

## NOTES

# SANCTIONS, TRANSPARENCY, AND ACCOUNTABILITY: THE MISSING LINKS IN NATURAL RESOURCE ANTI-CORRUPTION EFFORTS

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*Openness, transparency—these are among the few weapons the citizenry has to protect itself from the powerful and the corrupt . . .*<sup>1</sup>

### ABSTRACT

*When natural resource governance breaks down, corrupt exploitation of those resources often fills the management void. International demand for rare minerals has long turned a blind eye to the negative effects of natural resource corruption. Yet, as human rights abuses and harmful effects of failed governance have become more internationally recognized, international coalitions and individual countries have sought solutions to the natural resource curse. These efforts have found varying degrees of success. This paper argues that, through sanctions, voluntary reporting mechanisms, and mandatory reporting programs, governance of our world's most corruption-filled natural resource sectors is greatly improved but not yet poised to stop natural resource corruption in its tracks. To ensure accountability in the natural resource sectors, international and domestic programs should increase enforcement muscle through tools such as criminal sanctions and fines.*

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1. Andrew Hough, *WikiLeaks: Michael Moore Says Supporting Julian Assange 'True Act of Patriotism'*, THE TELEGRAPH (Dec. 15, 2010), <http://www.telegraph.co.uk/news/worldnews/wikileaks/8202567/WikiLeaks-Michael-Moore-says-supporting-Julian-Assange-true-act-of-patriotism.html> (quoting Michael Moore).

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I. INTRODUCTION

Corruption can be defined as a problem of access in a general sense. Bribes are regularly paid around the globe for access to business opportunities, special treatment, and hard-to-attain resources.<sup>2</sup> Robert Klitgaard famously equated corruption to a simple formula<sup>3</sup>:

$$\text{Corruption} = \text{Monopoly} + \text{Discretion} - \text{Accountability}$$

When the government holds a monopoly and lacks accountability, bribes are often demanded by officials, who find they can get more out of the public than they can from their government employer, or insisted upon by companies, which want to bypass competition for contracts or a long wait for lottery access.<sup>4</sup>

2. See, e.g., David Smith, *Zimbabwe Regime Accused of Stealing \$2bn in Diamonds*, THE GUARDIAN (Nov. 12, 2012, 13:54 EST), <http://www.theguardian.com/world/2012/nov/12/zimbabwe-diamonds-mugabe-marange-fields>; Henry Ridgwell, *Bribery and Corruption Worsening Worldwide, Survey Shows*, VOICE OF AMERICA (July 9, 2013, 8:33 AM), <http://www.voanews.com/content/corruption-on-the-rise-global-survey-shows/1697914.html>.

3. Robert Klitgaard, *International Cooperation Against Corruption*, INTERNATIONAL MONETARY FUND 4 (March 1998), <http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaard.pdf>.

4. See, e.g., Mark Jaffe, *Denver City Employee Indicted on DIA Contract Bribery Charges*, DENVER POST (Apr. 27, 2015, 12:29 AM), <http://www.denverpost.com/2015/04/27/denver-city-employee->

In the natural resource sector, control over commodities can mean great power and dominance. As such, corrupt dealings are particularly rampant when state officials manage natural resource use or when state mechanisms for resource management fail.<sup>5</sup> In the event of management collapse, corporations have a tough decision to make. In 2003, researcher Philippe LeBillon spelled out the problem clearly:

Although extractive businesses may decide not to invest or to disengage from their current operations, they generally sustain their access to resources and protect their investments by paying ‘whoever is in power’—ranging from a few dollars to let a truck pass a checkpoint, to multimillion dollars concession signature bonuses paid to belligerents.<sup>6</sup>

Unsurprisingly, violence and repression are a common theme within this sector’s management.<sup>7</sup> Additionally, empirical evidence finds that war is more likely to be associated with resource abundance than scarcity; the so-called resource curse is a very real phenomenon.<sup>8</sup>

Blood diamonds, first exposed internationally by the non-governmental organization (NGO) Global Witness and made famous by a Brad Pitt film,<sup>9</sup> are just one example of the many natural resource commodities that are routinely extracted, exploited, and used to fuel conflict and nefarious aims.<sup>10</sup> Lootable resources, including diamonds, gold, other minerals, and timber, have been found to be some of the most important predictors of conflict.<sup>11</sup> Natural resource governance is, then, an ever-growing field of scholarship and international interest.

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indicted-on-dia-contract-bribery-charges/; Ricardo Moraes, *Petrobras Ends Rig Contract with EnscO Over Bribery Allegations*, REUTERS (Jan. 6, 2016, 6:28 PM), <http://www.reuters.com/article/us-brazil-petrobras-ensco-idUSKBN0UK1DV20160106>; Michael Johnston, *Poverty and Corruption*, FORBES (Jan. 22, 2009, 6:00 PM), [http://www.forbes.com/2009/01/22/corruption-poverty-development-biz-corruption09-cx\\_mj\\_0122johnston.html](http://www.forbes.com/2009/01/22/corruption-poverty-development-biz-corruption09-cx_mj_0122johnston.html).

5. Philippe LeBillon, *The Political Ecology of War and Resource Exploitation*, 70 *STUD. POL. ECON.* 59, 69 (2003).

6. Interestingly, this paper’s publication preceded the initiation of the Extractive Industries Transparency Initiative by several months. *Id.* at 71.

7. Violent resource control is prevalent in both the extractive industries and logging. *Id.* at 65, 69.

8. LeBillon, *supra* note 5, at 61.

9. *BLOOD DIAMOND* (Warner Bros. 2006).

10. *See generally* GLOBAL WITNESS, *A ROUGH TRADE: THE ROLE OF COMPANIES AND GOVERNMENTS IN THE ANGOLAN CONFLICT* (1998).

11. Luke A. Whittemore, *Intervention and Post-Conflict Natural Resource Governance: Lessons from Liberia*, 17 *MINN. J. INT’L L.* 387, 388–89 (2008).

The United Nations, recognizing the effects of these resources, has utilized export bans on “conflict” resources in a number of sanctions regimes with varying success.<sup>12</sup>

The problem of natural resource extraction and corruption is endemic. In *The Heart of the Matter: Sierra Leone, Diamonds and Human Society*, NGO Partnership Canada Africa reported that there was very little to no oversight of the movement of diamonds across borders in the 1990s.<sup>13</sup> States that produced very few diamonds were exporting billions of dollars’ worth of diamonds laundered from neighboring states, and as much as one-fifth of the world’s rough diamond trade is estimated to be “illicit” in some manner, tied to theft, tax evasion, or money laundering.<sup>14</sup> Not to be outdone by its mineral exploiting counterparts, illegal logging generates ten to fifteen billion dollars per year in criminal proceeds, comprising as much as ninety percent of the world’s timber market.<sup>15</sup> Timber industry players target states with weak institutional control of forests, extracting timber as cheaply as possible while exacerbating poverty, inciting conflict, and further preying on the mayhem that ensues.<sup>16</sup>

The past decade has been an exciting time for natural resource exploitation watchdogs. Through the multilateral Extractive Industry Transparency Initiative (EITI),<sup>17</sup> the diamond origin-tracing Kimberley Process,<sup>18</sup> the Dodd-Frank Act of 2010 (Dodd-Frank Act)<sup>19</sup> provisions regarding conflict minerals from the Democratic Republic of

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12. Examples of sanctions regimes this paper will address include Cote d’Ivoire, Liberia, Sierra Leone, and Angola. For more information on conflict timber and conflict minerals in UN sanctions regimes, see GLOBAL WITNESS, *THE LOGS OF WAR: THE TIMBER TRADE AND ARMED CONFLICT* 8 (2002), [https://www.unglobalcompact.org/docs/issues\\_doc/Peace\\_and\\_Business/Logs\\_of\\_War.pdf](https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Logs_of_War.pdf).

13. IAN SMILLIE ET AL., *PARTNERSHIP AFRICA CANADA, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS AND HUMAN SECURITY* 3-4 (2000).

14. Lansana Gberie, *War and Peace in Sierra Leone: Diamonds, Corruption and the Lebanese Connection* 2 (The Diamond & Hum Security Project, Occasional Paper No. 6, 2002).

15. MARILYNE PEREIRA GONCALVES ET AL., *JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING*, *THE WORLD BANK* vii (2012), [http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal\\_Logging.pdf](http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal_Logging.pdf).

