Setting up an effective system in promoting conflict free minerals in Africa

by

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Declaration

Except for references specifically indicated in the text, and such help as I have acknowledged, this Mini-Dissertation is wholly my own work and has not been submitted for degree purposes to any other university. I hereby present this Mini-Dissertation in partial fulfilment of the Legum Magister (LL.M) Degree in International Trade and Investment in Africa at International Development Law Unit, Faculty of Law, University of Pretoria.

_______________________________________  _____________________
G. Mavropoulos-Vagelis     Date
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Abstract

Conflict has been rife in the Democratic Republic of Congo (DRC) for many decades, in a war over minerals. The economic incentive for this conflict lies in the multimillion dollar trade in conflict minerals, and the results are human rights abuses, violent conflict and corruption. International industries from resource-rich countries play a role in business and human rights violations in other countries where governance is weak, such as the DRC. The focus of this study is minerals extracted from the eastern DRC – the ores that produce tin, tantalum, tungsten (the 3Ts) and gold. These minerals are essential to the electronics industry, where various companies, primarily publicly listed companies, use these minerals in their production processes.

This study examines the way in which companies at the top of the minerals supply chain use their buying power to influence their suppliers, exerting pressure down the supply chain. There have been dramatic changes in this arena recently, including the passing of conflict minerals legislation in the United States of America (USA) and an evolving multilateral architecture for supply chain due diligence emanating from the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD).

This study explores a variety of efforts initiated by a number of companies, governments and non-governmental organisations (both in the DRC and internationally) committed to combating conflict minerals. These efforts are aimed at formulating a regulatory framework on the security exchanges in Africa. Such a system should be conceptualised to regulate the due diligence process relating to minerals to enable end-users to trace supply chains from companies who use these minerals back to the sources of origin, by using independent audit chains of custody in a certification scheme similar to the Kimberley Process for conflict diamonds. This system is intended to be a means to strengthen the global transparency and accountability of electronics companies, together with industry
initiatives, the OECD’s guidelines and extractive industry transparency initiatives principles, targeting publicly listed companies.

This study, which consisted of a desktop review of books, journals, reports and internet sources, analyses elements of the USA’s Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) and South Africa’s King Code Report III on Corporate Governance of 2009 to determine whether these instruments are appropriate to be applied to African exchanges. It examines whether these instruments can be used to create a system requiring companies trading in or using conflict minerals in their production to compile an annual report that is to be made publicly available, disclosing the source and chain of custody of conflict minerals which originate from conflict zones, notably the DRC and other African countries.

Due to the globalised markets, companies are gaining greater power than some governments. Companies are regulated by the legislation of the host country in which they are incorporated. The countries in which these companies operate and publicly trade are usually developing countries, which are characterised by impoverished communities and unstable or emerging democracies.

The recent passing of the conflict minerals provisions in the Dodd-Frank Act requires that publicly traded companies in electronics industries report annually to the Securities Exchange Commission (SEC) on whether conflict minerals are part of their supply chains, and if so, what the steps have been taken to ensure that the companies do not contribute to the ongoing conflict. The practical/managerial implications of the African system is that the inconsistencies and instability in these emerging markets legislation and their relaxed rule of law create loopholes in the systems of industry which would normally require adherence to human rights principles and industry’s assistance in developing global standards and/or incorporating such standards into legislation. Industry is still largely unaware of whether products are conflict-free and has no way of determining the status of products. Responsible supply chain co-operation is therefore needed by companies to take steps to trace supply chains, and ensure independent auditing and certification.
This study looks at how industry and governments can formulate international standards and regulations that require publicly listed companies using the 3Ts and gold in the production of their goods to put human rights at the heart of their enterprises.

The findings of the study highlight the urgent need for due diligence, transparency and an accountability agenda for resource sectors. The study argues that more African states need to buy into these initiatives. Greater transparency must be part of broader governance schemes. The study recognises the important role of stock exchanges and the importance of regulating companies which trade and source minerals from the DRC and other countries in Africa. The study recommends a reform of securities exchanges and the implementation of corporate governance codes. The study argues that Africa can incorporate elements of the Dodd-Frank Act, the SEC Act, King III and the JSE Listing Requirements into national legislation in the individual states to impose important legal duties on companies to promote fairness, accountability, responsibility and transparency. Passing legislation to regulate the international minerals trade is crucial for the promotion of a legal mineral trade.
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<tr>
<td>CFS</td>
<td>Conflict Free Smelter</td>
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<tr>
<td>DFID</td>
<td>Department for International Development</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>EITI</td>
<td>Extractive Industries Transparency Initiatives</td>
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<td>EICC</td>
<td>Electronic Industry Citizenship Coalition</td>
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<td>EU</td>
<td>European Union</td>
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<td>GeSI</td>
<td>Global e-Sustainability Initiative</td>
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<td>ICGLR</td>
<td>International Conference on the Great Lakes Region</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>ITRI</td>
<td>International Tin Research Initiative</td>
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<tr>
<td>JSE</td>
<td>Johannesburg Stock Exchange Limited</td>
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<td>KING III</td>
<td>the King Report on Governance Principles for South Africa of 2009 and King Code of Governance Principles of 2009</td>
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<td>KING Report</td>
<td>King Report on Governance Principles for South Africa of 2009</td>
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<td>MONUC</td>
<td>United Nations Organisation Mission in the Democratic Republic of Congo</td>
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<td>NCP</td>
<td>National Contact Points</td>
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<td>NGO</td>
<td>Non Governmental Organisation</td>
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<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>OECD due diligence guidance for supply chains</td>
<td>OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas</td>
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<td>OECD MNE Guidelines</td>
<td>OECD Guidelines for Multinational Enterprises</td>
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<tr>
<td>RINR</td>
<td>Regional Initiative against the Illegal Exploitation of Natural Resources</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>SEC</td>
<td>Securities Exchange Commission</td>
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<td>Dodd-Frank Act</td>
<td>Dodd-Frank Wall Street Reform and Consumer Protection Act 2010</td>
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<tr>
<td>3Ts</td>
<td>Tin, tungsten and tantalum</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UN Illegal Exploitation Report</td>
<td>United Nations Group of Experts Panel of the Illegal Exploitation of Natural Resources and Other Forms of Natural Wealth</td>
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<td>US / USA</td>
<td>United States / United States of America</td>
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Chapter 1:
Introduction

1.1 Background

There are several hidden costs behind Africa’s resource extraction industry. Many African countries are blessed with mineral wealth that has the potential to transform their economies if the exploitation of those minerals is properly managed. However, in numerous African countries, the discovery of natural resources has led to economic instability, conflict, environmental damage, human rights violations, and corruption, bred through secrecy and inadequate management. In short, what has come to be called Africa’s resource curse has led to resource wars. The challenge for Africa is to prevent the resource curse from continuing to operate and Africa’s sad history from repeating itself in the next era of massive resource extraction. It is therefore necessary for companies that use these mineral resources to be open, transparent and accountable in their business.

The United Nations’ (UN’s) largest and most expensive peacekeeping operation is the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC). MONUC has been deployed in the Democratic Republic of Congo (DRC) since 1999, but the mission has been unable to contain the violence between the militias and the Congolese army. In 2010, the UN described the situation in the DRC as ‘one of the worst

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1 One of the most complex and persistent problems that face development experts has been dubbed the resource curse. The term describes the fact that there is a poor correlation between abundant natural resources in some countries and economic growth, good governance, and political stability in such countries. D Firger ‘Transparency and the natural resource curse: examining the new extraterritorial information forcing rules in the Dodd-Frank Wall Street Reform Act of 2010’ (2010) 41 George Town Journal of International Law 1051-1052.


4 MONUC Report (n 3 above).
humanitarian crises in the world.\textsuperscript{5} It is against this backdrop that \textit{militias} finance themselves and try to profit from controlling the DRC’s vast mineral wealth.\textsuperscript{6}

The UN Security Council assigned a panel to investigate the illegal exploitation of natural resources and other forms of wealth of the DRC. The panel’s brief was to produce reports, to follow up on reports, and to come up with recommendations and research on the region.\textsuperscript{7} The result, the ‘UN Report of the Panel on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of the Congo’ (UN Illegal Exploitation Report),\textsuperscript{8} is a comprehensive catalogue of violations of international norms and conventions linked to natural resource exploitation. One of the important issues raised by the report is that of ‘elite networks.’\textsuperscript{9}

The DRC, located in the heart of Africa, has been the site of the deadliest conflict in all of Africa’s documented history. More than five million people were killed in the conflict between 1997 and 2010, of which 40 per cent were women and children.\textsuperscript{10} The conflict is fuelled by the struggle to access and hold power over natural resources such as cobalt, copper, niobium, tantalum, petroleum, industrial diamonds, gold, silver, zinc, manganese, tin and uranium, all of which are found in the region.

Many of these minerals do not have much intrinsic utility, so ordinary people cannot actually use them until they have been processed and transformed into goods or useful components. Once processed, these minerals become immensely valuable. The rebel groups in the DRC depend on a series of partners along a stream of commerce to move these raw natural resources from their point of origin to a legitimate recipient who can then process them, transform them into component parts for consumer goods, and thereby

\textsuperscript{8} UN Illegal Exploitation Report (n 7 above).
\textsuperscript{9} These ‘elite networks’ are organised crime cartels that collaborate to strip the DRC systematically of its minerals and other wealth, according to P Asiimwe ‘Report of the UN Panel on the Illegal Exploitation of Natural Resources of the Democratic Republic of the Congo’ (2004) 22(2) \textit{Journal of Energy \& Natural Resource Law} 194. See also UN Illegal Exploitation Report (n 7 above).
derive value from them. These minerals are ultimately used in legal consumer products, including the electronic equipment that occupies a central role in today’s modern Western life.

As in other conflict commerce situations, a large portion of the initial trade in these minerals occurs illegally or through the informal sector. As a result, the early points along the trade route for these minerals are difficult to discern or comprehend fully, while points closer to their end use, once the taint of conflict has been carefully obscured, are more transparent or potentially transparent. This situation makes it important to pressurise companies and industry sectors to source responsibly and to disclose their sourcing process by being open and transparent in order to counter conflict and the elements thereof.

Greater awareness among the public (and thus the end-users of conflict minerals) has prompted leading electronics companies such as Hewlett Packard and Research In Motion (the manufacturers of Blackberry), to re-examine their supply chains to ensure that minerals sourced for their products are sourced responsibly. Companies such as these need to investigate their supply chains to take the necessary steps to encourage responsible sourcing of minerals. However, these companies face significant challenges because of a lack of transparency, and the complex structures and relationships in particular minerals’ supply chains.

Many DRC communities depend on artisanal mining for their livelihoods, with an average of five dependents per digger. Secondary economies and supply chains sustain a further one million people regionally in the Eastern DRC. Tin, tungsten, tantalum (3Ts) and gold are the region’s primary export minerals. Gold is of a significantly higher value and

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15 Various interviews by N Garrett (September 2009) cited in the ‘South Kivu Province DRC (2007-2009) A Democratic Republic of the Congo senate report’ estimated that 40 tonnes, or USD 1.24 billion of gold, are smuggled out of the DRC each year.
is also the primary military-traded mineral. It is estimated that 95 per cent of the DRC’s artisanal gold production is informally exported.\textsuperscript{16} The UN Illegal Exploitation Report\textsuperscript{17} has traced gold shipments through the region, in particular through Uganda and Burundi, to international marketplaces, such as the United States of America (USA), Europe and the United Arab Emirates.\textsuperscript{18}

The 2001 UN Illegal Exploitation Report\textsuperscript{19} lists five main strategies that the DRC/Zimbabwean elite network employed in their secret trade, namely

\begin{quote}
...asset stripping of state mining companies; gaining control of procurement and accounting of state revenue; using corporate facades as a cover for criminal activities; organised theft of diamonds and other minerals from state companies; and the procurement of military equipment from mining revenues.\textsuperscript{20}
\end{quote}

The activities of this organised criminal syndicate of well-connected networks and companies have serious adverse effects on the economy and society of a country such as the DRC. It penetrates rapidly into various regions of Africa, leading to violence and insecurity among citizens in these countries. It is fuelled by illegal wealth and illicit money gathered from contract killings, extortion, smuggling in contraband, illegal trade in narcotics, kidnappings for ransom, and money laundering.\textsuperscript{21}

‘Conflict resources’\textsuperscript{22} is a term used to define natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law.\textsuperscript{23}

‘Conflict minerals’ are minerals mined in conditions of armed conflict and human rights abuses, notably in the eastern provinces of the DRC, by the Congolese National Army and

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\textsuperscript{17} UN Illegal Exploitation Report (n 7 above).
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\textsuperscript{18} UN Illegal Exploitation Report (n 7 above) 32.
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\textsuperscript{19} UN Illegal Exploitation Report (n 7 above).
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\textsuperscript{20} Asiimwe (n 9 above) 196.
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\textsuperscript{21} Asiimwe (n 9 above) 196.
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\textsuperscript{22} Le Billon (n 2 above) 561.
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various armed rebel groups. Conflict minerals then produce ‘conflict goods’, which refers to the commercialisation of these minerals under the control of rebel groups and governments, with the assistance of foreign patrons. Industry demands, the sourcing of these minerals and the trading thereof provide conflict financing in these regions. The main difference between conflict diamonds and the minerals trade is that high quality diamonds are a luxury item which is optional to Western consumers, while conflict minerals are built into products such as laptops, cell phones and cameras that Western consumers deem essential.

Four main minerals are mined in the DRC. The first three are cassiterite (the ore for tin), coltan (the ore for a rare metal called tantalum), wolframite (the ore for tungsten) – these three are often referred to as the ‘3Ts’ (tin, tantalum and tungsten). The fourth mineral is gold. World prices for each of these minerals have been rising in the last few years, giving armed groups in the Eastern DRC an incentive to target and keep a hold on the mines.

The illicit trade of these minerals provides rebel groups and units of the national army with tens of millions of dollars a year that they use to buy arms and shore up their rival campaigns. In 2008, it was estimated that these minerals provided Congolese armed groups with approximately $185 million in profits.

The issue of conflict goods and minerals has gained prominence on a multilateral level through various reports by the UN Security Council sanctions monitoring mechanism. The monitors who occasionally report on the UN embargo have little influence, apart from the reports they prepare every six months for the UN Security Council.

Some corporations have done their part to reduce the level of conflict in and around their properties, but others appear not to care and may simply conciliate local leaders with...
payments and turn a blind eye to the consequences.\textsuperscript{29} An example of such payments is Anglo Gold’s notorious payments to Floribert Njabu, a rebel leader in Ituri.\textsuperscript{30} Increased corporate investment is not necessarily a positive sign in developing countries – especially not in the Congo – where the government is weak, disinterested or otherwise occupied with conflict. Countries characterised by weak governance are easy targets for corporate investors who have little concern for human rights. This raises the question of how to make investments socially beneficial and ensure that business interests promote human rights, rather than compromise them. How then should corporate social responsibilities be promoted in difficult situations such as these?\textsuperscript{31}

1.2 The need for regulation and standards

The 2010 G8 Communiqué emphasises that conflict minerals contribute directly to the instability and violence that is causing undue suffering among the people of the DRC.\textsuperscript{32} The UN Illegal Exploitation Report\textsuperscript{33} recommends that the role of transnational corporations in areas of conflict be appraised, that the OECD guidelines regarding the behaviour of transnational companies be enforced, that initiatives for peace-building alongside support for legitimate regional trade organisations be enhanced and that a regulatory framework for commodity trade from conflict areas be set up.\textsuperscript{34}

Thus far, companies have relied on assurances from their suppliers that suppliers do not purchase conflict minerals, and companies have not required independent verification. Legislation in future may, however, shift the burden of proof to companies, making it imperative for them to find out where their suppliers source minerals and to check the chain of custody.\textsuperscript{35} It is important to ascertain not only where companies source supplies, ...

\textsuperscript{31} Friedman (n 29 above) 110 .
\textsuperscript{33} MONUC Report (n 3 above).
\textsuperscript{34} Asimwe (n 9 above) 200.
\textsuperscript{35} ‘Chain of custody’ refers to the chronological documentation or paper trail showing the seizure, custody, control, transfer, analysis, and disposition of evidence, physical or electronic. Raj (n 26 above) 988.
but also how they go about tracing and auditing the process, documenting it and providing independent verification of the process.

Far too often, companies outside the host state do not take responsibility for their actions on where or how they obtain their resources, because companies are left to regulate themselves when they operate outside their home state and in countries where there is weak legislation.\(^{36}\) Most African countries do not have a centralised institution or legislation to manage the resource industry, so the countries need to establish an institution or body that can mediate between policy, regulation and business.

This study emphasises the importance of co-operation between industry and governments in creating systems that can trace, audit and certify minerals in order to promote conflict free minerals. The term ‘conflict minerals’ is rapidly becoming a term that is familiar to the public as concerned consumers, organisations and politicians enter an era of public awareness and consumer consciousness on the matter. Greater public awareness makes it possible and important to put pressure on governments, international institutions and companies to develop international standards and regulation to transform international financial systems and to improve reporting standards and requirements.

In order to find African recipes to promote an effective legal minerals trade, it should not be only the intention behind a piece of legislation that matters, but also the purpose of the law concerned and its ability to have an impact on and transform the incentives of the relevant stakeholders. In considering passing legislation to regulate the international minerals trade in order to promote the legal mineral trade, the intentions behind the legislation need to be examined. This is important to consumers of electronics products who are uncomfortable knowing that their purchases are contributing to the devastation of communities, families and lives. It is critical for those in the international electronics industry who care about maintaining the brand names and image of some of the largest companies in the industry, such as Apple, Hewlett Packard and Dell. Some of these companies have already expressed their willingness to improve their supply chains and have taken steps to do so. A successful approach to minerals regulation requires the

industry itself to create change. This study examines how the steps companies are taking can be regulated more effectively than they are at present.

Participants in the International Conference on the Great Lakes Region (ICGLR) and Organization for Economic Co-operation and Development (OECD) Meeting on implementing due diligence recommendations for responsible mineral supply chains in the Summary Report have stated that more effort needs to be made by all stakeholders to convey the positive message that companies who choose to source responsibly from the DRC and adjoining countries contribute to development and a transition towards lasting peace and security. However, the message also needs to be conveyed that significant progress still has to be made with regard to harmonising the normative framework and avoiding a duplication of efforts in operationalising different schemes and industry initiatives.

1.3 What is the Dodd-Frank Act, and what does the conflict minerals provision in the Dodd-Frank Act require companies to do?

