CONFLICT MINERALS AND POLYCENTRIC GOVERNANCE OF BUSINESS AND HUMAN RIGHTS

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INTRODUCTION

During his mandate and since, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises ("SRSG") John Ruggie referred to the "Protect, Respect, and Remedy" Framework ("PRR framework") and the Guiding Principles on Business and Human Rights ("Guiding Principles") as a polycentric governance system.[1] Influential commentators like Larry Catá Backer[2] and Mark B. Taylor[3] have done so as well. But what exactly that means has not been very carefully elucidated. This paper places that description in the context of a deep and varied literature on polycentric governance and evaluates the PRR framework in that light. In particular, the paper uses as a case study an emerging potential polycentric governance system related to the sourcing of certain minerals from conflicted-affected countries in the African Great Lakes region to explore these issues. The conflict minerals regulatory regime incorporates a notable number of the concerns and opportunities Ruggie highlighted and promoted in the PRR framework and Guiding Principles. The paper concludes with a recommendation for further study of the business and human rights sector generally, and conflict minerals regulation specifically, in accordance with the polycentric governance literature.

I. BACKGROUND ON POLYCENTRIC GOVERNANCE SYSTEMS

A. History and Broad Application

The concept of polycentricity has been utilized in a number of different ways by scholars from a number of different disciplines. In general, polycentric governance is marked by a regulatory system—sometimes referred to as a regime complex[4]—that consists of a collective of partially overlapping and nonhierarchical regimes.[5] "Polycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric unit."[6] In a polycentric governance regime, therefore, the state is not the only source or foundation of authority and, in fact, may play little or no role at all.[7] Instead, a complex array of interdependent actors or decision making centers, both state and non-state, which are formally independent of one another, form networks and interact among themselves, each adding some value, while reinforcing each other and compensating for each other's limitations and weaknesses.[8] Each individual actor within the system is typically free from domination by the others and can make its own rules and develop its own norms within its domain of influence.[9] Nevertheless, there is also opportunity within the system for "mutual monitoring, learning, and adaptation of better strategies over time."[10]

The boundaries of a polycentric governance regime are often marked by the problems or issues with which the various actors share a common concern.[11] In other words, a polycentric system is focused on problem solving but is not defined by any single or particular solution to that problem.[12] Often, polycentric governance emerges in the face of a collective action problem that the state is either ill-equipped, unwilling, or too slow to tackle. Professor Michael McGinnis explains that, when facing a collective action problem, a group should be able to address it in the way it sees fit, which can and should include crafting new governance structures that will be able to facilitate the problem-solving process.[13] In this way, a polycentric regime usually involves "bottom-up" rather than "top-down" governance.[14]

Likely no one has done more to advance the study of polycentric governance, especially as related to public goods and common pool resources, than Nobel laureate Elinor Ostrom, Vincent Ostrom, and their colleagues at the Vincent and Elinor Ostrom Workshop in Political Theory and Policy Analysis at Indiana University.[15] Their early work in polycentric governance challenged the prevailing notion in the 1970s and 1980s that the provision of public services, like police and education, was better and more cost-effectively accomplished by slashing the number of departments and districts and consolidating them.[16] This work showed that "[n]o systematic empirical evidence supported reform proposals related to moving the provision of public goods from smaller-scale units to larger governments."[17] Rather, a series of studies showed, for example, that small and medium-sized police departments outperformed their larger counterparts serving similar neighborhoods in major urban centers in measures of efficiency and cost.[18] Though the small and overlapping centers governance seemed inefficient, in practice they performed well.

Elinor Ostrom built on these studies to determine whether polycentric governance regimes could adequately combat collective action problems associated with the provision and regulation of common pool resources. She challenged the conventional theory of collective action,[19] which held that rational actors would not cooperate to achieve a socially optimal outcome in a prisoner's dilemma scenario like that associated with the tragedy of the commons.[20] Thus, it was thought that

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only top-down, state-imposed regulations could create the proper incentives for optimal collective action.[21] A series of field studies that she and others conducted on the provision of water resources in California,[22] the design and maintenance of irrigation systems in Nepal,[23] and the protection of forests in Latin America[24] consistently showed that, contrary to the conventional theory, many individuals will cooperate in the face of collective action problems.[25] Local and regional groups of small to medium scale were found to have self-organized to develop solutions to common-pool resource problems, despite what the rational choice theory would suggest.[26] Moreover, in field studies, systems governed polycentrically were often found to have better outcomes than those governed by a central governmental authority.[27] The polycentric regimes were more nimble, flexible, and invested in guaranteeing success at the local level. And regimes marked by top-down state regulation did not get the kind of local and regional expert input that the polycentric systems did.[28] These observations in the field were consistent with laboratory experiments that found externally imposed regulations that were intended to maximize joint returns in the face of collective action problems actually "crowded out" individuals' voluntary cooperative behavior.[29]

Prior to her death, Elinor Ostrom was applying this research, and the institutional analysis and development ("IAD") framework[30] that grew out of it, to the regulation of global climate change. She assumed that sufficient global regulation through treaty or other international legal instrument was either unlikely ever to occur or, certainly, not forthcoming in the near future;[31] thus, some alternative means of regulating greenhouse gas ("GHG") emissions will be necessary to address the collective action problem such emissions represent. Ostrom challenged the prevailing belief that atmospheric conditions and climate, which are *global* public goods, must be addressed on a *global* scale to be effective.[32] Rather, she argued that, because a tremendously large number of actions taken at multiple scales—for example, the household, cities and states, countries, transboundary regional areas, and global levels—affect the amount of GHG emissions, a polycentric system addressing global climate change would incorporate the experience, expertise, and investment of various actors each of those scales and produce effective, if not perfect, cooperative behavior.[33] This is consistent with the "matching principle" in international law, which holds that multilevel problems should involve contributions by each of those levels.[34]

Thus, problems like those posed by the tragedy of the commons that transcend the Westphalian conception of national jurisdictional boundaries[35] need not be addressed only (or, necessarily, at all) by comprehensive global regulation or international law. Rather, polycentric regulatory action and experimentation by multiple actors at multiple levels linked together by diverse information networks is certainly better than failed or lumbering international initiatives, and likely bring benefits that the top-down regulation cannot.

B. Relevance to Business and Human Rights

SRSG Ruggie recognized similar challenges and opportunities as he undertook his mandate to address human rights and transnational corporations. The likelihood that the corporate responsibility for human rights could be enshrined in some sort of comprehensive and binding instrument of international law or treaty was nil.[36] The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Norms") would have imposed on businesses affirmative duties concurrent with states "to promote, secure the fulfillment of, respect, ensure respect of and protect human rights" within their "sphere of influence" (Norms, 2003).[37] The controversy surrounding the Norms is well known. They failed to get any traction at the United Nations. Ultimately, the U.N. Human Rights Commission took no action on the Norms and instead established Ruggie's mandate.[38] Ruggie recognized that the Norms were both too ambitious and too limited in their scope, that there was no hope to build consensus around an approach that imposed state-like duties with regard to some delimited set of human rights directly on businesses at the level of international law.[39] So, early in his mandate, he made clear his intent to distance his own efforts from the Norms. In his own words, his "first official act was to commit 'Normicide.'"[40] Thus, as with global climate change, it would be folly to look to a top-down approach to regulate transnational corporations with regard to human rights violations and abuses.

Still, globalization has created a dynamic whereby transnational corporations operate beyond the reach of any particular national regulatory system. Governance gaps result from inadequate national regulatory reach, a nonexistent international regulatory framework, and insufficiently organized and empowered non-state market and social actors. The PRR framework was crafted to address and fill those governance gaps.[41] They take several forms. Structurally, public governance is fragmented along national territorial lines, while the global economy transcends such territorial boundaries.[42] Even within and among those national jurisdictions, governments lack policy coherence on both vertical and horizontal axes.[43] Finally, states often lack the capacity or will to adopt or implement regulatory measures, because they fear either that they lack the means to enforce them or that they will suffer negative consequences in the global marketplace.[44] With regard to policy coherence and governance gaps, in 2010, Ruggie identified

> five priority areas through which States should strive to achieve greater policy coherence and effectiveness as part of their duty to protect: (a) safeguarding their own ability to meet their human rights obligations; (b) considering human rights when they do business with business; (c) fostering corporate cultures respectful of rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict affected areas; and (e) examining the cross-cutting issue of extraterritorial jurisdiction.[45]

Thus, States clearly have a vital role to play to address the governance gaps, but they cannot by themselves completely close the governance gaps created by globalization.

