain Initiative, Discussion Paper, Version 2*, ITRI (Oct. 2009), http://www.itri.co.uk/SITE/UPLOAD/Document/iTSCi_Final_Version_2_English__2.10.09.pdf [hereinafter *ITRI Discussion Paper*]. This certification system has come under criticism from some NGOs that do not believe that it is likely to be effective. *See Faced with a Gun*, *supra* note 48, at 65–66.

[58] DRC conflict minerals are known to be smuggled through neighboring countries, including Uganda and Rwanda. *See supra* note 34. The legislation attempts to address this by requiring reporting on minerals from adjacent countries. This creates a risk of a de facto ban on those countries as well.

[59] For one estimate of the number of artisanal miners in the eastern DRC, see Laura Seay, *Congo Mining Ban Hurt More than it Helped*, CHRISTIAN SCIENCE MONITOR, Oct. 5, 2010, *available at* http://www.csmonitor.com/World/Africa/Africa-Monitor/2010/1005/. She states that as a result of a temporary ban on mining in the eastern DRC, 50,000 artisanal miners are out of work. Estimates of the total number of miners in the eastern DRC and their dependents vary.

[60] Although some Congolese forces are acting to protect the country from rebel groups, some divisions of the DRC military has been accused of serious human rights violations in the eastern DRC, and NGOs also claim that the military is benefiting from the trade in conflict minerals. *See Faced with a Gun*, *supra* note 48. The legislation requires the U.S. government to create a conflict map that identifies which mines are controlled by armed groups, which presumably requires the U.S. government to determine whether government forces count as

regarding which actors control particular areas, and the situation frequently changes.[61] Minerals in the DRC are handled by a number of intermediary traders in often unstable and dangerous areas. These minerals are not necessarily conflict minerals—it depends on the identity of the intermediaries and the origin of the minerals—but conducting the due diligence is challenging and possibly dangerous.

The types of factors that have led to the formation of other multi-stakeholder initiatives are clearly present. The DRC presents a highly challenging and changing environment that requires innovative and flexible approaches to due diligence on corporate supply chains. Information is hard to obtain and is likely to be much more reliable when civil society, governments, and business combine their intelligence sources. A multi-stakeholder approach would offer a learning forum where better standards could be developed, information could be shared regarding the situation on the ground, and errors, if the company were well-intentioned, could be addressed quietly. This would prevent companies from ending all sourcing from the DRC entirely due to reputational or U.N.–sanctions risk.

A lack of trust between parties has hampered the multi-stakeholder learning and rulemaking that is needed to develop effective due diligence systems for conflict minerals, another factor that points to the benefits that a multi-stakeholder initiative might bring. For example, the International Tin Research Institute (ITRI), the tin mining association, developed a traceability and certification program for minerals from the DRC. [62] The system has been consistently publicly criticized by a prominent NGO, which claims that it is not being implemented in a timely manner, that it lacks an independent monitoring mechanism, and that it relies too much on the government—and therefore that it is unlikely to be reliable.[63] ITRI has replied that the program has been implemented according to schedule, will include an

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"armed groups." Dodd-Frank Act § 1502(c). This aspect of the legislation points out the fact that companies sometimes need governments to make political determinations when dealing with conflict zones.

[61] The U.S. State Department's conflict map notes: "[c]ompiling a more detailed and current map would require closer and continuous monitoring of the situation on the ground in affected areas of the DRC. However, physical dangers and resource and staffing constraints . . . necessarily limit reporting on the situation on the ground." If the U.S. government is unable to access key areas of the eastern DRC, it indicates that the ability of companies to conduct effective due diligence in or near a conflict zone is questionable. United States Dept. of State Humanitarian Information Unit, *Democratic Republic of the Congo Mineral Exploitation by Armed Groups*, June 28, 2010, http://hiu.state.gov/index.cfm?fuseaction=public.display&id=02a66c45-c38e-4892-a12e-ef45e1436cbe.