The Dodd-Frank Act represents the USA’s response to the collapse of the financial markets in the Autumn of 2008. It is primarily designed to identify large-scale risk in the financial markets by increasing the regulation of banks, private financial companies, public markets and also of securities. This legislation is also an attempt to deal with the complex social and legal problems and the violence associated with the exploitation of minerals from the DRC by exposing, through disclosure and public pressure, those companies that use these minerals. The Dodd-Frank Act contains provisions requiring US-registered companies using minerals mined in the DRC and neighbouring countries to carry out due diligence on their supply chains. The Act also imposes reporting requirements through the Securities Exchange Commission (SEC), which includes

37 Following the adoption of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, this meeting addressed how best to implement the OECD-UN due diligence recommendations.
39 OECD (n 38 above).
40 Ochoa & Keenan (n 11 above) 129, 134.
41 Sections 13(a) and 15(d) of the Securities Exchange Act of 1934 (SEC Act) (Proposed changes incorporated into US Legislation in December 2011) Security and Exchange Commission available at
requiring companies to publish what they pay governments for natural resource exploration and extraction, country by country and project by project.\textsuperscript{42}

The new legislation was prompted by the US Congress’s concern that the exploitation of and trade in conflict minerals originating in the DRC and neighbouring countries are helping to finance conflict characterised by extreme levels of violence in the eastern DRC, particularly sexual and gender-based violence, and contributing to an emergency humanitarian situation in this region.\textsuperscript{43} This legislation has placed significant international pressure on major electronics companies to report on their efforts to ensure that their supply chains do not include any conflict minerals from the DRC and from neighbouring countries.

### 1.4 What is the King code and what does it do?

In South Africa, soft law, in the form of codes of conduct such as the King Code, shows how responsible behaviour of companies can be monitored, and recommendations are adhered to by companies. Compliance with the ‘King Report on Governance Principles for South Africa of 2009’ (King Report) and ‘King Code of Governance Principles of 2009’ (King Code), together referred to as ‘King III’,\textsuperscript{44} is voluntary, but companies are encouraged to follow these guidelines through the listing requirements of the Johannesburg Stock Exchange Limited (JSE), which acts as a compliance mechanism. Compliance with the King Report is a requirement for companies listed on the JSE\textsuperscript{45} and

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\textsuperscript{42} Section 1504 of the Dodd-Frank Act 845.


\textsuperscript{44} The King Committee on governance issued the ‘King Report on Governance for South Africa of 2009’ (the King Report) and the ‘King Code of Governance Principles of 2009’ (the King Code), together referred to as ‘King III’, on 1 September 2009. The King Code came into effect on 1 July 2010.

\textsuperscript{45} The JSE Limited (JSE) was formally established on 8 November 1887. It was created to meet the needs of the rapidly developing gold mining industry. It has since become an active player in meeting both the political and economic challenges of post-apartheid South Africa. The JSE is licensed as an exchange under the Security Services Act 36 of 2004, and is Africa’s biggest exchange. In the 125 years since its inception, the JSE has evolved from a traditional floor-based equities market to a modern securities exchange providing fully electronic trading, clearing and settlement in securities, financial and agricultural derivatives and other associated instruments. Its stringent listing requirements gives the JSE extensive surveillance capabilities. The JSE is also a major provider of financial information. In everything it does, the JSE strives to be a responsible corporate citizen. JSE ‘Guidelines to listing on JSE’ (n.d) available at http://www.jse.co.za/Libraries/JSE_-_How_to_List_-_Guideline_to_Listing_on_the_JSE/Guidelines_to_Listing_on_the_JSE.sflb.ashx (accessed 3 April 2012).
the King Report has been cited as ‘the most effective summary of best international practices in corporate governance.’

1.5 What is being done about this issue?

Mining activities that fuel conflict are unacceptable, and some industry members are committed to doing their part to ensure transparency and responsible sourcing. The following are industry groups addressing the issue of conflict minerals in the following ways:

- the Electronics Industry Citizenship Coalition (EICC) and the Global eSustainability Initiative (GeSI) are working to ensure conflict free sourcing of minerals, including the development of a smelter validation plan, support for pilot projects and due diligence guidelines for the mining sector;
- the International Tin Research Institute (ITRI) has spearheaded efforts for the development and the implementation of a ‘bag and tag’ scheme at mines as a key element of credible traceability for cassirite from the mine of origin to the processing facility;
- and
- the Automotive Industry Action Group aim at educating and preparing suppliers for reporting that will enable compliance with the provisions of the Dodd-Frank Act.

NGOs which are actively promoting the issue of conflict free minerals include:

- the Enough Project (a project of the Centre for American Progress to end genocide and crimes against humanity), which conducts field research, advocacy, and communications to bolster a grassroots movement and track companies’ actions on the issue of conflict minerals;
- Global Witness, which runs campaigns against natural resource-related conflict and corruption, associated environmental and human rights abuses, aimed at documenting,

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49 EICC (n 47 above), GeSI (n 48 above).
exposing and ultimately breaking these links between politicians, military and militia groups;\textsuperscript{53}

- Resolve, which seeks to create enduring solutions to environmental, social and health challenges, by collaborating with community, business, government and NGOs, conducts research with the EICC and the GeSI to see how companies can trace the supply chain back to the mine of origin;\textsuperscript{54} and

- Friends of the Congo, which works in partnership with Congolese to bring about peaceful, lasting change in the DRC – the organisation advocates an aggressive diplomatic path in pursuing a regional political framework to end regional conflict.\textsuperscript{55}

Other initiatives include the World Gold Council’s international standard for gold (the Gold Standard), which is currently in the draft phase. The Gold Standard is based on a declaration of principles including

implementing companies’ commitment to: respect human rights; ensure that payments are not made, directly or indirectly, to armed groups; be transparent about their payments to governments; only accept gold from conforming sources; and to establish a credible and accessible grievance mechanism.\textsuperscript{56}

The Gold Standard provides a mechanism requiring producers of gold to assess the risk that their operations may contribute to armed conflict and associated serious human rights abuses.\textsuperscript{57} Where such a risk exists (in that gold production may support armed conflict), gold producers who wish to comply with the Gold Standard will be required to adhere to a number of commitments in terms of human rights, including but not limited to, the Universal Declaration on Human Rights,\textsuperscript{58} the United Nations Global Compact,\textsuperscript{59} the United Nations’ Guiding Principles on Business and Human Rights\textsuperscript{60} and ‘OECD Due

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\textsuperscript{54} Resolve available at www.resolve.org (accessed 12 November 2011).
\textsuperscript{60} United Nations Human Rights Council (7 April 2008) ‘8th session on the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and
Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas’ (OECD due diligence guidance for supply chains).  

The ‘OECD Guidelines for Multinational Enterprises’ (OECD MNE Guidelines) have developed far-reaching recommendations for responsible business conduct. An OECD due diligence framework which provides detailed guidance for companies using the 3Ts or gold from conflict-affected areas can apply these guidelines to ensure that these companies are not causing harm through their mineral purchases. The UN Security Council adopted a similar framework in its November 2010 resolution on the DRC.

1.6 Regional initiatives

The ICGLR is a regional initiative against the illegal exploitation of natural resources. It aims particularly at breaking the link between mineral revenues and rebel financing.

It is important to recognise the OECD guidelines, as well as regional, NGO and industry initiatives in addressing the importance of transparency in the private sector in dealing with conflict minerals. The private sector needs to work with regional and international partners to deter conflict trade and to establish a legitimate supply chain. This supply chain must be compliant with the OECD due diligence guidance for supply chains which the OECD, UN Security Council and ICGLR issue and endorse. In addition, it is important to include auditing mechanisms by downstream end users who want to comply with EICC and GeSI efforts in the process. This is to ensure smelter process conflict free minerals and other initiatives that are designed to prevent the entry of minerals whose value contributes.
to conflict minerals into the supply chain. A supply chain that meets regionally and internationally accepted criteria can help to stabilise the economy by reducing funding to destabilising elements and can facilitate a sustainable route to the market for responsible upstream products and responsible sourcing.

There is a need for publicly listed and unlisted companies that are using conflict minerals from the DRC and other conflict-ridden areas to create a conflict minerals report, which should be attached as an exhibit to their annual reports. This should include the measures the company has employed in order to exercise due diligence on the source and chain of custody of their conflict minerals, enabling the company to flag its products as conflict free and to establish that the minerals did not directly or indirectly finance or benefit armed groups in the DRC and other areas affected by conflict.66

In creating a system to regulate conflict minerals, the study shows the need to incorporate key aspects of existing systems and new innovations into a system of regulation where there is a conductor.67 An attempt is therefore made to determine whether such a system needs to be approached from a soft or hard law perspective.

While transnational corporations cannot be held responsible for restoring governments as a measure of official power, it must be admitted that the decisions and activities of transnational companies carry significant weight in national and international policy making.68

1.7 Lessons learned from the blood diamonds trade

To design effective conflict minerals structures and regulation, the lessons already learned from a conflict commodity such as conflict diamonds need to be examined.

One of the main problems identified in the Kimberley Process in regulating the diamond trade is the lack of any mechanisms for independently auditing or regularly monitoring the supply chain. Where corruption is prevalent, or where elites control the state apparatus, purely domestic responses to the resource curse will be inadequate. Thus, any serious effort to lift the curse must include channels that are transnational in scope.70

### 1.8 Aims of the study

The study considers international bodies and organisations that have already taken up initiatives on the matter of conflict minerals, in order to implement regulatory efforts constructively. The study explores how it is possible to promote transparency and accountability. It further posits that any legislation that purports to regulate the trade in conflict metals must be aligned broadly with the Kimberley Process, industry standards initiatives, EITI principles and OECD Guidelines. The study also examines the possibilities of regulating conflict minerals in Africa by requiring companies to report on their sourcing processes and to disclose a minerals report annually in their financial statements to stock exchanges.

### 1.9 Problem statement

In its examination of issues relating to conflict minerals, this study recognises the link between business practices and social injustices stemming from the trade of such minerals. It analyses possible action that can be taken to prevent atrocities resulting from the desire or need to access mineral wealth by calling on corporations to exercise due diligence in establishing conflict free supply chains. Resource wealth does not have be a curse for Africa, if such wealth and its use is properly managed. If African lenses are used to look at transparency, traceability and certification initiatives in order to promote a legal minerals trade in the course of development, the continent’s potential can be transformed into tangible growth.

Inconsistencies and instability in the legislation in countries with emerging markets and the relaxation of these countries regarding the rule of law creates loopholes in the systems

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69 Raj (n 26 above) 1016.
70 Firger (n 1 above) 1056.
of industry obligations to human rights and demonstrate the need for industry to assist in developing global standards and incorporating such standards into a regulatory system. These aspects are also explored in the study.

1.10 Research questions

The following specific research questions were explored in this study:

- What industry regulators and institutional initiatives exist? What are the roles of the different players? Are these roles mutually exclusive?
- What role does transparency and due diligence play in a solution to the trade in conflict minerals? Does Africa need to regulate the minerals industry? If so, how?
- What is the relevance of the Dodd-Frank Act, King III and JSE Listing Requirements? Is there a need to legislate trade in conflict minerals? Is the new conflict minerals’ law a silver bullet to stop all armed violence in the DRC and in Africa?

1.11 Methodology

The research for this study consists of a desktop review. This includes a review of published books, interviews, journals, reports and internet sources. The study covered various types of sources from disciplines such as mining, accounting, auditing reporting practices and law. An analytical approach was used in reading these texts.

The main documents consulted were the Dodd-Frank Act and the proposed SEC regulations, the OECD due diligence guidance for supply chains, the OECD MNE Guidelines,\(^\text{71}\) King III\(^\text{72}\) and JSE Listing Requirements,\(^\text{73}\) the ICGLR,\(^\text{74}\) UN Global Compact,\(^\text{75}\) EITI, the UN Illegal Exploitation Reports,\(^\text{76}\) ISO 26000 and various industry initiatives.

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\(^{71}\) OECD MNE Guidelines (n 62 above).
\(^{72}\) King III (n 44 above).
\(^{74}\) ICGLR (n 65 above).
\(^{75}\) UN Global Compact (n 59 above).
\(^{76}\) UN Illegal Exploitation Report (n 7 above).
1.12 Outline of the study

- Chapter 1: Introduction

This chapter covers the background on the study, and provides an introduction on the purpose of the study, the methodology used and chapter overviews. This chapter explains the concept of conflict minerals, the ‘conflict curse’ and the connection of conflict goods. It also describes the 3Ts and other key minerals such as gold, and the use of these minerals in electronic products, as well as problems related to the supply chain process and responsible sourcing relating to international companies. This chapter aims to create a better understanding of the minerals, supply chain and sourcing of end users relevant to this study.

- Chapter 2: Transparency and due diligence

The second chapter focuses on the importance of due diligence and transparency. It looks at accounting for mineral sourcing, the concept of International Financial Reporting Standards and auditing mechanisms.

- Chapter 3: Roles of different players

This chapter identifies the roles of different players in strategic positions, recognising their efforts in creating a system to regulate minerals.

- Chapter 4: The Dodd-Frank Act, SEC responsibilities, King III and JSE Listing Requirements

In the fourth chapter, special attention is paid to the USA’s Dodd-Frank Act, discussing in particular the elements of sections 1502 and 1504 of the Act. Next, the SEC responsibilities are examined. The chapter also addresses the role and importance of security exchanges and companies reporting, with specific reference to the South African King III code and JSE Listing Requirements.
Chapter 5: Conclusion

This chapter sets out the findings and conclusions of the study on the current and changing situation and proposes recommendations for future progress in the fight against conflict minerals.
Chapter 2:
Due Diligence and Transparency

2.1 Introduction

This chapter focuses on the importance of ensuring due diligence and transparency as a means of creating an effective system to promote the trading of conflict free minerals in Africa. The chapter explains what due diligence in the mineral supply chain is, why it is necessary and whose responsibility it is to carry out due diligence. Next, transparency is discussed, showing why it is needed as a tool in a comprehensive strategy to tackle the obstacles to ethical trading of minerals. Lastly, the lessons learned from industry, public campaigns and similar processes are explored to identify possible solutions to the problem of conflict minerals trading.

2.2 Due diligence

2.2.1 What is due diligence in the mineral supply chain?

Before looking at what due diligence is, the supply chain needs to be defined. The minerals supply chain

...involves multiple actors and generally includes the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing and sale of end products. The term supply chain refers to the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers. 77

According to the OECD due diligence guidance for responsible supply chains, due diligence is

...an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict. Due diligence can also help companies ensure [that] they observe international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions. Risk-based due diligence

77 OECD due diligence guidance for supply chains (n 61 above) 14.
refers to the steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions.\textsuperscript{78}

According to \textit{Black’s Law Dictionary}, due diligence can be defined as ‘the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation.’\textsuperscript{79}

The \textit{Black’s Law Dictionary} definition is also used in the “Guiding principles on the business and human rights: Implementing the United Nations ‘Protect, Respect and Remedy Framework’” (the Ruggie Framework).\textsuperscript{80} Customarily, the term ‘due diligence’ refers to a factual investigation in which information is gathered in order to analyse risks ranging from general business and tax risks to transaction-related risks.\textsuperscript{81} Nowadays the term ‘due diligence process’ also includes analysing risks that stem from not complying with corporate social responsibility standards embodied in new rules and guidelines such as human rights issues, environmental impact and corruption.\textsuperscript{82}

In the context of the future of doing business in ‘conflict affected and high risk areas’,\textsuperscript{83} due diligence is a key term and refers to a continuous risk-based assessment process. The Ruggie Framework states that

\begin{quote}
business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.\textsuperscript{84}
\end{quote}

\begin{thebibliography}{84}
\item \textsuperscript{78} OECD due diligence guidance for supply chains (n 61 above) 13.
\item \textsuperscript{79} BA Garner \textit{Black’s Law Dictionary} (2006).
\item \textsuperscript{80} UN Human Rights Council (n 60 above).
\item \textsuperscript{81} UN Human Rights Council (n 60 above).
\item \textsuperscript{82} TE Lamboooy ‘Corporate Social Responsibility: Legal and semi-legal frameworks that support CSR developments 2000-2010 and case studies’ (2010)10.
\item \textsuperscript{83} Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict takes a variety of forms, such as international or non-international conflict. It may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas include areas where there is political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law. OECD due diligence guidance for supply chains (n 61 above) 13.
\end{thebibliography}
2.2.2 Why is due diligence necessary?

As framed in the Ruggie Report,

...human rights due diligence involves the implementation of policies, assessment mechanisms, and internal oversight and control systems to identify, prevent, and address the actual and potential adverse human rights impacts associated with a company's operations.  

Due diligence is necessary because it is an ongoing, proactive and reactive process through which companies can claim that they value human rights and do not contribute to conflict. Due diligence assists companies in taking cognisance of international law, and in being in compliance with domestic laws. It also takes into account laws against any illegal trade in minerals, and UN sanctions. Risk-based due diligence refers to the steps companies should take to identify and address risks which could have an adverse impact on a company’s activities or sourcing decisions.

The OECD due diligence guidance for responsible supply chains defines ‘risks’

...in relation to the potentially adverse impacts of a company’s operations, which result from a company’s own activities or its relationships with third parties, including suppliers and other entities in the supply chain. A company assesses its risk by identifying the factual circumstances of its activities and relationships and evaluating those facts against relevant standards provided under national and international law, recommendations on responsible business conduct by international organisations, government-backed tools, private sector voluntary initiatives and a company’s internal policies and systems.

In practical terms, due diligence as implemented by companies is structured around the steps that they should take to do the following:

- identify the actual circumstances involved in the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing or selling of products that contain minerals originating from conflict-affected and high-risk areas;
- recognise and assess any actual or potential risks by evaluating the factual circumstances against standards set out in the company’s supply chain policy ‘as can been seen the Model Supply Chain Policy, Annex II’; and

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86 Adverse effects may include external and/or internal effects such as harm to people or reputational damage or legal liability for the company. These effects are interdependent and result in reputational risk and legal liability. OECD due diligence guidance for supply chains (n 61 above).