In the absence of obligatory international law and in light of the governance gaps Ruggie identified, a polycentric system of governance and regulation can thrive. The PRR framework was conceived as just such a polycentric system. When asked about the interaction between the state duty to protect and business's responsibility to respect human rights, Ruggie indicated that the framework and the Guiding Principles reflect a system of polycentric governance. He described it as "an emerging regulatory dynamic under which public and private governance systems each add distinct value, compensate for one another's weaknesses, and play mutually reinforcing roles—out of which a more comprehensive and effective global regime might emerge."[46] Referencing the polycentric nature of the framework, Professor Backer describes it as "an attempt to build simultaneous public and private governance systems as well as coordinate, without integrating, their operations."[47] In other words, the framework serves as a means of providing the information networks and linkages that allow for the multiple actors at multiple levels of society to act as governing authorities within their particular realm of expertise and influence, while reinforcing each other and compensating for each other's limitations and weaknesses.[48] Furthermore, it incorporates the "matching principle" at both a legal and social regulatory level.[49] The problem of business involvement or complicity in human rights violations and abuses is a multilevel one, ranging from the purely local to the transnational. By complementing the state's duty to protect with business's responsibility to respect human rights, as well as explicating the role that both state and non-state actors must play in remedying any violations or abuses, the framework anticipates a broad and multilevel approach and provides guidance and expectations for all involved to contribute to addressing the problem at their respective level.

II. CONFLICT MINERALS AND POLYCENTRIC GOVERNANCE

The polycentric nature of the PRR framework is an important and elegant feature of the SRSG's work. Whether it will spawn well-functioning, issue-specific polycentric governance regimes is vital to determine the ultimate success or failure of the PRR framework and Guiding Principles. The remainder of this paper is devoted to a case study of one emerging, issue-specific polycentric governance regime. Because it emulates that polycentric system, incorporates the norms elucidated in the Guiding Principles, and confronts a number of the most troublesome governance gaps, the approach to supply chain transparency and conflict minerals in the Democratic Republic of Congo ("DRC") may well portend how lasting and meaningful the PRR framework and Guiding Principles will be.

A. Background on the Conflict Minerals Issue

Significant swaths of the African continent are rich in natural resources, but poor in stable governance and the hallmarks of civil society and rule of law. In these areas, local communities are often dominated—and even terrorized—by outside interests who seek to extract the value from those resources for their own gain with little regard for the effect on the local peoples. The effects are devastating. Such groups can and do wreak havoc on the local populations and the environment, leave the community without a lucrative source of support, and rob communities of the right to self-determination. These interlopers can range from warlords and terrorists to knights of industry, sometimes (wittingly or not) working in concert.

In the eastern DRC armed rebel groups, as well as some groups loosely affiliated with the official DRC military, profit and fund their operations in part through the domination and control of mineral mines, as well as unauthorized extortive taxation of trade routes and facilities.[50] In turn, some of these groups terrorize the local populations, taking particular aim at women and girls.[51] They use rape as a tool of control and intimidation. The eastern DRC is perhaps the most dangerous place in the world to be female.[52]

The origins of the human rights travesty in the DRC are well known. Fighting between and among the armed rebel groups and government forces has led to the deaths of more than five million since the mid-1990s when the aftermath of the Rwandan genocide spilled across the border into eastern DRC.[53] It is a zone of weak or nonexistent governance and nearly constant conflict.

No doubt, such conflict is expensive. Thus, the DRC's vast supply of natural resources is also a natural source for rebel groups to tap for funding. The United Nations Security Council adopted a resolution in 2005 recognizing the link between illegal exploitation of natural resources, the illicit trade in those resources, and arms trafficking as a significant factor exacerbating the continuing conflicts in the region.[54] The armed groups' occupation and exploitation of the mineral mines have provided a rich source of funding for guns, ammunition, and other conflict-sustaining supplies. Along with gems and other precious metals, the DRC has a rich supply of gold, cassiterite, wolframite and coltan. The latter three minerals are refined into the metals tin, tungsten, and tantalum.[55] Gold, tin, tungsten, and tantalum are widely used in numerous industries, but they are particularly important in the production of electronic devices.[56] Cell phones, laptop computers, and digital video cameras, among others, rely on these minerals for their operation.[57] Gold is used for wire coating.[58] Tin is a

soldering agent.[59] Tungsten makes cell phones vibrate.[60] Tantalum capacitors store electricity in electronic devices.[61] Though the DRC is not the sole—or even majority—supplier of these conflict minerals, their abundance has made the DRC a major global supplier.[62] The minerals have been dubbed "conflict minerals" to denote their role in the ongoing conflict and unrest in the Great Lakes Region of Africa, particularly in the DRC.[63]

Artisanal mining is perhaps dangerous enough in and of itself for the miners and the environment. The violence and terror that the military and paramilitary groups inflict on the local inhabitants exacerbates exponentially the difficulties of life in the eastern DRC.[64] Only a multifaceted strategy of international pressure, support, and cooperation at the political, military, social, and economic levels has any hope to produce any long-lasting successful resolution to the tragedies caused by these entrenched and conflicting interests in the DRC. Yet at least some part of the solution has to address the role that foreign businesses, those up the supply chain from the mines, play in the cycle of conflict and violence. Markets create value in the minerals. That value drives the unauthorized exploitation of the mines and the local populations. Those value-creating markets would not exist without the demand for the products that incorporate the minerals. Though the electronics manufacturers and consumers may be geographically far removed from the DRC mines, it would be short-sighted to ignore their role in any comprehensive strategy for bringing stability to the DRC.

As such, the conflict minerals issue embodies the governance gaps that Ruggie identified as plaguing the business and human rights space.[65] The Congolese government lacks sufficient capacity to deal with the issue, not least because of its recent history—and, in some parts of the country, current threat—of bloody and devastating violence.[66] Even if the Congolese government's capacity were not so limited, the complexity of the supply chain for these minerals is such that the challenge presented by legal fragmentation and the conundrum of extraterritorial application of any one nation's laws to a global industry is writ large. The number of actors involved in the process from mine to a finished product is significant;[67] the number of home and host states that are touched by those actors' commercial activities is daunting. The situation presents a classic collective action problem,[68] in that it takes a cooperative comprehensive approach to starve the rebel groups of their sources of income. Defectors who continue buy from conflict-affected mines and to fund the rebel groups can undermine governance efforts. Thus, any governance regime needs to be innovative, be adaptive, build trustworthiness and cooperation among the affected actors, and work at multiple scales. A polycentric approach is warranted.

In fact, a polycentric governance regime focused on supply chain transparency and due diligence and intended to limit the access of rebel groups to the deep pockets of the global market has emerged. The regime incorporates norms that are consistent and, perhaps, inspired by the PRR framework and Guiding Principles.[69] This polycentric regime involves a growing network of state and non-state regulators, acting interdependently to complement each other and to add value with their strengths while counterbalancing each other's weaknesses.

The causes and continuing dynamics that fuel the instability in the eastern DRC and that lead to the gross human rights abuses are many. It is unlikely that halting illicit trade in conflict minerals will, by itself, remedy all that ills the region. Nonetheless, the success or failure of the efforts to curb trade in conflict minerals may provide some evidence for how a polycentric approach to issues of business's participation and complicity in violations of human rights will fare.

B. Independent Actors and Decision-Making Centers Affecting Conflict Minerals

Though I make no representation that what follows is a comprehensive or complete accounting of all the various actors in this emerging governance regime, it is worthwhile to map some of the activities of the major players at various levels in the process, both state and non-state. After doing so, I query if there is reason for concern over whether the well-intentioned, state-based legislative action will end up "crowding out" what might have been otherwise voluntary cooperative behavior to create a truly effective polycentric system of governance.[70] Or, in the alternative, should the legislation be viewed as an important catalyst for the propagation of the various regulatory and decision-making centers that have developed, bringing about more quickly a fully polycentric regime? Ultimately, careful field study and application of mature analytical tools, such as the IAD framework from the Ostrom Workshop,[71] will be vital to measure the effectiveness of these efforts and to improve and encourage subsequent initiatives. It is not overstatement to suggest that the PRR framework's legitimacy and longevity will likely hang on the success of these types of efforts.