[62] Industry groups have created a traceability and certification system that would tag minerals at their source and provide a chain of custody from point of origin to the smelter. The system is being implemented in stages. It is currently in stage 2—which is a traceability system. Stage 3 will create a certification system. *See generally ITRI Discussion Paper*, *supra* note 57.

[63] *See Faced with a Gun, supra* note 48, at 65–66.

independent monitoring mechanism, and that the government, while problematic, must be part of any solution.[64] ITRI also states that it has invited the concerned NGO to join a multi-stakeholder group that it has formed to develop more effective approaches to conflict minerals due diligence and that it has also recently sought the NGO's input into the ITRI scheme.[65] This series of exchanges points out the need for greater trust and more collaboration between stakeholders in order to develop an effective traceability and certification system.

Given that the ITRI program, although perhaps imperfect, is essentially the only traceability and certification program being implemented on the ground, it would be helpful if concerned stakeholders could be brought together to co-design such a certification program and address its weaknesses, but this requires overcoming the trust barrier.[66] Effective due diligence for the DRC requires a system that all stakeholders can support, even though due diligence in such a challenging region of the world is likely to be imperfect. The challenge of the context, and the likelihood that the due diligence system will not always function perfectly, is precisely why it is so important that companies, civil society, and governments join their efforts to make the system work as well as possible. Companies will be frightened away from sourcing from the region if a single instance of conflict minerals slipping through their systems will subject them to NGO campaigns—although those who are not making all efforts to carry out effective due diligence should be identified publicly. There needs to be a forum for sustained dialogue in which problems with the due diligence system can be identified, mutually understood, and effectively addressed.

In other instances in which trust was lacking and a solution to human rights abuses in the supply chain was required, governments took on a catalytic role to ensure that formerly opposed parties worked together to create a solution—for instance, by creating the FLA. No government has taken on such a role to address conflict minerals. Despite the dearth of such leadership, some efforts that involve business, NGOs, and government are emerging, although none provide a long-term forum for discussion and problem solving. Such efforts appear to be acquiring increased momentum, perhaps partially in response to the U.S. legislation, which makes

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[64] Letter from Kay Nimmo, Mg'r of Sustainability & Reg. Affairs ITRI, to Global Witness (Sept. 2010) (on file with author).

[65] *Id.* The author did not have the opportunity to discuss with the NGO its reasons for not engaging.

[66] Bundesanstalt für Geowissenschaften und Rohstoffe (BGR) has developed a method for tantalum fingerprinting which could also be used to identify the source of minerals, although it is unclear how expensive such a scientific process would be. *"Coltan Fingerprint": BGR Enables the Certification of Trading Chains*, BUNDESANSTALT FÜR GEOWISSENSCHAFTEN UND ROHSTOFFE, http://www.bgr.bund.de/nn_326194/EN/Themen/Min__rohstoffe/Rohstoff__forsch/LF__Herkunftrsnachweis__COLTAN__Newsletter01-2010.html (last visited Nov. 6, 2010).

corporations more urgently need an effective due diligence system to be defined.[67] The legislation may also have created an impetus for neighboring governments to address cracks in their customs systems that allow DRC conflict minerals to infiltrate the system, as one potential effect of the legislation is a de facto ban on sourcing from not only the DRC, but the region.

The Organisation for Economic Co-operation and Development (OECD) has taken the first steps towards establishing a definitive due diligence system for minerals potentially sourced from conflict areas of the DRC. The OECD Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereinafter "Due Diligence Guidance for Responsible Supply Chains of Minerals") was issued in mid-2010.[68] Although the OECD is not a multi-stakeholder initiative, the rulemaking process was similar to that utilized in such an initiative. The OECD developed the due diligence standards through a process that incorporated the ongoing input of a range of NGOs, governments, and companies.[69] The due diligence standards are detailed and provide guidance for both the upstream (from mine to smelter) and downstream (from smelter to end user) sections of the supply chain. Those involved have expressed hope that the Guidance will not only inform the SEC as it engages in rulemaking for the U.S. conflict minerals legislation[70] but also will help inform the U.N. Panel of Experts, which has been charged with establishing due diligence criteria for industry sourcing from the DRC.[71] This would create coordinated standards for companies, which would be more easily implemented and simpler for civil society to monitor. The current situation also raises the specter of conflicting standards if the SEC develops rules that are at odds with that of the OECD.