87 OECD due diligence guidance for supply chains (n 61 above) 13-14.

88 OECD due diligence guidance for supply chains (n 61 above) 20-24.
prevent or mitigate the risks identified by adopting and executing a risk management plan\textsuperscript{89} which may result in a decision to continue trading through the path of risk mitigation efforts, temporarily suspend trading while pursuing ongoing risk mitigation, or disengage from a supplier either after failed attempts at mitigation or where the company deems mitigation not viable or the risks intolerable.\textsuperscript{90}

2.2.3 Who should carry out the due diligence?

All companies in the mineral supply chain that supply the 3Ts and gold sourced from conflict-affected or high-risk areas should apply the OECD due diligence guidance for supply chains or some other form of due diligence. While the implementation of due diligence should be customised to each company’s activities and relationships, depending on the company’s position in the supply chain, the objective of all companies should be to conduct their due diligence in such a way as to ensure that they do not contribute to human rights abuses or conflict.\textsuperscript{91}

The OECD due diligence guidance for supply chains recognises that due diligence in conflict-affected and high-risk areas presents practical challenges. There is a need for flexibility in the application of due diligence. The nature and extent of due diligence that is appropriate will vary, depending on circumstances, and can be affected by factors such as ‘the size of the enterprise, the location of the activities, the situation in a particular country, the sector and nature of the products or services involved.’\textsuperscript{92}

These challenges may be met in a number of ways, including, but not limited to the following:

\begin{itemize}
  \item Industry-wide cooperation in building capacity to conduct due diligence.
  \item Cost-sharing within industry for specific due diligence tasks.
  \item Participation in initiatives on responsible supply chain management.\textsuperscript{93}
  \item Coordination between industry members who share suppliers.
  \item Cooperation between upstream and downstream companies.
  \item Building partnerships with international and civil society organisations
\end{itemize}

\textsuperscript{89} OECD due diligence guidance for supply chains (n 61 above) 14.
\textsuperscript{90} OECD due diligence guidance for supply chains (n 61 above) 14.
\textsuperscript{91} OECD due diligence guidance for supply chains (n 61 above) 15.
\textsuperscript{92} OECD due diligence guidance for supply chains (n 61 above) 15.
\textsuperscript{93} For example: ITRI (n 50 above), the Smelter Validation Scheme, EICC (n 47 above) and GeSI (n 48 above), the Gold Standard (n 56 above), World Gold Council and Chain of Custody in the Diamond and Gold Jewellery Supply Chain, Responsible Jewellery Council ; Global Reporting Initiative Supply Chain Working Group.
- Integrating the model supply chain policy (Annex II) and specific due diligence recommendations outlined in this Guidance into existing policies and management systems, due diligence practices of the company, such as procurement practices, integrity and “know your customer” due diligence measures and sustainability, corporate social responsibility or other annual reporting.\textsuperscript{94}

In addition to providing the principles and processes for companies, the OECD due diligence guidance for supply chains recommends due diligence processes and procedures that emerging industry-wide supply chain initiatives should meet as they work towards conflict-sensitive responsible sourcing practices. These guidelines may assist and complement the development and implementation of comprehensive certification schemes, such as the ICGLR certification scheme and tools.\textsuperscript{95}

Due diligence is about gathering intelligence – about gathering facts and information as part of a larger process of assessing risk. An example of a process-wise risk-based due diligence approach is a three-tier model of intelligence-gathering developed by the KPMG-Forensic Services consultancy firm for carrying out due diligence for their clients in fragile states.

The first tier consists of the collection of desktop intelligence from various sources, collating and synthesising the information sourced, and carrying out an initial risk assessment before embarking on business with entities in the fragile state. In the analysis that constitutes the risk assessment, this intelligence is sifted for the purpose of identifying high, medium or low risk levels.

The second tier involves on-the-ground investigation which requires physically going to the country under review to collect more information. This type of investigation involves working with particular tools for intelligence-gathering, such as approaching the global business network and talking to outsiders and business partners. However, one must bear in mind that due diligence only goes as far as the intelligence which can be gathered. A limiting factor in obtaining local information is the possible safety risk for people on the ground if they collaborate with a company and reveal what may be happening in reality.

The third tier aims at identifying ways to overcome the risk involved. This entails weighing up all the risks based on all the intelligence gathered, and coming up with a

\textsuperscript{94} OECD due diligence guidance for supply chains (n 61 above) 15.
\textsuperscript{95} OECD due diligence guidance for supply chains (n 61 above) 15.
compliance programme structured around the prevention, responses to and detection of these risks.\(^{96}\)

It can be said that due diligence is opportunities-based. A company with knowledge of the risks in its worldwide operations and supply chains problems related to corporate social responsibility, and in the areas of environment, human rights and corruption, is in a better position to face the future of its operations. Opportunities arise when a company sees possibilities for new business ventures and/or to explore innovative solutions – often in collaboration with other stakeholders or competitors – to counter existing problems. Finally, a well-prepared company should produce an informative and transparent corporate social responsibility report annually, or as often as required. Doing so will improve the reputation of the company, because it would display the company’s progressive forward-thinking approach. Conversely, weak due diligence can have a damaging effect on a company’s reputation.\(^{97}\)

2.3 Transparency and a comprehensive strategy

The bulk of the mineral trade in the DRC is in the hands of operators who act ‘a-legally’,\(^{98}\) and generally involves trading activities which are entirely informal until the export stage. In practice, this happens where a country’s law imposes a number of conditions on agents (for example, the need for them to have traders’ license cards), but fails to put in place the necessary structures for agents to comply (for example, the state does not provide the cards). In the DRC, a-legal trade and illegal activity co-exist, in that many of the minerals are extracted by artisanal miners who operate a-legally and informally, and in some areas of mineral production and trade these miners are then illegally taxed by armed groups at the local level. This suggests that the challenge in the DRC, as it relates to conflict dynamics, is not the mineral trade per se, but rather the military predation on the mineral trade and other economic activities. In order to bring the conflict trade to an end, it is important to prioritise security sector reform and political bargaining. Security sector reform interventions are best suited to tackle the crisis of insecurity in the DRC, whilst

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\(^{97}\) Lambooy et al (n 96 above).

\(^{98}\) ‘A-legal’ activity has been defined as ‘trade where it is not possible for the agent to act legally because the state either does not facilitate law application and/or does not enforce the law correctly.’ Garrett & Mitchell (n 14 above) 23.
natural resources management intervention in the mineral trade is best suited to increase the dividend of the mineral trade’s development.99

A crucial element to promote legal trade in the DRC is to extensively increase transparency by implementing transparency processes at the point of contact between the government of the DRC and the private sector. Transparency can be defined as “public access to information, or more precisely ‘timely and reliable economic, social and political information accessible to all relevant stakeholders’”.100

Transparency can be used as an instrument to influence corruption-related problems in a number of ways. Firstly, transparency can prevent corruption by making such practices riskier and less attractive. Secondly, transparency can offer incentives for public officials and companies to act cleanly and more efficiently. Thirdly, transparency can develop confidence and security by improving the sustainability of cooperation and minimising the likelihood of opportunistic rent-seeking. Fourthly, it is linked to other ongoing interventions in the mineral sector such as the regular public disclosure of data on trade, exports and taxes to provide the necessary information to improve the effectiveness of interventions aimed at promoting the professionalisation and formalisation of the legal mineral trade and/or mineral trade, whether through certification, due diligence procedures or larger reform processes.101

Transparency is a crucial element in shedding light on processes and supply chains. Many industries are moving towards transparency, as can been seen in financial reporting and accounting standards. Producers of electronic goods who source minerals that might contain conflict minerals now have a responsibility to make sure their business dealings are not unintentionally helping to fuel atrocities. Electronics companies have the power to put pressure on their suppliers to enable the traceability of the minerals they use in order to ensure that the minerals do not originate from mines that are funding armed groups and criminal interests. The role of consumers and global citizens in demanding that companies and governments exercise leverage over the supply chain is crucial to ending the trade in the DRC’s conflict minerals. Bringing transparency to the consumer electronics supply

100 Garrett et al (n 99 above) 21.
chain would be a major first step toward transforming the DRC’s rich mineral resources from a source of violence to one of empowerment for the millions of people currently caught up in the conflict and all those who depend on the meagre livelihoods they earn in mines throughout the DRC.\textsuperscript{102}

2.4 A comprehensive approach

A more ‘comprehensive approach’\textsuperscript{103} is needed to overcome the conflict minerals curse in the DRC. Such an approach should embrace significant, sustained, long-term investment in the DRC’s security, governance and the livelihood of its people. A comprehensive strategy to end the DRC’s conflict minerals trade should be made up of four parts:

1. Shining a light on the supply chain,
2. Identifying and securing strategic mines,
3. Reforming governance,
4. Supporting livelihoods and economic opportunities for miners.\textsuperscript{104}

Ensuring transparency is a step closer to changing the conflict economy in the DRC. The capability of end users to trace and audit the supply chains for the metal components in their electronics products is a crucial step to routing international demands away from armed groups and towards legitimate sources.

International advocacy and corporate engagement has started to become important in Europe and the USA in the form of the EICC.\textsuperscript{105} The EICC issued a report initiating a supply chain transparency model for the 3TIs recognising that ‘they can influence standards throughout the supply chain and within the wider industry.’\textsuperscript{106} This is an important submission, but industry-led efforts have thus far fallen short on the level of transparency necessary to make a difference. Currently companies only give vague written assurances from suppliers that they do not traffic in the DRC’s conflict minerals. There is no mechanism in place to carry out independent verification or audited chains of custody. Advocacy efforts must make sure companies do not simply produce numerous reports and statements that do not address issues but simply ‘paper over’ concerns, for example, electronics companies have begun to issue declarations that they are not buying from

\textsuperscript{102} Enough Project & Grassroots Reconciliation Group (n 6 above).
\textsuperscript{103} Enough Project & Grassroots Reconciliation Group (n 6 above) 1.
\textsuperscript{104} Enough Project & Grassroots Reconciliation Group (n 6 above) 2.
\textsuperscript{105} Other initiatives are discussed in detail in subsequent chapters.
\textsuperscript{106} Enough Project & Grassroots Reconciliation Group (n 6 above) 9.
illegal mines, but fail to provide real proof that consumer electronics do not contain conflict minerals.  

In developing an effective system to ensure transparency, consumers and activists need to demand independently verifiable supply chain audits to make sure that products are indeed conflict free. This system should not take the form of a boycott of the DRC minerals; instead, it should take the form of stricter requirements for purchasing minerals so that consumers can be credibly guaranteed that armed groups are not benefiting from illicit activity relating to the minerals that companies buy, or from the oppression of local populations. For example, experience with marketing of products such as “Wal-Mart’s ‘Love Earth’ jewellery line”\(^{108}\) has shown that it is possible to implement a system that places a FedEx-like tracking number on gold shipments from the mine of origin all the way to the shopping mall, tracking each step along the way.\(^{109}\) Wal-Mart’s long-term goal is to ensure that ‘100% of gold, silver and diamonds used in the jewellery sold in Wal-Mart will be sourced from mines and produced by manufacturers that meet Wal-Mart’s sustainability standards and criteria.’\(^{110}\)

Setting up an effective system is a daunting task: it involves significant costs, and the incentives to falsify documentation must be addressed as part of the efforts. There are two main objectives in creating an effective system: making it compulsory for key players in the supply chain to work together to create a tracing/tracking system, and implementing sound monitoring of the system by independent third parties. To develop a tracing/tracking system, the electronics industry should work together with its suppliers from the solder manufacturers to the tantalum processing companies to the tin minerals smelters who have more information on the sources of the minerals used. A multi-sector cross-supply chain effort approach is needed.

### 2.5 Lessons learned

In order to create a system to promote effective trade of conflict free minerals, it is vital to look at the lessons that can be learned from previous attempts to tackle similar issues.

\(^{107}\) Enough Project & Grassroots Reconciliation Group (n 6 above) 9.

\(^{108}\) See also [http://www.loveearthinfo.com/criteria.html](http://www.loveearthinfo.com/criteria.html), (accessed 23 February 2012)

\(^{109}\) Enough Project & Grassroots Reconciliation Group (n 6 above) 9.

\(^{110}\) (n 108 above)
2.5.1 Lessons learned from the blood diamonds trade

In order to create effective regulation of conflict minerals, it may be fruitful to look at the lessons that can be learned from another conflict commodity, conflict diamonds, notably the Kimberley Process.\textsuperscript{111}

One of the main problems with the Kimberley Process, which is used to regulate the diamond\textsuperscript{112} trade, is that there are no mechanisms for independently auditing or regularly monitoring the supply chain, in other words, the industry polices itself. For example, a US State Department report discovered that Lebanon was misreporting the prices and sources of its rough diamonds, which resulted in illicit funding of Hezbollah.\textsuperscript{113}

The decidedly mixed track record of mine-of-origin declarations and supply chain audits needs to be verified by third parties with the skills to correctly monitor metals transactions, such as forensic accountants, or the US Customs Department, which has supply chain specialist teams. The German mineral fingerprinting initiative would be extremely helpful in this regard,\textsuperscript{114} if it is implemented properly. Where there is widespread corruption or where corrupt elites control the state apparatus, purely domestic responses to the resource curse will continue to fall short. Thus, any serious effort to lift the curse must include measures that are transnational in scope.\textsuperscript{115}

2.5.2 Lessons learned from the United Nations Panel’s first report on the DRC

Three lessons have been learned since the panel of experts on the DRC first searched for a credible international standard of corporate behaviour.\textsuperscript{116} Firstly, if the process is unmonitored or unregulated, the economic interests of commercial ventures and mining, particularly in the DRC, will continue to contribute to maintaining the levels of conflict in the region. Secondly, the roles of diplomatic and political solutions, peace accords, peacekeepers, elections and demobilization schemes are functional but limited, in that their effects are indirect at best, as they are slow and modest. Thirdly, more significantly than ever before, international codes of conduct, guidelines and conventions have finally

\textsuperscript{111} Raj (n 26 above) 991.
\textsuperscript{112} Raj (n 26 above) 1016.
\textsuperscript{113} Enough Project & Grassroots Reconciliation Group (n 6 above) 10.
\textsuperscript{114} Garrett et al (n 99 above) 12.
\textsuperscript{115} Firger (n 1 above) 1056.
\textsuperscript{116} Friedman (n 29 above) 117.
started to prove themselves. In the past, states and international jurists have been hesitant about the credibility to international conventions and agreements, but such instruments have had some successes, for example, the International Criminal Court is bringing warlords Charles Taylor and Thomas Lubanga to trial.\textsuperscript{117} From this one can conclude that corporate social responsibility is no longer purely optional.

2.5.3 \textit{Building leverage via end users}

Another important lesson is that it is possible to engage end users as a way to build leverage in an effective system. The electronics industry is the main end user of the 3Ts and gold from the DRC over which the Western world dominates the consumption of electronic products. The electronics industry’s need to maximise profit has driven demand for the DRC’s conflict minerals, which can be produced at a low price because of the extremely basic conditions in which they are mined and the illicit networks that channel them out of Africa.\textsuperscript{118} By using international advocacy efforts and corporate engagement, for example, an electronics industry ‘Corporate Social Responsibility Association’, the EICC commissioned research on the metals supply chain. On the basis of the research report, the EICC initiated a supply chain transparency model for the 3Ts ‘recognising [that] they can influence standards through supply chains.’\textsuperscript{119} Building on such efforts will help to promote a legitimate minerals trade.

2.5.4 \textit{Lessons from campaigns}

Lessons from public campaigns indicate that, when end user companies are pressurised, this can influence middle companies further up the supply chain (suppliers, smelters, etc) dramatically. Wal-Mart, for example, was able to influence its suppliers in China to change their packaging practices.\textsuperscript{120} Campaign strategists have emphasised that campaigns focusing on consumer companies and visible brands such as Apple and Hewlett Packard generate public interest and have a higher chance of success.\textsuperscript{121} A productive public

\begin{thebibliography}{99}
\bibitem{117} Friedman (n 29 above) 110.
\bibitem{118} Enough Project & Grassroots Reconciliation Group (n 6 above) 9.
\bibitem{119} Enough Project & Grassroots Reconciliation Group (n 6 above) 9.
\bibitem{120} Enough Project & Grassroots Reconciliation Group (n 6 above) 9.
\bibitem{121} Enough Project & Grassroots Reconciliation Group (n 6 above) 9.
\end{thebibliography}
campaign on the electronics industry should have a multiplier effect on the other key industries in changing their ways.

In the 2010 proxy season, socially responsible investors filed resolutions\textsuperscript{122} with numerous companies such as Caterpillar, Hewlett-Packard, Motorola and KBR requesting that comprehensive human rights policies and assessment mechanisms be implemented. The resolutions filed with Motorola and Hewlett-Packard urged these companies to create policies to prove that their ‘products and services are not used in human rights violations.’\textsuperscript{123} The resolution filed with KBR requested the company to report on the extent to which its ‘contractors and suppliers are implementing human rights policies in their operations, including monitoring, training and addressing issues of non-compliance.’\textsuperscript{124}

\textbf{2.5.5 Incoherent international efforts}

Various international efforts have attempted to address the trade in the DRC’s conflict minerals. Since 2001, the UN Security Council has authorised a panel of experts to compile a series of UN Illegal Exploitation Reports (Group of Experts),\textsuperscript{125} investigating the situation and war economy in the DRC.

In 2004, after the arms embargo and targeted sanctions regime in the DRC, the Security Council established a second group of experts who concentrated on monitoring the provisions of the sanctions regime. The series of in-depth investigative reports produced by both the UN expert bodies indicated the non-stop economic underpinnings of insecurity in the DRC, despite the political progress the country has experienced during this period.\textsuperscript{126} The recommendations by the group of experts has changed over time from an embargo on select conflict minerals to more attenuated measures such as a traceability

\begin{footnotesize}
\begin{enumerate}
\item These are resolutions in line with recommendations put forward by the UN Special Representative for Business and Human Rights that companies should carry out ‘human rights due diligence’ in order to discharge their responsibility to respect human rights. As framed in the Ruggie Framework, ‘human rights due diligence’ entails the implementation of policies, assessment mechanisms, and internal oversight and control systems to identify, prevent, and address the actual and potential adverse human rights impacts associated with a company’s operations.
\item Altschuller (n 85 above).
\item Altschuller (n 85 above).
\item UN Illegal Exploitation Report (n 7 above).
\item MONUC Report (n 3 above).
\end{enumerate}
\end{footnotesize}
system for mineral supply chains, or due diligence requirements for companies buying minerals from the region.\(^{127}\)

The notion of imposing sanctions on minerals emanating from conflict-ridden areas of the DRC has been controversial. In 2006, the UN Group of Experts advised that the Security Council ‘declare all illegal exploration, exploitation, and commerce with the natural resources of the Democratic Republic of the Congo to be a sanctionable act’ and a subsequent UN report examined the potential humanitarian fallout from such sanctions.\(^{128}\)

A potentially long-term initiative led by the German government and the G-8 brought about the development of Certified Trading Chains with legitimate mining sites connected to international purchasers, linked to scientific efforts to ‘fingerprint’ specific minerals to their geological origin and ensure their traceability.\(^{129}\) The bilateral assistance programs of the German government, together with the DRC and Rwanda, have helped to establish a traceability system for tantalum, and this system may be extended to the other minerals. Various private companies have confirmed that the technology exists to trace tin and other metals, by using isotope testing. However, the implementation of such an initiative would entail huge challenges in terms of logistics, political opposition, and costs.\(^{130}\)

In addition to efforts to sever the link between conflict and the trade in natural resources, extensive international assistance has been directed toward building the capacity of Congolese institutions. The World Bank has developed a comprehensive plan for Growth with Governance in the Mining Sector,\(^{131}\) and donor agencies, including the US Agency for International Development (USAID) and the British Department for International Development (DFID) have created a joint initiative known as ‘Trading for Peace’,\(^{132}\) which seeks to use the trade in natural resources to build peace in the DRC and

\(^{127}\) MONUC Report (n 3 above).