1. National-Level State Actor: U.S. Conflict Minerals Legislation and SEC Regulation

At the urging of several civil society nongovernmental organizations ("NGOs"), most notably the Enough Project and Global Witness,[72] the U.S. Congress took notice of the conflict mineral supply chain. In 2010, Congress somewhat uncomfortably appended to the Dodd-Frank Wall Street Reform and Consumer Protection Act,[73] the financial reform bill, section 1502, which addresses the conflict minerals.[74] Its goal is to starve the armed rebel groups of the essential funding source that comes from trading in conflict minerals.[75]

Without banning the purchase or use of conflict minerals from the DRC or its neighbors even if they prove to have funded armed rebels, section 1502 instead incorporates the due diligence and reporting norm that Ruggie says requires companies to "know and show" that they are respecting human rights.[76] Congress chose to force companies to disclose information about their behavior and choices rather than to directly regulate them. Section 1502 regulates the flow of

information in three complementary ways.[77] The first affects corporations and their activities. The other two direct other government officers to assist in the compilation and sharing of information related to conflict minerals trade.

i. Due diligence, reporting, and disclosure. Most significantly, section 1502 forces certain companies, consisting primarily of publicly-traded technology, automotive, mining, jewelry, and aerospace companies, to disclose to the U.S. Securities and Exchange Commission ("SEC") and to make available through their websites information related to their supply chain monitoring and use of conflict minerals. Specifically, the covered companies must disclose whether conflict minerals that are "necessary to the functionality or production of a product" they manufacture originated in the DRC or the countries sharing an internationally recognized border with the DRC (i.e., Angola, Burundi, Central African Republic, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda, and Zambia).[78] In addition, the companies must provide "a description of the measures taken . . . to exercise due diligence on the source and chain of custody of conflict minerals."[79] This requirement includes that the company must submit to the SEC a private audit of those efforts, as well as "a description of the products manufactured or contracted to be manufactured that are not DRC conflict free . . . and the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to locate the mine or location of origin with the greatest possible specificity."[80] To be "DRC conflict free" a product cannot contain minerals "that directly or indirectly finance or benefit armed groups in the [DRC] or an adjoining country."[81] This is basically a requirement that covered companies audit their supply chains to insure that the mines from which the minerals are extracted and/or the trade routes and trading facilities through which the minerals pass are neither under the control of nor financing armed groups.

In August 2012, following an extensive and extended notice and comment period, the SEC issued its final rule on the conflict minerals provision, implementing the Dodd-Frank requirements.[82] The final rule, numbering more than 300 pages, lays out a three-step process for covered companies to determine whether and what to report regarding their use of conflict minerals and the minerals' origin.[83] Figure 1 provides a flowchart of the processes.

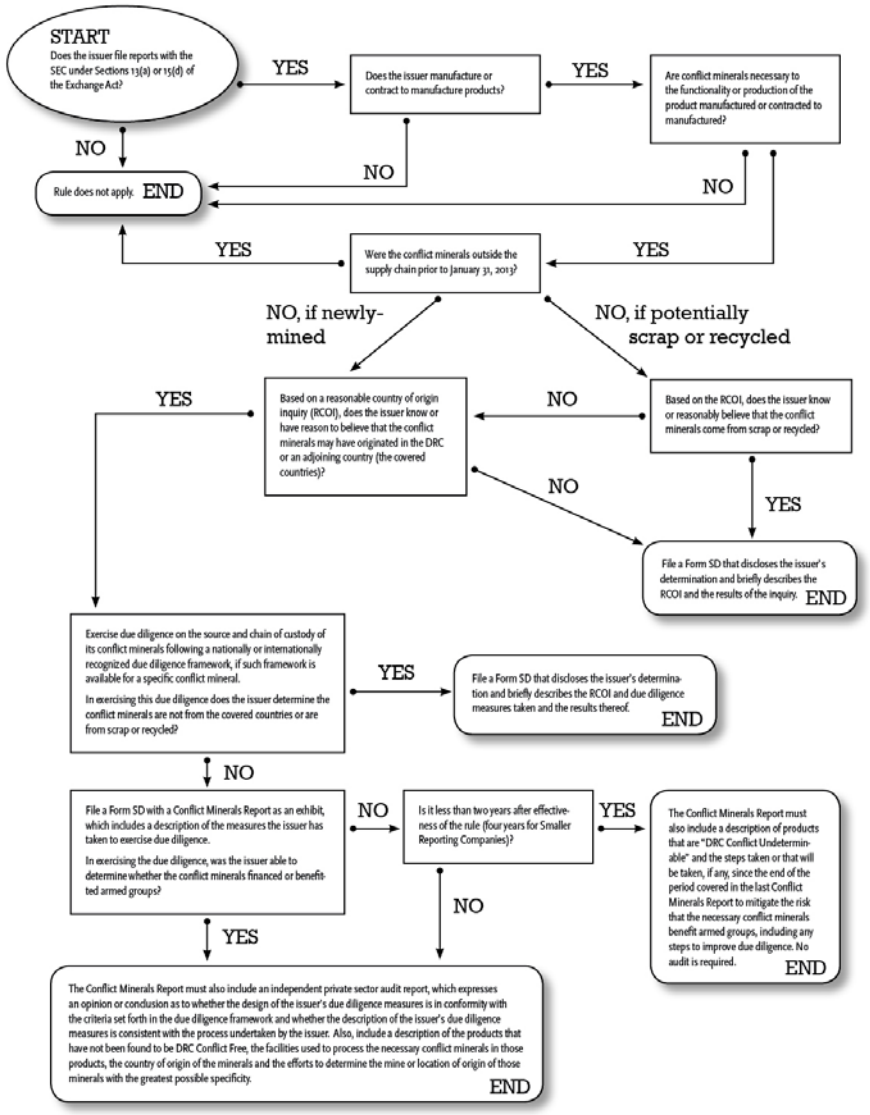

Figure 1. Conflict Minerals Flowchart
Source: Securities and Exchange Commission (Conflict Minerals, 77 Fed. Reg. 56,274, 56,283 (Sept. 12, 2012))

The three steps of the rule's approach can be summarized as follows:

> **First Step:** A company must determine if it is subject to the rule.[84] Only those companies whose minerals are necessary to the functionality or production of a product they manufacture are covered.[85] If a company does not fall within this definition, it need not engage in any further investigation or due diligence, make any disclosures, or file any reports under the rule.[86]
>
> **Second Step:** If a company determines that it is subject to the rule as required in the first step, then it must conduct a reasonable country of origin inquiry.[87] This inquiry must be reasonably designed to determine if the conflict minerals originated in the DRC or its neighboring countries and must be done in good faith.[88] The results of this inquiry can be any of the following: (a) a determination that the conflict minerals did not originate in the covered countries, (b) a determination that the conflict minerals are from recycled or scrap sources, (c) an inability to determine the origin of the conflict minerals, or (d) a determination that the conflict minerals *did* originate in the covered countries.[89] A company that determines either of the first two is required to disclose that fact in a new specialized disclosure, Form SD, and to describe the process it utilized in its reasonable country of origin inquiry.[90] Such companies need not proceed to the third step. If a company is unable to determine the origin of the conflict minerals, it too must file a specialized disclosure stating its conclusion and describing its inquiry, but it need not proceed to the third step unless it has reason to believe its conflict minerals may have originated in a covered country and may not be from recycled or scrap sources.[91]

Third Step: Companies whose reasonable country of origin inquiry have led to the determination that the conflict minerals originated or may have originated in the covered countries and that did not come from recycled or scrap materials must exercise due diligence on the source and chain of custody of the conflict minerals and file an extensive report about its due diligence measures along with its From SD.[92] Ultimately, if the due diligence process reveals that a company's conflict minerals financed or benefited armed groups in the covered countries, the company must disclose as much, presumably subjecting it to significant social and market pressure to avoid such complicity in the future.[93]

The due diligence process must comport with a nationally or internationally recognized framework.[94] Furthermore, the rule requires an independent, external private audit of the report.[95] The objective of the audit is to express an opinion or conclusion as to whether the report describes due diligence measures that comply with an appropriate due diligence framework and whether it accurately describes the due diligence process the company actually undertook.[96]

ii. Government information gathering. The second way (following the public company reporting requirements) that the Dodd-Frank Act addresses the conflict minerals issue is that it instructs the U.S. Department of State to develop a strategy to address "the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products,"[97] and to create a map detailing conflict minerals in the DRC.[98] In particular the map is intended to provide up-to-date and publicly available information about what mines, routes, and facilities are considered to be under the control of armed groups.[99] Third, it requires the U.S. Comptroller and the Secretary of Commerce to provide baseline and ongoing reporting of commercial activities in conflict minerals, including notably by companies not required to file reports with the SEC.[100]

iii. Relation to PRR Framework. The U.S. conflict minerals legislation reflects a number of challenges and goals of the PRR framework and Guiding Principles. As Professor Taylor notes, section 1502 is early indication that they have begun taking root.[101] Its incorporation of the know-and-show style due diligence, auditing, and reporting approach quite clearly comport with Ruggie's vision of a human rights due diligence norm.[102] Section 1502 is likely evidence that human rights due diligence has entered the "norm cascade" phase of the norm life cycle in international relations.[103] Moreover, Congress and the SEC are clearly limited in what they can do to extend regulatory efforts extraterritorially.[104] Yet, as Ruggie has argued, domestic measures that force companies that are listed on a country's stock exchanges to report on a variety of risks, regardless of where the risks are incurred, can have extraterritorial implications without charging headlong into the controversial nature of the direct regulation of actors or actions that take place extraterritorially.[105]

In essence, section 1502 and the SEC's final rule forces the dissemination of information that is otherwise difficult or impossible to discover.[106] Trade in conflict minerals is not prohibited or sanctioned in any way. Rather, the filings and reports by covered companies, the Secretary of State, Comptroller, and the Secretary of Commerce are intended to distribute information about the use and exploitation of conflict minerals up the supply chain and, ultimately, to the consumer. The SEC rule recognizes that government entities are not always in the best position to extract information on the ground. As such, it anticipates that an independent and interconnected system of public and private regulative actors will need to assist in that work, bringing to bear their greater technical capacities and expertise. In other words, it relies on the development of a polycentric system of which the legislation and regulation are only part. The other components of this network are discussed in the following sections.