16. GLOBAL WITNESS, *supra* note 12, at 13.

17. *History of EITI*, EITI, <https://eiti.org/eiti/history> (last visited May 17, 2017).

18. *About*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/about> (last visited May 14, 2017).

19. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.).

Congo,<sup>20</sup> and the Lacey Act of 1900<sup>21</sup> Amendments of 2008 (2008 Lacey Act Amendments) banning the importation of illegally logged timber,<sup>22</sup> strides are being taken to right the exploitation of natural resources in the world's most mineral-rich areas. This Note will look at natural resource export sanctions in Liberia, Côte d'Ivoire, Angola, and Sierra Leone, and at the absence of export sanctions in the Democratic Republic of Congo. All of these sanctions have been lifted, but many of their effects remain. Most of the sanctions regimes required compliance with the Kimberley Process or another certification scheme to confirm that illegal mining or logging is not occurring. This link suggests an inverse relationship between sanctions and transparency: more transparency, less need for sanctions; less transparency, more sanctions required.

If this is the case, do sanctions and transparency perform a similar role in adding accountability to the corruption equation, tipping the balance away from rampant corruption? Do the transparency regimes function similarly to sanctions committees in naming and shaming corrupt elements in the natural resource industry? As these mechanisms expand and become more widespread, will U.N. natural resource export sanctions fall out of use? More importantly, are the transparency regimes currently in place effective means through which to combat corruption and exploitative extraction of natural resources? The following sections will address these questions. Part II will focus on the current legal frameworks regarding natural resource exploitation, Part III will problematize these frameworks, and Part IV will recommend a more cohesive transparency framework.

## II. INTERNATIONAL AND DOMESTIC DEVELOPMENTS

By the early 2000s, international organizations, NGOs, governments, and corporations were beginning to recognize the importance of ensuring that international trade was not fueling conflict and corruption in the developing world.<sup>23</sup> Southern African states met in Kimberley, South Africa in May 2000 to discuss how to stop the flow of "conflict

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20. 15 U.S.C. § 78m(p) (2015).

21. Pub. L. No. 110-246, 122 Stat. 1664 (codified as amended at 16 U.S.C. §§ 3371-3378).

22. For the amendments themselves, see *Amendments to the Lacey Act from H.R. 2419, Sec. 8204*, U.S. DEP'T OF AGRIC. (2008), [https://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/background-redlinedLaceyamndmnt-forests-may08.pdf](https://www.aphis.usda.gov/plant_health/lacey_act/downloads/background-redlinedLaceyamndmnt-forests-may08.pdf).

23. See *About, KIMBERLEY PROCESS*, *supra* note 18; *History of EITI, EITI*, <https://eiti.org/eiti/history> (last visited May 14, 2017).

diamonds” in the international diamond market.<sup>24</sup> In December 2000, the U.N. General Assembly recognized a need for a global certification scheme for rough diamonds in a landmark resolution.<sup>25</sup> By 2003, the Kimberley Process Certification Scheme (KP) was in force.<sup>26</sup> EITI closely followed, launching in mid-2003.<sup>27</sup>

The United States took additional action against the negative effects of natural resource exploitation in the Dodd-Frank Act and the Lacey Act Amendments of 2008. The Dodd-Frank Act included Section 1502 on conflict minerals specific to the Democratic Republic of Congo (DRC)<sup>28</sup> and Section 1504 on natural resource developers disclosing certain payments to governments.<sup>29</sup> Section 1502 specifically required disclosure of chain-of-custody information related to the extraction and further processing of columbite-tantalite, cassiterite, wolframite, and gold in the DRC.<sup>30</sup> The Lacey Act Amendments expanded prohibited forestry activity to include any involvement with logging in foreign states that is illegal under the applicable foreign legal code.<sup>31</sup> These unilateral actions demonstrate support for the growing international movement against society-damaging natural resource exploitation.<sup>32</sup>

After considering the current state of the above reporting programs and an overview of U.N. sanctions on natural resource exports, this paper will look briefly at five case studies. All five states are labeled as currently or formerly affected by conflict diamonds by the Kimberley

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24. *About, KIMBERLEY PROCESS*, *supra* note 23.

25. *Id.*

26. *Id.*

27. EITI is a multi-stakeholder disclosure scheme in which governments report their natural resource exports and imports; relevant industry groups and NGOs are involved in an observer capacity. *History of EITI*, *supra* note 23.

28. 15 U.S.C. § 78m(p) (2015).

29. *Id.*; see also Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 *GEO. J. INT'L L.* 1043, 1087–88 (2010).

30. Firger, *supra* note 29, at 1088.

31. Stephanie Eberhardt, Comment, *The Lacey Act Amendments and United States' Policing of International Trade*, 35 *HOUS. J. INT'L L.* 397, 402–03 (2013).

32. President Donald Trump, however, has indicated that he would like Congress to repeal the Dodd-Frank Act and has started considering rollback of Dodd-Frank provisions through a recent executive order. See Renae Merle & Steven Mufson, *Trump Signs Order to Begin Rolling Back Wall Street Regulations*, *WASH. POST* (Feb. 3, 2017), [https://www.washingtonpost.com/business/economy/trump-signs-order-to-begin-rolling-back-wall-street-regulations/2017/02/03/650668d8-ea30-11e6-80c2-30e57e57e05d\\_story.html](https://www.washingtonpost.com/business/economy/trump-signs-order-to-begin-rolling-back-wall-street-regulations/2017/02/03/650668d8-ea30-11e6-80c2-30e57e57e05d_story.html).

Process.<sup>33</sup> Liberia, Sierra Leone, Côte d'Ivoire, and Angola are four states in sub-Saharan Africa that were put under U.N. natural resource export sanctions.<sup>34</sup> The DRC, another sub-Saharan African state, is also well known for its mine problems, but the U.N. Security Council (UNSC) never put a ban on exports.<sup>35</sup>

A. *Reporting Mechanisms and Legal Regimes, Although Piecemeal, Are Showing Encouraging Development*

As recently as the turn of the century, natural resource exploitation was a reality in resource-rich areas that went widely unnoticed by the international community. Steps taken since 2000 to propose, develop, and implement both voluntary and mandatory reporting mechanisms around the globe demonstrate widespread concern for the corruption and human rights abuses that go hand-in-hand with resource extraction, particularly in economically poor areas.

1. International Reporting Mechanisms

On an international scale, two major natural resource reporting mechanisms are at the forefront. The Extractive Industries Transparency Initiative aims to increase transparency across natural resource governance,<sup>36</sup> while the Kimberley Process focuses on diamond trade transparency.<sup>37</sup>

a. *EITI*

International stakeholders formed EITI with an aim to encourage companies and states to address key governance issues surrounding the oil, gas, and mining industries through standards of transparency and accountability.<sup>38</sup> EITI stood on the shoulders of other transparency efforts, following a World Bank mandate that all extractive industry

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33. *FAQ: What Areas of the World Are Affected by Conflict Diamonds?*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/faq> (last visited May 17, 2017).

34. Rep. of the S.C., *Research Report on U.N Sanctions: Natural Resources 2*, n.1 (2015), [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research\\_report\\_4\\_sanctions\\_2015.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_4_sanctions_2015.pdf). [hereinafter S.C. Natural Resources Report].

35. GLOBAL WITNESS, *THE TRUTH ABOUT DIAMONDS 1* (2006), [https://www.globalwitness.org/sites/default/files/import/the\\_truth\\_about\\_diamonds.pdf](https://www.globalwitness.org/sites/default/files/import/the_truth_about_diamonds.pdf) [hereinafter TRUTH ABOUT DIAMONDS].

36. *History of EITI*, *supra* note 23.

37. *About*, KIMBERLEY PROCESS, *supra* note 20.

