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## Business, Human Rights, and the Promise of Polycentricity

Jamie D. Prekert

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# Business, Human Rights, and the Promise of Polycentricity

Jamie Darin Prenkert\*  
Scott J. Shackelford\*\*

## ABSTRACT

*Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) John Ruggie referred to the “Protect, Respect, and Remedy” Framework (PRR Framework) and the UN Guiding Principles on Business and Human Rights (Guiding Principles) as a polycentric governance system. However, the exact meaning of this phrase has not been very carefully elucidated. This Article analyzes that description in the context of the deep and varied body of literature on polycentric governance and evaluates the PRR Framework in that light. In particular, this Article uses a case-study approach, analyzing the emerging polycentric governance system in the context of the sourcing of certain minerals from conflict-affected countries in the African Great Lakes region to explore these issues. The conflict minerals regulatory regime incorporates a notable number of the concerns and opportunities SRSG Ruggie highlighted and promoted in the PRR Framework and Guiding Principles. This Article then recommends further study of the*

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*concepts explored herein as applied to the business and human rights sector generally and conflict minerals regulation specifically. Ultimately, this Article argues that, given the relative paucity of binding international law regulating the human rights aspects of business and the unlikelihood of substantial multilateral progress in the near future, the success of the PRR Framework and Guiding Principles may well depend on whether the promise of their polycentric nature can be fully realized.*

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I. INTRODUCTION

In an era defined by globalization and the attendant rise of multinational corporations,<sup>1</sup> businesses are increasingly influencing human rights practices around the world.<sup>2</sup> From recent disasters in the Bangladeshi textile industry, in which more than 1,200 garment workers died making clothing for Western firms,<sup>3</sup> to alleged human rights abuses by subsidiaries of Canadian mining firms,<sup>4</sup> the impact of business on human rights cannot be underestimated. However, given the relative lack of binding international law governing labor

1. See, e.g., THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 9–10 (2006) (arguing that “the key agent of change, the dynamic force driving global integration [through the year 2000], was multinational companies”).

2. See *The Global Human Rights Regime*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/human-rights/global-human-rights-regime/p27450> (June 19, 2013), [<http://perma.cc/GSH7-AFVW>] (archived Jan. 27, 2014) (“Many in the international community are reassessing economic, social, and cultural rights as IGOs increasingly link human rights to business practices and public health. Elsewhere, attention to the rights of women, minorities, and persecuted ethnic groups has steadily increased.”).

3. See Laura Neilson & Meenal Mistry, *Feel-Good Fashion: The New Black*, WALL ST. J. (Aug. 16, 2013, 6:00 PM), <http://online.wsj.com/news/articles/SB10001424127887323977304579001150660068542> [<http://perma.cc/BTQ2-KPUC>] (archived Jan. 27, 2014) (“However, the issue has exploded in the past year after two major factory disasters in Bangladesh together killed more than 1,200 garment workers who were making clothes for Western companies.”).

4. See Priya Sarin, *Canadian Mining Company May Be Held Liable for Human Rights Abuses Committed Abroad By Its Foreign Subsidiaries*, RABBLE.CA (Aug. 1, 2013), <http://rabble.ca/columnists/2013/08/canadian-mining-company-may-be-held-liable-human-rights-abuses-committed-abroad-i> [<http://perma.cc/6J8P-YKCP>] (archived Jan. 27, 2014) (describing human rights abuses such as “forcible evictions of indigenous communities from disputed land, contamination of water supply, assassination/disappearance of anti-mining activists, and rape of local women by private security forces”).

practices in these industries,<sup>5</sup> the international community has struggled to enforce human rights best practices. This absence of an international legal framework has led to the development of novel governance systems, an effort spearheaded by John Ruggie, special representative of the secretary-general on the issue of human rights and transnational corporations and other business enterprises (SRSG).

During his mandate and after, SRSG Ruggie referred to the “Protect, Respect and Remedy” Framework (PRR Framework) and the Guiding Principles on Business and Human Rights (Guiding Principles) as a *polycentric governance system*.<sup>6</sup> However, the exact meaning of this phrase has not been very carefully elucidated. This Article analyzes that description in the context of a deep and varied body of literature on polycentric governance and evaluates the PRR Framework in that light. In particular, this Article uses a case-study approach, analyzing the emerging polycentric governance system related to the sourcing of certain minerals from conflict-affected countries in the African Great Lakes region to explore these issues. The conflict minerals regulatory regime incorporates a notable number of the concerns and opportunities SRSG Ruggie highlighted and promoted in the PRR Framework and Guiding Principles. This Article then recommends further study of the concepts explored herein as applied to the business and human rights sector generally and conflict minerals regulation specifically. Ultimately, this Article argues that, given the relative paucity of binding international law regulating the human rights aspects of business and the unlikelihood of substantial multilateral progress in the near future, the success of the PRR Framework and Guiding Principles may well depend on whether the promise of their polycentric nature can be fully realized.

The Article is structured as follows. Part I introduces the literature on polycentric governance to provide a framework for analysis. Part II applies the conceptual framework of polycentric governance to the policy problem of conflict mineral regulation. Part

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5. See Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *Labor Standards and Human Rights: Implications for International Trade and Investment 2* (IPC Working Paper, Ser. No. 119, 2011) (describing different occasions when “coordination of labor laws” was pursued but later abandoned).

6. Specifically, Ruggie noted the following:

The overriding lesson I drew . . . was that a new regulatory dynamic was required under which public and private governance systems . . . each come to add distinct value, compensate for one another’s weaknesses, and play mutually reinforcing roles—out of which a more comprehensive and effective global regime might evolve, including specific legal measures. International relations scholars call this “polycentric governance.”

*E.g.*, JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 78 (2013).

III concludes this Article with a discussion of the promise and pitfalls of polycentric governance in advancing human rights in business.