\(^{129}\) Enough Project & Grassroots Reconciliation Group (n 6 above) 7.

\(^{130}\) Enough Project & Grassroots Reconciliation Group (n 6 above) 7.


surrounding regions. Trading for Peace has recently published a reform agenda that encapsulates many of the elements necessary to help legitimize regional trade, but such development efforts will have to be linked to a feasible political strategy if they are to achieve critical mass. Thus, if development efforts are not married to a political strategy to restrain the most unacceptable actors, and make trading with human rights abusers unacceptable, they risk legitimizing the status quo and harming the very civilians they seek to help. These initiatives can and should complement a political strategy, but they cannot act as a replacement for such a strategy.

### 2.6 Conclusion

Due diligence and transparency are two key elements that can be used in promoting conflict free minerals in Africa. This chapter has shown that risk-based due diligence will be necessary in the future for doing business in regions where there is conflict. Steps are suggested that companies should take to identify and address existing and potential risks related to conflict minerals which may have an adverse effect on a company’s activities, and in particular on its sourcing decisions. The chapter highlights the importance of transparency and how it can be used to prevent corruption-related problems and human rights violations by, amongst other things, making corruption and human rights abuses riskier and less attractive.

Industry-led efforts have hitherto fallen short in attempts (if any) to ensure the transparency necessary to make a difference. Currently, most companies only use vague written assurances from suppliers that they do not traffic in the DRC’s conflict minerals. There is no mechanism in place to carry out independent verification or to implement audited chains of custody. Therefore, in order to develop an effective system, consumers and activists need to demand independently verifiable supply chain audits to ensure that products are indeed conflict free. It is possible to achieve this aim, as has been demonstrated in Wal-Mart’s ‘Love the Earth’ jewellery line.

The chapter has shown that industry should consider the lessons learned from the blood diamonds trade, the UN Illegal Exploitation Report, various campaigns, civil society and

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133 Enough Project & Grassroots Reconciliation Group (n 6 above) 7.
134 Trading for peace (n 132 above).
135 Enough Project & Grassroots Reconciliation Group (n 6 above) 7.
international efforts. In developing Africa, the markets should use and improve on current initiatives to develop a more comprehensive approach to promoting a successful legal minerals trade and responsible sourcing by companies. Consequently, due diligence can play a pivotal role for companies in identifying possible issues, and how it can overcome these problems and at the same time uphold human rights.
Chapter 3:
Roles of different players

3.1 Introduction

Transparency and due diligence are important elements in promoting a legal minerals trade, as has already been established in Chapter 2. Transparency and due diligence form part of various initiatives. This chapter identifies the roles of different players in strategic positions, recognising their efforts in creating a system to regulate the minerals trade in respect of the 3Ts and gold, and suggests features which could be a foundation for the regulation of other minerals in the future.

3.2 The UN’S recent focus on corporate responsibility regarding human rights

The Kimberley Process, which is a product of cooperation between various governments, NGOs, corporations and industry associations, has established a certification process for diamonds traded globally. The Process provides a unique model that was not formed in the halls of the UN, but was developed on the ground by governments, NGOs and companies which devised a model with executable protocols and monitoring procedures. The Kimberley Process has had an impact on transnational corporations that lacked practical applications of processes or enforcement mechanisms, whereas the UN’s interest is more in the ‘role and responsibilities of transnational corporations in ensuring that human rights are protected in every state [where] they operate.’

Looking at the successes of the Kimberley Process and the pitfalls faced in the Process’s inception, ratification and implementation can be helpful in view of the UN’s continuous efforts to force transnational corporations to meet their responsibility for sustaining human

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rights where these corporations operate. In 2004, this focus was evident in the ‘Draft norms on responsibilities of transnational corporations and other businesses.’  

The Universal Declaration of Human Rights (Declaration) serves as a basis for clarifying corporate responsibility for human rights, as well as the modern conception of human rights generally. Although the Declaration focuses on the responsibility of states, the Declaration can be argued to be equally applicable to businesses in that the Declaration appeals to ‘every organ of society’ to uphold human rights. In the 1970s and 1980s, the UN tried to draft international codes of conduct for businesses, but was unsuccessful. Concurrently, other international organisations started to codify their expectation of corporate social responsibility, including the OECD MNE Guidelines in 1976, and the International Labour Organization’s (ILO) 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises. These efforts encouraged a number of voluntary, internal corporate codes of conduct throughout the 1980s and 1990s.

Only in 1999 did the UN manage to codify its expectations regarding corporate social responsibility in the UN Global Compact, an initiative that encourages corporations to participate voluntarily in a network of UN agencies, governments, labour, NGOs and other companies to adopt and implement ten principles of corporate social responsibility, of which the first two deal with human rights:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence. Principle 2: Businesses should ensure that their own operations are not complicit in Human rights abuses.

The constant debate and movement of soft law to more enforceable hard law across boundaries is epitomised in the Kimberley Process model. Essentially, the Kimberley Process is a mechanism to bring together key global stakeholders in the diamond trade, identify universal human rights goals and pursue the implementation of universal and national legislation in the stakeholder states. In the past, the UN has followed a more soft

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137 MONUC Report (n 3 above).
138 D Cassel ‘Human rights and business responsibilities in the global market place’ (2001) 11(2) Business Ethics Quarterly 261 and UN General Assembly (n 58 above).
139 Wallis (n 136 above) 410.
140 Wallis (n 136 above) 410.
142 Wallis (n 136 above) 411.
law norms approach (and it continues to do so). This soft law approach has involved encouraging the voluntary adoption of the UN’s recommendations, but without implementation and enforcement mechanisms. The UN needs to move away from purely soft to international hard law. In doing so, it needs to take into account the best practices and standards developed by mechanisms such as the Kimberley Process, the ICGLR and the OECD, amongst others.

Several multinational corporations have been found to be involved in, and directly responsible for, grave human rights breaches. Such breaches include the enforced displacement of communities, enforced disappearances, the diversion of life-sustaining waterways, the compulsory employment of forced labour, the intimidation of trade unions, cooperation with oppressive government regimes, racial and gender discrimination, torture and murder. In general, the behaviour of a corporation is regulated by the laws in the country where it is established. In the globalised workplace, multinationals operate outside their primary place of incorporation, and transnational companies work across borders. Such corporations operating in foreign jurisdictions should be regulated by the entity’s home state. However, there is a ‘dearth in this type of governance.’ Similarly, there is often a lack of regulation at the level of the host state. Because of the need for foreign capital hosts in emerging markets, countries in the developing world tend to compete with one another for business, and in order to do so, they may keep social and environmental legislation weak and the cost of labour low. This results in so-called ‘governance gaps’: multinationals operate outside the jurisdictional control of their host state, in states which are pushed to keep their corporate legislation and regulations flexible, resulting in a ‘race to the bottom’ approach, ‘accelerating violations of human rights, environmental standards and good governance practice.’

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143 Wallis (n 136 above) 389.
144 Meyersfeld (n 36 above) 174.
145 Sarei v Rio Tinto PLC 221 F Supp 2d 1116.
147 Sarei v Rio Tinto (n 145 above) and Doe v UNOCAL (n 146 above).
149 Sarei v Rio Tinto (n 145 above) and Doe v UNOCAL (n 146 above).
150 Meyersfeld (n 36 above) 175.
151 Meyersfeld (n 36 above) 176.
152 Meyersfeld (n 36 above) 176.
In this regard, a precedent was set by the anti-apartheid efforts of Rev. Sullivan, who was an African American civil rights leader and anti-apartheid activist. He advocated a step-by-step approach of multinational companies’ putting pressure on governments by practising corporate civil disobedience against particular laws in a host state. Sullivan threatened the South African government that, if apartheid continued, every American company would pull out of the South African market.\textsuperscript{153} Similar tactics are still used by multinational companies elsewhere to exert pressure.

Over the last few decades, there has been a change in the culture of multinationals, which had previously only been concerned with profits. Due to globalised and emerging markets and the movement of cross-border trade, where corporations operate in and outside their home states’ jurisdictions, corporations now have a responsibility to adapt to codes of conduct that guide the behaviour of their international affiliates, promising to ensure responsible sourcing and ethical trade. Below, the roles of various players are highlighted.

### 3.3 A corporation’s home state

The home state of a corporation is where the investor’s parent company is based. Pressure may be exerted on international financial institutions and/or on the host state to affect decisions on whether an investment project should go ahead and on what terms.\textsuperscript{154} Some avenues to exert pressure are official development agencies and international financial institutions.

The home state is theoretically in a better position to exercise legal control over the conduct of companies operating in host states,\textsuperscript{155} provided the home state has a moral obligation to demonstrate that it does not contribute to illegal activities by multinational corporations domiciled in that home state, even if corporations benefit from such activities. The home state, through its nexus of nationality with companies, is capable of evaluating and monitoring the activities of mining companies and of making sure that there is transparency. This is confirmed by Sornarajah’s view pertaining to multinationals’ obligations – most of the obligations that have been created require action by the home

\textsuperscript{155} L Boulle \textit{The law of globalization} (2009) 459.
states of multinational corporations or their courts and, for that reason, need to be considered under the heading of home state measures and obligations.\textsuperscript{156}

If meeting a given responsibility has to be enforced through the intermediary of the home states’ courts, then it would be fair to characterise such a responsibility as involving a corporation’s home state in ensuring that the necessary measures are identified.\textsuperscript{157} The home state must have certain policies and laws in place before corporations domiciled in that state can do business in another region. Company law in a corporation’s home state can develop compulsory transparency standards for multinationals, and the financial law governing financial markets in the corporation’s home state could include transparency requirements to influence multinationals abroad.

Home states also have the power to introduce an independent body mandated to check that multinationals comply with transparency standards, possibly imposed by law, but which act as an inquiry point.\textsuperscript{158} This body should have the necessary powers to impose sanctions and provide remedies to victims. The body should follow a number of extrajudicial mechanisms, including state-based non-judicial mechanisms, for example, national human rights institutions or mechanisms such as the OECD’s National Contact Points, along with non-state mechanisms provided by industry organisations, multi-stakeholder initiatives or specific companies or projects. Depending on the mechanism(s) used, remedies can vary from compensation, restitution for damage, guarantees of non-repetition or a cessation of business operations, disclosure of information, and changes in the relevant law(s), and public apologies.\textsuperscript{159}

It is a characteristic of home states that most multinational corporations’ home countries are developed and are donors to host states, which gives them with certain influence to push for greater transparency and for linking development aid to progress in the arena of good governance policies.

\textsuperscript{156} M Sornarajah ‘The liability of multinational corporations and home state measures’ in The International Law of Foreign Investment (2010) 147.
\textsuperscript{157} Sornarajah (n 156 above) 147.
3.4 Institutions

The notion that multinationals should consider how their investment affects people and the environment is not new. Responsible investment by multinationals is associated with the concept of ‘ethical investment’, which is also linked to the notion that investment is predicated on two main principles that companies must adhere to, namely profit maximisation and the protection of shareholders interests.160

There are, however, numerous ways in which investors can influence their corporations to protect human rights and economic development in the countries in which they source from and operate in. This can be achieved without compromising profits for investment beneficiaries. The first way for investors to put pressure on a company is that investors can disinvest or threaten to disinvest in corporations if the corporations fail to perform financially.161 Investors can opt to, or be required to, refrain from sourcing and investing in companies that are engaged in violating human rights. For example, the Sudan disinvestment campaigns led investors to warn the oil company Talisman that they would disinvest unless Talisman discontinued operations in Sudan’s oil fields.162 The second method of responsible investment is screening. In that case, investors require multinationals to indicate environmental, social and good governance standards before investing as a prerequisite for their business.163 The third method is exerting ‘active ownership’, where institutional investors can engage with their portfolio companies to monitor their compliance with human rights standards.164 Pressure from shareholders can turn a corporation’s attention to human rights.

3.5 Financial institutions

Financial institutions such as commercial banks, the World Bank and the European Bank of Reconstruction and Development, can play a role in financing corporations, in that they may call on investors to comply with institutional policies on environmental and social impact assessments, thereby influencing relations between investors and local resource

162 Human Rights Watch (n 161 above) 387.
163 Meyersfeld (n 36 above) 185.
164 Meyersfeld (n 36 above) 185
users. These institutions may also exert considerable pressure on a host state because of the importance of their overall lending to the state.\footnote{165}

An important element to consider is the fact that all stakeholders who participate in processes and supply chains need to obtain crucial credible information before making any decisions. Therefore it is vital that commercial banks conduct feasibility studies before providing funding in the form of loans or otherwise.\footnote{166}

Investment guarantee schemes, such as the UK Export Credit Guarantee Department\footnote{167} and the Overseas Private Investment Corporation,\footnote{168} can pressurise host states and multinationals to comply with transparency processes and the disclosure of such processes, because multinationals need guarantees with regard to political risks, and host states have to be deemed eligible to attract investments.

The focus on international financial thinking needs to be broadened to analyse and include greater attention to the impact of supply chains on the maintenance of human rights, as enshrined in international law and national constitutions, as this has a direct impact on the lives of real people and real communities.\footnote{169} In addition, a greater awareness of systemic human rights impacts can contribute to stabilising the international financial systems or, at the very least, accelerate getting a social license to operate.\footnote{170}

Due to global integration and the central role of money-driven economic processes and business, financial markets can exert a very powerful influence and can put pressure on the world economic structures, from the international level right down to the local sphere, and can pressurise companies to do business responsibly. Thus the financial markets can have an impact on corporations’ supply chains and sourcing.

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\footnote{165} Cotula (n 154 above) 25.
\footnote{166} See, for example, Micon International Limited at \url{http://www.micon-international.com/miconIntro.php} (accessed 30 April 2012).
\footnote{168} See also \url{http://www.opoc.gov/about-us} (accessed 8 March 2012).
\footnote{170} Dowell-Jones & Kinley (n 169 above) 183.
\end{flushleft}
3.6 Intergovernmental organisations

The UN working group of experts in the field of International Standards of Accounting and Reporting\(^\text{171}\) can play a crucial monitoring role in negotiating contracts and in auditing multinationals. This group already has the ability to provide actors such as host states and civil society with informed, accurate information, by conducting audits of multinationals’ reports. Therefore, with small changes, the International Standards of Accounting and Reporting could play a similar role to that of the Public Company Accounting Oversight Board\(^\text{172}\) in the US in establishing the Public Company Accounting Oversight Board to watch over the audits of companies which are subject to securities legislation, and to encourage public interest in the preparation of accurate independent audit reports. In addition to registering public accountancy firms in accordance with legislation to establish high standards of auditing quality control ethics, and to conducting inspections of accountancy firms to assess compliance with the basis of fair procedural rules, the Public Company Accounting Oversight Board may also implement legislation in respect of firms that do not issue audit reports, and can play a substantial role in producing reports, therefore allowing overseas associates of the lead auditor of the multinationals listed on US Markets\(^\text{173}\) to pressurise such in producing reports.

3.7 NGOs

Some NGOs which are actively engaging with the issue of conflict free minerals include the Enough Project,\(^\text{174}\) Global Witness,\(^\text{175}\) Resolve\(^\text{176}\) and Friends of the Congo.\(^\text{177}\)

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\(^{172}\) The Public Company Accounting Oversight Board is a non-profit corporation established by Congress to oversee the audits of public companies in order to protect the interests of investors and promote the public interest in the preparation of informative, accurate and independent audit reports. The Public Company Accounting Oversight Board also oversees the audits of broker-dealers, including compliance reports filed in accordance with federal securities laws aimed at investor protection. See also [http://pcaobus.org](http://pcaobus.org) (accessed 12 March 2012).

\(^{173}\) P Muchlinski ‘Multinational enterprises and the law’ (2007) 149.

\(^{174}\) Enough Project is a project of the Centre for American Progress to end genocide and crimes against humanity. It conducts field research, advocacy, and communications to bolster a grassroots movement and track companies’ actions on the issue of conflict minerals. Available at [www.enough project/conflict-minerals](http://www.enough project/conflict-minerals) (accessed 12 November 2011).

\(^{175}\) Global Witness, which runs campaigns against natural resource-related conflict and corruption, associated environmental and human rights abuses, is aimed at documenting, exposing and ultimately breaking problematic links between politicians, military and militia groups (n 23 and n 53 above).
It is difficult to deny NGOs as formal players in a fight against conflict minerals, since international law is not a result of legitimate democratic procedure. In all issues regarding transparency and the fight for conflict free minerals, NGOs must adopt positions that adhere to the policy of the International Centre for Settlement of Investment Disputes and the World Trade Organisation. Given the important roles that NGOs play, their roles should be formalised by providing them with *locus standi* in the judiciary and in seeking legal remedies.

Surveys of international and regional procedures which provide NGOs with *locus standi* demonstrate that NGOs have an important role to play in many compliance mechanisms. The number of procedures open to NGOs as parties is increasing. Important developments that have come into force are the 9th Additional Protocol to the European Court of Human Rights in 1990, which made it possible for NGOs to refer cases which had formerly been considered by the European Commission to the European Court of Human Rights. In 1998, the 11th Protocol gave NGOs and individuals direct access to this Court. Thus far, the European Court of Human Rights and the European Court of Justice are the only courts which are directly accessible to NGOs as parties, and they have only limited access to the European Court of Justice. However, NGOs are able to lodge cases at the African Court of Justice.

The role of NGOs extends beyond the states where the NGOs operate and the multinationals they engage with, so their roles ‘need to be taken into account as a relatively new participant in the process of bargaining over regulatory controls.’ NGOs can defend public interests and influence business by scrutinising investment projects. Undertaking public campaigns against a project or for the adoption of higher social and

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176 Resolve attempts to find lasting solutions to environmental, social and health challenges by collaborating with communities, businesses, governments and NGOs. It also conducts research with EICC and GeSi to find out how companies can trace a supply chain back to the mine of origin (n 54 above).
177 Friends of the Congo works in partnership with local Congolese to bring about peaceful, lasting change in the DRC. It advocates adopting an aggressive diplomatic path in pursuit of a regional political framework to end regional conflict (n 55 above).
178 According to A Lindblom *Non Governmental Organisations in international law* (2005) 28, the acceptance of a concept of legal legitimacy that is ultimately linked to the individual implies the standpoint that international law is not legitimate.
179 Lindblom (n 178 above) 298.
180 Lindblom (n 178 above) 108.
environmental standards may put pressure on investors, lenders’ home states, and host states, hence affecting their behaviour.  

