Chapter
07

The US 'Conflict Minerals' Law: Is there an indirect sanctioning mechanism?

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1. INTRODUCTION

The US "Conflict Minerals" legislation, namely Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act[331] (DFA), sheds light on an interesting aspect concerning the link between sensitive trade control and sanctions. Indeed, the provision triggers what could be conceived as an *indirect sanctioning mechanism.* This expression refers to a "system of penalties" which is implicitly imposed for those legal entities failing to comply with the obligations prescribed by the law in question. Particularly, although the aforementioned Section 1502 does not contain any *ban* or *penalty*[332] for the infringement of the disclosure requirements mandated for the addressed issuers, the "adverse impacts" of Section 1502 have resulted both in a *de facto ban* on Congolese minerals and in a *naming and shaming* mechanism compelling companies to abide their law obligations. Moreover, it results interesting to note that not only does the US law indirectly affect its primary target to comply

331 The document is available at the following website: https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

332 That Section 1502 places no ban or penalty on the use of conflict minerals has been extensively reiterated by both the scientific community and several non-governmental organisations interested in tackling the illicit trade in "conflict minerals". To deep in knowledge, it is possible to consult the following website: https://www.globalwitness.org/en/archive/dodd-frank-acts-section-1502-conflict-minerals/; or Sharretts, Paley, Carter & Blauvet, P.C., International Trade Counsel for Toy Industry Association, "Dodd-Frank Act Conflict Minerals Reporting Requirements", *International Trade Bullettin,* September 2012.

with its disclosure requirements, but also it manages to impose the aforesaid obligations on several foreign firms by exercising its extraterritorial jurisdiction.

2. THE NORMATIVE FRAMEWORK

Before entering at the core oft the issue, it results necessary to briefly contextualise what is meant by "Conflict Minerals". As far as the definition is concerned, the concept of "conflict resource" emerged for the first time in the late 1990s, in line with the international debate related to the so-called *conflict/blood diamonds* and it was initially discussed at the United Nations level. It was only in 2006 that a non-governmental organisation, *Global Witness*, proposed a definition for *conflict resource,* as follows: Natural resource 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.[333]

Nevertheless, the term "conflict minerals" entered into the international vocabulary only after the enactment of Section 1502 providing the following definition: (A) columbine-tantalite (colt an), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.[334]

Therefore, at the present, doling with conflict minerals basically means coping with tin, tantalum, tungsten and gold - the

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333 Marcus Tullius Cicero, "The Sinews of War. Eliminating the Trade in Conflict Resources", *Global Witness,* 2006, available a: https://www.globalwitness.org/sites/default/files/import/the_sinews_of_war.pdf.

334 Dodd-Frank Act, *Section 1502*, H. R. 4173—843.

so-called '3TG' - which could be found in an endless number of products such as cell phones, car, laptop computers, medical devices, airplanes and machine tools.[335]

Concerning the normative framework of reference, international, regional, national and private industry provisions[336] have been delivered in order to break the link between the illegal exploitation in natural resources and the armed conflict in the so-called *conflict-affected and high-risk areas.* Nonetheless, several prominent actors like the United States and the United Nations have focused on a specific geographical area, namely the Democratic Republic of the Congo (DRC) and its nine "adjoining/covered countries".[337]

On the whole, the rationale a the basis of these initiatives lies in the willingness to both promote and boost a responsible way of sourcing by exercising supply chain *due diligence* transparency.[338] This concept has been defined by the Organisation for the Economic Co-operation and Development (OECD) as 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 they observe international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions.[339]

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335 Drimmer J. C. and Philips N. J., "Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of SEC Regulation of Social Issues", *Human Rights & International Legal Discourse,* Vol. 6, 2012, p. 8.

336 To get a complete picture of the normative framework please consult: Grieger G., "Minerals from conflict areas. Existing and New Responsible-sourcing Initiatives", *European Parliamentary Research Service,* 2014, pp. 1-8.

337 Precisely, these Covered Countries are: Democratic Republic of the Congo, Central Africa Republic, South Sudan, Zambia, Angola, the Republic of the Congo, Tanzania, Burundi, Rwanda, Uganda.