2. Subnational Level State Actor: State and Municipal Enactments

Following enactment of the section 1502, two states and several cities have enacted complementary legislation aimed at reducing their exposure to human rights risks associated with conflict minerals. Maryland's State Procurement and Congo Conflict Minerals Bill prohibits state government units from knowingly procuring supplies or services from any company that has failed to comply with section 1502.[107] Likewise, California's legislation, an amendment to a public contracting act focusing on the genocide in Darfur, makes companies that are noncompliant with section 1502 ineligible to bid on contracts with a state agency to provide goods or services.[108]

The Massachusetts House of Representatives is currently considering a similar procurement bill, prohibiting any "scrutinized company" from bidding or submitting a proposal for a contract for goods or services with a state agency.[109] "Scrutinized company" is defined as a company "that is required to disclose information relating to conflict minerals originating in the Democratic Republic of the Congo, or its adjoining countries, pursuant to [section 1502] . . . , where the [company] has filed an 'unreliable determination,' . . . reported false information in their report . . . , or failed to file a report .

. . and which the [SEC] has, upon the completion of the commission's processes, determined that [the company] has made a report that does not satisfy the requirements of due diligence described" in section 1502.[110]

Some cities, such as Pittsburgh, Pennsylvania; St. Petersburg, Florida; and Edina, Minnesota, have passed resolutions calling on companies in their cities to engage in due diligence and to take any necessary remedial steps to remove from their supply chains any conflict minerals that fund armed groups.[111] Pittsburg's proclamation additionally declared its support for the development of international certification systems to ensure minerals from Central Africa are not contributing to conflict.[112]

These enactments and proclamations reinforce the norms related to due diligence and reporting on conflict minerals. They address one of the priorities that Ruggie enumerated in his 2010 report to the Human Rights Council to help bridge the coherence-based governance gaps, namely that governments should consider human rights when they do business with business.[113]

3. National Level State Actors: Other National Laws

Other countries have given some indication of following the lead of the United States with regard to domestic legislation like section 1502. For instance, in March 2013, Canadian MP Paul Dewar introduced a bill that would impose due diligence and reporting requirements similar to section 1502.[114] Bill C-486 (2013) would require Canadian corporations that have "processed, purchased, traded in, used or extracted a designated [conflict] mineral, or contracted to do so" to "exercise due diligence in respect of any extraction, processing, purchasing, trading in or use of designated [conflict] minerals that it carries out in the course of its activities, or that it contracts to have carried out."[115] Such companies would be required to submit reports to the Minister of Foreign affairs and publish them on their websites. The reports would include a description of the due diligence process and would be required to be independently audited by a third party.[116]

Similarly, in March 2013, the Directorate-General for Trade for the European Union commenced a public consultation to explore the possibility of an EU initiative similar to section 1502.[117] A public questionnaire was opened to solicit views an initiative for responsible sourcing of conflict minerals.[118] The questionnaire seeks feedback on whether a due diligence and reporting framework should be adopted.[119] In addition, the questionnaire asks whether an EU conflict minerals initiative should operate in the same manner as the EU Timber Regulation.[120] The results of the questionnaire are likely to be used to determine whether and how to reasonably and effectively support ongoing due diligence initiatives related to conflict minerals.[121]

4. Intergovernmental Actors: OECD Guidance

The SEC rule implementing section 1502 requires that companies use a nationally or internationally recognized due diligence framework to conduct their conflict mineral due diligence.[122] The rule specifies that, at the time of its adoption, the Organisation for Economic Co-operation and Development ("OECD") had issued the only known internationally recognized framework that would allow companies to comply with the rule.[123] Thus, this section will describe the OECD and its due diligence framework.

The OECD is an intergovernmental economic organization consisting of thirty-four of the most developed nations in the world who are all committed to democratic government and the market economy.[124] Another twenty-five non-member countries participate as regular observers or full participants in OECD committees.[125] Some fifty non-members are less extensively engaged in other OECD activities.[126] The OECD is "a forum in which governments can work together to share experiences and seek solutions to common problems," with the mission to "promote policies that will improve economic and social well-being of people around the world."[127] The OECD, thus, focuses mostly on the generation of knowledge and best practices.[128] Its consensus-based programs are typically nonbinding but are meant to be dispersed and adopted to the extent that member and nonmember states have the political will to do so.[129] Because of the collective and individual influence and global market power of the member states, OECD programs and standards tend to be adopted broadly and exert significant influence.[130]

Relevant to this discussion, the OECD has long provided leadership by example in the promulgation of corporate governance initiatives. For instance, the OECD Principles of Corporate Governance provide a framework for effective corporate governance, including a chapter devoted to disclosure and transparency.[131] Growing out of this commitment to corporate governance and recognizing the need to provide guidance regarding conflict mineral due diligence in light of the increased attention to the abuses in the DRC, the OECD adopted the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas ("Due Diligence Guidance") in May 2011.[132] Subsequently, in 2012, the Supplement on Gold was developed as a complement to the Due Diligence Guidance, and the Due Diligence Guidance was updated to include references to the Supplement.[133]

The Due Diligence Guidance was developed in concert with representatives of eleven countries of the International Conference on the Great Lakes Region ("ICGLR"), which include Angola, Burundi, Central African Republic, Republic of Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda, and Zambia. In addition, representatives from industry, civil society, and the United Nations Group of Experts on the DRC consulted in its development.[134] It has received broad-based

support from U.N. organizations, including the Security Council; from the ICGLR countries; and at both committee and ministerial levels within the OECD itself.[135] As with most OECD guidance, it is not legally binding, but it has received sufficient OECD endorsement to "reflect[] the common position and political commitment of the OECD members and non-member adherents."[136]

The Due Diligence Guidance provides a detailed framework for due diligence for responsible supply chain management of the conflict minerals. Due diligence is defined in the guidance as "an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict."[137] Although a full description of the Due Diligence Guidance is beyond the scope of this paper, it is worth noting that it provides a five step framework for risk-based due diligence, which includes: (1) establishing strong company management systems, (2) identifying and assessing risk in the supply chain, (3) defining and implementing a strategy to respond to identified risks, (4) carrying out independent third-party audits of supply chain due diligence at identified points in the supply chain, and (5) reporting on supply chain due diligence.[138] In essence, the Due Diligence Guidance provides the expert guidance for the development and implementation of the due diligence requirements in section 1502 and other regulatory efforts aimed at conflict mineral supply chain management.

Acting independently, but with knowledge of the governance efforts of other actors in this space, particularly Congress, the OECD has contributed its broad-based consultation and expertise to provide non-legally binding regulation to the polycentric governance system for conflict minerals. Because the conflict minerals issue represents a challenge to responsible corporate participation in the global economy, the matching principle[139] would suggest that an intergovernmental economic organization ought to be involved in addressing the problems associated with it. However, as discussed in the Conclusion below, there is the possibility that the adoption of the Due Diligence Guidance as the only compliant due diligence framework under section 1502 will actually stifle the effective functioning of the polycentric governance system by crowding out smaller-scale local, regional, or national due diligence systems that might have been more appropriately tailored to the needs of regulated actors at that scale.[140]

5. Global Industry-Level Non-State Actors: GeSI/EICC Conflict-Free Smelter Program and IPC Due Diligence Guidance

In addition to state and intergovernmental soft-law actors, purely private industry organizations have been intensely involved in the process of regulating the conflict mineral supply chain. Here I highlight just two examples of organizations that represent collective concerns of private commercial interests.

i. Conflict-Free Smelter Program. Among the more daunting challenges to implementing any transparency and traceability regime for conflict minerals is the unique nature of the supply chain. To grossly oversimplify a complex process,[141] unrefined minerals and come from a huge number of different mines and intermediate sources to smelting companies to be refined into the minerals that are ultimately used in products like electronics.[142] Thus, the smelters represent a choke point in the supply chain.[143] As such, they can play a vital role in helping with the traceability challenges that are inherent in an inquiry of origin process or in performing due diligence. If companies can trace their conflict minerals to specific smelters and those smelters can credibly certify that their inventories of conflict minerals did not finance or benefit armed rebel groups, that substantially lessens the complication of tracing the minerals back to their countries of origin and/or completing the due diligence process. Smelters can do so by knowing where and from whom they source their unrefined stock, keeping track of their inputs, and matching that to their outputs.[144]