### 3.8 Industry

Manufacturers have responded to the UN Security Council resolutions and to the concerns of NGO analyses and reports on their supply chains and conflict minerals by implanting industry initiatives.  

These industry initiatives include the ITRI Tin Supply Chain Initiative (iTSCi), the EICC, the GeSI, the ITRI, the Chain of custody in the Diamond and Gold Jewellery Supply Chain, the Global Reporting Initiative-Supply Chain Initiative, and Conflict Free Smelter (CFS) programme. Some industry initiatives are discussed in more detail below.

#### 3.8.1 The Extractive Industries Transparency Initiative (EITI)

The EITI can be described as a ‘globally developed standard that promotes revenue transparency at the local level.’ The EITI’s objective is to strengthen governance by improving transparency and accountability, for example, by promoting global revenue transparency in the extractives sector to improve the governance in resource-rich countries through the verification and full publication of company payments and government revenue from oil, gas and mining. As the result of a multi-stakeholder effort, the EITI developed a global standard for transparency in oil, gas, and mining that is rapidly gaining support from the international community. The EITI constitutes a coalition of

181 Cotula (n 154 above) 26.
183 ITRI (n 50 above).
184 EICC (n 47 above).
185 GeSI (n 48 above).
186 ITRI (n 50 above).
governments, companies, civil society, investors and international organisations, including the World Bank, the International Monetary Fund and the G-8. EITI has three categories of members: countries (implementing and supporting), companies (including institutional investors), and civil society organisations. Country members are validated, whereas companies are required to endorse the EITI Principles and Criteria, as well as perform self-assessments.

The EITI is a voluntary governance standard implemented by governments, and generally receives strong political support from many countries worldwide. In the European Union (EU), the European Commission has imposed disclosure requirements to strengthen EITI. This means that EU companies will be required to publish all payments to the governments of the countries in which they operate.

The DRC endorsed the EITI principles in 2005 and was accepted as a candidate country member in 2008. In December 2010, the DRC was designated as being close to compliance and was given until June 2011 to complete remedial actions, but the DRC failed to comply. However, the DRC’s EITI Candidate status was renewed until 1 March 2013, by which time the DRC will be required to have completed an EITI Validation to demonstrate compliance.

The EITI has a robust yet flexible methodology that is safeguarded by the EITI Board and the international secretariat. It ensures that a global standard is upheld in all the different implementing countries. For example, in the US, the government decided to incorporate the EITI standard into its national law by including a relevant section into the Dodd-Frank Act, which makes it mandatory for companies to fully disclose all material payments made

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to the government in a country where such a company operates. The implementation of this standard at a national level may prove beneficial in overcoming the challenge of voluntarism by compelling all companies listed on a particular stock exchange, irrespective of size and scale, to report such information. Nevertheless, Lambooy has stated in an Experts Meeting that the topic of ‘the actual reporting process often remains a challenge for businesses.’

Companies expect governments to supply guidelines for the reporting process to help overcome this obstacle.

Even where national legislation does not require disclosure, leading extractive companies do voluntarily disclose payments due to their participation in EITI. Companies that disclose payments and governments that disclose the receipt of such payments do so in the form of an ‘EITI report’, which requires independent verification of tax and royalty payments.

The EITI has helped direct the attention of the international development community to an industry sector that is traditionally characterised by secrecy. The EITI, however, is not a cure for the resource curse and cannot, in itself, not solve the issue. Areas from which we can learn in building a better system is that the EITI has not improved the overall perceptions of corruption in many of the countries that claim to implement the EITI. An OECD working paper has highlighted several shortcomings in the current structure of the EITI that prevent it from living up to its true potential. The most crucial three problems with the EITI are, firstly, that the minimum standards of the EITI do not ensure the level of transparency required to enable scrutiny by outsiders; secondly, that the EITI’s focus is limited to transparency in material payments between governments and corporations and fails to address problems at the centre of the extractive industries; and thirdly, that the EITI assumes that a strong EITI-friendly environment already exists in all the countries that have joined the initiative.

196 Lambooy et al (n 96 above).
197 About 61 of the world’s largest oil, gas and mining companies have chosen to become EITI Supporting Companies at the international level. These companies support the EITI process by taking part of governance of the EITI globally, through their country operations in implementing countries, and through industry associations; (n 192 above).
199 Olcer (n 198 above) 36.
Although these problems have been highlighted with regard to the EITI, such criticism should not be taken as a rejection of the initiative. Instead, they should be seen as a reminder of what still needs to be done to derive the maximum benefit from the EITI and to improve the true level of transparency in resource-rich countries.

In response to criticism, some recommendations were that

- the EITI alone is not efficient enough, so it needs to be integrated into a broader reform process and linked to credible institutions, in particular judicial ones;
- the EITI country reports need to be more stringent in terms of the quality and consistency of information, which includes requiring disaggregated data and unambiguous definitions of materiality, but also more information about the underlying contracts and prices; and
- the EITI reports’ objective should be to give a holistic picture of the extractive industries and cover the entire value chain.\(^{200}\)

### 3.8.2 The Global e-Sustainability Initiative (GeSI) and the Electronic Industry Citizenship Coalition (EICC)

The GeSi, an industry-lobbying group, funded a report by Flora and Fauna International on Coltan mining in 2003.\(^{201}\) This described the state of the industry at that time. The EICC and GeSi have jointly developed the Conflict-Free Smelter (CFS) programme to ensure that the 3Ts and gold are authenticated from legitimate sources in the DRC and other parts of the world.\(^{202}\)

The CFS programme identifies smelters of firms that can indicate through independent third party assessments that the metals used did not originate from sources that contribute to the conflict in the DRC. CFS workshops were held with participants in the tantalum and tin supply chains to identify the challenges faced in responsible sourcing.

The EICC and GeSi together formed the ‘EICC-GeSi working group on conflict minerals’ (‘EICC-GeSi’). Given the convolutedness of supply chains in practice, the EICC and GeSi are committed to advancing transparent conditions in the electronics supply chain, thus

\(^{200}\) Olcer (n 198 above).
\(^{201}\) K Hayes & R Burge Coltan mining in the Democratic Republic of Congo: how tantalum-using industries can commit to the reconstruction of the DRC(2003).
\(^{202}\) GeSI (n 182 above).
ensuring that mining activities that fuel conflict are not tolerated. To enable companies to source conflict-free minerals, the EICC-GeSI has set up programmes in collaboration with the electronics industry, the mobile phone industry, ITRI and the Tantalum-Niobium International Study Centre for promoting greater transparency throughout both upstream (from mine to smelter) and downstream (from smelter to retailer) mineral supply chains.

Specifically, EICC-GeSI has created the concept of CFS and has instituted due diligence programmes to verify conflict free mineral claims down the chain to original equipment manufacturers. The CFS Programme is important in that it recognises that the smelter is at the key point in the supply chain to enforce responsible sourcing. The development of the CFS system is therefore crucial, since there is currently no credible system in the global electronics industry that allows a company to determine the source of the minerals it uses.\footnote{203}

In order to be eligible for the CFS programme, smelters sourcing from the DRC and adjoining countries must

- implement the OECD due diligence guidance for supply chains for these minerals;
- demonstrate conformity with the OECD due diligence guidance for supply chains, including a mandatory independent third party review and verification of conformity; and
- ensure that smelters and their suppliers provide 100 per cent supporting documentation in connection with the mine of origin and subsequent trading partners to the smelter by establishing a chain of custody and a traceability system.\footnote{204}

One of the outcomes is that with regard to tantalum (which can be derived from coltan), amongst other sources, and is used in mobile phones, several CFSs have been successfully audited and have had their names published.\footnote{205} Through CFS, EICC-GeSI verifies the origin of minerals, enabling legitimate minerals from conflict regions, such as the DRC, to enter global supply chains, thereby supporting the local economy and communities.

\footnotetext{204}{EICC-GeSI (n 203 above).}
\footnotetext{205}{List available at \url{http://www.conflictfreesmelter.org/cfshome.htm}. The list contains only the smelters which successfully fulfilled the programmed conditions; several other smelters are currently under review. CFS ‘Conflict Free Smelter Tools and Resources’ (2011) available at \url{http://www.conflictfreesmelter.org/cfshome.htm}. (accessed 19 March 2012).}
With regard to due diligence, the EICC and GeSI have developed the ‘EICC-GeSI Due Diligence Reporting Template’, also called the Conflict Minerals Reporting Template tool, to facilitate disclosure and the communication of information regarding smelters that provide material to a company’s supply chain. This template, in the form of a questionnaire, poses questions about the use and origin of metals, about what types of supply chain due diligence measure have been taken, based on the OECD due diligence guidance for supply chains, and about the identification of the smelters used to process the metals. However, this reporting tool as a paper trail system poses some difficulties with regard to confidentiality, because traders are afraid that they will be bypassed and that their suppliers will be ‘stolen.’

Furthermore, the EICC and GeSi are supporting in-region sourcing schemes, which are on-the-ground activities. In particular, they have supported the tin and tantalum industries to develop the in-region ‘bagging and tagging’ scheme known as the iTSCi, a mechanism that traces and certifies minerals from the mine of origin to the smelter. The scheme is driven by the tin industry organisation ITRI and the implementation of the NGO Pact. Such programmes provide a warranty that materials are not being tampered with in the supply chain, ultimately restoring customer-confidence that the material has been sourced responsibly.

Effective collection of information remains an on-going challenge for implementation purposes. Businesses have emphasised how important it is that government assists them in collecting information in order to facilitate, for example, the identification of conflict free mines.

3.8.3 World Gold Council

The World Gold Council is forming an international standard for gold (the Gold Standard) which is currently in its draft phase. The Gold Standard is based on a declaration of principles including the commitment of ‘implementing companies’ to

CFS (n 205 above).


respect human rights; ensure that payments are not made, directly or indirectly, to armed groups; be transparent about their payments to governments; only accept gold from conforming sources; and to establish a credible and accessible grievance mechanism. \(^{209}\)

The Gold Standard provides a mechanism that requires producers of gold to assess the risk that their operations may contribute to armed conflict and associated serious human rights abuses. Where there is a risk that gold production may support armed conflict, gold producers who adhere to the Gold Standard are required to meet a number of commitments in terms of human rights, including, but not limited to, the Universal Declaration on Human Rights, the UN Global Compact, the United Nations Guiding Principles on Business and Human Rights and the OECD due diligence guidance for supply chains. \(^{210}\)

### 3.9 Regional initiatives – the International Conference on the Great Lakes Region (ICGLR)

The ICGLR\(^ {211}\) is a regional initiative aimed at rationalising the management of public resources, including the establishment of a regional certification mechanism for the 3Ts and gold. The initiative is led by the German Federal Institute for Geosciences and Natural Resources, with the goals of supporting certified trading chains and building transparency to ensure a chain of custody for buyers of 3Ts and gold in regions where there is conflict. \(^{212}\)

The ICGLR is a regional body concerned with the issue of conflict minerals. The Pact on Security, Stability and Development in the Great Lakes Region (the Pact), signed by heads of states in Nairobi on 15 December 2006, provides a legal framework and the agenda for the ICGLR. \(^{213}\)

The ICGLR objective is to create conditions for security, stability and development in the region. There are ten protocols associated with the Pact, one of which is the Protocol

\(^{209}\) World Gold Council (n 56 above).
\(^{210}\) World Gold Council (n 57 above).
\(^{211}\) The ICGLR consists of the governments of Angola, Burundi, the Central African Republic, the DRC, Kenya, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia (n 65 above).
\(^{212}\) Garrett et al (n 99 above).
against the Illegal Exploitation of Natural Resources, implemented through the Regional Initiative against the Illegal Exploitation of Natural Resources (RINR).  

RINR aims at breaking the link between taxes on mineral revenues and the financing of rebel groups. It consists of the following instruments:

1. Regional certification for tracking the chain of custody of key minerals;
2. Harmonisation of national legislation;
3. Regional database on mineral flows;
4. Formalisation of artisanal mining processes;
5. EITI peer learning process; and
6. A whistle-blowing mechanism.

The chain of custody of minerals is tracked from the mine to the point of export, with independent third party auditing and full public disclosure of audited mineral flows. In collaboration with the OECD and the Pact, RINR is supported by Canada, Ireland and Switzerland. Rwanda had asked for a delay in implementation, stating that it needs to include smaller mining operations. This is crucial to ensure that 3Ts and gold from the DRC are not being smuggled through Rwanda.

The ICGLR submitted comments to the US SEC expressing its support for the USA’s Dodd-Frank Act, and the efforts of the US government to assist the governments and institutions of the Great Lakes Region in eliminating conflict minerals and the financing of armed groups and conflict.

### 3.10 International trade programmes: the John Ruggie guiding principles

Professor John Ruggie, UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, launched a global governance framework’ (the Ruggie Framework) regarding human rights, 

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215 Sutherland (n 214 above) 20.
216 S Blore and I Smillie (2011) “Taming the resource curse: Implementing the ICGLR certification mechanism for conflict-prone minerals.”
218 Namata (n 217 above).
accompanied by a set of Guiding Principles. The Ruggie Framework is based on three pillars:

(i) the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication; (ii) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and (iii) the need for greater access by victims to effective remedy, both judicial and non-judicial.±219

Each pillar of the Framework is a crucial component in an inter-related and strong system of preventative and remedial measures:

- the state’s duty to protect because it lies at the very foundation of the international human rights regime;
- the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and
- access to remedy because even the most concerted efforts cannot prevent all abuse.

According to Guiding Principle 14, the responsibility of business enterprises to respect human rights applies to all enterprises, regardless of their size, sector, operational context, ownership and structure. The Guiding Principles’ normative contribution lies not in the creation of new international law obligations, but in structuring the implications of existing standards and practices for states and businesses, integrating them within a single, logically coherent and comprehensive template.±220 This is a significant landmark and should cause all businesses whose activities have a real or potential impact on human rights to sit up and take notice.

Professor Ruggie started his work in 2005 and put forward his draft ‘Protect, respect and remedy’ framework (the Ruggie Framework) in 2008. It was unanimously accepted by the UN Human Rights Council²²¹ and has been adopted by a range of public and private actors since.

²²¹ UN Human Rights Council (n 60 above).
The Ruggie Framework does not establish any new legal obligations on companies or States – this is an issue that has led to some conflict with parts of civil society. The foundation of the rights that are being supported through the Ruggie Framework are those found in a range of international instruments, from the International Bill of Rights, through to the ILO core labour standards. The Guiding Principles provide guidance on how respective parties could operationalise the Ruggie Framework.

The Ruggie Framework has had an impact on the revision of a number of key standards, including the International Financial Corporation Performance Standards, revisions to the OECD MNE Guidelines and ISO 26000, which is a crucial move in the right direction in attempts to try and codify the broad range of sustainability standards which have emerged over the last decade and, in several instances, almost copies out the Ruggie Framework and its implementing steps.

There are numerous ways of interpreting the Ruggie Framework, and this causes concern around the interpretation of international corporate legal responsibility, as the debates around human rights in the UN Human Rights Council are ongoing, and will probably continue for some time to come.  

The Guiding Principles have indicated how the calculated use of carefully chosen terms such as ‘responsibility’ rather than ‘duty’, ‘impact’ rather than ‘violation’ and concepts such as ‘due diligence’ have the potential to roll back the evolving jurisprudence about human rights obligations. In the EU, the construct of corporate social responsibility has arisen in the form of codes of conduct, principles and norms to framework conventions. The European Commission recently launched a new strategy for corporate social responsibility, indicating that it is slowly starting to adopt a legal flavour by taking a new definition, ‘the responsibility of enterprises for their impact on society’, as its point of departure. This demonstrates the transition from voluntary to mandatory standards.

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3.11 THE OECD

The OECD has introduced a number of initiatives, which are discussed below.

3.11.1 The OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas

The OECD due diligence guidance for supply chains was adopted as an OECD recommendation by 41 OECD and non-OECD countries. These are published guidelines for due diligence by companies to warrant that the sources of minerals or related products used in their products and processes are not specifically related to conflict.225 This is a voluntary and non-enforceable measure developed through a multi-stakeholder process with in-depth involvement of manufacturers and its Member States. The OECD due diligence guidance for supply chains, adopted on 25 May 2011, is endorsed by the 11 member states of the ICGLR and by the OECD Development Assistance Committee.226 These recommendations reflect the common stance and political commitment of the OECD members and non-members adhering to the OECD Declaration on International Investment and Multinational Enterprises.227 The OECD due diligence guidance for supply chains aims to ensure that finances do not find their way to parties engaged in wars, civil wars and the violation of human rights.