338 Specifically, in monitoring that the whole supply chain exercised *due diligence,* issuers can assure that the materials they use are not been originated in conflict areas and, consequently, are "free of conflict". Indeed, it is common to label the final products as "conflict-free".

339 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition*, OECD Publishing, 2013, p. 13. Available at http://dx.doi.org/10.1787/9789264185050-en.

Assumed this normative backdrop, the focus of this contribution rests upon the US national legislation on "conflict minerals" since it is viewed as the main statutory provision able to exert an *indirect sanctioning* power on its target, the Securities and Exchange Commission (SEC) listed companies. However, it could be interesting to note that also the United Nations Security Council Resolution 1952 of 2010[340] triggers a sort of *sanctioning mechanism* aimed at putting pressure on issuers to exercise due diligence and, as a result, to be implicitly subjects of the disclosure requirements mandated by Section 1502.

In plain terms, Section 1502 requires certain public companies, registered on an American Exchange, to provide disclosures about the use of specified conflict minerals emanating from the DRC and nine adjoining countries. Conceived just as *disclosure* or *reporting* requirement[341] the aim of Section 1502 is to dissuade companies from continuing to engage in trade that supports regional conflicts. Indeed, as the Congress clearly stated in the Prologue:

It is the sense of Congress that the *exploitation* and *trade of conflict minerals* originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly *sexual – and gender-based violence*, and contributing to an emergency humanitarian situation therein.[342]

As evident, the ostensible goals of Section 1502 are humanitarian and diplomatic in nature and have little to do with the primary focus of the Dodd-Frank Act: tackling the financial crisis through a financial regulatory reform.[343] As a result, the main "unintended consequences", following the enactment of the American bill on minerals, have been

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340 United Nations, UN Security Council Resolution 1952, S/RES/1952 (2010).

341 To deepen, consult "Progress and Challenges on Conflict Minerals: Facts on Dodd-Frank 1502", Enough Project, January 2016. Available at: http://www.enoughproject.org/special-topics/progress-and-challenges-conflict-minerals-facts-dodd-frank-1502.

342 Dodd-Frank Act, *Section 1502,* H. R. 4173—838.

343 Woody K. W., "Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog", *Fordham Law Review,* Vol. 81(3), 2012, p. 1317.

originated by this constituency 'incoherence'. Moreover, the fact that the SEC was appointed as the only authority for the implementation of Section 1502 implicitly confirms the legislative 'discrepancy' between ends and means at the basis of the whole Dodd-Frank act. Indeed, as Karen E. Woody remarks "Requiring SEC to enforce these disclosure requirements [...] demands that it oversees diplomatic and humanitarian regulations for which it lacks the institutional competence".[344] To be clear, the SEC was established in 1934 with its threefold mandate/mission, as follows: "a) protect investors; b) maintain fair, orderly and efficient markets; and c) facilitate capital formation".[345] Regarding Section 1502, the SEC adopted in August 2012 an Implementing Final Rule explaining in detail a three-step process the companies have to undertake in order to comply with the disclosure requirements of the US conflict minerals law.[346]

3. NON-COMPLIANCE

Basically, non-compliance with Section 1502 means failing to disclose the information prescribed by the law according to the specific form established (the Form SD)[347] and an international due diligence framework of reference, such as the 2012 OECD Due Diligence Guidelines. However, are there any consequences for issuers using conflict minerals in their products but complying with Section 1502 disclosure obligations? Definitely not. As a matter of fact, there are not, at the present moment, sanctions for non-compliance with

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344 *Ibid.,* p. 1341.

345 To deepen consult the US Securities and Exchange Commission website: https://www.sec.gov/about/whatwedo.shtml.

346 The SEC Final Rule document is available at the following website: https://www.sec.gov/rules/final/2012/34-67716.pdf. However, since the accurate and detailed nature of the document, it is possible to get a comprehensive overview of the prosivisions by consulting: Ernst & Young, "Conflict Minerals. What you need to know about the new disclosure and reporting requirements and how Ernst & Young can help", 2012. Available at: http://www.ey.com/Publication/vwLUAssets/EY_CnflictMinerals/$FILE/EY_ConflictMinerals.pdf.