Yet, the task is still daunting for any one company to tackle on its own. For instance, after mapping over ninety percent of its supply line for microprocessors between 2009 and 2012, Intel found that it had approximately 200 suppliers, more than 6000 line items involved, and approximately 140 unique smelters who were engaged in that supply chain.[145]

Industry groups have stepped into this gap to assist companies and coordinate cooperative behavior to encourage smelters to be able to credibly assert their conflict-free status.[146] Moreover, the groups coordinate cooperative action among mineral buyers and end-users, which helps to lessen the collective action problem that would otherwise arise when noncompliant companies would be willing to source from smelters who do not want to expend the money or effort to become conflict-free certified.[147] Without a critical mass of demand and pressure from up the supply chain, insufficient numbers of smelters would have the incentive to cooperate.[148]

In the wake of the move toward conflict mineral regulatory initiatives, the Electronic Industry Citizenship Coalition ("EICC") and the Global e-Sustainability Initiative ("GeSI") joined forces to create the Conflict-Free Sourcing Initiative ("CFSI").[149] EICC is a coalition of leading electronics companies that coordinate on global supply chain initiatives to improve efficiency and social, ethical, and environmental outcomes.[150] GeSI is a coalition of information and communication technology companies to focus on sustainability issues.[151] Together they spearheaded a working group along with stakeholders in the Automotive Industry Action Group, the Japanese Electronics and Information Technology Industries,

and the Retail Industry Leaders Association, among others.[152] This inter-industry working group launched the CFSI in April 2013. It incorporates a Conflict-Free Smelter Program ("CFS Program"), a Conflict Minerals Reporting Template,[153] conflict-free minerals supply chain workshops, conflict minerals training and best practices dissemination, and research on conflict minerals and metals used in the electronics sector.[154] To date, the CFS Program has certified twelve gold refiners[155] and eighteen tantalum smelters.[156] No tin or tungsten smelters have yet achieved compliance.[157] Compliant smelters and refiners have taken steps to document their sourcing and sales to ensure conflict-free status of their inventories. They also submit to rigorous third-party auditing to ensure their compliance. Therefore, becoming conflict-free certified is not cheap.

Individual members of EICC and GeSI developed an "Early Adopters Fund" to incentivize smelters to undergo the certification and audit process.[158] Intel, HP, and the GE Foundation donated $225,000 to the program, which was managed by EICC and RESOLVE,[159] a well-respected NGO that is active in problem solving diverse natural resource, environmental, and public health issues.[160] The Early-Adopters Program promised smelters or refiners that passed their conflict-free audit that they would receive reimbursement for half the audit costs, or about $5000 (Duran, 2013).[161] This cooperative problem-solving is a hallmark of polycentric governance.

ii. IPC Due Diligence Guidance. A number of industry organizations have additionally imparted to their stakeholders education and guidance meant to provide additional support for and uptake of the conflict minerals due diligence norm. An example of such private stakeholder governance initiative, IPC–Association Connecting Electronics Industries has promulgated Conflict Minerals Due Diligence Guidance.[162] IPC is a global trade organization focused on the electronic interconnection industry.[163] Though its Guidance does little of substance beyond synthesizing the requirements of section 1502 and the guidance provided by the OECD Due Diligence Guidelines, it provides additional education, exposure, and operational capacity to incorporate the investigation, due diligence, and reporting requirements.

6. Civil Society-Level Non-State Actors: On-the-Ground Initiatives in the DRC and the Enough Project's Conflict-Free Campus Initiative

Any truly polycentric system will have truly local decision-making centers involved in the process. This is one area where the RPP framework could be argued to ill fit the polycentric governance model. Ruggie has been criticized for failing to adequately and explicitly include civil society and multi-stakeholder initiatives in the RPP framework.[164] He has indicated that their participation is incorporated and assumed in both the second and third pillars of the framework.[165] Perhaps belying that criticism, civil society and NGO activist organizations have had significant influence on the development of section 1502, the complementary state and local legislation, and other initiatives. The Enough Project, for instance, was instrumental in mobilizing grass roots support and providing testimony and anecdotal evidence to support the need for the state-based initiatives.[166] In addition, Enough Project affiliates have spearheaded related small-scale and local initiatives to raise awareness about sourcing of conflict minerals. In particular, the conflict-free campus programs that took root at a large number of college and high school campuses, including at fifteen campuses where official resolutions encouraging conflict-free sourcing have been passed.[167] At the least, these initiatives serve an educative purpose; moreover, they also likely co-opt these educational institutions—themselves influential civil society organizations and market actors—to the polycentric governance project, providing additional opportunities for creative thinking, market pressure, and norm diffusion.

On the other hand, stakeholders on the ground in the DRC have seemingly had less involvement in the conflict minerals regulatory process than one might expect. Some local NGOs have been instrumental in studying chain of custody and cross-border transactional issues in the conflict minerals space.[168] As the regime has developed, it presents a potential threat, at least in the short term, even to the meager sustenance local populations receive from mining operations, both legitimate and illicit. Indeed, a group of local miner cooperatives expressed to the SEC in comments on the proposed conflict mineral rules concern about the effects that section 1502 will have on the ground.[169] Concerns have been raised that the process will have little positive or constructive effect to alleviate the conflict and the concomitant violence and abuse suffered by local populations.[170]

There have been initiatives on the ground in the DRC and neighboring countries to assist in traceability efforts from the mine-to-smelter stage of the supply chain. These include the iTSCi Bag and Tag initiative, focused on tin mines; Solutions for Hope, dealing with tantalum mining; and the Public-Private Alliance for Responsible Mineral Sourcin.[171] The extent of their incorporation of in-region communities and organizations is, however, unclear. And, regardless, the instability on the ground in the DRC has made these initiatives difficult to sustain. For example, the iTSCi initiative, focused on piloting tin traceability in mines in a couple of regions in eastern DRC had to be abandoned when the DRC government suspended mining operations in those regions between September 2010 and March 2011.[172] Thus, instability at the local level has presented challenges for the involvement of organizations at that level to be as active in the polycentric governance regime as one might expect or hope.

CONCLUSION

The PRR framework and the Guiding Principles have been dubbed by Ruggie and others as creating a system of polycentric

governance. The implications of what distinguishes a polycentric governance regime from a state-based monocentric governance regime have not been adequately explored in the literature addressing business and human rights. Legal scholars tend to view the polycentrism of the PRR framework through the lens of international law; however, international relations, political science, and institutional design scholars have explicated and applied the concept far beyond its simple application in federalist legal systems. The interplay among the state responsibility to protect against human rights abuses, business's responsibility to respect human rights, and both state and non-state actors' duty to address and remedy human rights risks and violations as Ruggie has described them provides a fertile ground for applying that broader polycentric governance literature. In particular, the IAD framework developed by the scholars in the Vincent and Elinor Ostrom Workshop in Political Theory and Policy Analysis Policy Analysis could help to analyze the application and implementation of the PRR framework and the Guiding Principles.

In the meantime, there is a possible natural experiment in the emerging polycentric governance regime that is focused on stemming human rights abuses in the DRC related to conflict minerals. In this paper, I have laid out a case study of that nascent governance system. The conflict minerals regime is an intriguing early application of many of the norms and values that animate the PRR framework and Guiding Principles. It has to grapple with the challenges unique to doing business in a conflict-affected area. It attempts to skirt the concerns that accompany the exercise of extraterritorial jurisdiction over actors engaged in potentially harmful acts beyond the boundaries of the home state by regulating domestic actors in a way that has ripple-effect implications in the foreign jurisdiction. It has done so by incorporating the due diligence norm of the second pillar of the PRR framework to require reporting and disclosure of foreign activities, incorporating Ruggie's "know and show" mantra. It implicates the responsibility of state actors to be cognizant of their human rights risks when doing business with business. And it has relied upon a variety of non-state actors engaged at various levels and scales to fill out the regime and implement the traceability and due diligence norms. As such its success (or failure) may augur well (or poorly) the future of the PRR framework and Guiding Principles as a polycentric approach to regulating business and human rights.

Still, it is worth considering whether the conflict minerals regime has been hindered by the central position section 1502 of the Dodd-Frank Act has occupied. As the driver of much of the above-described activity in the conflict minerals space, perhaps the system is more hierarchical than a truly polycentric regime ought to be. If section 1502 dominates and demands the focus and efforts of the other actors in the network, they are then unable to be truly creative in their approach to the problem and are robbed of the ability to make their own rules and develop their own norms within their respective domains of influence. As such, instead of the problem-solving Professor Black ascribes to polycentric governance systems,[173] perhaps the conflict minerals regime has come to be defined by section 1502's particular solution to the problem. In other words, it is important to determine whether—as occurred in laboratory experiments with externally imposed rules intended to maximize joint returns[174]—section 1502 has "crowded out" alternative creative and cooperative behaviors that would have emerged but for the mandate of an influential state actor. For example, perhaps section 1502 has entrenched the OECD Due Diligence Guidance as the singular standard by which conflict minerals due diligence will be done, even though other local, regional, national, or international schemes might have developed alternative schemes appropriate to their domain of influence.