38. *Who We Are*, EITI, <https://beta.eiti.org/about/who-we-are> (last visited May 14, 2017).



projects funded by the World Bank must publish their payments to governments and the Publish What You Pay (PWYP) initiative.<sup>39</sup> PWYP is a civil society-led initiative aimed at increasing government accountability by encouraging extractive industry disclosure of payments to governments by corporations.<sup>40</sup> PWYP objectives included mandatory public disclosure requirements for extractive industry investments that would precede listing on international stock exchanges and foreign markets.<sup>41</sup> PWYP's model had various shortcomings, including uneven effects on public companies versus private or government-owned properties.<sup>42</sup>

Building on these models, former U.K. Prime Minister Tony Blair launched EITI at the Summit on Sustainable Development in Johannesburg in 2002.<sup>43</sup> Unlike PWYP, EITI works on the country level, encouraging companies, government, investors, and NGOs in the extractive industries to opt in to promote revenue transparency in this sector.<sup>44</sup> Implementation criteria include: wide publication of payments and revenues from extractive industries, independent audits, reconciliation of discrepancies in payments and revenues data, involvement of all types of extractive industry companies and civil society groups, and a financially sustainable work plan.<sup>45</sup> EITI compliance does not require a state to be free of corruption; rather, member states are encouraged to use EITI data to identify and address weaknesses in management of their natural resource sector.<sup>46</sup>

A multi-stakeholder initiative, EITI involves representatives from the government, extractive industry, and civil society from each member state.<sup>47</sup> There are currently fifty-one implementing states, thirty-one states compliant with EITI requirements, and forty-nine states that have published revenues; these published revenues comprise a total of \$1.910 trillion that has been reported in government revenues from

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39. MARY ELLA KEBLUSEK, IS EITI REALLY HELPING IMPROVE GLOBAL GOOD GOVERNANCE?, NIGER DELTA PROFESSIONALS FOR DEVELOPMENT 7 (Jan. 2010), <http://nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>.

40. *About*, PUBLISH WHAT YOU PAY, <http://www.publishwhatyoupay.org/about/> (last visited April 2, 2017).

41. KEBLUSEK, *supra* note 39, at 7.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 8–9.

46. *How We Work*, EITI, <https://beta.eiti.org/about/how-we-work> (last visited May 14, 2017).

47. *Id.*



oil, gas, and mining.<sup>48</sup> The 2016 EITI Standard describes the EITI process as three steps: first, a national multi-stakeholder group decides how EITI will work in their state; then, annual reports are made alongside recommendations for improving governance of the extractive industries; lastly, this information is widely shared to inform public debate.<sup>49</sup>

EITI has seen some very encouraging responses from companies seeking to maintain good reputations on the international scene. For instance, a 2016 EITI briefing on Chinese companies in the EITI found that at least 130 Chinese companies are reporting globally, a surprisingly high number given China's corporate culture of privacy.<sup>50</sup> While the regime lacks teeth, it has slowly been changing the culture of transparency around these resources.

b. *Kimberley Process*

The Kimberley Process, a U.N.-backed rough diamond certification scheme, regulates the international trade in rough diamonds by tracing a diamond from its origin mine, seeking to ensure that its extraction and sale do not further conflict.<sup>51</sup> Diamonds, often the resource of choice for rebels, cannot yet be traced through scientific means.<sup>52</sup> Instead, the KP relies on certifications of origin, sealed containers, and chain-of-custody monitoring.<sup>53</sup> Under current KP standards, member states can only trade with other participants who have also met the minimum requirements of the KPCS scheme, and all international shipments of rough diamonds must be accompanied by KP certificates.<sup>54</sup> The current fifty-four participants<sup>55</sup> comprise approximately 99.8% of the world's production of rough diamonds.<sup>56</sup> The World

48. *Countries*, EITI, <https://beta.eiti.org/about/how-we-work> (last visited May 14, 2017).

49. EITI INT'L SECRETARIAT, *THE EITI STANDARD* (2016), [https://eiti.org/files/english-eiti-standard\\_0.pdf](https://eiti.org/files/english-eiti-standard_0.pdf) [hereinafter EITI STANDARD].

50. EITI INT'L SECRETARIAT, *CHINESE COMPANIES REPORTING IN EITI COUNTRIES: REVIEW OF THE ENGAGEMENT OF CHINESE FIRMS IN COUNTRIES IMPLEMENTING THE EITI 4* (2016), [https://eiti.org/sites/default/files/documents/eiti\\_chinese\\_companies\\_reporting\\_updated\\_feb2016.pdf](https://eiti.org/sites/default/files/documents/eiti_chinese_companies_reporting_updated_feb2016.pdf).

51. *FAQ: What is the Kimberley Process?*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/faq> (last visited May 22, 2016).

52. LeBillon, *supra* note 5, at 75; *FAQ: Is It Possible To Say Where a Rough Diamond is From?*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/faq> (last visited May 22, 2017).

53. KIMBERLEY PROCESS, *supra* note 52.

54. KIMBERLEY PROCESS CERTIFICATION SCHEME §§ II(a), III(a)–(c), <https://www.kimberleyprocess.com/en/kpcs-core-document> (last visited May 27, 2017).

55. The EU qualifies as one participant. *About*, KIMBERLEY PROCESS, *supra* note 18.

56. *Id.*

Diamond Council, a major industry group, and civil society organizations, including Partnership Africa Canada, participate as observers in KP meetings.<sup>57</sup>

In recent incidents, traders have been presented with fake documents claiming to be Kimberley Process certificates from the Democratic Republic of Congo, Ghana, Angola, and Malaysia.<sup>58</sup> Since the origin verification process relies on chain-of-custody monitoring rather than lab tests, the success of the Kimberley Process depends on proper implementation at all levels. As corruption continues to plague the diamond trade, this process remains imperfect.

## 2. U.S. Enforcement

The United States has taken a more aggressive approach to natural resource exploitation in several areas. The Lacey Act Amendments, focused on imports of timber and plant products, criminalizes dealing in illegally logged products<sup>59</sup>; the Dodd-Frank Act requires companies sourcing metals from the Democratic Republic of Congo to report on their supply chains to help avoid fueling conflict in the region.<sup>60</sup>

### a. *Lacey Act Amendments*

The illegal logging industry has grown under the tenure of countries unable to enforce timber laws thanks to lack of capacity, lack of political will, and corruption.<sup>61</sup> Illegal timber can be even more difficult to trace to its origin than minerals, as legal timber and illegal timber are indistinguishable if papers are forged skillfully.<sup>62</sup> In this climate, buyers can easily claim ignorance of the actual origin, even if they know the wood's source is potentially illegal.<sup>63</sup> The Lacey Act Amendments sought to change this balance by adding teeth to U.S. enforcement of the laws of developing countries that are home to rich timber resources.<sup>64</sup> The Lacey Act is particularly thorough in its prosecution of illegal logging-related activities, criminalizing not only

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57. *Id.*

58. *Enforcement*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/enforcement> (last visited May 27, 2017) [hereinafter *Enforcement*, KIMBERLEY PROCESS].

59. 16 U.S.C. §§ 3372(a)(2) (2015).

60. 15 U.S.C. § 78o (2015).

61. Eberhardt, *supra* note 31, at 409–10.

62. *Id.* at 412–13.

63. *Id.*

64. *Id.* at 414–15.

the harvesting, processing, and transport of timber, but also the later stages of international trade, further processing, and sale.<sup>65</sup>

The Lacey Act's prohibition on importing wood related to any illegal logging<sup>66</sup> was the first of its kind, setting the United States' law as a gold standard.<sup>67</sup> The American interest in rooting out illegal wood in the global market goes beyond an interest in good global governance and anti-corruption efforts, however. Illegal wood has a depressive effect on the legal wood trade, negatively affecting American manufacturers who are playing by the rules.<sup>68</sup>

While the United States cannot adequately combat illegal logging singlehandedly, the Lacey Act Amendments have proven to have a significant bite.<sup>69</sup> Once a wildlife and plant crime law limited to flora native to the United States, the Lacey Act now carries consequences for buyer, seller, or handler of illegal timber from all over the world, giving manufacturers and marketers renewed interest in ensuring that their goods are legally sourced.<sup>70</sup> Jurisdiction ranges from raw material to finished products, and new reporting requirements add paperwork to any import.<sup>71</sup> Serious criminal sanctions follow customs declarations that are found to be false, and prosecution can extend beyond the importer of record.<sup>72</sup> All related imports require a standard of "due care," with the Department of Justice holding that this will be determined on a case-by-case basis.<sup>73</sup>

To date, mostly larger operations have been investigated, but smaller investigations are not off the table.<sup>74</sup> As more large prosecutions are carried out, the hope is that more businesses will turn to proactive compliance measures as a cheaper and safer alternative to prosecu-

65. *Id.*

66. 16 U.S.C. §§ 3372(a)(2) (2015).

67. *Id.* at 414.

68. *See id.* at 413; *see also* Sean H. Waite, *Blood Forests: Post Lacey Act, Why Cohesive Global Governance is Essential to Extinguish the Market for Illegally Harvested Timber*, 2 SEATTLE J. ENV'T'L L. 317, 342 (2011).