347 To have a concept of the Form SD see: http://us.practicallaw.com/0-521-4859.

Section 1502. Nevertheless, it is interesting to know that, even the concept of non-compliance, *eo ipso,* reveals several different understandings. For instance, legally speaking, there are at least three direct consequences for those who fail to comply with the rule, as follows:

1. The SEC Office of Enforcement has the power to take enforcement actions against non-compliant companies; (even if is unlikely that the SEC will endorse it)
2. Section 18 of the Securities and Exchange Act of 1934[348] provides a private right against any person who makes a false statement on which a purchaser or seller of a security relies, unless the person can show he did not know the statement was false or that the statement did not affect the price of the security;
3. Other Conflict Minerals law[349]: some US cities and states have started to pass laws on conflict minerals in line with the US one. Specifically: *California SB 861* - which passed in 2011 - bars state officials from awarding procurement contracts to companies that have failed to comply with the SEC's conflict minerals rule.[350] Maryland, Massachusetts, and the cities of Pittsburgh, Pennsylvania, and Petersburg, Florida have adopted or considered to adopt similar legislations.

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348 Securities and Exchange Act, 1934. Available at: https://www.sec.gov/about/laws/sea34.pdf.

349 Another thing worth mentioning is that Canada is currently involved in seeking to adopt a "Conflict Minerals Act" (Bill C-486) requiring "Canadian companies to exercise due diligence in respect of the exploitation and trading of designated minerals originating in the Great Lakes Region of Africa in seeking to ensure that no armed rebel organization or criminal entity or public or private security force that is engaged in illegal activities or serious human rights abuses has benefited from any transaction involving such minerals". However, the bill has been defeated. The document is available at the following website: http://www.parl.gc.ca/content/hoc/Bills/412/Private/C-486/C-486_1/C-486_1.PDF.

350 It is noteworthy to say that since January 2012 US companies that do business in California have been subject to the *California Transparency in Supply Chains Act of 2010* (SB-657). The law requires retail sellers and manufacturers doing business in the state to disclose - by posting on their websites - their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The document is consultable at the following address: http://www.state.gov/documents/organization/164934.pdf.

Despite its "just reporting requirement" nature, the enactment of Section 1502 has activated a process of remarkable *indirect pressure* exerted by various stakeholders on companies, especially NGOs, in order to push these to meet their obligations under the law. After all, as the famous Supreme Court Justice Louis Brandeis suggested, "sunlight is said to be the best of disinfectants".[351]

4. AN INDIRECT PENALISING SYSTEM

Beyond the unintended consequences of Section 1502, the indirect penalizing system described at the beginning of this contribution, actually triggers a twofold mechanism. Pragmatically, on the one hand, the US proposal results overturned in a *de facto* ban by penalizing the very beneficiaries it intends to help the Congolese people (negative effect). On the other, the legislation profits from its "naming and shaming" nature by managing to oblige issuers to comply with SEC disclosure requirements in order to "save their face", the so-called reputational risk (positive outcome).

4.1. A de facto embargo

Described as a *de facto embargo*[352], nicknamed "Obama's Law",[353] Section 1502 has effectively imposed a ban on Congolese mineral exports and put million of Congolese miners out of work because the eastern DRC economy still depends on its mining industry to a considerable extent.[354] Indeed, the high-level of unemployment

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351 Drimmer J. C. and Philips N. J., 2012, p. 12.

352 Woody K. E., 2012, p. 1345.

353 Seay L. E., "What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy", Center for Global Development, Working Paper 284, 2012, p. 1. See also "Africa and 'Obama's Embargo'", *Wall Street Journal,* 18 July 2011. Available at: http://www.wsj.com/articles/SB10001424052748703956604576109773538681918.