## II. BACKGROUND ON POLYCENTRIC GOVERNANCE SYSTEMS

Mapping the current state of a regulatory regime is a difficult proposition, especially with the presence of many rapidly changing variables. For example, in the context of cyber law, commentators such as Professor Andrew Murray have argued for adopting dynamic regulatory models, such as symbiotic regulation, to help better understand this complex legal environment.<sup>7</sup> Other scholars have turned to systems theory, which was first developed in the field of biology to describe the relationships between parts of a system, such as the human body.<sup>8</sup> Even under these approaches, however, changing one element of the system can have “ripple effects” throughout,<sup>9</sup> a phenomenon also noted by Professor Lon Fuller, who advocated for a polycentric approach to conceptualize and manage complex regulatory schemes.<sup>10</sup>

A critical aspect of understanding polycentric regulation is that neither states nor any other entities enjoy sole rulemaking powers in a given context, be it internet governance or multinational business regulation.<sup>11</sup> For example, most definitions of *law*, including Professor Fuller’s description of *law* as “the enterprise of subjecting human conduct to the governance of rules,”<sup>12</sup> allow for overlapping regulatory systems. Professor Fuller himself noted: “Multiple systems do exist and have in history been more common than unitary systems.”<sup>13</sup> Some commentators define *polycentric governance* as

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7. See ANDREW W. MURRAY, *THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT*, at xii, 250 (2007) (providing introductory and concluding remarks on the theory of symbiotic regulation).

8. See *id.* at 25–26 (describing system theory’s application to study of the human body, the gardener’s dilemma, and other complex systems).

9. *Id.* at 26 (“The system is ‘caught in a web of conflicting constraints [in which] each element of the system affects other parts of the whole system and changing [a single element] will have affects which ripple throughout the system.’” quoted in STUART KAUFFMAN, *AT HOME IN THE UNIVERSE* 173 (1995)); see also David G. Post & David R. Johnson, *Chaos Prevailing on Every Continent: Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1070–71 (1998) (“[T]he system can take any one of an astronomical number of different configurations and may, via the ‘ripple effects’ of changes throughout the system, respond to small changes of the state of those elements with large changes in whatever system-wide variable we seek to measure.”).

10. See MURRAY, *supra* note 7, at 26–27 (“This is the ripple effect by Lon Fuller and which he labelled ‘polycentric.’”).

11. See *id.* at 27–29 (explaining the “law of requisite variety” in which active regulatory processes tend to overlap with each other and no one entity has sole rulemaking power).

12. *Id.* at 47 (quoting LON FULLER, *THE MORALITY OF LAW* 106 (1964)).

13. *Id.* (quoting LON FULLER, *THE MORALITY OF LAW* 123 (1964)).

analogous to “non-statist law.”<sup>14</sup> However, such definitions miss some of the unique aspects of polycentric governance, including its emphases on self-organization and the notion that “diverse organizations” and governments working at “multiple levels” can create policies that “increase levels of cooperation . . . [and] compliance.”<sup>15</sup> This Article defines *polycentric governance* generally as a regulatory system—sometimes referred to as a regime complex<sup>16</sup>—that consists of “a collective of partially overlapping and nonhierarchical regimes.”<sup>17</sup> In order to understand the benefits and drawbacks of a polycentric approach, it is first necessary to briefly review the literature on regimes.

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14. *Id.* at 7 n.15 (citing Tom W. Bell, *Polycentric Law*, 7 HUMANE STUD. REV. 4 (1991–1992)).

15. Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 12 (World Bank, Policy Research Working Paper No. 5095, 2009), available at <http://www.iadb.org/intal/intalcdi/pe/2009/04268.pdf> (listing four broad characteristics for when cooperation governing the global commons (i.e., the international spaces existing beyond national jurisdiction) is most likely to occur, “[including] the following: (1) Many of those affected have agreed on the need for changes in behavior and see themselves as jointly sharing responsibility for future outcomes; (2) The reliability and frequency of information about the phenomena of concern are relatively high; (3) Participants know who else has agreed to change behavior and that their conformance is being monitored; and (4) Communication occurs among at least subsets of participants”); see also Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change* 3 (Harvard Project on Int’l Climate Agreements, Discussion Paper No. 10-33, 2010) (discussing regime complexes in the context of the climate change debate).

16. See, e.g., Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395 (2011) (treating regime complex and polycentricity as practically the same thing); Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L ORG. 277, 277–78 (2004) (noting the inherent complexity of international regimes, the accompanying difficulties raised by that complexity, and describing the regime complex for plant genetic resources); Scott J. Shackelford, *Governing the Final Frontier: A Polycentric Approach to Managing Space Weaponization and Orbital Debris*, 51 AM. BUS. L.J. 429 (2014) (noting the use of *regime complex* as synonymous with polycentric governance); Shackelford, *supra* note 24 (noting use of *regime complex*).

17. Raustiala & Victor, *supra* note 16, at 277; see also Scott J. Shackelford, *Toward Cyber Peace: Managing Cyber Attacks Through Polycentric Governance*, 62 AM. U. L. REV. 1273 (2013) (representing the first publication of portions of this analysis); cf. Michael D. McGinnis, *An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework*, 39(1) POL’Y STUD. J. 163, 171–72 (2011) (defining polycentric governance as “a system of governance in which authorities from overlapping jurisdictions (or centers of authority) interact to determine the conditions under which these authorities, as well as the citizens subject to these jurisdictional units, are authorized to act as well as the constraints put upon their activities for public purposes”); MURRAY, *supra* note 7, at xi (noting the complexities of the cyber-regulatory theory).