The OECD due diligence guidance for supply chains is an illustration of a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas. Its purpose is to urge companies to respect human rights and steer clear of contributing to conflict through their mineral sourcing practices. The OECD due diligence guidance for supply chains is also intended to develop transparent mineral supply chains and sustainable corporate engagement in the mineral sector with the vision of allowing countries to benefit from their own natural mineral


225 OECD due diligence guidance for supply chains (n 61 above).
226 OECD due diligence guidance for supply chains (n 61 above).
227 OECD due diligence guidance for supply chains (n 61 above).
resources and preventing the extraction and trade of minerals from becoming a source of conflict, human rights abuses, and insecurity.\textsuperscript{228}

This OECD due diligence guidance for supply chains provides a framework for detailed due diligence as a basis for responsible global supply chain management of the 3Ts and gold. It is to be used as a common reference for companies to respect human rights and avoid contributing to conflict through their sourcing decisions, including the choice of their suppliers,\textsuperscript{229} thus resulting in sustainable development and creating an environment for constructively engaging with suppliers. This OECD due diligence guidance for supply chains is intended to serve as

\begin{quote}
\ldots a common reference for all suppliers and other stakeholders in the mineral supply chain and any industry-driven schemes which may be developed, in order to clarify expectations concerning the nature of responsible supply chain management of minerals from conflict-affected and high-risk areas. This Guidance is the result of a collaborative initiative among governments, international organisations, industry and civil society to promote accountability and transparency in the supply chain of minerals from conflict-affected and high-risk areas. \textsuperscript{230}
\end{quote}

According to the OECD due diligence guidance for supply chains, due diligence should help companies to ensure that they not only respect human rights and that they do not contribute to conflict, but that they take cognisance of international law and act in accordance with domestic laws, including those governing the illicit trade in minerals and UN sanctions. To meet this end, the OECD due diligence guidance for supply chains constitutes a practical mechanism which proposes to companies a five-step risk-based due diligence framework, a model supply chain policy, and principles for risk mitigation. It also includes specific supplements on respective minerals. The framework recommends the following steps:

- Establishing strong company management systems;
- Identifying and assessing risks in the supply chain;
- Designing and implementing a strategy to respond to identified risks – the Due Diligence chain is inherent to the length of the minerals trade supply chain and can entail companies around the world;
- Carrying out independent third-party audits of smelter’s/refiner’s Due Diligence – to demonstrate externally that you do verify the information received;
- Reporting annually on supply chain due diligence – for upstream companies it should include among other things – disclosure of all suppliers, as well as the information on payments made to governments in line with EITI criteria and principles. For downstream

\textsuperscript{228} OECD due diligence guidance for supply chains (n 61 above) 12.
\textsuperscript{229} OECD due diligence guidance for supply chains (n 61 above) 13.
\textsuperscript{230} OECD due diligence guidance for supply chains (n 61 above) 13.
companies it should include, among other things, disclosure of the steps taken to identify smelters/refiners in the supply chain including a list of qualified smelters/refiners through industry validation schemes.\textsuperscript{231}

In the OECD due diligence guidance for supply chains, due diligence as a general principle is seen as an ongoing, proactive and reactive process in which the information is collected and built into the process, with the quality improving progressively. Companies are encouraged to integrate their due diligence standards and principles into their existing due diligence as part of their management and practices systems.\textsuperscript{232}

Even though the OECD due diligence guidance for supply chains has only been recently promulgated, it has global support and recognition, for example, in the Dodd-Frank Act.\textsuperscript{233} The OECD due diligence guidance for supply chains provides functional principles that might also be applied to any other due diligence process for different companies and types of sectors. Lambooy noted in a conference that, in contrast to the Kimberley Process, the OECD due diligence guidance for supply chains does not relate to third-party certification; it promotes and relies on corporate processes instead and can be ‘audited, verified and disclosed.’\textsuperscript{234}

The rationale for the OECD due diligence guidance for supply chains is ‘to fill in the legal vacuum and to monitor companies in areas where legal instruments – on disclosure, tax responsibilities, treatment of employees, protection of citizens, and protection of the environment – are of little or no use at all.’\textsuperscript{235} It is in this way that a convention such as the OECD due diligence guidance for supply chains seizes the initiative to overcome inertia regarding human rights norms.\textsuperscript{236}

\begin{itemize}
\item \textsuperscript{231} OECD due diligence guidance for supply chains (n 61 above) 45.
\item \textsuperscript{232} Lambooy (n 96 above).
\item \textsuperscript{233} Lambooy (n 96 above).
\item \textsuperscript{234} Lambooy et al (n 96 above).
\item \textsuperscript{235} Friedman (n 29 above) 117.
\item \textsuperscript{236} Friedman (n 29 above) 117.
\end{itemize}
3.11.2 OECD Guidelines for Multinational Nationals (OECD MNE Guidelines)

In 2011, the OECD MNE Guidelines were revised. This was ‘a significant year for corporate social responsibility.’ Since 2000, when the last version of the OECD MNE Guidelines were drafted, the setting of international business has changed rapidly as a result of the financial crisis, climate change, the increased role of emerging economies and the business trend to outsource. At the UN, the debate on business and human rights in 2008 with the Ruggie Framework illuminated the OECD MNE Guidelines’ blind spot with regard to human rights, an insufficient declaration amidst the general principles of the OECD MNE Guidelines’ Chapter II, where there had been continuous disapproval from civil society on the functioning of the National Contact Points (NCPs), which led to the first discussions of revision of the MNE Guidelines in 2009. This discussion led to the inclusion of a new Chapter IV on Human Rights, which drew heavily on the Ruggie Framework, even before this Framework was officially endorsed by the UN.

Remarkably, the scope of application of the OECD MNE Guidelines was expanded from investments to business relationships, to include suppliers, agents and franchises. The new due diligence and supply chain-related provisions are aimed at preventing and mitigating adverse impacts in relation to most of the issues covered by the OECD MNE Guidelines. Risk-based due diligence is seen as an important tool to that end. The provisions of the OECD MNE Guidelines include:

- a risk-based due diligence recommendation – to identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed;
- a results-based recommendation – to avoid causing or contributing to adverse impacts through one’s own activities and address such impacts when they occur; and

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240 Deva (n 223 above) and Lambooy (n 96 above).
241 The Due Diligence provisions do not apply to the Chapters on Science and Technology, Competition, and Taxation. See Commentary on Chapter II of the OECD MNE Guidelines (n 62 above).
• an effort-based recommendation – to seek ways to prevent and mitigate adverse impacts to which the company is directly linked.  

The updated OECD MNE Guidelines also expand on the NCPs procedures (conceptual improvements, practical guidance for the NCP complaint procedure, and institutional improvements). Furthermore, the Investment Committee adopted a proactive agenda on responsible business conduct, which highlights the positive role that multinationals can play in sustainable development, and which will in turn foster the development of practical tools or guidance in cooperation with the NCPs and other partners.

The accounts of corporate theft of DRC natural resources raise the issue of the inadequacy of current international law to curb this illicit trade. Most of the corporations that source from DRC come from OECD member states, but they only pay lip service to the OECD MNE Guidelines for the conduct of multinational corporations. This indicates the limits of soft law and suggests that the OECD should adopt a more credible sanctions-based regime, which could result in substantial fines that would be repatriated to the country affected or held in trust by the UN in cases where there is no functional state. The institutional resources of regional integration initiatives must be used more.

3.12 ISO 26000

The International Standard ISO 26000: 2010, Guidance on social responsibility

…provides harmonized, globally relevant guidance for private and public sector organizations of all types based on international consensus among expert representatives of the main stakeholder groups, and so encourage the implementation of best practice in social responsibility worldwide.

The aim of ISO 26000 ‘Guidance on social responsibility’ (ISO 26000) is to maximise organisations’ contribution to sustainable development. The ISO 26000 is not only applicable to companies, but can also be used by governments, NGOs and civil society organisations; hence, the term ‘social responsibility’ is used, rather than corporate social

242 OECD MNE Guidelines (n 62 above)
243 Asiimwe (n 9 above) 200.
responsibility. This international standard was developed by a multi-stakeholder group and it is linked to the OECD MNE Guidelines and the UN Global Compact’s Ten Principles. It benefits from the existing systems such as Global Reporting Initiative, the European Foundation for Quality Management, and OHSAS 18001 Certified (Occupational Health and Safety Management System). The ISO Standard is designed to offer practical guidance that will help organisations implement the OECD MNE Guidelines.

The definition of ‘due diligence’ used by the ISO 26000 describes it as ‘a proactive process’, which is meant to identify the actual and potential negative social, environmental and economic impacts of the organisation’s decisions and activities. Due diligence should be pursued over the entire life cycle of a project or organisational activity with the aim of avoiding and mitigating negative impacts. Due diligence under the ISO 26000 is applicable not only to human rights but also to seven core subjects, namely

- community involvement and development;
- human rights;
- labour practices;
- environment;
- fair operating practices;
- consumer issues; and
- organisational governance.

The ISO 26000 further states that due diligence is the approach for a company to understand the social responsibility risks and opportunities which are not limited to the organisation’s operations, but that arise in its ‘sphere of influence’, inside or outside its

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245 Lambooy (n 96 above) and ISO 26000 (n 244 above).
249 ‘Sphere of influence’ is defined as ‘the range of political, contractual, economic or other relationships through which an organisation has the ability to affect the decisions or activities of individuals or organisations.’ United Nations Human Rights Council (15 April 2008) “8th session on the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie -Clarifying the Concepts of ‘Sphere of influence’ and ‘Complicity’” (A/HRC/8/16) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/134/78/PDF/G0813478.pdf?OpenElement (accessed 12 January 2012).
value chain. The ISO 26000 goes further than the Ruggie Framework with which it cooperated closely. They agree that the ability to influence (‘can’) does not, in itself, imply a responsibility (‘ought to’) to exercise influence. John Ruggie argues that ‘companies cannot be held responsible for the human rights impact of every entity over which they may have some influence’ and that ‘it is not desirable to have companies act whenever they have influence, particularly over governments.’ The ISO 26000 specifies that the ‘impact should be related to activities and decisions of the own organisation.’ However, the ISO 26000 goes further by adding that the organisation may decide to use its ability to make an impact also when the situation is not related to its activities and decisions. This is also related to the notion of ‘complicity’ included in the ISO 26000. It consists of

- direct complicity (by knowingly assisting the abuse);
- beneficial complicity (by benefiting directly from the abuse perpetrated by others); and
- silent complicity (by failing to raise questions).

The ISO 26000 thus developed a comprehensive framework that gives recommendations for avoiding complicity issues, as well as for the due diligence process and exercising influence. It is the intention that, when using the ISO 26000, an organisation applies all principles and integrates social responsibility in all its (core) activities and decisions. The concepts of ‘sphere of influence’ and of ‘stakeholder’ remain fairly open to interpretation.

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251 UN Human Rights Council (n 250 above) 20.
252 ISO 26000 (n 244 above).
253 Lambooy et al (n 96 above).
3.13 International remedies

3.13.1 The UN Global Compact

The situation in the DRC has been continuously addressed by the UN Security Council. An expert panel furnishes the Security Council with reports on the exploitation of the peoples and natural resources, including the forests and wildlife. The UN Security Council has repeatedly found that the plundering of metal ores is a major factor fuelling conflict in the region and demanded that all states take immediate steps to end the illegal activities.

The UN Global Compact’s ten principles in the areas of human rights, labour, the environment and anti-corruption enjoy universal consensus and are derived from

- the Universal Declaration of Human Rights;
- the ILO’s Declaration on Fundamental Principles and Rights at Work;
- the Rio Declaration on Environment and Development; and

The UN Global Compact encourages companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. These principles reflect the encouragement of human rights in business and suggest that corporations should support and respect human rights and avoid human rights violations. In addition these principles encourage respect for labour rights, environmental responsibility and anti-corruption practices.

3.13.2 The International Financial Corporation Performance Standards

The International Financial Corporation has implemented performance standards for the extractive sector that corporations must meet before the International Financial

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255 UN General Assembly (n 58 above).
259 UN Global Compact (n 59 above).
Corporation approves loans over US $50 million.\(^{260}\) This indicates the growth in more specialised agreements coming to fruition,\(^{261}\) as it is indicative of remedies being covered in agreements.

### 3.13.3 The Alien Tort Claims Act

The US Alien Tort Claims Act 28 U.S.C. 1350\(^{262}\) allows US Corporations to be sued in US Courts for human rights violations committed abroad.\(^{263}\) A number of cases on such matter have gone to court. Although thus far, cases have been unsuccessful, they set the precedent that courts are a mechanism which can be used. Given that cases such as those in which warlords such as Charles Taylor are being brought to the International Criminal Court, corporate responsibility is not going to be to a voluntary matter for much longer,\(^{264}\) and that would imply that redress and remedies will be made available.

### 3.14 Conclusion

This chapter has identified the roles of different players and their strategic positions in recognising efforts and success in creating a system to promote and regulate the legal minerals trade effectively. It has also set out the vast number of international, regional and country instruments in the form of declarations and principles, focusing primarily on soft law norms. These roles highlight the importance of transparency and due diligence as outlined in Chapter 2 and of addressing the lack of adequate mechanisms in place.

The UN, through the Ruggie Framework, has established new legal obligations on companies and states. These obligations have an impact on civil society too. The Ruggie Framework has implications for the revision of a number of key industry standards, including the International Financial Corporation Performance Standards, the OECD MNE Guidelines and ISO 26000.

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\(^{260}\) Friedman (n 29 above) 117.

\(^{261}\) Friedman (n 29 above) 117.

\(^{262}\) The Alien Tort Claims Act was adopted in 1789 as part of the original Judiciary Act. In its original form, it made no assertion about legal rights; it simply asserted that ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’

\(^{263}\) Friedman (n 29 above) 117.

\(^{264}\) Friedman (n 29 above) 117.
The ISO 26000 is an important move in the right direction, in that it codifies a wide range of sustainability and human rights standards. Over time it has emerged that the steps of the Ruggie Framework and others initiatives have been replicated in the ISO 26000. The ISO 26000 requires due diligence as an approach for a company to understand the social responsibility risks associated with its operations, and that go beyond its operations. This can influence factors in the political, contractual and economic spheres, both inside and outside the value chain. The Ruggie Framework and the ISO 26000 agree that the ability to influence does not in itself imply the responsibility to influence.

Regarding minerals in Africa, this chapter has identified transparency in the revenue system as essential to address issues of accountability, in terms of the EITI, and to promote good governance. As indicated in this chapter, where operators are opaque in their processes, they are exposed to reputational risks in cases where there is public dissatisfaction. This can be done with the assistance of the national governments. In addition, transparency can also reduce political risks by achieving political consensus, revenue allocations, licenses and contracts, thus reducing the likelihood of long-term contamination of projects. Thus transparency can lead to more stable communities, which will support a reliable work force and create reliable incomes and communities. Hence, more African states need to sign onto the EITI, as doing so would be an important step forward in promoting legitimate trade in minerals.

The study highlights the importance of the OECD due diligence guidance for supply chains and the OECD MNE Guidelines. Although these instruments are not legally binding on companies, they are successful in setting out the basic obligations of due diligence to ensure that minerals are sourced responsibly and that their sale is not funding any illegal activities in the region concerned. The chapter recognises that the OECD remains proactive and continues to discuss the implementation of guidelines and individual cases, which indicates the OECD’s commitment to addressing conflict trade.

The study further emphasises that corporations’ home states are in the best position to exercise control over companies operating in a host state. Laws and policies should also be enacted in host states where governance is weak, before companies are allowed to do business in such a host state. The home state governments need to work with host states
through official development agencies and financial institutions to develop and promote judicial behaviour in their regions, by negotiating this into companies’ contracts.

The study recommends that certification, transparency and traceability incentives should be identified to promote the legal minerals trade and respond to challenges impeding the trade. Current shortcomings in these initiatives include the fact that they are predominantly suited to a Western context, and often fail to take into account local communities in countries where corporations source resources from. Not enough solutions are generated out of Africa, and consequently policy-making tends to fall short of local realities, affecting outcomes.

An exception is the ICGLR, which has addressed the issue through African lenses through regional cooperation, although the progress has been slow. The ICGLR offers a potentially innovative, locally driven tool for establishing cross-border collaboration in the development of trading mechanisms that could provide a more enabling climate for international investment. The German government’s efforts in situating technical advisors on mineral certification in the DRC is another commendable first step towards encouraging a regional approach.
Chapter 4:
The Dodd-Frank Act, SEC responsibilities and the King Code of Corporate Governance

4.1 Introduction

Transparency and due diligence processes are important in addressing the conflict minerals trade. This chapter looks at the shift from a soft law approach, as discussed in Chapter 3, to a mix of soft and hard law, and mechanisms to enforce due diligence processes and transparency. The chapter looks at the role of stock exchanges and the importance of regulating companies which trade in the DRC and source minerals from mining companies in the DRC, as well as companies that source minerals from them, tracing the chain of custody to the end consumers. Special attention is given to US legislation in the form of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) and the Securities Exchange Commission’s (SEC) responsibilities. In particular, elements of sections 1502 and 1504 of the Dodd-Frank Act are discussed, in addition to the SEC’s responsibilities in addressing the role and importance of reporting by security exchanges and companies. This chapter therefore focuses on hard law, which is encoded in legislation and can be enforced (transgression of these laws is punishable).

By contrast, in South Africa it can be shown how responsible behaviour of companies is monitored and recommendations are adhered to by companies under soft law, through codes of conduct such as King Report and the King Code.\textsuperscript{265} Although King III is voluntary, companies are encouraged to follow these guidelines, and this is done through the JSE, which acts as a compliance mechanism. This chapter looks at enhancing and promoting due diligence via integrated reporting on securities exchanges to make the actions that companies engage in more transparent.

\textsuperscript{265} King III (n 44 above).
4.2 The role of stock exchanges

Stock exchanges play an important role in corporate governance and their role is of interest and very topical to the OECD and other international organisations. Stock exchanges have a direct impact on the governance of listed companies. This impact then has a trickle-down effect on unlisted companies’ and multinationals’ behaviour. Companies tend to look to best industry practices for guidance where no legislation exists. It is therefore necessary to change the thinking of companies and make them more responsible and transparent in their processes. Thus it has been found that stock exchanges have ‘become global players in developing corporate governance codes and recommendations.’

Previously the regulatory function of stock exchanges was limited to issuing rules and clarifying portions of existing frameworks. Initially, the standard-setting role of stock exchanges was exercised through the issuance of listing, ongoing disclosure, maintenance and de-listing requirements. On the enforcement side, stock exchanges’ regulatory function is paired with capital market supervisory agencies. In addition to overseeing their own rules, stock exchanges have been assigned the role of monitoring compliance with legislation and subsidiary securities regulation and have enlarged their regulatory role to embrace a wider range of corporate governance concerns, contributing to the development of corporate governance recommendations and encouraging their application. Stock exchanges that have used the OECD Principles as their starting point attempt to fill the lacuna between various roles.

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266 Corporate governance refers to a set of systems, principles and processes governing a company. These provide guidelines to a company on how it can be directed or controlled in such a manner that it can fulfil its goals and objectives to add value for investors and be valuable to all stakeholders in the long term. Stakeholders include the board of directors, management, shareholders and customers, employees and society in general. The management of the company hence assumes the role of a trustee for all the stakeholders.


269 Christianson & Koldertsova (n 267 above) 4.
4.3 The importance of regulating the minerals trade

It is very important to regulate the minerals trade. In order to analyse this trade, the process needs to be broken down. Effective regulation is made up of legislation that protects both international human rights and the legitimate minerals trade.