354 "Notably from eastern DRC where mineral trade is estimated to account for roughly 90% of export revenue", Grieger G., 2014, p. 4.

forced a large number of artisanal miners to join armed groups or engage in mineral smuggling as the solely alternative for making a living.[355]

Politically and locally speaking, the US conflict minerals bill has not passed 'indifferent'. Specifically, the disastrous economic effects produced by Section 1502 have been compounded by the so-called DRC President Joseph "Kabila's ban" who, in an attempt to boycott Section 1502, imposed a general suspension of mining exploitation in the areas of North Kivu, South Kivu and Maniema provinces[356] from September 2010 to April 2011.

As a matter of fact, Section 1502 has resulted in a "strong deterrent" for reporting companies - the so-called *competitive disadvantage* - as well as it has caused a *market distortion* on Congolese minerals.

→ COMPETITIVE DISADVANTAGE

Assumed that, as Commissioner Gallagher have observed, Section 1502 may "contribute to a reduction in, or abandonment of, commercial activity in DRC leading to a '*de facto* economic embargo' on minerals sourced from the region",[357] it is interesting to focus on another interrelated negative aspect regarding the ban on Congolese minerals. Particularly, even though the US legislation aims at the harmonisation of standards, the disclosure requirements, which impose *per sè* a certain degree of liabilities on companies, "will function to create a *market disincentive* with regard to sourcing from the region".[358] Indeed, the aforementioned ban has inadvertently prompted a chain reaction devastating economic results. In a *vicious circle* dynamic, when companies recognise that, in order to comply with the disclosure requirements of the conflict minerals legisla-

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355 *Ibid.*

356 ITRI. Delivering the future of the tin. "DR Congo mining ban announced by President Kabila: impact on iTSCi project", 13 September 2010. Available at https://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=992&Itemid=177.

357 Arimatsu L. and Mistry H., "Conflict Minerals: The Search for a Normative Framework", Chatham House, International Law Programme Paper, IL PP 2012/01, 2012, p. 27.

358 *Ibid.*

tion, they face potential legal and economic consequences for their activities (e.g. compliance costs, and operational, reputational and legal risks),[359] they will probably feel discouraged to undertake the requirements mandated by the conflict minerals law. As a result, if the minerals, which companies depend on, contribute to the conflict in the DRC, they could simply decide to divest from the region by rendering Congolese minerals valueless, leaving a mining-depended economy in ruins.[360] Perfectly in line with these assumptions, as Drimmer and Philip explain, the 'transparency' aspired through the disclosure requirements mandated by Section 1502 "will lead those 'downstream' in the supply chain, and consumers, to disfavour companies using conflict minerals in their products and processes".[361]

→ MARKET DISTORTION

Economically speaking, the *de facto* ban has brought a sort of market distortion according to which "American companies rather than run the risk of buying any minerals that might have been smuggled from the Congo are simply refusing to buy minerals from central Africa".[362] For instance, Arimatsu and Mistry stressed, the feasibility of determining if a product has been effectively 'contaminated' by a conflict minerals in order to label it as "DRC conflict free" is all but ascertained. Rather, it is more probable that "businesses would simply source from outside the region to avoid breaching the rigid requirement".[363] Therefore, by restricting the effective US's business ability to obtain minerals from the DRC and Covered Countries, Section 1502 of the DFA has opened the door for other

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359 Mini-roundtable, "Conflict Minerals Disclosure Requirements". *Risk & Compliance*, October-December 2014, p. 124. Available at: www.riskandcompliancemagazine.com.

360 Ochoa C. and Keenan P. J., "Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation", *Maurer School of Law: Indiana University,* Faculty Publications, Paper 1316, 2011, p. 148.

361 Drimmer J. C. and Philips N. J., 2012, p. 15.

362 Woody K. E., 2012, p. 1346. See also, "Congo: America Gives China A Mineral Monopoly", *StrategyPage, the News as History,* 16 August 2011. Available at https://www.strategypage.com/qnd/congo/20110829.aspx.