### A. *The Study of Regimes*

According to Professor Oran Young, “Regimes are social institutions governing the actions of those involved in specifiable activities or sets of activities. . . . [T]hey are practices consisting of recognized roles linked together by clusters of rules or conventions governing relations among the occupants of these roles.”<sup>18</sup> Regimes have two primary effects. First, they constrain the policy options of actors.<sup>19</sup> Second, they create rights.<sup>20</sup> Nations respond to the concerns of domestic politics when deciding the composition of a new regime.<sup>21</sup> Yet even with a high degree of scientific and political agreement, regulatory action may still be delayed as a result of differing incentive structures among diverse stakeholders including states, nongovernmental organizations (NGOs), and “epistemic communities,” which “are policy networks formed by [experts] specializing in a particular policy area.”<sup>22</sup> This can lead to deadlock, and even if these diverse groups can agree on a new regime, the result may still be suboptimal due to issues of consensus decision making, ratification, and enforcement.<sup>23</sup> Various strategies may be employed to address these problems, such as negotiating treaties with incentive structures or sanctions to promote compliance, but often such strategies are politically unpopular or prove insufficient.<sup>24</sup> Instead, regime complexes are formed as interim responses to help manage complex global problems, such as promoting human rights.<sup>25</sup>

18. ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATIONAL RESOURCES AND THE ENVIRONMENT* 12–13 (Peter J. Katzenstein ed., 1989).

19. See SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 30 (1998) (“[E]xisting institutions constrain policy options of individual actors.”).

20. See *id.* (“They may also establish rights, such as the right to conduct research in the Antarctic, but these established rights are limited in eligibility and exercise.”).

21. See Keohane & Victor, *supra* note 15, at 3, 18 (noting how regime complexes adapt over time to a number of issues, including the conditions of domestic politics).

22. BUCK, *supra* note 19, at 8.

23. See *id.* at 30–31 (discussing institutional analysis, institutional choice, and the evolution of regimes in international relations); Eilene Galloway, *Consensus Decisionmaking by the United Nations Committee on the Peaceful Uses of Outer Space*, 7 J. SPACE L. 3, 3–4 (1979) (describing the contours of consensus decision making); Liz Klimas, *Republicans Defeat Ratification of the U.N.’s ‘Rights of Persons with Disabilities’ Treaty in Senate*, THE BLAZE (Dec. 4, 2012, 1:32 PM), <http://www.theblaze.com/stories/2012/12/04/republicans-defeat-ratification-of-the-u-n-s-rights-of-persons-with-disabilities-treaty-in-senate/#> [<http://perma.cc/HN6T-D8HF>] (archived Jan. 27, 2014) (reporting on the U.S. Senate’s failure to ratify a disability rights treaty that was “modeled after the Americans with Disabilities Act”).

24. See Keohane & Victor, *supra* note 15, at 12, 19 (identifying the different approaches used to combat these problems along with a critical assessment of the solutions’ effectiveness).

25. See *id.* at 10–11 (discussing regime complexes in the climate change context).



Regime complexes are created when several different regimes “coexist in the same issue area without clear hierarchy,” which can be caused by different and continuously evolving political coalitions.<sup>26</sup> Given the multipolar state of international relations,<sup>27</sup> “loosely coupled” regime complexes have significant advantages over unitary regimes such as some UN consensus-driven multilateral treaties.<sup>28</sup> Building institutions is costly, and thus, leaders who invest in such efforts often find it easier to work in smaller “clubs,” such as the Major Emitters Forum comprised of the largest greenhouse gas (GHG) emitters,<sup>29</sup> rather than through forums with universal membership like the UN Framework Convention on Climate Change.<sup>30</sup> Under these varying frameworks, the United Nations may play the role of an umbrella organization or one component within a regime complex rather than being the center of gravity for regulatory efforts.<sup>31</sup> As regime complexes become relatively more popular, efforts to create flexible regimes will possibly supersede less practical efforts to negotiate binding multilateral treaties.<sup>32</sup>

Comprehensive regimes are not without fault, however. As interests, power, technology, and information change over time, comprehensive regimes are difficult to form and, once formed, can be unstable.<sup>33</sup> An inflexible comprehensive regime could actually stifle innovation by crowding out smaller scale efforts that might be more effective at promoting human rights, as is discussed below.<sup>34</sup> There

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26. *Id.* at 4.

27. See, e.g., Fareed Zakaria, *Excerpt: Zakaria's 'The Post-American World and The Rise of the Rest'*, NEWSWEEK, May 3, 2008, at 24, available at <http://www.newsweek.com/excerpt-zakarias-post-american-world-89645> [<http://perma.cc/WZ27-96SL>] (archived Jan. 27, 2014) (explaining that geopolitical power is shifting from the United States to other countries). *But see* Richard N. Haass, *The Age of Nonpolarity: What Will Follow U.S. Dominance*, FOREIGN AFF., May–June 2008, at 44, 44 (arguing for the emergence of “a nonpolar international system . . . characterized by numerous centers with meaningful power”).

28. See Keohane & Victor, *supra* note 15, at 2 (“Furthermore, such regime complexes have some advantages over coherent, integrated regimes.”).

29. See *id.* at 3 (discussing the idea of “clubs” and why some state governments choose to participate in them); *Major Economies Forum on Energy and Climate*, U.S. DEP’T OF ST. (Sept. 15, 2011), <http://www.state.gov/e/oes/climate/mem/index.htm> [<http://perma.cc/Y36M-CBDZ>] (archived Jan. 27, 2014) (providing details of the Major Economies Forum).

30. See Keohane & Victor, *supra* note 15, at 6 (describing the formation of these kinds of “clubs” to cooperate on issues of climate change).

31. See *id.* at 23 (describing the “umbrella” nature of the UN involvement “under which many different efforts proceed”).

32. See Keohane & Victor, *supra* note 15, at 2 (“Efforts to create an integrated, comprehensive regime are therefore unlikely to be successful and may even divert attention from more practical efforts to create regime complexes.”).

33. See *id.* at 2–3 (explaining how the inflexibility of comprehensive treaty systems tend to lead to their demise).

34. See, e.g., Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 656 (2010) (noting experiments that have documented this “crowding out” phenomenon).

are also the costs of regime complexes to consider, including enforcement, sustainability, and legal inconsistencies.<sup>35</sup> Consequently, regime complexes must be critically assessed.