69. Eberhardt, *supra* note 31, at 428.

70. 16 U.S.C. §§ 3371-78 (2015); *see also* Waite, *supra* note 68, at 336.

71. *See* Waite, *supra* note 68, at 334-35.

72. Customs declarations must include the scientific name of the tree, the volume of the import, the value of the import, and the country of origin. *Id.* at 334.

73. *Id.* at 335.

74. *See Tennessee: Deal with Guitar Maker Ends Case on Illegal Import of Wood*, N.Y. TIMES (Aug. 7, 2012), <http://www.nytimes.com/2012/08/07/us/deal-with-gibson-guitar-corporation-ends-case-on-illegal-import-of-wood.html>; Ben Fox Rubin & Shelly Banjo, *Federal Authorities Raid Lumber Liquidators Headquarters*, WALL STREET J. (Sept. 27, 2013, 6:41 PM), <http://www.wsj.com/articles/SB10001424052702303342104579101042712448428>.

tion.<sup>75</sup> Between legal fees, fines, and public image damage, the cost of investigation can be ruinous.<sup>76</sup>

b. *Dodd-Frank Act*

“The thing that is really unique about Dodd-Frank . . . is it represents the first time that a government has taken that principle of human rights due diligence and made it a legal requirement for companies operating not just on U.S. soil but overseas.”<sup>77</sup> In the same vein as the “due care” standard in the Lacey Act, Sections 1502 and 1504 of the Dodd-Frank Act require “due diligence” on the part of corporations involved in the trade of columbite-tantalite, cassiterite, wolframite, and gold.<sup>78</sup> Companies dealing in tantalum, tin, tungsten (the 3Ts), or gold must disclose any use of these minerals to the U.S. Securities and Exchange Commission (SEC).<sup>79</sup> Companies are responsible for conducting country of origin inquiries into any of the designated materials, determining whether or not the materials may come from the DRC.<sup>80</sup> If the company’s inquiry does not prove that the materials come from a different country of origin than the DRC, due diligence must be taken to determine the chain of custody and ensure that the funds were not entering illegal mining or sourcing operations.<sup>81</sup> The reports on conflict mineral use must be made publicly available on the company’s website, noting whether the materials are “DRC conflict free,” “DRC conflict undeterminable,” or whether they have “Not been found to be DRC conflict free.”<sup>82</sup>

Under the Dodd-Frank Act and related certification and due diligence measures, the mining production quantities of the minerals listed above have declined as global demand for DRC-related products

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75. See Thomas G. Allen, William M. Sullivan Jr., & Benjamin J. Cote, *Lumber Liquidators Case Highlights Lacey Act Risk*, LAW360 (June 11, 2015, 9:22 AM), <http://www.law360.com/articles/665102/lumber-liquidators-case-highlights-lacey-act-risk>.

76. *Id.*

77. Natasja Sheriff, *The Losing Battle Against Conflict Minerals*, ALJAZEERA (Sept. 14, 2015, 7:15 AM), <http://america.aljazeera.com/articles/2015/9/14/the-losing-battle-against-conflict-minerals.html> (quoting Chris Albin-Lackey, Human Rights Watch).

78. Common derivatives of these minerals are tantalum, tin, and tungsten. *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/News/Article/Detail/Article/1365171562058> (last visited May 27, 2017).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

has dwindled.<sup>83</sup> There is not, however, any criminal sanction involved in failing to ensure that a corporation is not sourcing materials from the DRC. Instead, the scheme functions solely on the public scrutiny related to the conflict mineral reports released on the company's website.<sup>84</sup> Some posit that the reasoning behind this limitation is to soften the blow of reporting requirements on miners, as a de facto embargo on DRC conflict-related minerals could affect the livelihoods of as many as two million mining families.<sup>85</sup> Others find this scaled-down reporting to be easier to handle for the SEC, which is not equipped to investigate audits and reports from every corporation importing the 3Ts or gold.<sup>86</sup>

Regardless of the aim, the Dodd-Frank Act conflict mineral provisions<sup>87</sup> fail to threaten the harsh economic impact on non-complying companies in the way the Lacey Act does. If a company wants to avoid bad face without submitting numerous reports and producing independent audits, it can source its minerals elsewhere. If it can afford the bad publicity, it need not even do that. Yet, some tax firms and law firms are addressing these conflict mineral reporting requirements from a proactive compliance program perspective, encouraging their clients to act now to ensure maintenance of a good reputation and good mineral sources.<sup>88</sup>

### B. *Natural Resource Export Embargoes and Case Studies*

In the era of “smart” sanctions, the U.N. targets the financing of rebel groups through individual asset freezes and commodity export

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83. U.N. Mission des Nations Unies en République Démocratique du Congo & U.N. Office on Drugs and Crime, *Experts' Background Report on Illegal Exploitation and Trade in Natural Resources Benefitting Organized Criminal Groups And Recommendations On MONUSCO's Role In Fostering Stability and Peace in Eastern DR Congo*, ¶ 26 (Apr. 15, 2015) [hereinafter MONUSCO Report].

84. Allison M. Blake, Comment, *SEC Cannot Cleanse the Electronics Industry Alone: Blood Minerals Mandatory Disclosure Legislation Effective Only If Applied across the Board*, 39 J. CORP. L. 395, 403 (2013).

85. *Id.* at 404.

86. *Id.* at 404–05.

87. S.C. Res. 1478 (May 6, 2003); S.C. Res. 1689 (June 20, 2006).

88. See, e.g., KPMG INT'L, CONFLICT MINERALS AND BEYOND—PART FOUR: LESSONS FOR AN INTEGRATED COMPLIANCE PROGRAM (Oct. 10, 2014), <https://assets.kpmg.com/content/dam/kpmg/pdf/2014/10/conflict-minerals-beyond-part-four-new.pdf>; Sanjay M. Shirodkar & Sarah E. Ritter, *Supply Chain Management and the Conflict Minerals Rules—Action Items for 2016*, DLA PIPER (Feb. 16, 2016), <https://www.dlapiper.com/en/us/insights/publications/2016/02/supply-chain-management-conflict-minerals-rules/>.

(or import) bans.<sup>89</sup> As diamonds are increasingly linked to the financing of arms and ammunition of rebel groups in sub-Saharan Africa, diamond export bans are increasingly used in U.N. sanctions regimes.<sup>90</sup> Sanctions on diamond exports in Angola, Sierra Leone, and Liberia are touted as successes, though military movement also contributed to the fall from power of rebel groups and authoritarian governments in these states.<sup>91</sup>

The five states discussed below have all been plagued by serious conflict that was in large part funded by illicit natural resource exploitation. The first three, Côte d'Ivoire, Liberia, and Sierra Leone, are West African neighbors, while Angola and the DRC share a large border in south-central Africa. Sierra Leone and Liberia are the most closely tied, with cutting off former Liberian President's Charles Taylor's support of the Revolutionary United Front (RUF) in Sierra Leone as a major aim of the sanctions on Liberia.<sup>92</sup> These examples offer a more detailed understanding of how international bodies have used sanctions and other actions to combat harmful natural resource exploitation.

### 1. Côte d'Ivoire

A diamond export embargo was first utilized in Côte d'Ivoire in 2005 after a U.N. Group of Experts Report suggested that diamonds were being utilized as an illegal source of funds for weapons acquisition by the Forces Nouvelles (an armed rebel group) in 2005.<sup>93</sup> Conflict in Côte d'Ivoire stretched on for a decade, but the embargo was finally lifted in 2014 after several years of Security Council requests for

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89. *Security Council Diamond Sanctions and the Kimberly [sic] Process*, SECURITY COUNCIL REP. (Sept. 28, 2006), [http://www.securitycouncilreport.org/monthly-forecast/2006-10/lookup\\_c\\_gIKWLeMTIsG\\_b\\_2087355.php](http://www.securitycouncilreport.org/monthly-forecast/2006-10/lookup_c_gIKWLeMTIsG_b_2087355.php) [hereinafter *Security Council Diamond Sanctions*].

90. *Id.*

91. *Id.*; see also Web-Based Application: SanctionsApp (Version 3.0, Thomas Biersteker et al., updated Nov. 17, 2015), <http://www.sanctionsapp.com/> [hereinafter SanctionsApp]. The SanctionsApp website, a helpful web-based tool, is only navigable from the main website. The user must select a series of menu choices to reach detailed information about a particular sanctions regime. For instance, reaching this information requires choosing Targeted Sanctions Commodity Diamonds Cases episodes in Angola, Sierra Leone, or Liberia. SanctionsApp itself hosts a database based on the research of the Targeted Sanctions Consortium, a group of more than fifty scholars and policy practitioners worldwide with interest in and specialized knowledge of UN targeted sanctions. UN SANCTIONS APP (July 2013), [http://www.watsoninstitute.org/pubs\\_news/Sanctions-App-flyer-July-2013.pdf](http://www.watsoninstitute.org/pubs_news/Sanctions-App-flyer-July-2013.pdf).