The detailed guidance provided by the OECD, developed with the expertise of a multitude of perspectives, is certainly an important first step. However, it places all responsibility for preventing conflict minerals from entering the supply chain on

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[67] Industry has stated its aspiration that the SEC will adopt the OECD Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, referenced below, as the standard for effective due diligence under the U.S. conflict minerals legislation. *OECD Standards Taken Up in Fight Against Conflict Minerals*, OECD, http://www.oecd.org/document/1/0,3343,en_2649_34889_46130881_1_1_1_1,00.html (last visited Nov. 6, 2010).

[68] For more information, see *Due Diligence in the Mining and Minerals Sector*, OECD, http://www.oecd.org/document/36/0,3343,en_2649_34889_44307940_1_1_1_1,00.html (last visited Nov. 6, 2010).

[69] See, for instance, the participants in a recent round of consultation. *ICGLR-OECD Joint Consultation on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas Sept. 29-30, 2010, Nairobi*, ICGLR-OECD, Sept. 30, 2010, http://www.oecd.org/dataoecd/13/39/46082522.pdf.

[70] *See supra* note 67 regarding the hopes that companies have expressed that the SEC will adopt the OECD's definition of due diligence.

[71] S.C. Res. 1896, ¶ 7, U.N. Doc. S/RES/1896 (Nov. 20, 2009).

companies. Companies thus bear a heavy burden, as they are expected to fully understand the facts on the ground in a volatile area without the support of other sectors, including government. It is very likely that companies' due diligence approaches will require a significant increase in the role played by governments to be effective. For instance, without a heightened level of security on the ground, corporate due diligence will hard to implement and less reliable.

Companies will be hard pressed to implement effective due diligence as long as minerals continue to leak through the customs regimes of neighboring states. To prevent smuggling and leakage, a coordinated regional approach is needed, as was utilized under the Kimberley Process. There is a push for the International Conference on the Great Lakes Region (ICGLR) to adopt the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals and establish a linked certification system. The ICGLR consists of the DRC and ten of its neighboring countries, so if the ICGLR created a certification system, it would include the DRC's neighbors, through which minerals leak. Certainly, in some manner, the customs regimes of the countries in the region need to be strengthened so that fewer minerals are smuggled, eventually making their way into global supply chains.

Perhaps anti-smuggling efforts utilizing regional customs regimes will occur via the ICGLR instead of a multi-stakeholder initiative such as the Kimberley Process, which should provide an opportunity to identify which approach works best. It is not certain that a multi-stakeholder structure is needed, although it is clear that a coordinated approach and tightening of the customs system is necessary to better regulate the flow of potential conflict minerals at national borders in Central Africa. Yet it seems likely that, in order to improve problem solving regarding a challenging environment and to enhance trust and the legitimacy of any due diligence or certification system, a multi-stakeholder initiative would be advisable. Furthermore, given the hesitation of the governments in the Kimberley Process to enforce the rules against their fellow states, a strong NGO watchdog role also seems critical, and may be lacking if the ICGLR is put in charge.

The U.S. legislation calls for the U.S. government to develop a strategy to "address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products."[72] Part of that plan could include pushing for the adoption of a certification method based on the Due Diligence Guidance for Responsible Supply Chains of Minerals. Such a certification system is likely to be best designed, and gain the greatest trust and support, if civil society and companies play a role in developing it. Therefore, the United States and other governments should push for the creation of such a certification system, either by the ICGLR or in another forum, and encourage such a certification system to be as robust and credible as possible by ensuring that it emerges from a genuine multi-stakeholder process.

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[72] Dodd-Frank Act § 1502(c)(1).