When analyzing regimes, according to Professors Robert Keohane and David Victor, “it is helpful to imagine a continuum.”<sup>36</sup> Thick, comprehensive treaty systems such as the World Trade Organization are “at one extreme,” and “at the other extreme are highly fragmented collections of institutions with no identifiable core and weak or nonexistent linkages.”<sup>37</sup> In between is a range of semihierarchical regimes with “loosely coupled systems of institutions.”<sup>38</sup> Comprehensive regimes are most common when the interests of powerful actors are aligned “across a broad issue area.”<sup>39</sup> The potential comprehensive regime forming around the interests of transnational businesses in respecting and promoting human rights serves as an example of this phenomenon.<sup>40</sup> Such a level of agreement and cooperation is rare in the international community, particularly in an era increasingly defined by multipolar politics.<sup>41</sup> This has led to a greater emphasis on targeted, issue-specific regimes, which are discussed next in the context of polycentric analysis.

### B. *The Evolution of Polycentric Analysis*

Scholars from various disciplines have utilized the concept of polycentricity in a number of different ways. According to Professor Elinor Ostrom, “Polycentric systems are characterized by multiple governing authorities at differing scales rather than a monocentric unit.”<sup>42</sup> In a polycentric governance regime, therefore, the state is not the only source or foundation of authority and, in fact, may play little

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35. See Keohane & Victor, *supra* note 15, at 4 (noting that “conflicts between individual regulatory elements may be especially likely to arise”); Raustiala & Victor, *supra* note 16, at 277–78 (2004) (noting the inherent complexity of international regimes and the accompanying difficulties raised by that complexity).

36. Keohane & Victor, *supra* note 15, at 3.

37. *Id.*

38. *Id.* at 4.

39. *Id.*

40. See, e.g., Jeremy Kirk, *Russia Pushes for Online Code of Conduct at United Nations General Assembly*, COMPUTERWORLD UK (Oct. 3, 2011, 5:10 PM), <http://www.computerworlduk.com/news/public-sector/3307976/russia-pushes-for-online-code-of-conduct-at-united-nations-general-assembly/> [http://perma.cc/H35W-BB45] (archived Jan. 27, 2014) (describing efforts of several countries, including Russia, to promote a code of conduct that would promote peace and cybersecurity).

41. See Abraham M. Denmark, *Managing the Global Commons*, WASH. Q., July 2010, at 165, 167 (discussing challenges to U.S. unilateral dominance of global commons governance).

42. Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550, 552 (2010).

or no role at all.<sup>43</sup> Instead, a complex array of interdependent entities or decision-making centers, both state and nonstate, which may be formally independent of one another, form networks and interact among themselves. Ideally the entities each add some value while reinforcing each other and compensating for each other's limitations and weaknesses.<sup>44</sup> Each entity within the system is typically free from domination by the others; it can make its own rules and develop its own norms within its domain of influence.<sup>45</sup> Nevertheless, there is also opportunity within the system for "mutual monitoring, learning, and adaptation of better strategies over time."<sup>46</sup>

The shared problems or issues that concern multiple actors often mark the boundaries of a polycentric governance regime.<sup>47</sup> In other words, a polycentric system is focused on problem solving but is not defined by any single or particular solution to that problem.<sup>48</sup> Often, polycentric governance emerges in the face of a collective action problem that a state is ill-equipped, unwilling, or too slow to tackle on its own.<sup>49</sup> Professor Michael McGinnis explains that "[t]he basic idea [of polycentric governance] is that any group . . . facing some collective action problem should be able to address that problem in whatever way they best see fit,"<sup>50</sup> which can and should include crafting new governance structures that will be able to facilitate the problem-solving process.<sup>51</sup> In other words, "[a] system of governance is *fully polycentric* if it facilitates creative problem-solving at all

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43. See Julie Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 137–38 (2008) ("[Polycentric] regimes are those in which the state is not the sole locus of authority, or indeed in which it plays no role at all.").

44. See Vincent Ostrom, Charles M. Tiebout & Robert Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV. 831, 831 (1961) ("[T]hey take each other into account in competitive relationships, enter into various contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts.").

45. See Ostrom, *supra* note 42, at 552 ("Each unit within a polycentric system exercises considerable independence to make norms and rules within a specific domain.").

46. *Id.*

47. See Black, *supra* note 43, at 137 ("Polycentric systems are marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both regulators and regulated, and their boundaries are marked by the issues or problems which they are concerned with, rather than necessarily by a common solution.").

48. *Id.*

49. See Ostrom, *supra* note 15, at 10–13 (noting these characteristics in the international attempts to reduce greenhouse gas emissions).

50. Michael D. McGinnis, *Costs and Challenges of Polycentric Governance: An Equilibrium Concept and Examples from U.S. Health Care* 1–2 (Ind. Univ. Vincent & Elinor Ostrom Workshop in Pol. Theory & Pol'y Analysis Working Paper W11-3, 2011), available at [http://php.indiana.edu/~mcginnis/Beijing\\_core.pdf](http://php.indiana.edu/~mcginnis/Beijing_core.pdf) [<http://perma.cc/NP56-3XZK>] (archived Jan. 20, 2014).

51. *Id.* ("[T]hey might work through the existing system of public authorities, or they may establish a new governance unit[.]").

levels.”<sup>52</sup> In this way, such a multilevel, multipurpose, multitype, and multisectoral model<sup>53</sup> lends itself to “bottom-up” rather than “top-down” governance.<sup>54</sup> If done correctly, by providing incentives to systems where “large, medium, and small governmental and nongovernmental enterprises engage in diverse cooperative as well as competitive relationships,” such a bottom-up approach can lower transaction costs, more efficiently utilizing potentially scarce resources.<sup>55</sup>

No one has likely done more to advance the study of polycentric governance, especially as related to public goods and common-pool resources, than Nobel laureate Elinor Ostrom, Vincent Ostrom, and their colleagues at the Vincent and Elinor Ostrom Workshop in Political Theory and Policy Analysis at Indiana University.<sup>56</sup> Their early work in polycentric governance challenged the prevailing notion in the 1970s and 1980s that the provision of public services, like law enforcement and education, was improved and made more cost effective by reducing the number of departments and districts and consolidating them.<sup>57</sup> The Ostroms’ work showed that “[n]o

52. *Id.* at 3.