92. *Security Council Diamond Sanctions*, *supra* note 89.

93. S.C. Res. 1643, ¶ 6 (Dec. 15, 2005); Biersteker et al, *supra* note 91, at Cote d'Ivoire—Ep 2.

Kimberley Process reporting.<sup>94</sup>

According to the Transparency International Corruptions Perception Index, the public sector of Côte d'Ivoire is still perceived to be very corrupt, with a score of 34 out of 100 in 2016, relegating the state to a rank of 108 out of 176.<sup>95</sup> The perception of control of corruption is also negative, with a score of -0.42 demonstrating that the perception is that public power is often exercised for private gain, with little governmental control.<sup>96</sup> When perception of corruption is high, there is little trust in the government or in formal government processes. This perpetuates problems of corruption, as more individuals are willing to pay bribes and turn to informal markets.

Côte d'Ivoire has been an EITI member state since 2008 and is compliant with EITI standards.<sup>97</sup> It has also been a member of the KP since 2003.<sup>98</sup> The government of Côte d'Ivoire reported a value of \$112,000 in rough diamond production in 2014, the lowest in this case study grouping. Because Côte d'Ivoire is the only current case of rebel forces controlling diamond-producing areas according to the KP, much of the legal diamond market in Côte d'Ivoire is currently on hold as the U.N. and Côte d'Ivoire's neighboring states work to stop the conflict diamonds from entering the market.<sup>99</sup>

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94. S.C. Res. 2153, ¶ 13 (Apr. 29, 2014); *see also* Michelle Nichols, *U.N. Security Council Lifts Ban on Ivory Coast Diamond Exports*, REUTERS (Apr. 29, 2014, 12:00 PM), <http://www.reuters.com/article/us-ivorycoast-un-diamonds-idUSBREA3S0RQ20140429>.

95. Transparency International's Corruption Perceptions Index is a composite index that draws on a variety of independent and reputable surveys. The most recent survey was conducted in 2015. *Corruption Perceptions Index 2016*, TRANSPARENCY INT'L, [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table) (last visited June 1, 2017).

96. Control of corruption scores are based on a range from about -2.5 to 2.5. Higher scores indicate better governance outcomes. The World Bank's Worldwide Governance Indicators aggregates data from a number of sources to devise this score. Cote d'Ivoire's percentile rank is forty-two percent, up from ten percent in 2010. The most recent survey was taken in 2015. *Worldwide Governance Indicators: Cote d'Ivoire*, WORLD BANK, <http://info.worldbank.org/governance/WGI/#reports> (last visited June 1, 2017).

97. *Cote d'Ivoire*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, [https://beta.eiti.org/implementing\\_country/28](https://beta.eiti.org/implementing_country/28) (last visited May 14, 2017).

98. *Cote d'Ivoire*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/186> (last visited May 14, 2017).

99. *FAQ: What Areas of the World Are Affected by Conflict Diamonds?*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/faq> (last visited May 22, 2017).



2. Liberia

Although Liberia's civil war stretched from 1989 to 2003, diamond sanctions were not imposed until 2001.<sup>100</sup> Throughout most of the diamond export embargo, Charles Taylor's government forces were fighting rebels of the Guinea-based Liberians United for Reconciliation and Democracy (LURD), causing other natural resource sectors to suffer.<sup>101</sup> In 2003, UNSC Resolution 1521 specified a requirement for lifting the sanctions: the establishment of a transparent, effective, and internationally verifiable Certificate of Origin regime.<sup>102</sup> UNSC Resolution 1753 encouraged KP reporting as the diamond exports ban was lifted in 2007.<sup>103</sup> A U.N. press release called for transparency, accountability, and security in Liberia as precursors to the renewal of diamond trade.<sup>104</sup>

Timber export sanctions were imposed in 2003 and lifted in 2006 without additional requirements.<sup>105</sup> Global Witness unsuccessfully called on the U.N. Security Council to continue its export ban on timber unless and until the Liberian government imposed a moratorium on timber exports itself.<sup>106</sup> Global Witness also called for reforms to the Liberian logging sector that included participatory forest/land use planning, comprehensive national forest inventory, a new forest use system, clear chain of custody definitions, and related control systems and structures to combat the resurgence of illegal logging.<sup>107</sup> Liberia's timber sector is still plagued by corruption.<sup>108</sup>

The public sector in Liberia is perceived to be corrupt on the TI Index, with a score of 37 out of 100, but its rank is significantly more favorable than its neighbor Côte d'Ivoire—90 out of 176.<sup>109</sup> Liberia's control of corruption scores has recently moved from more favorable

100. S.C. Res. 1343, ¶6 (Mar. 7, 2001).

101. SanctionsApp, *supra* note 91, at Cases and Episodes Liberia Episode 1; *see also* Liberia, EITI, <https://eiti.org/liberia> (last visited June 4, 2017).

102. S.C. Res. 1521, ¶¶ 7-8 (Dec. 22, 2003).

103. S.C. Res. 1753, ¶ 1 (Apr. 27, 2007).

104. Press Release, Security Council, Security Council Renews Liberia Sanctions on Arms, Travel, Timber, Diamonds, Unanimously Adopting Resolution 1579 (2004), U.N. Press Release SC/8275 (Dec. 21, 2004).

105. S.C. Res. 1478, ¶ 17 (May 6, 2003); S.C. Res. 1689, ¶ 1 (June 20, 2006).

106. *Cautiously Optimistic: The Case for Maintaining Sanctions in Liberia 2*, GLOB. WITNESS (2006).

107. *Id.*

108. *See generally* Liberia: Holding the Line, GLOB. WITNESS (Feb. 17, 2017), <https://www.globalwitness.org/en/reports/liberia-holding-line/>.

109. Corruption Perceptions Index 2016, *supra* note 95.

than its neighbor to slightly less favorable, with a current score of -0.61 to Côte d'Ivoire's -0.42.<sup>110</sup> Liberia has been an EITI member since 2009 and is making "meaningful progress" with the EITI standards.<sup>111</sup> It has been a member of KP since 2007 and reported a value of \$32.5 million from the rough diamond sector in 2015.<sup>112</sup> While perceived as less corrupt than its neighbors,<sup>113</sup> Liberia still has a long way to go.

### 3. Sierra Leone

Sierra Leone's civil war lasted over a decade from 1991 to 2002. Rebel group RUF mined up to \$125 million in diamonds annually. The UNSC imposed diamond sanctions in 2000 and allowed the regime to lapse in 2003.<sup>114</sup> From July 2000 to January 2002, the sanctions were found to be largely effective.<sup>115</sup> The diamond embargo was credited with "an almost complete halt to the traffic in illicit diamonds from Sierra Leone to Liberia."<sup>116</sup>

Sierra Leone is ranked even lower on the Corruption Perceptions Index than both Côte d'Ivoire and Liberia, at a score of 30 out of 100.<sup>117</sup> Ranked 123 out of 176 states, Sierra Leone has recently suffered from falling commodity prices and the 2014 Ebola outbreak, which led to many of the mining operations shutting down.<sup>118</sup> Its Control of Corruption score, -0.78, falls below that of Côte d'Ivoire and Liberia.<sup>119</sup> Sierra Leone has been a member of EITI since 2008 and is currently being assessed against the new compliance standards set in 2016.<sup>120</sup>

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110. Liberia's percentile rank for the control of corruption index is thirty-one percent in the 2015 survey. *Worldwide Governance Indicators: Liberia*, WORLD BANK, <http://info.worldbank.org/governance/WGI/#reports> (last visited June 1, 2017).

111. *Liberia*, EITI, *supra* note 101.

112. *Liberia*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/200> (last visited May 22, 2017).

113. Côte d'Ivoire and Sierra Leone, neighbors of Liberia, both have higher rankings on the Corruption Perceptions Index. *See* Corruption Perceptions Index 2016, *supra* note 95.

114. Diamonds that were controlled by the government of Sierra Leone through a Certification of Origin regime were exempt from the embargo. S.C. Res. 1306 § 5 (July 5, 2000); Biersteker, *supra* note 91, at Sierra Leone – Ep 4.