Even if an effective certification system is created by the ICGLR or another forum, states will also still need to step into their traditional governance roles. The DRC will need technical support and funding from other governments to end corruption and enable the due diligence system to work. In addition, progress is needed on the customs systems of the region, quite apart from any conflict minerals certification process. The DRC customs system needs to be normalized with its neighbors because much lower customs fees to export from the DRC's neighbors are one cause of mineral smuggling.[73] "Old governance" organizations providing traditional rule of law support and development aid will play a key role. The United Nations Stabilization Mission in the DRC must continue to be funded and strengthened. Development aid must create alternative livelihood programs for miners, and the regulatory capacity of the legally mandated mining sector should be strengthened. Former soldiers must be reintegrated through formal programs. Until a certain degree of stability is established, it will remain highly challenging for companies to undertake effective due diligence or for the DRC customs regime to operate effectively. These changes all rely on governments brining their political skills and development aid to bear on the problem.

Overall, the approach to conflict minerals in the DRC has been much more piecemeal than that utilized for conflict diamonds. The Kimberley Process provides some degree of multi-stakeholder one-stop shopping. It wraps together industry chain of warranty efforts and a government certification system that required changes to national customs regimes. It continues to provide a forum for ongoing discussions between governments, business, and civil society regarding the best means to address new problems, and civil society continues to place pressure on governments to sanction non-compliant members so that the Kimberley Process functions as intended.

In contrast, the U.S. legislation and OECD Due Diligence Guidance for Responsible Supply Chains of Minerals seem to make identifying conflict minerals via due diligence purely the purview of companies. It appears thus far that any certification system will be developed separately, with limited coordination, although it may draw on the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals. New governance theories would suggest that ongoing learning, which is certainly needed for a locale such as the eastern DRC, will be diminished, unless the certification system somehow develops a forum for such interactions. Governments, including the U.S. government, should consider supporting a ongoing multi-stakeholder forum in which approaches to due diligence and certification can be refined.

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[73] John Prendergast & and Noel Atama, *Eastern Congo: An Action Plan to End the World's Deadliest War*, ENOUGH PROJECT, (July 16, 2009), http://www.enoughproject.org/publications/eastern-congo-action-plan-end-worlds-deadliest-war.

Meanwhile, due diligence and certification can only function amidst the dire humanitarian situation and limited governance capacity in the DRC to some degree. It is critical that governments do not look to corporate due diligence to provide an end to the conflict in the eastern DRC because it is but one small piece of a much more complex puzzle. Rather, a coordinated effort is needed, drawing on the best of old and new governance. The United States should help provide that coordinating role. The private sector can contribute to the peace in the DRC, but governments must lead.

V. CONCLUSION

New governance mechanisms such as multi-stakeholder initiatives have proven to be reasonably effective mechanisms to address human rights violations in supply chains. When they are utilized in the context of conflict minerals, governments may need to play a more significant role in such multi-stakeholder initiatives. Governments involved in the multi-stakeholder initiative may need to undertake reforms of their customs or trade regimes to prevent the leakage of conflict minerals from neighboring states. In addition, to address conflict minerals, governments cannot simply rely on the efficacy of multi-stakeholder initiatives and corporate due diligence and monitoring but must also utilize their traditional powers, including diplomacy, development aid, and peacekeeping.

Thus far, the approach to the conflict in the eastern DRC has been somewhat haphazard. Its multi-stakeholder aspects should be strengthened to enhance learning and trust and improve decision-making. Moreover, governments should move beyond placing requirements solely on companies and take on a number of responsibilities. Within the region, the cross-border flow of conflict minerals needs to stemmed, which requires a regional commitment to strengthened customs regimes and perhaps a certification system that has the support and input of all stakeholders. In addition, governments, including the United States, should heighten their supportive and coordinating role in the region. They should utilize diplomacy to create the political will in the DRC and its neighbors to address the conflict and should ensure that any certification system developed is viable. They should also provide technical support for customs departments. Additionally, they should heighten their financial and political support for rule of law and development in the DRC.

In sum, new governance has its place at the domestic and international level, but it is no panacea. Traditional forms of government still have a role to play, especially when human rights are involved. This is particularly true when human rights violations are occurring in a conflict zone. A coordinated approach is needed that melds the best of new governance with the continuing political power of traditional statesmanship and support for effective internal governance.