53. See generally Michael D. McGinnis, *An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework for the Analysis of Institutions and Their Development* (Ind. Univ. Research Paper No. 2011-02-01), available at [http://php.indiana.edu/~mcginnis/iad\\_guide.pdf](http://php.indiana.edu/~mcginnis/iad_guide.pdf) [<http://perma.cc/W837-4TJS>] (archived Jan. 27, 2014).

54. See McGinnis, *supra* note 50, at 1 (“Bottom-up governance institutions are typically characterized by a shared sense of legitimacy, high levels of community participation, effective use of local information, and potential robustness in the face of ever-changing challenges.”).

55. See Elinor Ostrom, *Polycentric Systems as One Approach for Solving Collective-Action Problems* 3–4 (Ind. Univ. Vincent & Elinor Ostrom Workshop in Pol. Theory & Pol’y Analysis Working Paper No. W08–6, 2008), available at [http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4417/W08-6\\_Ostrom\\_DLC.pdf?sequence=1](http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4417/W08-6_Ostrom_DLC.pdf?sequence=1) [<http://perma.cc/HT6D-PYAV>] (archived Jan. 20, 2014) (citing Bruno S. Frey & Reiner Eichenberger, *FOCJ: Competitive Governments for Europe*, 16 INT’L REV. L. ECON. 315, 315 (1996)) (discussing the distinction between polycentric systems and a “monocentric hierarchy”); see also Cole, *supra* note 16, at 405 (citing Ostrom, *supra* note 15, at 33) (arguing that “[i]nstead of a ‘monocentric hierarchy,’ where governmental units at higher levels make all the decisions, and units at lower levels simply follow commands from above, a truly polycentric system is one in which governmental units both compete and cooperate, interact and learn from one another, and responsibilities at different governmental levels are tailored to match the scale of the public services they provide”).

56. See generally Vincent & Elinor Ostrom Workshop Political Theory & Policy Analysis, INDIANA UNIV. BLOOMINGTON, <http://www.indiana.edu/~workshop/> [<http://perma.cc/J4SG-W84M>] (archived Jan. 27, 2014) (last visited Feb. 1, 2014).

57. See generally ELINOR OSTROM, ROGER B. PARKS & GORDON P. WHITAKER, PATTERNS OF METROPOLITAN POLICING (1978) (reporting on a major study of police organization in 80 metropolitan areas); E.A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. ECON. LIT. 1141, 1167 (1986) (finding no better performance in larger school districts); Roger B. Parks, *Metropolitan Structure and Systemic Performance: The Case of Police Service Delivery*, in POLICY IMPLEMENTATION IN FEDERAL AND UNITARY SYSTEMS 161 (Kenneth Hanf & Theo A.J.

systematic empirical evidence supported reform proposals related to moving the provision of public goods from smaller-scale units to larger governments.”<sup>58</sup> Rather, a series of studies showed, for example, that small and medium-sized police departments outperformed their larger counterparts serving similar neighborhoods in major urban centers in measures of efficiency and cost.<sup>59</sup> Though the small and overlapping centers of governance seemed inefficient, in practice they performed well.<sup>60</sup>

Elinor Ostrom built on these studies to determine whether polycentric governance regimes could adequately combat collective action problems associated with the provision and regulation of common-pool resources.<sup>61</sup> She challenged the conventional theory of collective action,<sup>62</sup> which held that rational actors would not cooperate to achieve a socially optimal outcome in a prisoner’s dilemma scenario like that associated with the tragedy of the commons.<sup>63</sup> Proponents of the conventional theory thought that only

Toonen eds., 1985) (finding that citizens in metropolitan areas with the most fragmented provision of police service experienced more police presence on the street as a function of tax expenditures than citizens living in areas with consolidated police services); Paul Teske et al., *Establishing the Micro Foundations of a Macro Theory: Information, Movers, and the Competitive Local Market for Public Goods*, 87 AM. POL. SCI. REV. 702 (1993) (applying the Tiebout model of competition in the local market for public goods to explain how an informed subset of consumers who are selective in their choice of alternate suppliers of public goods can create competitive outcomes, which helps explain how polycentric regions can produce greater efficiency).

58. Ostrom, *supra* note 15, at 50 (emphasis omitted).

59. See generally POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS (Michael D. McGinnis ed., 1999), available at <http://www.indiana.edu/~workshop/publications/materials/volume2.html> [<http://perma.cc/TR28-H2EW>] (archived Jan. 27, 2014) (collecting these studies).

60. See generally *id.* (discussing results from studies of public economies).

61. See Ostrom, *supra* note 15, at 10 (listing various projects and field experiments focused on polycentric governance of common pool resources).

62. The traditional theory of the collective action problem was first articulated in the late 1960s by Mancur Olsen, an economist and social scientist from the University of Maryland. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (providing a comprehensive explication of the collective action problem). Professor Olsen theorized that, “Only a separate and ‘selective’ incentive will stimulate a rational individual in a latent group to act in a group-oriented way.” *Id.* at 51. In other words, members of a large group will not act in the group’s common interest unless the individual members have some reason to expect personal gain (e.g., economic, social, reputational) from doing so.