115. SanctionsApp, *supra* note 91, at Cases and Episodes > Sierra Leone > Episode 4.

116. *Id.*

117. *Corruption Perceptions Index 2016*, *supra* note 95.

118. *Id.*; *Sierra Leone*, EITI, [https://beta.eiti.org/implementing\\_country/11](https://beta.eiti.org/implementing_country/11) (last visited May 27, 2017).

119. Sierra Leone's percentile rank for the World's Bank's Control of Corruption indicator is roughly twenty-one percent. *Worldwide Governance Indicators: Sierra Leone*, WORLD BANK, <http://info.worldbank.org/governance/WGI/#reports> (last visited June 1, 2017).

120. *Sierra Leone*, EITI, *supra* note 118.

Sierra Leone has been a member of the Kimberley Process since 2003 and reported a value of \$154.3 million from rough diamond production in 2015.<sup>121</sup>

#### 4. Angola

Angola was the first country put under a diamond export ban by the UNSC.<sup>122</sup> In a civil war that raged from 1961 to 2002, hundreds of thousands died as the rebel group National Union for the Total Independence of Angola (UNITA) funded its rebellion with control of sixty to seventy percent of the state's vast diamond production.<sup>123</sup> Signed in 1998, UNSC Resolution 1173 imposed a prohibition on the sale of mining equipment to areas not under state administration and forbade the export of diamonds not controlled under the certification of origin scheme or the Angolan government.<sup>124</sup> While UNITA recognized the significance of diamond sanctions in cutting off funding of the rebel group, it was also driven militarily from the mines, undercutting the impact of the sanctions.<sup>125</sup>

Angola comes in last place on the Corruption Perceptions Index—a score of 18 out of 100, leading to a rank of 164 out of 175.<sup>126</sup> In other words, Angola is ranked the twelfth most corrupt state in the world according to Transparency International as of 2016.<sup>127</sup> Its place on the control of corruption index is also low—a score of -1.40.<sup>128</sup> Angola has been a member of the Kimberley Process since 2003 but is not a member of EITI.<sup>129</sup> Angola reported a production of \$1.3 billion in value from the rough diamond sector.<sup>130</sup> Angola's high corruption and status as the second biggest oil producer in Africa are what, according

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121. *Sierra Leone*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/210> (last visited May 27, 2017).

122. GLOBAL WITNESS, *supra* note 35, at 1.

123. *Id.*

124. S.C. Res. 1173, ¶12(b-c) (June 12, 1998).

125. Biersteker et al., *supra* note 91, at Angola.

126. Corruption Perceptions Index 2016, *supra* note 95.

127. *Id.*

128. Its percentile rank on the control of corruption index is an abysmal four percent. *Worldwide Governance Indicators: Angola*, WORLD BANK, <http://info.worldbank.org/governance/WGI/#reports> (last visited June 1, 2017).

129. *Angola*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/1376> (last visited May 27, 2017).

130. *Id.*

to PWYP, make it a strong candidate for EITI.<sup>131</sup> An inter-ministerial working group created over a year ago to evaluate the possibility of Angola membership in EITI, however, has yet to determine whether it is the right step for the resource-rich state.<sup>132</sup> PWYP posits that Angola's lack of independent civil society organizations (CSOs) would make implementation difficult and that the political will of any existing CSOs would be muted by lack of funding and fear of repression.<sup>133</sup>

### 5. Democratic Republic of Congo (DRC)

While the DRC was never subject to a U.N. export sanctions regime, it has often been used as an example of crippling natural resource struggles. The civil war in the DRC was most prominent from 1998 to 2003, but conflict still reigns in eastern Congo today. Millions of lives have been lost in the turmoil of rebel groups competing for control over the resource-rich mines, charcoal, and timber.<sup>134</sup> These rebel groups have stepped in as regulatory figures, taxing goods as they pass through militia checkpoints as well as households under their control.<sup>135</sup> UNSC Resolution 1533 addressed the illegal exploitation of natural resources in the DRC, emphasizing the Security Council's condemnation of this exploitation and affirming the importance of "bringing an end to these illegal activities, including by applying the necessary pressure on the armed groups, traffickers and all other actors involved."<sup>136</sup> No diamond export bans were imposed in DRC by the U.N.<sup>137</sup>

Smuggling networks use a myriad of routes to remove minerals from eastern DRC through Uganda, Rwanda, and Burundi for international sale.<sup>138</sup> The DRC's diamonds are mostly mined outside of the major conflict area, in central Congo.<sup>139</sup> Militia control of diamond mines is limited to raids, with the limited economic gain of an estimated \$500,000 in profit per year.<sup>140</sup> The gold mines, on the other hand, yield

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131. Liliane Chantal Mouan, *Can EITI Make a Difference in Angola?*, PUBLISH WHAT YOU PAY (Feb. 29, 2016), <http://www.publishwhatyoupay.org/can-eiti-make-a-difference-in-angola/>.

132. *Id.*

133. *Id.*

134. GLOBAL WITNESS, *supra* note 35, at 1.

135. MONUSCO Report, *supra* note 83, ¶ 113–15.

136. S.C. Res. 1533, ¶ 6 (March 12, 2004).

137. S.C. Natural Resources Report, *supra* note 34.

138. MONUSCO Report, *supra* note 83, Annex 2.

139. *Id.* ¶ 92.

140. *Id.*

a much higher profit for rebel militias, with \$4,000,000 going to militias—one percent of the total value of DRC gold mines.<sup>141</sup> The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) estimates that \$180-450 million of economic gain resulted from smuggling of an estimated ten tons of gold at the point of sale in 2015.<sup>142</sup> The 3T minerals are much heavier and therefore harder to sell locally, leading to a profit for militias of about \$800,000 annually out of a combined export value of \$73.1 million.<sup>143</sup>

The DRC joined EITI in 2008 and is currently under assessment against the 2016 standard for compliance.<sup>144</sup> The DRC has been a member of the KP since 2003 and reported a value of \$132.5 million in production from the rough diamond trade in 2015.<sup>145</sup>

TABLE 1. GDP, Diamond Production Value, and Corruption Perceptions Index.<sup>146</sup>

State	GDP (bill)	GDP/capita	Diamond Prod. Value (mill)	DPV % of GDP	CPI (2016)
Liberia	\$2.05	\$455.87	\$31.5	1.5%	90
Côte d’Ivoire	\$43.25	\$1398.98	\$0.5	0.0%	108
Sierra Leone	\$4.22	\$653.17	\$154.3	3.7%	123
Angola	\$102.63	\$4101.47	\$1182.1	1.2%	164
DRC	\$35.24	\$456.06	\$132.5	0.4%	156

141. *Id.* ¶ 93.

142. *Id.*

143. The 3Ts are cassiterite (tin), wolframite (tungsten), and coltan (tantalum). *Id.* at ¶ 89.

144. *Democratic Republic of Congo*, EITI, [https://beta.eiti.org/implementing\\_country/5](https://beta.eiti.org/implementing_country/5).

145. *Democratic Republic of Congo*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/184> (last visited May 27, 2017).

146. GDP per capita calculation is based on 2014 GDP and population from the World Bank data. Transparency International’s Corruption Perceptions Index is a composite index that draws on a variety of independent and reputable surveys. Corruption Perceptions Index 2016, *supra* note 95; *Worldwide Governance Indicators*, WORLD BANK, <http://info.worldbank.org/governance/WGI/#reports> (last visited June 1, 2017); *Democratic Republic of Congo*, THE WORLD BANK, <http://data.worldbank.org/country/congo-dem-rep> (last visited May 27, 2017); *Angola*, THE WORLD BANK, <http://data.worldbank.org/country/angola>; *Sierra Leone*, THE WORLD BANK, <http://data.worldbank.org/country/sierra-leone> (last visited May 27, 2017); *Côte d’Ivoire*, THE WORLD BANK (2016), <http://www.worldbank.org/country/cote-divoire>; *Liberia*, THE WORLD BANK, <http://data.worldbank.org/country/liberia> (last visited May 27, 2017).

No clear parallels can be drawn between the diamond revenues, Gross Domestic Product (GDP), and Corruption Perceptions Index of these states based on this data. There are many possible explanations for why there is no clear correlation, including porous borders, tolerance for corruption, and other causes of corruption.