363 Arimatsu L. and Mistry H., 2012, p. 27.

investors, which can benefit from the unintended consequences of the conflict minerals Bill. Concretely, Section 1502 gave Chinese firms a virtual monopoly on some Congolese minerals. As a civil society member, Jason Lueno Maene, pointed out in relation to the Chinese mineral buyers: *They are paying 20 percent less, maybe even 30 percent less than the old price, because now they are the only buyers [...] The lower price means fewer people are bringing minerals to sell, and a lot of mines have suspended operations. But the Chinese are buying what comes to them. Their warehouses are full, with constant turnover.*[364]

4.2 The efficacy of a naming and shaming legislation

According to Bryan Stuart Silverman, disclosure laws are used as a shaming mechanism. Indeed, by "alerting shareholders to offensive corporate practices, the laws can indirectly modify substantive corporate practices through shareholders demands".[365] By taking a wider perspective, the effects of Section 1502 have literally transformed it in a *naming and shaming* legislation since it cannot mandate companies to stop or even cease their use of conflict minerals. The 'shaming' should incite issuers to make change and to become proper corporate actors in line with the conflict minerals legislation. It is implicit and indirect the effect the law aims at attending: in a *virtuous circle* perspective, the law boosts companies to be 'responsible' by means of the disclosure requirements, which, being available on websites, constitute an incentive for issuers to

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364 Magistad M. K., "Slideshow: Why Chinese Mineral Buyers are Eying Congo", PRI's The World, Conflict and Justice, 26 October 2011. Available at: http://www.pri.org/stories/2011-10-26/slideshow-why-chinese-mineral-buyers-are-eying-congo.

365 Silverman B. S., "One Mineral at a Time: Shaping Transnational Corporate Social Responsability Through Dodd-Frank Section 1502", *Oregon Review of International Law,* Vol. 16(127), p. 144.

respect the law. In other terms, it could be probable that corporate actors comply with the conflict minerals obligations in order to "save their faces" - namely, a reputational damage/risk.[366]

All things considered, the *naming and shaming* mechanism is believed to be a successful deterrent to oblige issuers to exercise due diligence and to comply with the disclosure requirements of Section 1502. However, more than being 'pushed' by *noble purposes*, companies or issuers feel obliged to abide their conflict minerals law obligations just to maintain *credibility* at international and national level, and in economic terms, to keep their revenues alive. Indeed, the *name and shame* is nothing more than a subtle *ruse* that leverages on an international common sense.

Ultimately, the final assessment of Section 1502 is all but promising: "the expected high compliance costs, an extensive administrative burden […] coupled with the scarcity of traceability and certification schemes on the ground to perform supply-chain due diligence have prompted many companies to pull out of the region altogether".[367]

5. THE INDIRECT EXTRATERRITORIAL JURISDICTION

Another interesting aspect concerning Section 1502 is that the legislation could be enter into the domain of what has been identified as a "common habit" of the US governmental action: attending *extraterritorial* goals by means of indirect approaches.[368] Dealing with Section 1502 as an expression of the US extraterritoriality means to define the legislation as "just foreign policy masquerad-

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366 "The requirement under Section 1502 for companies to disclose on their website whether they are sourcing labelled "DRC conflict free", or on the contrary, "not DRC conflict free has created significant reputational risks", Grieger G., 2014, p. 4. See also Mini-roundtable, 2014, p. 124; and Arimatsu L. and Mistry H., 2012, p. 34.

367 Grieger G., 2014, p. 3.

368 Woody K. E., 2012, p. 1345.

ing as securities regulation".[369] Indeed, the law has a foreign policy objective with an intended "ultimate effect outside the borders of the US".[370] Specifically, the Congress would have chosen a direct extraterritorial jurisdiction to address the stated aim of the conflict minerals legislation: "improve the security situation in the DRC by supporting a conflict-free mining economy that benefits the Congolese people".[371] This goal would have been achieved by simply banning any product from any company, domestic or foreign, to be sold in the US if it contained conflict minerals. However, in doing so the Congress would not have had influence on companies not registered on an American exchange and therefore not recipient of Section 1502. Instead, by selecting a more indirect approach, it could control all companies belonging to the supply chain in which the final product is manufactured. In other words, the Congress has chosen the strategy that allowed it to influence the majority of the issuers, even those that are not directly subject to the Section 1502 disclosure requirements.[372] Indeed, any foreign company outside the direct umbrella of conflict minerals requirements could easily be involved by feeling the pressure of those companies that comply with the aforementioned obligations. Therefore, they could choose to meet the standards of the provision, even if they are not theoretically obliged to do so.