The interests of the international electronics industry, the consumers of these electronics products and those affected by human rights violations resulting from the exploitation of the minerals used in this industry are not necessarily the same. However, they are inextricably linked by the need to protect and preserve the legitimate minerals trade with countries such as the DRC. A legislative approach that publicises the frightening human rights violations in the DRC, but leaves companies unable to distinguish whether their minerals are conflict free can have a negative impact on the public relations of these companies, causing them to abandon mining and sourcing from the DRC.270 This happened, for example, to Traxys, a major tin buyer, after a UN report linked its minerals to mines connected to a Rwandan génocidaire, and to Thaisarco, a subsidiary of the Amalgamated Metal Corporation, which suspended all cassiterite purchases from the DRC after the UN linked the mining of its minerals to Forces for the Democratic Liberation of Rwanda militia.271

Numerous concerns been raised about the possibility that the US legislation of SEC reporting requirements in terms of section 1502 of the Dodd-Frank Act, which is discussed below, will restrict reporting companies in such a way that they would prefer to divest from the region, rendering minerals in the region valueless and leaving a mining-dependent economy in shambles. NGOs in the DRC have cautioned that such an outcome may lead to even more conflict in the DRC.272 This concern has been expressed especially by local communities who are frustrated by the fact that they are not being consulted by the key players who are designing conflict commerce governance mechanisms.273

270 Raj (n 26 above) 991.
271 Raj (n 26 above) 991.
272 Raj (n 26 above) 991.
4.4 The Dodd-Frank Act

The Dodd-Frank Act\textsuperscript{274} represents the US response to the collapse of the financial markets in the fall of 2008. It was primarily designed to identify large scale risk in the financial markets by increasing the regulation of banks, private financial companies, public markets and securities.

The constant conflict in the DRC seems disconnected from the financial crisis and distant from the Dodd-Frank Act. However, through this legislation, attempts are made to deal with complex social and legal problems arising from the violence associated with the exploitation of minerals derived from countries such as the DRC by exposing companies that use these conflict minerals through disclosure and public pressure.

US Congress passed the Dodd-Frank Act in July 2010, with the following provisions:

- 1502 requiring US-registered companies using minerals mined in the DRC and neighbouring countries to carry out due diligence on their supply chains and imposing reporting requirements through their SEC on them;\textsuperscript{275} and
- 1504 requiring all US-listed companies to publish what they pay to governments for natural resource exploration and extraction, on a country-by-country and even project-by-project.\textsuperscript{276}

Efforts to end the violence and increase transparency in corrupt systems led to this groundbreaking US legislation in terms of which electronics companies, regional governments and international organisations have to accelerate efforts to reform their supply chains, link mine sites to exports, develop audit protocols for smelters and put pen to paper on the regional certification plan of the ICGLR.\textsuperscript{277} This legislation in the US, where most of these companies are headquartered,\textsuperscript{278} has placed significant international

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\textsuperscript{275} Section 1502 of the Dodd-Frank Act 838 (n 274 above); Ochoa & Keenan (n 11 above) 144.
\textsuperscript{276} Section 1504 of the Dodd-Frank Act 845 (n 274 above).
\textsuperscript{277} OECD (n 38 above).
\textsuperscript{278} Partnership Africa Canada (n 11 above).
pressure on major electronics companies to report on their efforts to ensure that their supply chains do not include any conflict minerals from the DRC and neighbouring countries.

The new legislation was prompted by the US Congress’s concern that …the exploitation and trade of conflict minerals originating in the DRC and neighbouring countries is helping to finance conflict characterised by extreme levels of violence in the eastern DRC, particularly sexual and gender based violence, and contributing to an emergency humanitarian situation therein.279

The Dodd-Frank Act’s intention is to eliminate such violence and exploitation by exposing companies that use minerals derived from the DRC through disclosure and public pressure.

4.4.1 Section 1502 of the Dodd-Frank Act

Section 1502 of the Dodd-Frank Act legislates the requirement that manufacturers certify that their purchases of potential conflict minerals are not from sources involved in funding conflict in the DRC.280 It added section 13(p) to the Securities Exchange Act of 1934, defining the minerals concerned as ‘cassiterite, coltan, wolframite and gold.’281 It empowers the US Secretary of State to identify further minerals, if they are determined to have been used to finance conflict in the DRC and adjoining countries.282 ‘DRC conflict free’ is defined as products which do not contain metals from conflict minerals that ‘directly or indirectly finance or benefit armed groups’ in the DRC and surrounding countries.283

Approximately 6 000 corporations which use conflict minerals for their functionality or for the production of any of their products, whether manufactured directly or by a third party, are required to disclose in their annual reports whether these minerals originated in the DRC or in an adjoining country. The corporations that use the 3Ts and gold must then provide a report which includes a description of the due diligence carried out to determine both the source and the chain of custody of conflict minerals. These reports must be

279 United States Department of State (n 43 above).
280 Section 1502(e) 1 & e of the Dodd-Frank Act.
281 Section 1502(e) 1 & e (4) of the Dodd-Frank Act.
282 Countries adjoining the DRC are Sudan, Uganda, Rwanda, Burundi, the United Republic of Tanzania, Zambia, Angola, Congo and the Central African Republic.
283 Section 1502(b) 1 of the Dodd-Frank Act.
audited independently in accordance with standards set by the US Comptroller General.\textsuperscript{284} In addition, the Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006 enables the US to impose sanctions against states engaged in trade in conflict minerals.\textsuperscript{285}

Section 1502 has three parts: SEC disclosures, Department of State strategy, and progress reports. Section 1502 requires additional reporting to the SEC on the sources of ‘conflict minerals’.\textsuperscript{286} This section affects US stock-listed companies, but indirectly also affects their suppliers, as it requires companies to disclose whether their minerals come from the DRC or surrounding countries. If so (or if the origin is unknown), the issuer is required, in a separate report filed with the SEC and published on the company’s website, to supply a description of the measures taken to exercise due diligence on the source and chain of custody of the conflict minerals used. The Department of State explicitly endorses and encourages companies to follow the OECD due diligence guidance for supply chains.\textsuperscript{287}

The objective of section 1502 of Dodd-Frank Act is to promote transparency regarding the use of conflict minerals. Consequently, the purpose is to break the linkages between the minerals trade and conflict in the DRC and to try to take control of the violence and limit exploitation in the area. The rationale for this is that companies will be more careful in their affairs if they are required to disclose more about their chain of custody and that public pressure will make them source responsibly. It is important to note that the Dodd-Frank Act requires disclosure, but does not impose sanctions.\textsuperscript{288} This fact can be easily misunderstood if the relevant sections are not read carefully.

The separate report must be submitted to the SEC. It must include a description of products manufactured or contracted to be manufactured which contain minerals that are not DRC conflict free, and a description of the measures taken by the company to exercise due diligence on the source and chain of custody of its conflict minerals. These due diligence measures must include, but are not limited to, an independent private sector audit of the company’s report conducted in accordance with standards established by the

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\item\textsuperscript{284} E Sutherland ‘Due diligence in the sourcing of metals in mobile phones, computer and other electronics’ \textit{Computer and Telecommunications Law Review} (2011) 17(3) 63-64.
\item Sutherland (n 284 above) 64.
\item 3Ts, gold and other as determined by the US Secretary of State.
\item Lambooy et al (n 96 above).
\item Lambooy et al (n 96 above) 7.
\end{enumerate}
\end{footnotesize}
Comptroller General of the US. The company would be required to certify that it obtained an independent private sector audit of its report, must provide the audit report and make reports available on the company’s website.\textsuperscript{289}

Section 1502 has not been implemented yet, as the draft implementation of the Dodd-Frank Act is due in 2012. The US State Department is, however, encouraging companies to commence with due diligence in respect of conflict minerals.\textsuperscript{290} The companies should immediately start to structure their supply chain relationships in a responsible and productive manner in order to support legitimate, conflict free trade of minerals from the DRC. Companies carrying out such measures will facilitate disclosure and effective responses to any findings regarding benefit to armed groups. Lambooy, at the Hill experts’ meeting, noted ‘that without the final rule, uncertainty exists (e.g as to whether it suffices to apply existing compliance frameworks for bribery and corruption or the like).’\textsuperscript{291}

\subsection*{4.4.2 Section 1504 of the Dodd-Frank Act: Disclosure of Payment by resource extraction issuers\textsuperscript{292}}

Section 1504 of the Dodd-Frank Act enforces the requirement on prescribed resource extraction issuers to disclose in their annual reports (which are to be filed with the SEC) any information regarding payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to either the US Federal Government or a foreign government for the purpose of the commercial development of oil, natural gas or minerals. Section 1504 corresponds to efforts made by such industry initiatives as EITI.\textsuperscript{293}

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\item \textsuperscript{289} The SEC proposed changes to the annual reporting requirements of issuers that file reports pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 to implement Section 1502 of the Dodd-Frank Act according to SEC Proposed Rule [Release No. 34-63547; File No. S7-40-10] available at http://www.sec.gov/rules/proposed/2010/34-63547.pdf (1 April 2012) and Section 1402(d) of the Dodd-Frank Act HR 4173-843.
\item \textsuperscript{291} T Lambooy at the Experts meeting ‘The future business in fragile states – emerging CSR Regimes and importance of due diligence practices’ organised by the Hague Institute for International Law held on 18 November 2011.
\item \textsuperscript{292} Section 1504 of the Dodd-Frank Act HR 4173-845.
\item \textsuperscript{293} Lambooy et al (n 96 above).
\end{itemize}
4.4.3 The power of extracting, forcing and devolving information

Section 1502 of the Dodd-Frank Act contains legislation which is a by-product of other governance and regulatory efforts that try to connect market activity with social problems, in focusing on human rights, environmental protection and minimising corruption.294

Unlike many other efforts to attend to the conflict trade, section 1502 does not proscribe undesirable activity, in this case ‘conflict commerce’, but instead promotes the flow and location of information in respect of the problem.

The underlying rationale is that ‘information is power and vital information does not always reside with the state.’295 This framework has been referred to as ‘information-forcing’ rules.296 In looking at the environmental law arena, for example, it has been shown that manufacturers ‘almost always know much more than government about risks associated with their products, technologies and processes.’297 In essence, the idea of moving information ‘from the entity best situated to hold or obtain information to the entity most likely to use it for the protection of public interest (civil society and regulators)’298 should be considered.

Lately, information-forcing has become crucial, as the UN Secretary General on business and human rights has made due diligence for business with human rights the basis for its due diligence guidelines. The OECD has shed light on and encourages information-sharing, as can be seen in their recently launched project on due diligence, which specifically addresses the mining sector.299

294 Ochoa & Keenan (n 11 above) 138.
295 Ochoa & Keenan (n 11 above) 138.
297 Ochoa & Keenan (n 11 above) 139.
298 Ochoa & Keenan (n 11 above) 139.
Information flow challenges exist in the conflict commerce context, and information-forcing is thus important. In the arena of conflict commerce, manufacturers and other businesses covered by Section 1502 possibly lack important information about the sources of the minerals that go into their products, and whether the minerals they use aid conflict. Thus the company disclosure portion of Section 1502 involves a regulatory experiment in information extraction, because it addresses companies in a manner which they are not the best suited to hold or obtain the relevant information. The section is therefore designed to force information-gathering and disclosure not just from those companies covered, but also from the full supply chain, all the way to the mine of origin. The objective is to allow the US Comptroller, the Secretary of State and other parties to either (ideally) identify the mines of origin and chain of custody for conflict minerals, or determine the points along the chain of custody at which the information flows are intercepted or the transparency is broken.

This design seems to embed a number of objectives. First, it is designed to improve the amount and accuracy of information. In other words, it is designed to improve actual knowledge of conflict commerce and, in this way, Section 1502 is innovative. Second, it is designed to increase transparency and to force information about conflict commodities from commercial actors. Third, it is designed to improve the accessibility of information about conflict minerals and conflict commerce by making companies’ mandatory reports publically available, on their websites, for example.

Presumably, interested parties will use this information to exert pressure at the points along the supply chain where information stops flowing.

The power of information is only realised when it is brought to the attention of other actors, and only once these actors become aware thereof can the problem of breaking the chain of information on conflict minerals be addressed. In Africa, there needs to be a movement toward the disclosure of information in order to address the resource curse, and to help countries to function at their full potential. South Africa has started this awareness through its corporate codes, namely King III.

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300 Ochoa & Keenan (n 11 above) 140.
301 Ochoa & Keenan (n 11 above) 140.
4.5 King III and the JSE’s listing requirements

The King Report on Corporate Governance is a ground-breaking code of corporate governance in South Africa which was issued by the King Committee on Corporate Governance. The full report consists of three reports: King I was issued in 1994, King II in 2002 and King III in 2009. Compliance with the King Reports is a requirement for all companies listed on the JSE.\textsuperscript{302} The King Report on Corporate Governance has been cited as ‘the most effective summary of the best international practices in corporate governance.’\textsuperscript{303}

King III applies to all entities, regardless of their manner and form of incorporation or establishment, irrespective of size. King III relies on self-regulation, rather than on legislation that can be enforced in the South African courts. Nobody is mandated to ensure the enforcement of King III, and no sanctions can be imposed for non-compliance. There are, however, instances in which public interest companies and para-statals are under an obligation to comply.

If the principles contained in King III are adhered to, this will result in entities’ practising good governance. For that reason, King III does not address the application of its principles, and each entity has to consider the approach that best suits its size and complexity. Application of the Code may, however, be mandated by law or regulation, for example, by the JSE Limited Listings Requirements.\textsuperscript{304} In terms of the JSE Listing Requirements, a listed company is contractually bound to adopt King III, and any failure to do so would amount to a breach of the Listing Requirements. This is a slightly roundabout enforcement mechanism, but listed companies have no option but to follow King III or be delisted.\textsuperscript{305}

King III is drafted on an ‘apply or explain’\textsuperscript{306} basis, which is a legal duty imposed on directors to act in the best interests of a company in achieving the objective of the

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\item[302] JSE (n 45 above)
\item[303] Banhegyi (n 46 above) 317.
\item[304] The JSE Limited Listings Requirements (n 45 above); SAICA available at https://www.saica.co.za/Portals/0/documents/PWC%20SteeringPoint%20KingIII.pdf (accessed 15 February 2012)
\item[305] King III Report (n 44 above) 12.
\item[306] Section 8.63 of the JSE Listing Requirements states: In addition to complying with IFRS, Section 30 of the Act and paragraph 3.84 of the Listings Requirements, issuers are required to disclose the following information in the annual report (in the
\end{enumerate}
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‘overarching corporate governance principles of fairness, accountability, responsibility and transparency’. Under King III, management is obliged to explain how the principles of King III have been applied, or, if they have not been applied, an explanation as to why the code was not applied has to be supplied. Therefore an entity that does not comply will have to provide reasons for its decision and will have to explain this to stakeholders. Potentially, non-disclosure could expose the directors to liability in the event that statements of adherence to principles are made, but such best practices are not followed and non-compliance is not explained.

A key aspect of the King Report is that it is based on an approach of ethical leadership, sustainability and corporate citizenship. In addition, it facilitates an understanding of the thinking process and the key aspects of good governance. Sustainability and corporate citizenship are highlighted. One focus of this study is therefore the good governance and corporate citizenship guidelines of King III. Good governance is all about leadership and the theme that leaders should rise to the challenges of modern governance, characterised by the ethical values of accountability, fairness and transparency, and based on moral duties that find expression in the ‘concept of ubuntu.’

Another key aspect of King III is the importance of integrated reporting. The necessity for integrated reporting stems from the fact that normal financial reporting by companies requires a picture of companies’ financial position at a given point in time. However, the focus is often on forward-oriented information in order to provide stakeholders with assurances on the prospects of the company looking into the future. King III recommends integrated sustainability performance and integrated reporting in order to allow stakeholders to make a more informed assessment of the economic value of the company. An integrated report provides an adequate amount of information to record how the

case of 8.63(a) and (l)), and in the annual financial statements (in the case of 8.63(b)–(k) and (m)): (a) the King Code: (i) a narrative statement of how it has applied the principles set out in the King Code, providing explanation(s) that enable(s) its shareholders to evaluate how the principles have been applied; and (ii) a statement addressing the extent of the company’s compliance with the King Code and the reasons for non-compliance with any of the principles in the King Code, specifying whether or not the company has complied throughout the accounting period with all the provisions of the King Code and indicating for what part of the period any non-compliance occurred.

307 King III Report (n 44 above).
308 King III Report (n 44 above) 18,42.
309 The concept of ‘ubuntu’ is an African concept of humanity towards others. It is described as a philosophy of life representing personhood, humaneness, humanity and morality. King III Report (n 44 above) 18,19,42.
company has, both positively and negatively, impacted on the economic life of the community in which it operated during the year under consideration, often categorised as environmental, social and governance issues.\(^{310}\)

Principle 1 of King III refers to ‘ethical leadership and corporate citizenship’ and reflects in paragraph 1.1 that the Board should ensure that the company is a responsible corporate citizen. Principle 1.2 emphasises that the company should develop strategies to ensure that the company becomes and remains a good corporate citizen, while Principle 1.3 emphasises that the company should be run ethically.\(^{311}\)

Principle 8.5 of King III refers to the governing of stakeholder relationships and states that ‘transparent and effective communication with stakeholders is essential in building and maintaining trust and confidence.’\(^{312}\)

In addition, Principles 9.1 to 9.3 of King III refer to ‘integrated reporting and disclosure’ and highlight ‘transparency and accountability’ with the emphasis that effective stakeholder communication is necessary, and that comprehensive sustainability in reporting should be accurate and transparent. Sustainability reporting should be part of the reporting process.\(^{313}\)

This integrated reporting model can be replicated into a model on other exchanges. The crucial emphasis of the principles of King III is that, although it is voluntary, it encourages open, transparent and effective communication by corporations with the public, and makes corporations accountable for their actions by compelling them, via the stock exchange, to disclose information relating to their ethical conduct.

### 4.6 The link between good governance principles and the law

Good governance and compliance with the law are inextricably linked and cannot exist in isolation. Corporate governance mainly involves ‘the establishment of structures and processes, with appropriate checks and balances that enable directors to discharge their

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\(^{310}\) Principles 9.2 and 9.3 of the King III Report (n 44 above) 212, 214, 217.

\(^{311}\) King III Report (n 44 above) 36-52.

\(^{312}\) King III Report (n 44 above) 202.

\(^{313}\) King III Report (n 44 above) 212-219.
legal responsibilities and oversee compliance with legislation. In addition to what is required by companies through legislation, the criteria for good governance codes and guidelines are important in determining appropriate behaviour by and the expectations of corporations. The more good governance practices are established, the more likely it is that the courts will regard such conduct and practices as the required standard of care – ‘[c]orporate governance practices, codes and guidelines therefore lift the standard of conduct.’ As a consequence the ‘failure to meet a recognised standard of governance, even though not legislated’, renders a board member liable at law, which will have a knock-on effect on companies’ behaviour and liability. This indicates that soft law can result in enforcement and compliance, with the possibility of legal consequences when there is non-compliance. However, the debate as to whether hard or soft law is the more effective method continues.

4.7 Conclusion

This chapter recognises the important role played by stock exchanges and the importance of regulating companies that trade and source minerals from the DRC and the rest of Africa by enhancing transparency through regulatory disclosure. Special attention has been given to the US’s Dodd-Frank Act, the SEC responsibilities and the South African King III and the JSE Listing Requirements, which focus on corporate governance. The hard law and soft law approach has been outlined in this chapter, stressing that their roles are not mutually exclusive, but that combinations of initiatives are required.