63. William Forster Lloyd first proposed the concept of the tragedy of the commons in 1833 in his role as a fellow of the Royal Society. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). It was later more thoroughly explicated and popularized by Garrett Hardin. See generally *id.* (providing an early, thorough explanation of the tragedy of the commons). In its simplest form, the tragedy of the commons suggests that when a population is given unrestricted access to a resource, the resource is doomed to overexploitation. See, e.g., Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 STAN. ENVTL. L.J. 109, 118 (2009) (discussing Hardin’s explanation of the tragedy of the commons in the context of international law).

top-down, state-imposed regulations could create the proper incentives for optimal collective action.<sup>64</sup> However, a series of field studies that Ostrom and others conducted on the provision of water resources in California,<sup>65</sup> the design and maintenance of irrigation systems in Nepal,<sup>66</sup> and the protection of forests in Latin America<sup>67</sup> consistently showed that, “[c]ontrary to the conventional theory,” many individuals will cooperate in the face of collective action problems.<sup>68</sup> Local and regional groups of small-to-medium scale were found to have self-organized to develop solutions “to common-pool resource problems,” despite what the rational choice theory would suggest.<sup>69</sup> Moreover, in field studies, systems governed polycentrically were often found to have better outcomes than those governed by a central governmental authority.<sup>70</sup> The polycentric regimes were more nimble, flexible, and invested in guaranteeing success at the local level, and regimes marked by top-down state regulation did not have the kind of local and regional expert input that the polycentric systems did.<sup>71</sup> These field observations were consistent with laboratory experiments that found externally imposed regulations that were intended to maximize joint returns in the face of collective action problems actually “crowded out” individuals’ voluntary

64. As Ostrom notes:

Two broad grounds exist for doubting whether sole reliance on the conventional theory of collective action is a wise scientific strategy. The first is the weakness of empirical support for the conventional theory of collective action related to small- to medium-size environmental social dilemmas. The second is the existence of multiple externalities at small, medium, and large scales within the global externality that has been of primary concern in the academic and policy literature.

See Ostrom, *supra* note 15, at 9

65. See, e.g., Elinor Ostrom, *Public Entrepreneurship: A Case Study in Ground Water Basin Management* (1965) (unpublished Ph.D. dissertation, Univ. of Calif., Los Angeles) (reporting a case study on the management of ground water).

66. See generally IMPROVING IRRIGATION GOVERNANCE AND MANAGEMENT IN NEPAL (Ganesh Shivakoti & Elinor Ostrom eds., 2002) (discussing the polycentric governance of irrigation systems in Nepal).

67. See, e.g., Elinor Ostrom & Harini Nagendra, *Insights on Linking Forests, Trees, and People from the Air, on the Ground, and in the Laboratory*, 103 PROC. NAT'L ACAD. SCI. 4, 4–5 (2006) (detailing governance efforts at preserving forest resources in Latin America).

68. Ostrom, *supra* note 15, at 10.

69. *Id.*

70. See Elinor Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, in GLOBAL ENVIRONMENTAL COMMONS 105, 113–17 (E. Brousseau et al., eds., 2012) (noting that, for example, “farmer-managed irrigation systems” often outperformed “agency-managed irrigation systems” in Nepal).

71. See *id.* at 113–17 (“While there is variance in the performance of Nepali farmer-managed systems, few perform as poorly as government systems, holding other relevant variables constant.”).

cooperative behavior.<sup>72</sup> That is in part why Professor Ostrom has argued that polycentric regulation is “the best way to address transboundary problems . . . since the complexity of these problems lends itself well to many small, issue-specific units working autonomously as part of a network that is addressing collective-action problems.”<sup>73</sup> Polycentric governance, she concluded, “is an application of the maxim, ‘think globally, but act locally.’”<sup>74</sup>

Prior to her death, Elinor Ostrom was applying this research, and the institutional analysis and development framework (IAD framework)<sup>75</sup> that grew out of it, to the regulation of global climate change. She assumed that sufficient global regulation through a treaty or another international legal instrument was not likely to occur in the near future, if ever;<sup>76</sup> thus, she concluded that some alternative means of regulating GHG emissions would be necessary to address the collective action problem that emissions represent. Professor Ostrom challenged the prevailing belief that atmospheric conditions and climate, which are global common-pool resources, must be addressed on a global scale to be effective.<sup>77</sup> Rather, she argued that because a tremendously “large number of actions taken at multiple scales”<sup>78</sup>—for example, the household, cities and states, countries, transboundary regional areas, and global levels—affect the amount of GHG emissions, a polycentric system addressing global climate change would best incorporate the experience, expertise, and investment of various actors at each of those scales and produce effective, if not perfect, cooperative behavior.<sup>79</sup> The basic notion in this context is that “a single governmental unit” may be incapable of dealing with “global collective action problems,” like climate change or, potentially, human rights abuses, in part because free riders

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72. See generally Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746 (1999) (reporting an empirical analysis of crowding out behaviors); Ostrom, *supra* note 34, at 656 (citing Andrew F. Reeson & John G. Tisdell, *Institutions, Motivations and Public Goods: An Experimental Test of Motivational Crowding*, 68 J. ECON. BEHAVIOR & ORG. 273 (2008)) (finding “externally imposed regulation that would theoretically lead to higher joint returns ‘crowded out’ voluntary behavior to cooperate”).

73. Interview with Elinor Ostrom, Distinguished Professor, Indiana University-Bloomington, in Bloomington, Ind. (Oct. 13, 2010).

74. *Id.*

75. For a basic discussion of the IAD Framework, see generally McGinnis, *supra* note 17.

76. See Ostrom, *supra* note 42, at 550 (noting some of the problems standing in the way of global regulation through international agreement).

77. See *id.* at 552 (“An important lesson is that simply recommending a single governance unit to solve global collective-action problems—because of global impacts—needs to be seriously rethought.”).