On the other hand, it might instead be the case that section 1502 provided the vital catalyst to spur cooperative efforts to address the conflict minerals problem. None of the actors described above, save the directly regulated reporting companies, are beholden to Congress. And Congress is just as reliant on them for the due diligence requirement to succeed as anyone. Without the OECD Due Diligence Guidance, for instance, there would be no standard by which the conflict minerals reports could be audited. While the trade groups were no doubt spurred into quick action by the legislation, they have been free from interference from state mandate as to their development of strategies for conflict-free smelter certification systems and other traceability initiatives, subjects much more within their domain of influence and expertise than Congress's.

It is clear that this area is ripe for careful application of rigorous theoretical and field work on the optimum design of a polycentric governance system. If the PRR framework, as filled out by the Guiding Principles, truly serves as an example and progenitor of polycentric governance, refining the efforts will be vital to its success.

Footnotes

[1] *See, e.g.*, JOHN GERARD RUGGIE, JUST BUSINESS 78 (2013); Interview by Business and Human Rights Resource Center with John Ruggie at Berne Declaration (Nov. 2011), *available at* http://www.business-humanrights.org/media/documents/berne-declaration-interview-ruggie-nov-2011.pdf.

[2] Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L L. 37, 83,86, 94,106, 128 (2011).

[3] Mark B. Taylor, *The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility*, 5 ETIKKI I PRAKSIS: NORDIC J. APPLIED ETHICS 9, 21-22 (2011).
[4] *See, e.g.*, Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395 (2011) (treating regime complex and polycentricity as practically the same thing); Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 277 (2004); Scott J. Shackelford, *Governing the Final Frontier: A Polycentric Approach to Managing Space Weaponization and Orbital Debris*, 31 YALE L. & POL'Y REV. (forthcoming 2013) [hereinafter Shackelford, *Governing*]; Scott J. Shackelford, *Toward Cyber Peace: Managing Cyber Attacks Through Polycentric Governance*, 63 AM. U. L. REV. (forthcoming 2013) [hereinafter Shackelford, *Toward Cyber Peace*].
[5] Shackelford, *Toward Cyber Peace*, *supra* note 4.
[6] Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550, 552 (2010).
[7] Julie Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 137-38 (2008).
[8] Vincent Ostrom et al., *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV. 831, 831-32 (1961).
[9] Ostrom, *supra* note 6, at 552.
[10] *Id.*
[11] Black, *supra* note 7, at 137.
[12] *Id.*
[13] Michael D. McGinnis, Costs and Challenges of Polycentric Governance 1 (Jun. 5, 2005) (unpublished manuscript), *available at* http://www.indiana.edu/~workshop/papers/mcginnis_berlin.pdf.
[14] *See* Shackelford, *Governing*, *supra* note 4.
[15] *See* VINCENT & ELINOR OSTROM WORKSHOP IN POL. THEORY& POL'Y ANALYSIS, http://www.indiana.edu/~workshop/ (last visited June 1, 2013).
[16] *See, e.g.*, ELINOR OSTROM ET AL., PATTERNS OF METROPOLITAN POLICING (1978) (reporting on a major study of police organization in 80 metropolitan areas); E.A. Hanushek, *The Econoimcs of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LIT. 1141 (1986) (finding no better performance in larger school districts); Roger Parks, *Metropolitan Structure and Systemic Performance: The Case of Police Service Delivery*, *in* POLICY IMPLEMENTATION IN FEDERAL AND UNITARY SYSTEMS 161 (Kenneth Hanf & Theo A.J. Toonen, eds. 1985) (finding that citizens in metropolitan areas with the most fragmented provision of police service experienced more police presence on the street as a function of tax expenditures than citizens living in areas with consolidated police services); Paul Teske et al., *Establishing the Micro Foundations of a Macro Theory: Information, Movers, and the Competitive Local Market for Public Goods*, 87 AM. POL. SCI. REV. 702 (1993).
[17] Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 50 (World Bank Policy Research Working Paper No. 5095, 2009).
[18] *See generally* POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS (Michael D. McGinnis, ed. 1999) (collecting these studies).
[19] The traditional theory of the collective action problem was first articulated in the 1960s Mancur Olsen, an economist and social scientist from the University of Maryland. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (providing the first comprehensive explication of the collective action problem). Olson theorized that "only a *separate and 'selective' incentive* will stimulate a rational individual in a latent group to act in a group-oriented way." *Id.* at 51. In other words, members of a large group will not act in the group's common interest unless the individual member has some reason to expect personal gain (e.g., economic, social, reputational) from doing so.
[20] William Forster Lloyd first proposed the concept of the tragedy of the commons in 1833 in his role as a fellow of the Royal Society. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). It was later more thoroughly explicated and popularized by Garrett Hardin. *See generally id.* In its simplest terms, the tragedy of the commons suggests that when a population is given unrestricted access to a resource, the resource is doomed to overexploitation. *See* Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 STAN. ENVTL. L.J. 109,118 (2009) (discussing Hardin's explanation of the tragedy of the commons).
[21] *See* Ostrom, *supra* note 17, at 8-9 (discussing he shortcomings of the conventional theory of collective action).
[22] *See, e.g.*, Elinor Ostrom, Public Entrepreneurship: A Case Study in Ground Water Basin Management (1965) (unpublished Ph.D. dissertation, Univ. of Calif., Los Angeles).
[23] *See, e.g.*, IMPROVING IRRIGATION GOVERNANCE AND MANAGEMENT IN NEPAL (Ganesh Shivakoti & Elinor Ostrom, eds., 2002).
[24] *See, e.g.*, Elinor Ostrom & Harini Nagendra, *Insights on Linking Forests, Trees, and People from the Air, on the Ground, and in the Laboratory*, 103 PROC. NAT'L ACAD. SCI. 19224 (2006).
[25] Ostrom, *supra* note 17, at 10.
[26] *Id.*

[27] Elinor Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, *in* GLOBAL ENVIRONMENTAL COMMONS 105,113-17 (E. Brousseau et al., eds., 2012).
[28] *Id*.
[29] *See* Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746 (1999); Andrew F. Reeson & John G. Tisdell, *Institutions, Motivations and Public Goods: an Experimental Test of Motivational Crowding*, 68 J. ECON. BEHAV. & ORG. 273 (2008).
[30] For a basic discussion of the IAD Framework, see generally Michael D. McGinnis, *An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework*, 39 POL'Y STUD. J. 163 (2011).
[31] Ostrom, *supra* note 6, at 550.
[32] *Id.*at 552.
[33] *Id.* at 552-53.
[34] *See* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 133-34 (2005) (describing this matching principle as it relates to environmental regulation).
[35] Westphalian ideas of national sovereignty, in which a sovereign has absolute power within its own territory is traced to the Peace of Westphalia of 1648, which ended the Thirty Years' War. *See* Antony Anghie, *International Law in a Time of Change: Should International Law Lead or Follow?*, 26 AM. U. INT'L L. REV. 1315, 1335-36 (2011). Though recent studies of the Peace of Westphalia suggest that this understanding is a misinterpretation, it had significant influence over centuries of international relations and the development of international law. *Id.*
[36] RUGGIE, *supra* note 1, at 47-60 (discussing the failure of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights).
[37] Sub-Comm'n on Prot. & Promotion of Human Rights, Working Group, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).
[38] *See generally* RUGGIE, *supra* note 1 (laying out comprehensive discussion of the history and origin of the SRSG mandate).
[39] *Id.* at 47-60.
[40] *Id.* at 54.
[41] Report of the Special Representative of the Secretary- General on Human Rights, Transnational Corporations, and Other Business Enterprises, Protect, Respect and Remedy: A Framework for Business and Human Rights, Hum. Rts. Council, U.N. Doc. A/HRC/8/5 (April 7, 2008), available at http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf.
[42] *Id*.
[43] *Id.* Vertical incoherence occurs when a state adopts a human rights obligation, for instance through legislation, but fails to give sufficient regard or effort to its implementation. Horizontal incoherence occurs when states regulate in one area in isolation (e.g., securities regulation or labor) with little regard for how that interacts with or effects regulatory efforts elsewhere in the government . John Gerard Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Keynote Address at the 3rd Annual Responsible Investment Forum, New York, NY (Jan. 12, 2009), *available at* http://198.170.85.29/ruggie-address-to-responsible-invest-forum-12-jan-2009.pdf
[44] Ruggie, *supra* note 43.
[45] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and Human Rights: Further Steps toward Operationalization of the "Protect, Respect, Remedy" Framework, P 82, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).
[46] *See* Interview by Business and Human Rights Resource Center, *supra* note 1.
[47] Backer, *supra* note 2, at 43.
[48] *See supra* note 8 and accompanying text.
[49] *See supra* note 34 and accompanying text for discussion of the matching principle.
[50] *See* Delphine Schrank, *Tin Fever*, VA. Q. REV., Fall 2010, at 24, 32 (describing the interlocking military and rebel groups engaging in this type of exploitation at a cassiterite mine in eastern DRC).
[51] Fiona Lloyd-Davies, *Why Eastern DR Congo Is 'Rape Capital of the World,'* CNN.COM (Nov. 25, 2011, 5:53 AM EST), http://www.cnn.com/2011/11/24/world/africa/democratic-congo-rape/index.html.
[52] Amber Peterman, Tia Palermo & Caryn Bredenkamp, *Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo*, 101 AM. J. PUB. HEALTH 1060, (2011) (reporting a study of sexual violence in the DRC that estimates "rape among women aged 15 to 49 years in the 12 months prior to the survey[, which] translate[s] into approximately 1150 women raped every day, 48 women raped every hour, and 4 women raped every 5 minutes").
[53] *See generally* GÉRARD PRUNIER, AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTIENTAL CATASTROPHE (2010) (providing an exhaustive account of the history of the "African World War").
[54] S.C. Res. 1635, U.N. Doc. S/RES/1635 (Oct. 28, 2005).