In theory, at first glance, it may seem that the US legislation on conflict minerals is narrower in scope than the two international provisions committed in addressing the issue - namely, the OECD Due Diligence Guidance and the resolutions delivered at the United Nations Security Council level, included the UN Due Diligence Guidelines.[373] Indeed, if the former is addressed to only

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369 Drimmer J. C. and Philips N. J., 2012, p. 18.

370 *Ibid.*

371 As quoted in Woody K. E., 2012, p. 1345: 155 CONG REC. 10599–10600 (2009) (statement of Sen. Feingold).

372 Woody K. E., 2012, pp. 1342-1343.

373 The UN Due Diligence Guidelines is available at http://www.un.org/News/dh/infocus/drc/Consolidated_guidelines.pdf.

SEC-registered companies, the latter are addressed to "all companies in the mineral supply chain that supply or use tin, tantalum, tungsten and their ores or mineral derivatives and gold sourced from conflict-affected and high-risk areas".[374]

In practice, as explained above, the legal 'gap' is "likely to make little difference since the SEC-reporting companies will necessarily require all those companies with which they do business to comply with the terms of the Dodd-Frank Act".[375]

6. THE RISE OF SOCIAL CONSCIOUSNESS FOR CORPORATIONS

However, to what extent should companies, issuers or corporations feel obliged to have a "responsible-sourcing" behaviour? Is it sufficient the indirect effect triggered by Section 1502 to persuade issuers to be 'proper' corporate actors? In other words, although the effective deterrent exerted by the US conflict minerals bill, the successful outcome of influencing more issuers than those directly involved under the legislation is mainly due to the favourable intersection of aims with another, and broader, trend of international concern: the rise of the Corporate Social Responsibility.[376]

Firstly endorsed at UN level through the *Guiding Principles on Business and Human Rights*[377], over the two past decades companies started to recognise the impossibility to do business without take care of human rights principles. The corporate social impact has became the more and more an element to take into consideration

374 Arimatsu L. and Mistry H., 2012, p. 27.

375 *Ibid.*

376 Noteworthy, the concept of Corporate Social Responsability (CSR) has been endorsed at the European Commission level since 2011 through "A renewed EU strategy 2011-2014 for Corporate Social Responsability", COM(2011) 681 final, Brussels, 25-10-2011.

377 United Nations, UN Human Rights Officer, "Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect, and Remedy" Framework", New York and Geneva, 2011. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

in setting a business, in assessing an economic strategy or in outlining the pros and cons of a corporate action. On an operational level, "companies can no longer serve as passive participants in host countries, contributing to the local economy and seeking to avoid harm".[378] Therefore, maintaining a sort of "social licence"[379] to operate means to consider the respect of the stakeholders in the local communities companies do business, to provide economic aids if necessary and to include the local needs when developing a particular business strategy. Eventually, companies have to assess "likely adverse human rights impacts by considering applicable laws, regulations, norms and the expectations".[380]

In this framework, Section 1502 could be viewed as "a reflection of now well-recognized market trends making social criteria more important to investors".[381] Nevertheless, in light of the considerations drawn above, it seems not quite accurate to associate Section 1502 with an investor focus. Rather, the conflict minerals legislation could be best viewed as "a new kind of mechanism to compel corporations - like states and individuals before them - to play a role in protecting human rights".[382] Eventually, the ultimate effect of Section 1502 remains to be seen since, so far, the law has damaged the very beneficiaries it intended to help: the Congolese people.

7. THE UNSCR 1952

The United Nations focus in tackling the sensitive situation in the DRC has been primarily addressed to severe the linkage between armed conflict and illegal exploitation on minerals and to maintain the peace and security in the region through good governance and transparency. Since 2004, with the UNSCR 1533, a

378 Drimmer J. C. and Philips N. J., 2012, p. 1.

379 *Ibid.*

380 Drimmer J. C. and Philips N. J., 2012, p. 20.

381 *Ibid.,* p. 16.

382 *Ibid.,* p. 18.