78. Ostrom, *supra* note 15, at 14.

79. See Ostrom, *supra* note 42, at 552–53 (noting the benefits of a polycentric approach to reducing GHG emissions).

discourage “trust and reciprocity” between stakeholders.<sup>80</sup> Nations that are not bound, in other words, enjoy the benefits of other nations’ sacrifices without realizing the costs; solutions “negotiated at the global level, if not backed by a variety of efforts at national, regional, and local levels, . . . are not guaranteed to work well.”<sup>81</sup> This is somewhat similar to the interests that animate the “matching principle” in international law. The matching principle requires nations, and ultimately localities, to implement customary international law principles as well as ratified treaties—a call for multilevel action that is at the core of the polycentric thesis.<sup>82</sup>

Polycentric governance’s strengths are its capacity to embrace self-regulation and bottom-up initiatives, its focus on multistakeholder governance to foster collaboration across multiple regulatory scales, and its emphasis on targeted measures to address global collective action problems. On the positive side, the concept of polycentrism encourages regulatory innovation and competition between regimes as well as “flexibility across issues and adaptability over time.”<sup>83</sup> On the negative side, however, polycentric networks are susceptible to institutional fragmentation and gridlock caused by overlapping authority that must still meet standards of coherence,

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80. Ostrom, *supra* note 15, at 35; see Keohane & Victor, *supra* note 15, at 9 (discussing the feasibility of managing diverse problems within the climate change context with various institutions).

81. Ostrom, *supra* note 15, at 4.

82. See, e.g., Ramses Wessel & Jan Wouters, *The Phenomenon of Multilevel Regulation: Interactions Between Global, EU and National Regulatory Spheres*, in MULTILEVEL REGULATION AND THE EU: THE INTERPLAY BETWEEN GLOBAL, EUROPEAN AND NATIONAL NORMATIVE PROCESS 9, 20 (Andreas Follesdal et al. eds., 2008) (noting how regulations promulgated by international organizations like the WTO have a binding effect on other legal orders like the European Union, its member states, and even individuals); Jonathan R. Macey & Henry N. Butler, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL’Y REV. 23, 25 (1996) (developing the matching principle). However, the matching principle assumes the desirability of matching a particular jurisdiction with the scope of a given problem, which may be appropriate in some contexts but goes against the literature on polycentric governance as applied to the global commons insofar as the latter argues for the desirability of multisector and multitype action at multiple scales. Compare Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 133 (2005) (“By matching jurisdiction with the scope of a given problem, the institutional structure can ensure the greatest ‘match’ between a given problem and the institutional response.”), with Ostrom, *supra* note 15, at 4 (arguing in the climate change context that “given the importance of technological change, without numerous innovative technological and institutional efforts at multiple scales, we may not even begin to learn which combined sets of actions are the most effective in reducing the long-term threat of massive climate change”).

83. Keohane & Victor, *supra* note 15, at 18; see also Constantine Michalopoulos, *WTO Accession*, in DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK 61, 61–70 (Bernard M. Hoekman et al. eds., 2002) (discussing the benefits of polycentric regulation in the context of WTO accession).



effectiveness, and sustainability.<sup>84</sup> In other words, confusion and delay may result because no one person or organization is ultimately in control.<sup>85</sup> There are also moral and political problems at play, including an application of Professor Hardin's "lifeboat ethics"<sup>86</sup> and an unwillingness of some states to be politically pressured in smaller forums.

Thus, notwithstanding the drawbacks of polycentric governance, problems that transcend the Westphalian conception of national jurisdictional boundaries,<sup>87</sup> like those posed by the tragedy of the commons, need not necessarily be addressed *only* by comprehensive global regulation or international law. Rather, loosely linked regime complexes that avoid fragmentation "can be much more flexible and adaptable than integrated-comprehensive regimes."<sup>88</sup> Polycentric regulatory action by multiple actors at multiple levels linked together by diverse information networks may be preferable to failed or lumbering international initiatives and could even bring benefits that top-down regulation cannot—a possibility explored in the next subpart.

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84. See Keohane & Victor, *supra* note 15, at 2, 18–19, 25 (noting these challenges and stating that "[i]ndeed, dispersed institutions can also be associated with chaos, a proliferation of veto points and gridlock that deters policy makers and private investors from devoting resources to the climate change problem").

85. See Ostrom, *supra* note 42, at 554–55 (reviewing some of the objections to relying on polycentric governance to address global climate change, including "leakage, inconsistent policies, inadequate certification, gaming the system, and free riding").

86. Garrett Hardin, *Lifeboat Ethics: The Case Against Helping the Poor*, PSYCHOL. TODAY, Sept. 1974, at 38–40, 123–24, 126, available at <http://www.dces.wisc.edu/documents/ies-112/Hardin%201974%20lifeboat%20ethics.pdf> [<http://perma.cc/64NW-ZGLK>] (archived Jan. 27, 2014) (examining, from an ethical viewpoint, when swimmers surrounding a lifeboat should be taken aboard).

87. Westphalian ideas of national sovereignty, in which a sovereign has absolute power within its own territory, are traced to the Peace of Westphalia of 1648, which ended the Thirty Years' War. Antony Anghie, *International Law in a Time of Change: Should International Law Lead or Follow?*, 26 AM. U. INT'L L. REV. 1315, 1335–36 (2010–2011). Though recent studies of the Peace of Westphalia suggest that this understanding is a misinterpretation, it had significant influence over centuries of international relations and the development of international law. *Id.*

88. Keohane & Victor, *supra* note 15, at 25.

### C. Applying Polycentricity to Business and Human Rights

SRSR Ruggie recognized similar challenges and opportunities as he undertook his mandate to address human rights and transnational corporations. The likelihood that corporate responsibility for human rights could be enshrined in some sort of comprehensive and binding instrument of international law or treaty was nil.<sup>89</sup> The most recent attempt to do so was embodied in the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms), which would have imposed on businesses affirmative duties concurrent with states “to promote, secure the fulfillment of, respect, ensure respect of and protect human rights” within their “sphere of influence.”<sup>90</sup> The controversy surrounding the Norms is well known. They failed to get any traction at the United Nations.<sup>91</sup> Ultimately, the UN Human Rights Commission took no action on the Norms and instead established SRSR Ruggie’s mandate.<sup>92</sup> Ruggie recognized that the Norms were both too ambitious and too limited in their scope and that there was no hope to build consensus around an approach that imposed state-like duties with regard to some delimited set of human rights directly on businesses at the level of international law.<sup>93</sup> Therefore, early in his mandate, SRSR Ruggie made clear his intent to distance his efforts from the Norms. In his words, Ruggie’s “first official act was to commit ‘Normicide.’”<sup>94</sup> Thus, as with global climate change, it would be folly to look to a top-down approach to regulate transnational corporations with regard to human rights violations and abuses.