[55] JOHN PREDERGAST & SASHA LEZHNEV, FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN 9 n.4, *avaiable at* http://www.enoughproject.org/files/publications/minetomobile.pdf.
[56] *Id.*
[57] *See* Edward Wyatt, *Use of "Conflict Minerals" Gets More Scrutiny from U.S.*, N.Y. TIMES, Mar. 20, 2012, at B1.
[58] *Id.*
[59] *Tin Statistics and Information*, USGS, http://minerals.usgs.gov/minerals/pubs/commodity/tin/ (last modified May 17, 2013).
[60] Tristan McConnell, *Is Your New Mobil Phone Made with Conflict Minerals?*, GLOBALPOST (Dec. 19, 2010, 10:32 AM), http://www.globalpost.com/dispatch/africa/101214/mobile-phones-iphone-congo-war-conflict-minerals.
[61] *Id.*
[62] PENDERGAST & LEZHNEV, *supra* note 55.
[63] *See* Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b).
[64] For a description of the complex corruption and intimidation related to, as well as harrowing experience of miners at, cassiterite mining operations at the Bisie mine in North Kivu province in the DRC, see generally Schrank, *supra* note 50.
[65] *See supra* notes 41-45 and accompanying text.
[66] *See generally* PRUNIER, *supra* note 53 (providing background on the recent and ongoing conflict in the DRC).
[67] *See infra* note XXX and accompanying text (describing the complexity of the supply chain for just one mineral for just one company).
[68] *See supra* notes 19-20 and accompanying text (giving basic theory of the collective action problem and the tragedy of the commons).
[69] *See* Taylor, *supra* note 3, at 23-25 (discussing how the Ruggie idea of due diligence and reporting "knowing and showing" has been incorporated in the approach to conflict minerals).
[70] *See supra* note 29 and accompanying text (discussing the problem of central regulation crowding out creative, voluntary cooperative behavior).
[71] *See* McGinnis, *supra* note 30 (describing the IAD framework and the language of the Ostrom Workshop).
[72] Taylor, *supra* note 3, at 24.
[73] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of the U.S. Code).
[74] *Id.* § 1502 (codified at 15 U.S.C. § 78m(p) (Supp. 2011)).
[75] *Id.* § 1502(a).
[76] RUGGIE, *supra* note 1, at 99.
[77] *See generally* Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT'L L. 129 (2011) (describing the conflict minerals legislation and the legislation's objectives).
[78] 15 U.S.C. § 78m(p)(2)(B).
[79] *Id.* § 78m(p)(1)(A)(i).
[80] *Id.* § 78(p)(1)(A)(ii).
[81] *Id.* § 78m(p)(1)(D)
[82] Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 and 249b).
[83] *Id.*
[84] As an initial matter, only companies that are publicly traded via a listing on a U.S. stock exchange are subject to the rule, as only they are governed by the periodic reporting requirements of the Securities and Exchange Act of 1934. *See* 17 C.F.R. § 200.1 (2006). The final SEC rule makes this clear, stating, "the final rule applies to any issuer that files reports with the [SEC] under section 13(a) or Section 15(d) of the Exchange Act." Conflict Minerals, 77 Fed. Reg. at 56,287. Therefore, privately held corporations and, obviously, corporations not listed and traded in the United States are not subject to the conflict minerals legislation or the SEC's rule. However, the SEC decided, despite objections to the contrary, that foreign private issuers who are listed on U.S. securities markets are covered by the rule and must, therefore, file appropriate reports and engage in due diligence when the rule requires. *Id.* at 56,287-88.
[85] Conflict Minerals, 77 Fed. Reg. at 56,290.
[86] *Id.* at 56,279.
[87] *Id.* at 56,280.
[88] *Id.* at 56,310-14.
[89] *Id.*
[90] *Id.* at 56,280.
[91] If such a company proceeds to the due diligence process in the third step and, through that process, determines that the origin of the conflict minerals was not a covered country or that the conflict minerals came from recycled or scrap material, it does not have to complete the third step. *Id.* Rather, it can simply complete the specialized disclosure and briefly describe its

reasonable country of origin inquiry and the due diligence efforts that led to its conclusion that the conflict minerals were not from the covered countries. *Id.*

[92] *Id.* at 56,316-29.

[93] *Id.* at 56,316-24.

[94] *Id.* at 56,326.

[95] *Id.* at 56,328-29.

[96] *Id.* at 56,329. The rule provides a two-year transition period (four years for smaller companies) during which companies may certify their conflict minerals "DRC conflict undeterminable" either because they are unable to determine whether their conflict minerals that originated in the covered countries financed or benefited armed rebel groups or because their reasonable country of origin inquiry gave them reason to believe the conflict minerals may have originated in the covered countries and the due diligence failed to provide additional clarification as to whether they financed or benefited armed rebel groups. *Id.* at 56,321. Reports that conclude "DRC conflict undeterminable" during the transition period need not be audited, but must file their report along with a description of steps the company will take or has taken to mitigate the risk that their conflict minerals will benefit armed groups. *Id.*

[97] Dodd-Frank Wall Street Reform and Consumer Protection Act §1502(c)(1)(A), Pub. L. No. 111-203, 124 Stat. 2213.

[98] *Id.* § 1502(c)(2)(a).

[99] *Id.*

[100] *Id.* § 1502(d).

[101] Taylor, *supra* note 3, at 23-25.

[102] U.N. Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

[103] *See* RUGGIE, *supra* note 1, at 128-29 (citing Martha Finnemore & Kathryn Sikink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998)) (describing the life-cycle of norm uptake). In contrast, the relative paucity of national or internationally recognized due diligence frameworks that can be used by companies to comply with the SEC rule and the resistance that business groups have exhibited to the due diligence requirement are both evidence that the human rights due diligence norm has not advanced to the internalization stage, where the norm takes on a taken-for-granted quality. *See id.* (describing norm internalization). Indeed, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Business Roundtable petitioned the United States Court of Appeals for the District of Columbia Circuit suit to invalidate the SEC rule. *National Association of Manufacturers v. SEC*, Petition For Review, Case No. 12-1422 (D.C. Cir. October 19, 2012).

[104] *Cf.* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) (holding that the presumption against extraterritorial application of U.S. law applies to the Alien Tort Statute and that nothing in the text, history, or purpose of the statute rebuts the presumption).

[105] RUGGIE, *supra* 1, at 109.

[106] *See* Ochoa & Keenan, *supra* note 77 (discussing the information-forcing nature of the legislation).

[107] MD. CODE ANN., STATE FIN. & PROC., § 14-413 (LexisNexis 2013).

[108] CAL. PUB. CONT. CODE § 10490 (Deering 2013).

[109] An Act Relative to Congo Conflict Minerals, Mass. House Bill No. 2989, Doc. No. 599 (January 13, 2013), *available at* http://www.malegislature.gov/Bills/188/House/H2898.

[110] *Id.*

[111] *Appendix D—Legislative and Other Initiatives*, HEADS UP. (Deloitte, New York, N.Y.), Sept. 11, 2012, at 11.

[112] *File # 2011-1639*, CITY OF PITTSBURGH (Apr. 19, 2011), http://pittsburgh.legistar.com/LegislationDetail.aspx?ID=873982&GUID=53DB676C-7643-4948-A56D-6731D4925634 ("BE IT FURTHER RESOLVED, that the Council of the City of Pittsburgh calls on U.S. executive leadership in helping to establish an international certification system for minerals coming from Central Africa to ensure they are not contributing to conflict.").