### III. AND YET, THE RESOURCES CURSE PERSISTS

The resource curse continues to pose a pressing global problem, affecting both resource-rich developing countries, as well as the outsiders who deal in their resources and experience second-hand the destabilizing effects of conflict. The distributions of resource rents particularly magnify political schisms in oil and mineral-rich states that lack varied economic opportunity.<sup>147</sup> One major concern in the imposition of sanctions is that criminality and corruption will rise as a result of sanctions cutting off formal markets. Yet, in a sector already plagued by corruption, the current reporting mechanisms are not strong enough to combat rampant illegal exploitation without the more extreme option of sanctions to aid the initial efforts.

#### A. *Sanctions Benefits, Sanctions Busters, and Corrupt Governments*

The most common “unintended consequence” of a natural resource-related sanction is “increase in corruption and criminality.”<sup>148</sup> This negative effect of sanctions is not new to the academic field. In 2005, Peter Andreas developed an analytic framework to identify the potential criminalizing effects of sanctions and finds that there is evidence that sanctions can unintentionally contribute to the criminalization of the state, economic, and civil society of not only the targeted state but also its immediate neighbors.<sup>149</sup> While the negative effects of sanctions have vastly decreased with the dawn of the new smart sanctions, there is no denying that the successful sanctions buster is better poised to continue his trade after sanctions are lifted than his law-abiding neigh-

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147. Resource rents are typically distributed inequitably in the population, driving marginalized groups to seek political change. Often, as seen in the DRC, Liberia, and Sierra Leone, these political changes are pursued through violence. See Lebillon, *supra* note 5, at 63–64.

148. This effect appears in multiple episodes of diamond and timber sanctions in Angola, Liberia, and Cote d’Ivoire, according to SanctionsApp. See SanctionsApp, *supra* note 91, at Targeted Sanctions Commodity Diamonds & Timber.

149. Peter Andreas, *Criminalizing Consequences of Sanctions: Embargo Busting and Its Legacy*, 49 INT’L STUD. Q. 335 (2005).

bor.<sup>150</sup> Andreas found that targeted regimes will sometimes make alliances with organized criminal groups to generate illicit revenue, secure supplies, and strengthen holds on power.<sup>151</sup> The development of what he calls “uncivil society” leads to higher levels of public tolerance for lawbreaking and an undermined respect for the rule of law.<sup>152</sup>

While Andreas looked at sanctions in the Former Republic of Yugoslavia (FRY), Croatia, and Iraq, the sub-Saharan African sanctions regimes in question in this paper have a different focus and character. These sanctions take already-corrupt arenas and attempt to thwart their functionality, raising the risk of corruption through the imposition of embargoes. As Carolyn Nordstrom put in *Global Outlaws*, “In the flux that defines the world of the illegal, beginnings are often endings and vice versa—vice being the operative word here . . . .”<sup>153</sup> In this context, are the effects of sanctions just as criminalizing as Andreas found in FRY, or are they merely failing to solve an already-existing problem? Given the inherent value of natural resources, I posit that it is more often the latter.

#### B. *Reporting Schemes Are Not Strong Enough To Be Reliable Yet*

Weak points plague each of the reporting schemes addressed in this paper: lack of enforcement, corruption along the supply chain, and failure to report detract from the efficacy that these programs could reach. Some of the larger concerns are addressed in this section.

#### 1. EITI

EITI, while a worthwhile project with broad implementation, lacks the bite it could have with a stronger audience for information<sup>154</sup> CSOs can only take discrepancies between announced payments and revenues so far. If EITI is to continue as a voluntary disclosure program without criminal sanction, it needs a more public “stick,” which could be achieved through highlighting those discrepancies more publicly. Though the EITI Standard lists wide dissemination as a major part of

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150. *Id.* at 336–37, 358.

151. *Id.* at 336.

152. *Id.* at 337.

153. CAROLYN NORDSTROM, *GLOBAL OUTLAWS: CRIME, MONEY, AND POWER IN THE CONTEMPORARY WORLD* xv (2007).

154. KEBLUSEK, *supra* note 39, at 21.



the EITI process, it can and should go further.<sup>155</sup> Additionally, EITI is missing a major natural resource in its current formation and should be expanded to include timber in its reporting requirements. The overlap between the problems associated with extractive industries and the timber industry is so great that the burden on members would be minimal.

## 2. Kimberley Process

The Kimberley Process needs more enforcement, breadth, and oversight to work properly.<sup>156</sup> Despite the good intentions of the KP, the nature of certification is such that a corrupt government official can provide all of the necessary paperwork to declare a conflict diamond KP Certified.<sup>157</sup> Expulsion from the KP did not stop the Republic of Congo, a neighbor to Angola and the DRC, from serving as a superhighway for illicit diamond trade.<sup>158</sup> Global Witness, a one-time supporter of the KP, points to three major limitations of the Certification Scheme: a narrow definition of conflict diamonds that prevents the KP from addressing a broader range of risks to human rights posed by the diamond trade, persistent enforcement issues, and application of the scheme to only rough diamonds.<sup>159</sup> As such, Global Witness believes the diamond industry needs to step in to conduct supply chain due diligence in the manner of the Dodd-Frank Act reporting requirements.<sup>160</sup> The KP could learn from the Lacey Act's start-to-finish jurisdiction and broad scope. Without changes to its structure, the KP is at risk of failure.

## 3. Lacey Act Amendments

While the Lacey Act Amendments include robust enforcement mechanisms and a broad mandate, the unilateral law can only go so far to thwart the illegal timber trade. Currently, the illegal logging trade is widely overlooked in international legal fora. Only in the Liberia sanctions regime and the Lacey Act Amendments do we see enforce-

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155. EITI STANDARD, *supra* note 49, at 5.

156. TRUTH ABOUT DIAMONDS, *supra* note 35, at 7.

157. *Enforcement*, KIMBERLEY PROCESS, *supra* note 58.

158. Haley Blaire Goldman, *Between a ROC and a Hard Place: The Republic of Congo's Illicit Trade in Diamonds and Efforts to Break the Cycle of Corruption*, 30 U. PA. J. INT'L L. 359, 359–60 (2008).

159. *Briefing: The Kimberley Process*, GLOBAL WITNESS (April 1, 2013), <https://www.globalwitness.org/en/campaigns/conflict-diamonds/kimberley-process/>.

160. *Id.*

able action on a global scale. Amending the United Nations Convention Against Corruption (UNCAC), incorporating the timber trade into EITI, or encouraging U.N. member states to pass domestic legislation like the Lacey Act Amendments could all expand the impact of this well-crafted law immensely.

#### 4. Dodd-Frank Act

The Dodd-Frank Act, lacking an enforcement mechanism, is struggling in implementation. Compliance costs went well over initial predictions.<sup>161</sup> Poor consultation with DRC government and civil society led to local-level conflicts when Sections 1502 and 1504 were implemented.<sup>162</sup> The most concerning outcome is that onerous reporting requirements have created a de facto embargo on minerals from the DRC.<sup>163</sup> The reporting costs are so much greater for those companies who choose to continue to do business in the DRC that the hurdles, though relatively low, prove too high for many companies.<sup>164</sup> Even those companies that do try to accurately submit conflict mineral reports are coming up short. Out of the 147 companies required to submit CMRs in 2014, more than two-thirds were “DRC conflict undeterminable.”<sup>165</sup> A 2015 Global Witness investigation found that 79 out of the 100 companies analyzed failed to meet the requirements of the Dodd-Frank Act in some way.<sup>166</sup> Almost half of the companies analyzed failed to provide a description of a risk identification policy in their

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161. The initial SEC estimate of compliance cost was roughly \$71 million; that number soared to three to four billion dollars as it realized the enormity of some of the required filings and supply chain investigations. *See* Blake, *supra* note 84, at 407.

162. *See, e.g.*, Open Letter from 70 Academics, Journalists, and Advocates to Governments, Companies, Organisations, and Other Stakeholders Implicated in Efforts Related to Issue of ‘Conflict Minerals’ 2 (Sept. 2014), <https://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf> (citing harmful unintended effects of an increase in illegal mining as artisanal mining operations are unable to meet regulations).

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

164. *See, e.g.*, Melvin Ayogu & Zenia Lewis, *Conflict Minerals: An Assessment of the Dodd-Frank Act*, BROOKINGS (Oct. 3, 2011), <https://www.brookings.edu/opinions/conflict-minerals-assessment-of-the-dodd-frank-act/>; *Congo in Talks with Malaysia Smelting over Tin Foundry*, REUTERS (Oct. 3, 2011, 2:23 PM), <http://af.reuters.com/article/investingNews/idAFJ0E7920KM20111003>.