Furthermore, this chapter has illustrated that the role of exchanges in corporate governance is of great importance and must be developed. The role of stock exchanges is still evolving. Stock exchanges, over time, in addition to overseeing their own rules, have been assigned the role of monitoring compliance with legislation and subsidiary securities regulations. Since the promulgation of the OECD Principles on corporate governance some stock exchanges have enlarged their regulatory concerns to include corporate governance. It is recommended that the OECD MNE Guidelines regarding the behaviour of multinationals and due diligence processes be enforced where appropriate.

314 King III Report (n 44 above) 13.
315 King III Report (n 44 above) 13.
316 King III Report (n 44 above) 13.
317 OECD (n 268 above).
The chapter has also shown that the Dodd-Frank Act attempts to deal with complex social and legal problems through disclosure and public pressure. The Dodd-Frank Act stemmed, inter alia, from efforts to end violence in the DRC and to increase transparency in corrupt systems. Although its rationale is arguably not an entirely correct philosophy to base legislation on, it is a good attempt to combat trade in conflict minerals.

Specific focus in this chapter was given to section 1502 of the Dodd-Frank Act dealing with disclosure, making it a legislated requirement for manufacturers to certify that their purchases of minerals are conflict free and to issue a report dealing with due diligence. Section 1504 deals with disclosure in annual reports which are filed with the SEC, whereby all information regarding payments in the host country must be disclosed to the US federal government and/or a foreign government. It is submitted that these two parts of US law can be adopted into an African system, but that their scope should be expanded beyond the DRC to cover all conflict-prone African states. This should be done by extracting and modifying sections from the Dodd-Frank Act, incorporating these into an African system, requesting publically listed companies – whether African or foreign – sourcing minerals from Africa or other conflict-prone states to undergo independent audits and make disclosures to the public. Such due diligence should be disclosed in compulsory annual reports to be filed with stock exchanges, and should highlight responsible sourcing.

In addition, key aspects that can be extracted from King III to create an Africa-rooted system based on the legal duty of ‘apply or explain’, the philosophy of leadership, sustainability and corporate citizenship and the importance of integrated reporting.

This chapter has also argued that it is important not only to identify these principles but also to find an enforcement mechanism. In this regard, it was found that, in terms of the JSE Listing Requirements, a listed company is bound by King III, and any failure to abide by these requirements would amount to a breach that is punishable in law. Although this is a roundabout enforcement mechanism, listed companies have no option but to follow King III, indicating its effectiveness. This has trickle-down effects on unlisted companies and multinationals, and is therefore a good tool to move the legal agenda forward.
Chapter 5: Conclusion

5.1 Summary of findings

In addressing the problem of creating a system to promote the legal minerals trade in Africa, the study has explored a multitude of efforts initiated by companies, governments and NGOs (both in the DRC and internationally) committed to combating the trade in conflict minerals in regions where poor governance of natural resources is an issue. It also examined the current systems that are in place in order to propose solutions to create an effective framework to promote conflict free minerals in Africa, by looking at the possibility of securities exchanges as a mechanism alongside other initiatives.

In creating an effective system to control the trade in conflict minerals, it is essential to promote the due diligence process of minerals in such a way as to trace supply chains from companies who use these minerals back to the sources of origin of these minerals, using independent audit chains of custody to conceptualise a certification scheme similar to, but not a mere transportation of, the Kimberley Process for conflict diamonds. Such a system would be a means to strengthen the global transparency and accountability of electronics companies and other companies, together with industry initiatives, OECD guidelines and EITI principles, the ICGLR and the UN, amongst others. In looking at minerals, it is argued in this study that Africa and the world need not look at Africa’s resources as a curse, especially if current efforts can be translated into concrete growth for the continent, focusing on development and capacity building as part of a comprehensive and multi-layered approach.

Chapter 2 examined the influence of due diligence and transparency. These two requirements are key elements that can be used to promote conflict free minerals in Africa. The study outlined the necessity of risk-based due diligence in the future of doing business in regions where there is conflict. Furthermore, the chapter identified steps that companies could take to help them to identify and address existing and potential risks which may
have adverse effects on a company’s activities, and in particular sourcing decisions that could contribute to human rights abuses or conflict. The study focused on transparency as a mechanism to prevent corruption-related problems, amongst other things, by making corruption riskier and less attractive to perform, by offering incentives to public officials and by helping politicians be more accountable to the public (one of Africa’s key issues) to promote fair and effective ways to perform.

The study submitted that industry-led efforts have fallen short regarding the level of transparency needed to make a difference. Currently, companies only give vague written assurances from suppliers that products are conflict free. It should be noted that there is no mechanism in place to carry out verification or to audit chains of custody. Electronics companies have begun to issue declarations that they are not buying from illegal mines, but have thus far failed to provide proof that consumer electronics do not contain conflict minerals. Hence the importance for advocacy efforts to make sure that companies are not producing reports and statements that do not address the issue and simply ‘paper over’ concerns.

In developing an effective system, consumers and activists need to demand independently verifiable supply chain audits to make certain that products are indeed conflict free. This system should not take the form of a boycott of Congolese minerals. Instead, stricter requirements are needed for purchasing minerals so that a credible guarantee can be given to consumers that armed groups are not benefiting from illicit activity or the suppression of local populations. For example, confirmation from industries such as Wal-Mart’s ‘Love Earth’ jewellery line has shown that it is possible to implement a system that places a FedEx-like tracking number on gold shipments from the mine of origin all the way to the shopping mall, tracking each step along the way.

The study found that due diligence can play a pivotal role in identifying the issues companies face and so that they can triumph over human rights atrocities and be responsible with regard to human rights adherence and the application of such principles.

Chapter 3 identified the roles of different players and their strategic positions, recognising efforts and successes in creating a system to promote and regulate the legal minerals trade effectively. The chapter also set out the vast number of international, regional and country
instruments, declarations and principles addressing the issue, focusing primarily on soft law norms.

Governments are addressing the political and economic positions of conflict minerals through the UN, which is promoting more effective governance in countries that are affected by conflict. The UN Security Council recognises the importance of working in developing communities affected by conflict in alternate livelihoods and supports an entirely legitimate and legal mining sector. Through the Ruggie Framework, the UN Security Council has established new legal obligations for companies and states, and these obligations will have effects on civil society. The Ruggie Framework has implications for the revision of a number of key standards, including the International Financial Corporation Performance Standards, the revision of the OECD MNE Guidelines and ISO 26000.

ISO 26000 has emerged over time as a replication of the Ruggie Framework. It is an important move towards codifying a wide range of sustainability and human rights standards. Under ISO 26000, due diligence assists companies to understand the social responsibility risks influencing the political, contractual and economic spheres both inside and outside the value chain.

The study found that transparency in the conflict minerals value chain is necessary to address issues of accountability. The study shows that where operators’ processes are opaque, exposure thereof results in reputational risks, provided there is public awareness. Transparency can also reduce political risks by achieving political consensus, revenue allocations and licenses, while contracts reduce the likelihood of long-term contamination of the project, leading to more stable communities, supporting a reliable work-force and generating reliable incomes for communities. The study therefore identified the necessity of persuading more states to support EITI to promote legitimate trade of the 3Ts and gold.

Section 1504 of the Dodd-Frank Act requires improved transparency in extractive industries by exposing the abuse of the minerals trade through illegitimate payments. The study concludes that binding companies legally disclose of their payments in pursuing commercial development is an important aspect to consider when formulating an African system.
A number of lessons can be learned from the analysis of the Kimberley Process, the Dodd-Frank Act, and ITRI. Extensive consultation with all DRC stakeholders led to the formulation of a regional initiative, the ICGLR, which has produced a commendable certification and tracking system based on four principles of responsible resource management. The ICGLR initiative focuses on an African-rooted solution at a regional level, by incorporating the principles of the OECD due diligence guidance on supply chains. The ICGLR initiative supports certified trading chains and transparency to secure the chain of the 3Ts and gold in regions of conflict. More such initiatives need to be explored, taking into account local realities, stakeholders and the needs of African states, in order to create more capacity-building initiatives.

The study also highlighted the importance of the OECD due diligence guidance for supply chains. Although it is not legally binding on companies, it does successfully set out basic obligations regarding due diligence to ensure that minerals are sourced responsibly and are not funding any illegal activities in the region. The OECD remains proactive and continues to discuss the implementation of guidelines and individual cases.

Furthermore, the study emphasises that home states are usually in a better position than host states to exercise control over companies operating in the host state. The enactment of laws and policies in host states where governance is weak should be attended to before companies are permitted to do business in the host state. The home state governments need to work with the host state to develop and promote judicial behaviour in their regions, by negotiating this into their contracts, through official development agencies and financial institutions, while integrating transparency standards under international law, making it mandatory for multinationals to comply. More African states need to buy into these initiatives. Transparency and accountability can be strengthened by improving and tightening access to and the regulation of financial markets, including banks and international institutions. It is submitted that greater transparency must be part of broader governance schemes.

Passing legislation to regulate the international minerals trade is crucial to promoting the legal mineral trade. This is particularly important to consumers of electronics products who are uncomfortable knowing that their purchases contribute to the devastation of communities, families, and lives; it is critical for those in the international electronics
industry who care about maintaining the brand names and images of some of the largest companies in the industry, such as Apple, Hewlett Packard and Dell. Some of these companies have already expressed willingness and have taken steps to improve their supply chains. Hence, a successful approach to minerals regulation can work with the industry to create change.

The study recommends the reform of securities exchanges and the implementation of corporate governance codes, as a blend of soft and hard law. It may be concluded that there is no silver bullet approach to the legal minerals trade; instead, the emphasis should be on development, corporate governance and capacity building with African ingredients and outcomes. This study concluded that there are several current initiatives that cannot be looked at in isolation, but should rather be considered comprehensively.

In addition to proposing changes through stock exchanges, it is submitted that mandatory governance codes regarding financial regulation can improve the governance of financial markets in a home state by including transparency requirements to control multinationals abroad. The study recommends that financial institutions include conditions regarding financing transactions of companies relating to behaviour which would affect the conduct of multinationals in host countries. The study also recommends the promotion of good governance in financial institutions at all levels to include the corporations they finance.

To date, the UN has followed a soft law norms approach, which consists of voluntary adoption of UN recommendations, without concrete implementation or enforcement mechanisms. Based on the ineffectiveness of this approach, the study recommends that the UN move towards more solid international hard law, by recognising best practices and standards developed from mechanisms such as the Kimberley Process, the ICGLR, ITRI, iTSCI, EITI, King III and OECD initiatives.

Certification, transparency and traceability incentives promote the legal minerals trade and respond to challenges impeding the minerals trade. Shortcomings in these initiatives are that they are predominantly suited to a Western context, without necessarily taking into account local communities in other regions. Insufficient solutions are generated out of Africa and, consequently, policy-making often falls short of local realities, thus affecting the feasibility of outcomes. The study recommends that more African-generated solutions be explored in the context of development and in the promotion of transparency. To some
extent, this has been done through the ICGLR. Moreover, the German government has now situated technical advisors on mineral certification in the region, a commendable first step towards a legitimate regional approach. The study proposes that the ICGLR approach be mastered and promoted.

The study identified tracing and auditing of industries supply chains as having a lasting impact on increasing transparency legitimately. In particular, it is recommended that companies in the electronics industry should trace the 3Ts and gold in their products back to the mines of origin. Although end user companies may not at present have this information, they should work closely with their suppliers and smelting companies to retrieve this information, as the alternative is a continued and increased demand for conflict minerals. Companies should also have independent audits conducted of their supply chains to show the chain of custody for each step along the 3T mineral supply chain.

The study recognises the important role of stock exchanges and the importance of regulating companies that trade and source minerals from the DRC and other countries in Africa. In this regard, the US Dodd-Frank Act, the SEC responsibilities and the South African King III and JSE Listing Requirements, which all focus on corporate governance, were found to be of particular importance. Although previously the role of stock exchanges was a regulatory role limited to issuing rules, over time, stock exchanges have been assigned the role of monitoring compliance with legislation and subsidiary securities regulations. Since the promulgation of the OECD Principles on corporate governance, some stock exchanges have enlarged their regulatory concerns to corporate governance. The study recommends that, where appropriate, the OECD MNE Guidelines and the OECD due diligence guidance for supply chains regarding the behaviour of multinationals and their due diligence processes be strictly enforced.

It was found that the Dodd-Frank Act stemmed from efforts to end violence and increase transparency in corrupt systems, but it also deals with complex social and legal problems through disclosure and public pressure, reinforcing the move away from a purely Western way of thinking to creating legislation through African lenses. In formulating an effective system, Africa needs to focus on development and capacity-building initiatives and, where applicable, learn from Western initiatives.
The study found that section 1502 of the Dodd-Frank Act requires manufacturers to certify that their purchases of minerals are conflict free and report on due diligence carried, and that section 1504 requires disclosure in annual reports of all information regarding payments to the US federal government or a foreign government. It is submitted that these two parts of the US law can be adopted into an African system, with the necessary amendments to expand the coverage beyond the DRC. Such an African system should require publically listed companies sourcing African minerals from conflict-prone regions to undergo independent audits and to disclose the result of these audits publicly in a compulsory annual report filed with stock exchanges, explaining the due diligence processes followed and highlighting responsible sourcing. The rationale behind such disclosure is the goal of moving information from the entity best situated to hold or obtain information (the corporation) to the entity most likely to use it to protect the public interest (civil society and regulators). The study recommends using this information for capacity building in institutions to make a contribution to people’s livelihoods and ethical development of the African continent.

Therefore, the study concludes that the power of information is only realised when relevant information is brought to the attention of other actors who, through dissemination the information, can address the issue of breaking the chain of conflict minerals. The study proposes that there be disclosure of information in order to address the resource curse and to allow Africa to realise its full potential.

International law does not make corporations responsible for the protection of human rights – that is primarily the role of states and multinational corporations. These roles have become the focus of NGOs and various initiatives ranging from promoting human rights through socially responsible investing to human rights litigation to the Dodd-Frank Act and compulsory revenue transparency. Meeting those demands through corporate compliance solutions has now become a key corporate responsibility, whether it is done through monitoring the supply chain, requiring transparency and disclosure in annual reports or other means.

The study found that there are key aspects that can be extracted from King III to create an African-rooted system, borrowing from a South African model, including the legal duty to
‘apply or explain’, the philosophy of leadership, sustainability and corporate citizenship, and the importance of integrated reporting.

It is not only vital to identify and understand these principles, but also to find an enforcement mechanism. In this regard, the study proposes following the JSE Listing Requirements, whereby all listed companies are bound by King III, and any failure to comply amounts to a breach punishable in law. Although this is a roundabout enforcement mechanism, it is clear that listed companies have no option but to follow King III, indicating its effectiveness. This highlights the issues of accountability and the effects of information-forcing rules in creating transparency that will trickle down to unlisted companies and multinationals. This is an excellent tool to move the legal agenda forward.

The study found that Africa can use elements of King III and the JSE Listing Requirements, incorporating these elements into national legislation adopted in African states to generate important legal duties on companies to promote fairness, accountability responsibility and transparency.

5.2 Conclusion

In order to find African recipes to promote an effective legal minerals trade, one should look at more than the intention behind a piece of legislation. One should also consider the ability of the legislation to affect and transform the incentives of the relevant stakeholders. Consequently, passing suitable legislation to regulate the international minerals trade is crucial for the promotion of the legal mineral trade. This is particularly valuable to consumers of electronics products who are uncomfortable knowing that their purchases contribute to destructive effects elsewhere and to brand names in the international electronics industry who need to maintain their public image. Some of these companies have already taken steps to improve their supply chains. A successful approach to minerals regulation will assist the industry in creating further change.

This study considered resource wealth and argues it need not be a curse for Africa. It examined how current initiatives can add to the translation of the continent’s potential into tangible growth. In the context of the advancement of legal minerals trade, certification, transparency, traceability and capacity building initiatives were identified as ways to address to the challenges that impede legitimate trade. It was concluded that natural
resource management initiatives should be a national project led by government and pursued by citizens for the benefit of the countries concerned. The process of developing policies for states and businesses should be informed by an analysis of how natural resources sectors function in reality, including a contextualisation of the sectors, factoring in local, national, regional and international political and social economies.

Finally, the study concluded that the transparency and accountability agenda for resource sectors is crucial and that more African states need to buy into these initiatives. Transparency and accountability can be strengthened by improving and tightening access to financial markets and the regulation of these financial markets, including banks and international institutions. Greater transparency must be part of broader governance schemes.

5.3 Recommendations

The study recommends the following:

- Industry must learn from the blood diamonds trade, MONUC, various campaigns and civil society, and also from incoherent international efforts. In developing Africa, the markets need to use and improve on current initiatives to develop a more comprehensive approach toward promoting a successful legal minerals trade and responsible sourcing by companies.
- Transparency should be encouraged to reduce corruption-related problems, by making corrupt practices risky and less attractive to perform, offering incentives to public officials and helping politicians be more accountable to the public.
- More African states should sign the EITI as a significant step forward in promoting legal trade.
- Ethical disclosure conditions for companies should be legislated.
- More initiatives such as the ICGLR need to be introduced, taking into account local realities, stakeholders and the needs of African states, in order to create more capacity-building initiatives. The ICGLR approach needs to be mastered and promoted.
- In the context of the advancement of a legal minerals trade, certification, transparency, traceability and capacity building initiatives are vital in addressing the challenges that are faced in promoting legitimate trade.
• Laws and policies should be enacted in host states where governance is weak before allowing companies to conduct business in the host state.

• Transparency standards under international law need to integrated into the role of the home states.

• Corporations’ home state governments need to work with host states to develop and promote judicial behaviour in their regions, by negotiating this into contracts, through official development agencies and financial institutions.

• Good governance should be promoted in financial institutions at all levels to include the corporations that they finance.

• Greater transparency must be part of broader governance schemes.

• An international institution should be established to assume a global role in monitoring and evaluating transparency, certification and initiatives based on African experiences.

• The role of stock exchanges in corporate governance is of considerable importance and must be developed further.

• In Africa, there needs to be disclosure of information in order to address the resource curse and to allow the continent to function to its full potential.

• Information from reports relevant to capacity building by institutions should be used to make contributions to people’s livelihoods and the ethical development of the African continent.

• Where appropriate, the OECD guidelines regarding the behaviour of multinationals and their due diligence processes should be enforced.

• Africa can incorporate elements of Dodd-Frank Act, King III and the JSE Listing Requirements into the national legislation adopted in African states to impose important legal duties on companies in order to promote fairness, accountability responsibility and transparency.
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