[113] Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and Human Rights: Further Steps toward Operationalization of the "Protect, Respect, Remedy" Framework, P 82, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010); *see also supra* notes 41-45 and accompanying text (discussing Ruggie's conception of governance gaps).

[114] *Bill C-486: An Act Respecting Corporate Practices Relating to the Extraction, Processing, Purchase, Trade and Use of Conflict Minerals from the Great Lakes Region of Africa*. (2013), 1st reading march 26, 2013, 41st parliament, 1st session, *available at* http://www.parl.gc.ca/housepublications/publication.aspx?language=e&mode=1&docid=6062040&file=4&col=1.

[115] *Id.*
[116] *Id.*
[117] Kristen Wallerstedt, *EU and Canada Consider Conflict Minerals Rules*, 3E CO. (Apr. 4, 2013), http://3ecompany.com/blog/?p=172.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Conflict Minerals, 77 Fed. Reg. at 56,290, 56,326 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240).
[123] *Id.*
[124] *About the OECD*, ORG. ECON. CO-OPERATION & DEV., http://www.oecd.org/about/ (last visited Jun. 1, 2013).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *See* Larry Catá Backer, *Part 1; The U.S. National Contact Point—Corporate Social Responsibility Between Nationalism, Internationalism and Private Markets Based Globalization*, LAW AT THE END OF THE DAY (Feb. 2, 2013), http://lcbackerblog.blogspot.com/2013/02/part-1-us-national-contact-point.html.
[129] *See id.*
[130] *See id.*
[131] ORG. FOR ECON. CO-OPERATION & DEV. (OECD), PRINCIPLES OF CORPORATE GOVERNANCE (2004), available at http://www.oecd.org.ezproxy.lib.indiana.edu/daf/ca/corporategovernanceprinciples/31557724.pdf
[132] OECD, OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 3 (2d ed., 2013), *available at* http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf.
[133] *Id.* at 4.
[134] *Id.* at 3.
[135] *Id.*
[136] *Id.* at 4.
[137] *Id.* at 13.
[138] *Id.* at 17-19.
[139] See *supra* note 34 and accompanying text for a discussion of the matching principle.
[140] For a discussion of the risk of "crowding out," see *supra* note 29 and accompanying text.
[141] Intel, *Assessing the Supply Chain for Conflict Minerals*, EICC (2011), http://www.eicc.info/documents/Intel_CSFinal_09_2011.pdf ("The electronics industry supply chain is deep and wide, with many layers of suppliers and multiple countries. As a result, it is difficult for many companies to verify the origin of all the metals used in manufacturing products—some of which enter the supply chain dozens of levels away from many different sources . . . .").
[142] PRENDERGAST & LEZCHNEV, *supra* note 55.
[143] *See, e.g.*, ENOUGH PROJECT, GETTING TO CONFLICT FREE 3 (2010) ("The smelters represent the crucial chokepoint in the supply chain, where minerals are processed into metals, and are therefore key to ethical sourcing."), *available at http://www.washingtonpost.com/wp-srv/health/documents/corporate_action_report.pdf.*
[144] *See* Carolyn Duran, Intel and Conflict Minerals: A Journey of Learning, Challenges and Leadership: Progress in Driving Conflict Free Sourcing (unpublished PowerPoint slides) (on file with author).
[145] *Id.*
[146] *See Frequently Asked Questions*, EICC-GESI CONFLICT-FREE SMELTER (CFS) ASSESSMENT PROGRAM (Mar. 30, 2012), http://www.conflictfreesmelter.org/documents/Conflict-FreeSmelterFAQ.pdf.
[147] *See* Duran, *supra* note 144 (discussing the resistance of smelters to undertake the cost of certification and developing monetary incentives to encourage them to do so).
[148] *Id.*
[149] *See Conflict-Free Smelter (CFS) Program: Compliant Smelter and Refiner Lists*, CONFLICTFREESMELTER.ORG (last visited Jun. 1, 2013) (providing results of the CFS program).
[150] *About Us*, ELECTRONIC INDUS. CITIZENSHIP COUNCIL (last updated Aug. 4, 2011), http://www.eicc.info/about_us.shtml.
[151] *About GeSI: Promoting ICT Sustainability*, GLOBAL ESUSTAINABILITY INITIATIVE, http://gesi.org/About_ICT_sustainability (last visited Jun. 1, 2013).
[152] Press Release, EICC & GeSI, EICC and GeSI Launch Conflict-Free Sourcing Initiative (Apr. 30, 2013), *available at* http://eicc.info/documents/PRCFSILaunchFINAL.pdf.
[153] *See Conflict Minerals Reporting Template & Dashboard*, CONFLICTFREESMELTER.ORG., http://www.conflictfreesmelter.org/ConflictMineralsReportingTemplateDashboard.htm (last visited Jun. 1, 2013).
[154] Press Release, *supra* note 152.

[155] *CFS Program: Compliant Gold Refiner List*, CONFLICTFREESMELTER.ORG (last updated Jan. 23, 2013), http://www.conflictfreesmelter.org/Conflict%20Free%20Gold%20Refiners.htm.
[156] *CFS Program: Compliant Tantalum Smelter List*, CONFLICTFREESMELTER.ORG (last updated April 3, 2013), http://www.conflictfreesmelter.org/Conflict%20Free%20Tantalum%20Smelters.htm.
[157] *CFS Program: Compliant Tin Smelter List*, CONFLICTFREESMELTER.ORG (last updated May 17, 2013), http://www.conflictfreesmelter.org/Conflict%20Free%20Tin%20Smelters.htm; *CFS Program: Compliant Tungsten Smelter List*, CONFLICTFREESMELTER.ORG (last updated Mar. 26, 2013), http://www.conflictfreesmelter.org/ConflictFreeTungstenSmelters.htm.
[158] Duran, *supra* note 144.
[159] *Id*.
[160] *About*, RESOLVE (Jun. 1, 2013), http://www.resolv.org/about.
[161] Duran, *supra* note 144.
[162] *New IPC Guide Spells out Electronics Manufacturers' Conflict Minerals Due Diligence Obligations*, IPC: ASSOC. CONNECTING ELECTRONICS INDUS. (Feb 12, 2013), http://www.ipc.org/ContentPage.aspx?pageid=New-IPC-Guide-Spells-Out-Electronics-Manufacturers-Conflict-Minerals-Due-Diligence-Obligations.
[163] *See Our Mission*, IPC: ASSOC. CONNECTING ELECTRONICS INDUS. (May 5, 2008), http://www.ipc.org/ContentPage.aspx?pageid=Mission-Statement.
[164] Tara J. Melish & Errol Meidinger, *Protect, Respect, Remedy and Participate: "New Governance" For the Ruggie Framework*, *in* BUSINESS AND HUMAN RIGHTS AT A CROSSROADS: THE LEGACY OF JOHN RUGGIE 1 (Radu Mares, ed. 2011) (arguing that there should be a fourth "Participate" pillar to the RPP framework to account for the need to have formal involvement of civil society actors).
[165] *Id.* at 12.
[166] *See.e.g.*, *Enough Project Applauds Maryland Conflict Minerals Law*, ENOUGH (May 2, 2012), http://www.enoughproject.org/news/enough-project-applauds-maryland-conflict-mineral-law.
[167] *Participating Schools*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/participating-schools (last visited Jun. 1, 2013).
[168] *See, e.g.*, ALOYS TEGERA & DOMINIC JOHNSON, POLE INSTITUTE, RULES FOR SALE: FORMAL AND INFORMAL CROSS-BORDER TRADE IN EASTERN DRC (2007), *available at* http://www.pole-institute.org/documents/regard19_anglais.pdf; Aloys Tegera, *Blood Minerals (The Criminalization of an Economic Sector in Eastern DRC)*, POLE INSTITUTE (March 2010), http://www.pole-institute.org/site%20web/echos/echo134.htm.
[169] *See Democratic Republic of Congo: Mining Cooperatives Speak out Critically About Dodd-Frank*, AFRICAFILES, http://www.africafiles.org/article.asp?ID=25062 (last visited Jun. 1, 2013).
[170] *See generally* Laura E. Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* (Ctr. Global Dev. Working Paper No. 284, 2012) (outlining the case against section 1502).
[171] *See* Duran, supra note 144.
[172] *iTSCi Project Overview*, ITRI, https://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=2192&itemid=189 (last visited Jun. 1, 2013). iTSCi stands for "ITRI Tin Supply Chain Initiative." *Id.* "ITRI is the only organisation dedicated to supporting the tin industry and expanding tin use. It is largely funded by tin produces and smelters." *Welcome to ITRI*, ITRI, https://www.itri.co.uk/ (last visited Jun. 1, 2013).
[173] *See* Black, *supra* note 7, at 137-38.
[174] *See* authorities cited *supra* note 29.