Committee of the Security Council (Sanction Committee) as well as a Group of Experts have been instituted to strongly act and monitor the particular situation in the DRC, especially in the eastern part. However, the overlap of strategies among the different initiatives delivered have created a sort of 'confusion' that has made the UNSC "one-size-fits-all" approach little accurate to deal with the conflict minerals issue.

Nonetheless, by officialising the UN DD Guidelines through the UNSCR 1952 of 2010 a kind of *indirect sanctioning power* has been set up. Precisely, by paragraph 8 of the Resolution 1952 the Security Council not only support the work carried out by the Group of Experts through the UN DD Guidelines, but also requires the *Sanction Committee* whether to designate an individual or entity supporting the illegal armed group in the eastern part of the DRC through illicit trade of natural resources for sanctions, whether the individual or entity has exercised *due diligence*.[383] As a result, this provision gives the DD guidelines an immediate legal effect.

Therefore, even if on paper, the UN DD Guidelines have not a direct legal force on member states or individual and entities operating in or from their jurisdiction, the fact that the Sanction Committee can consider to designate sanctions depending on the exercise of due diligence constitute an *indirect pressure* on companies to comply with the guidelines, and in a wider perspective, to be subject of the disclosure requirements of Section 1502.[384]

To avoid the risk of being the subject of coercive measures, companies will need to design and implement strategies to mitigate the risk of providing direct and indirect support not only to organized armed groups as defined by the Security Council, but also to criminal network and/or perpetuators of serious human rights abuses [...].[385]

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383 UNSCR 1952, p. 3.

384 Arimatsu L. and Mistry H., 2012, pp. 17-18.

385 *Ibid.,* p. 18.

8. CONCLUSION: WHAT COULD BE THE CONTRIBUTION OF A CONSOLIDATED PENALTY SYSTEM?

Taking everything into account, even the mere perspective or the fear of a sanctioning mechanism could be used as a "stick against flagrant violators".[386] In addition, as Ochoa and Keenan points out, the imposition of "targeted sanctions" in the domain of Section 1502, could become a "more popular and more useful tool for states to employ".[387] Specifically, targeted sanctions may include: a) naming specific actors and conflict leaders; b) prohibiting business dealings with named entities; and c) imposing asset freezes and travel bans for named entities.[388]

However, at the present, the unexpected outcomes of Section 1502 constrain the effective functionality of a "conflict minerals regime".

In this framework, the 2014 EU Commission proposal, further amended by the European Parliament on May 2015, for a regulation of the European Parliament and of the Council setting up a Union system for supply chain diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas[389] could be an efficient response to the Section 1502 unintended consequences. Peculiarly,

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386 Hughes J., "Mini-roundtable, Conflict Minerals Disclosure Requirements", p. 136.

387 Ochoa C. and Keenan P. J., 2011, p. 152.

388 *Ibid.*

389 This document is available at the following website: http://eur-lex.europa.eu/resource.html?uri=cellar:5de359c4-a5f8-11e3-8438-01aa75ed71a1.0002.01/DOC_1&format=PDF. For an explanatory summary of the EU proposal consult, Squillaci G., ESU-Ulg trainee (under the supervision of Professor Quentin Michel), "Technical note on the EU Commission proposal, and on the European Parliament amendments of 20 May 2015, for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas", (Brussels, 5.3.2014 COM(2014) 111final 2014/0059 (COD)), *European Security Studies of Liège,* 28 August 2015.

it could be viewed as a way to overcome the US "market distortion" abovementioned and as a way to create legislative ground on the US conflict minerals Law. This should lead to a double positive effect: in particular, to enhance the credibility of the Section 1502 and in more general terms, to contribute to make the system more effective as occurred in the case of the *Kimberley Process Certification Scheme* (KPCS).[390]

390 The KPCS is an "international governmental scheme governing the link between diamonds and conflict". It requires its members to enforce the obligations prescribed through domestic legislation. The core document of the Kimberley Process Certification Scheme is available at: http://www.kimberleyprocess.com/en/kpcs-core-document. Instead, to get a comparison between Section 1502 and the KPCS see: Woody K. E., 2012, pp. 1347-1350.