165. Sheriff, *supra* note 77.

166. *See* DIGGING FOR TRANSPARENCY: HOW U.S. COMPANIES ARE ONLY SCRATCHING THE SURFACE OF CONFLICT MINERALS REPORTING, GLOBAL WITNESS 5 (2015).

Conflict Minerals Reports, an integral part of risk management.<sup>167</sup>

Now, as the Administration seeks to gut Dodd-Frank entirely, the future of this transparency measure is uncertain.<sup>168</sup> Further, a leaked draft of an administrative directive suggests that, even if the Dodd-Frank banking provisions are left intact, the Administration may suspend the conflict minerals provisions for two years.<sup>169</sup> This suspension is permissible under the aegis of national security interests. But despite the difficulty of compliance, some companies, such as Intel, Apple, and Tiffany & Co., are committed to keeping the Dodd-Frank conflict minerals provisions in place, citing a change in culture both internally and in the expectations of their buyers.<sup>170</sup> Though its future is unclear, the Dodd-Frank conflict minerals regime must adopt stricter enforcement measures if it is likely to succeed in widespread change.

#### IV. WITH ACCOUNTABILITY AS THE GOAL, A CALL FOR A LACEY ACT MODEL

In the corruption equation in Part I of this Note, monopoly and discretion are listed as factors affecting corruption. Yet, most sets of recommendations for how to improve natural resource governance focus only on the third factor: accountability, or holding entities and individuals responsible for their actions.<sup>171</sup> While neither sanctions nor current reporting schemes ensure accountability, with the current reporting schemes emphasizing transparency more than consequences for illicit acts, a combination of the two along with real enforcement muscle seems necessary for at least the near future. Without enforceable, reliable certification schemes for most conflict resources, sanctions are needed to provide a reset button in the global market when voluntary reporting schemes fall short.

Going forward, a second wave of anti-corruption efforts is needed. The Foreign Corrupt Practices Act (FCPA),<sup>172</sup> which became law in 1977, criminalizes bribery related to U.S. businesses, in simplified

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167. *Id.* at 21.

168. See Merle & Mufson, *supra* note 32.

169. Sarah N. Lynch & Emily Stephenson, *White House Plans Directive Targeting "Conflict Minerals" Rule: Sources*, REUTERS (Feb. 8, 2017, 8:33 PM), <http://www.reuters.com/article/us-usa-trump-conflictminerals-idUSKBN15N06N>.

170. Todd C. Frankel, *Why Apple and Intel Don't Want to See the Conflict Minerals Rule Rolled Back*, WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/business/economy/why-apple-and-intel-dont-want-to-see-the-conflict-minerals-rule-rolled-back/2017/02/23/b027671e-f565-11e6-8d72-263470bf0401\\_story.html?utm\\_term=.1a40a7ecdd7e](https://www.washingtonpost.com/business/economy/why-apple-and-intel-dont-want-to-see-the-conflict-minerals-rule-rolled-back/2017/02/23/b027671e-f565-11e6-8d72-263470bf0401_story.html?utm_term=.1a40a7ecdd7e).

171. See, e.g., GLOBAL WITNESS, *supra* note 106.

172. 15 U.S.C. §§ 78dd-1 (2012).

terms.<sup>173</sup> The FCPA is a great model for anti-corruption enforcement: enforcement under the FCPA is so active that the FCPA Blog publishes multiple articles a day, and the SEC page on FCPA Cases details many millions of dollars of settlements and judgments.<sup>174</sup> In 2016 alone, the Justice Department resolved criminal FCPA cases with twenty-seven companies, with fines and forfeitures totaling over \$2.4 billion.<sup>175</sup> Following the success of the FCPA in prosecuting bribe-payers both in U.S. companies and in foreign companies with U.S. ties, other states launched their own versions of the FCPA.<sup>176</sup> The global anti-bribery movement has been growing ever since, with more states taking enforcement actions against bribery all the time.

Similarly, the Lacey Act Amendments bring international crime to U.S. courts, slapping sizable fines on companies dealing in illegal timber and failing to exercise due care in their wood sourcing. Additionally, these Amendments, by criminalizing every point of the supply chain, bypass some of the gaps inherent in the effects of FCPA enforcement—not only the intermediate buyer is prosecutable; the seller is as well.<sup>177</sup> If the widespread adoption of FCPA-like legislation is any indication, the world is eager to promote good governance and anti-corruption efforts. Expanding a Lacey Act-like law to cover sourcing of other natural resources could raise the profile of U.S. anti-natural resource exploitation efforts. Additionally, it would give the United States an opportunity to right the wrongs of the Dodd-Frank Act DRC provisions, taking time to consult other governments and civil society groups to determine the best way to address each resource crisis instead of putting a de facto ban on one major source. This model is worth pursuing further across natural resource exploitation schemes to give more teeth to good governance measures and promote a presump-

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173. *Id.* § 78dd-1(a); see also *Foreign Corrupt Practices Act*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/spotlight/fcpa.shtml> (last visited May 14, 2017).

174. FCPA BLOG, <http://www.fcpablog.com/> (last visited May 14, 2017); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited May 14, 2017).

175. Richard L. Cassin, *The 2016 FCPA Enforcement Index*, FCPA BLOG (Jan. 3, 2017, 8:08 AM), <http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html>.

176. The field of anti-bribery and corruption laws is so large now that tax firms are writing their own guides for clients to navigate the landscape. See, e.g., CMS GUIDE TO ANTI-BRIBERY AND CORRUPTION LAWS (2013), <https://cms.law/en/CHN/Publication/CMS-Guide-to-Anti-Bribery-and-Corruption-Laws>.

177. Only bribe payers can be prosecuted under the FCPA; bribe takers get a pass. See Richard L. Cassin, *Bribe Takers Get A Pass Under the FCPA*, FCPA BLOG (May 27, 2008, 10:28 PM), <http://www.fcpablog.com/blog/2008/5/28/bribe-takers-get-a-pass-under-the-fcpa.html>.

tion of compliance and transparency in the United States and abroad. Additionally, an improved KP can easily be incorporated into a due diligence framework for ensuring diamonds are sourced responsibly.

State-supported transparency measures can also help in the larger fight against corruption. The United Kingdom recently published the world's first fully open register of beneficial ownership, which tracks the real ownership of companies and complicates attempts to hide laundered money and tax fraud.<sup>178</sup> Now, a number of other countries are following in the U.K.'s footsteps.<sup>179</sup> While establishing such a register will be complicated for countries with large informal market structures like the countries that are often worst affected by the natural resource curse, such a register could be developed hand-in-hand with EITI records and bolster governance and legitimacy in the country.

Yet, while continuing to support voluntary transparency measures like EITI is important for changing the global culture of business and corruption, the near-term requires more decisive action to stop fueling the natural resource curse with unwitting consumption. Blanket sanctions would only fuel more corruption, but the sanctions-to-transparency model that has been adopted in sub-Saharan Africa offers a good medium ground for offering a reset on accountability while governments regain control of natural resource territory and start to move forward under a transparent and accountable natural resource governance scheme. Requiring such certification schemes, as used in the Liberia diamond export ban language (but lacking in the logging ban requirements), could be a healthy way to diminish the criminalizing effects of post-sanctions vacuums. If each natural resource exploitation crisis could be met with sanctions as a reset, transparency regimes as a change of culture, and enforcement muscle as deterrence to bad actors, natural resources need not be a curse forever.

## V. CONCLUSION

When natural resource governance breaks down, corrupt exploitation often fills the management void. As human rights abuses and harmful effects of failed governance have become more internationally recognized, international coalitions and individual countries have sought solutions to the natural resource curse. Through sanctions,

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178. Rosie Sharpe, *Eight Reasons Why Everybody Needs to Be Able to See Company Ownership (Not Just the Police)*, GLOBAL WITNESS: BLOG (June 30, 2016), <https://www.globalwitness.org/en/blog/eight-reasons-why-we-all-need-be-able-see-beneficial-ownership-information-rather-just-police/>.

179. *Id.*

voluntary reporting mechanisms, and mandatory reporting programs, governance of our world's most corruption-filled natural resource sectors stands to improve greatly but is not yet in a position to stop natural resource corruption in its tracks. International and domestic enforcement programs should increase enforcement muscle, through tools such as criminal sanctions and fines, to further combat natural resource exploitation and the resultant abuses.