Still, globalization has created a dynamic whereby transnational corporations operate beyond the reach of any particular national regulatory system. Governance gaps result from inadequate national regulatory reach, a nonexistent international regulatory framework, and insufficiently organized and empowered nonstate actors. The

89. RUGGIE, *supra* note 6, at 47–60 (discussing the failure of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights).

90. Comm’n on Human Rights, Sub-Comm’n on Promotion & Protection of Human Rights, Working Group, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

91. See John H. Knox, *The Human Rights Council Endorses “Guiding Principles” for Corporations*, ASIL INSIGHTS (Aug. 1, 2011), <http://www.asil.org/insights/volume/15/issue/21/human-rights-council-endorses-“guiding-principles”-corporations> [<http://perma.cc/566G-BC28>] (archived Jan. 20, 2014) (“[T]he Draft Norms proved to be controversial. While human rights groups strongly supported them, most corporations opposed them, and the governments on the Human Rights Commission decided not to adopt them.”).

92. See generally RUGGIE, *supra* note 6 (providing a comprehensive discussion of the history and origin of the SRSR mandate).

93. *Id.* at 47–60.

94. *Id.* at 54.

PRR Framework was crafted to address and fill those governance gaps.<sup>95</sup> The gaps take several forms. Structurally, public governance is fragmented along national territorial lines, while the global economy transcends such territorial boundaries.<sup>96</sup> Even within and among those national jurisdictions, governments lack policy coherence on both vertical and horizontal axes.<sup>97</sup> Finally, states often lack the capacity or will to implement or adopt regulatory measures because they fear either that they lack the means to enforce them or that they, or domestic firms, will suffer negative consequences in the global marketplace.<sup>98</sup> With regard to policy coherence and governance gaps, in 2010, Ruggie identified five key ways that states could more effectively and coherently meet their duty to protect:

- (a) safeguarding their own ability to meet their human rights obligations; (b) considering human rights when they do business with business; (c) fostering corporate cultures respectful of rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict affected areas; and (e) examining the cross-cutting issue of extraterritorial jurisdiction.<sup>99</sup>

Thus, states clearly have a vital role to play in addressing these governance gaps, but they cannot by themselves completely close the governance gaps created by globalization.

In the absence of obligatory international law and in light of the governance gaps SRSG Ruggie identified, a polycentric system of governance and regulation can presumably thrive. The PRR Framework was conceived as just such a polycentric system. When asked about the interaction between the state's duty to protect and business's responsibility to respect human rights, Ruggie indicated that the framework and the guiding principles reflect a system of

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95. Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Hum. Rts. Council, ¶ 106, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) ("How to narrow and ultimately bridge the [governance] gaps in relation to human rights is our fundamental challenge.").

96. See *id.* ¶ 2 (noting that today the "scope and power [of markets] far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability").

97. *Id.* ¶ 33. Vertical incoherence occurs when a state adopts a human rights obligation—for instance, through legislation—but fails to give sufficient regard or effort to its implementation. *Id.* Horizontal incoherence occurs when states regulate in one area in isolation (e.g., securities regulation or labor) with little regard for how that interacts with or affects regulatory efforts elsewhere in the government. *Id.*; John G. Ruggie, Special Rep. for Bus. & Human Rights, Keynote Address at the 3d Annual Responsible Investment Forum (Jan. 12, 2009) [hereinafter Ruggie, Keynote Address] (transcript available at <http://www.reports-and-materials.org/Ruggie-address-to-Responsible-Invest-Forum-12-Jan-2009.pdf>).

98. Ruggie, Keynote Address, *supra* note 97.

99. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward Operationalization of the "Protect, Respect, Remedy" Framework*, ¶ 19, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie).

polycentric governance. He described it as “an emerging regulatory dynamic under which public and private governance systems each add distinct value, compensate for one another’s weaknesses, and play mutually reinforcing roles—out of which a more comprehensive and effective global regime might emerge.”<sup>100</sup> Referencing the polycentric nature of the framework, Professor Larry Backer describes it as “an attempt to build simultaneous public and private governance systems as well as coordinate, without integrating, their operations.”<sup>101</sup> In other words, the PRR Framework serves as a means of providing the information networks and linkages that allow for multiple actors at multiple levels of society to act as governing authorities within their particular realms of expertise and influence while reinforcing each other and compensating for each other’s limitations and weaknesses.<sup>102</sup> Furthermore, it incorporates the matching principle at both a legal and a social regulatory level.<sup>103</sup> The problem of business’s involvement or complicity in human rights violations and abuses is a multilevel one, ranging from the purely local to the transnational. By complementing the state’s duty to protect with business’s responsibility to respect human rights, as well as explicating the role that both state and nonstate actors must play in remedying any violations or abuses, the PRR Framework anticipates a broad, multilevel approach and provides guidance on how all involved can contribute to addressing the problem at their respective levels.

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100. Interview by Bus. & Human Rights Resource Ctr. with John Ruggie, Special Rep. for Bus. & Human Rights, at Berne Declaration (Nov. 2011), available at <http://www.business-humanrights.org/media/documents/berne-declaration-interview-ruggie-nov-2011.pdf>.

101. Larry Catá Backer, *On the Evolution of the United Nations’ “Protect-Respect-Remedy” Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT’L L. 37, 43 (2011).

102. See *supra* note 44 and accompanying text (noting the complementary and mutually reinforcing nature of polycentric institutions).

103. See *supra* note 82 and accompanying text for a discussion of the matching principle.

### III. CONFLICT MINERALS AND POLYCENTRIC GOVERNANCE

“The Democratic Republic of the Congo is a vast country, the size of western Europe and home to sixty million people. For decades it was known for its rich geology, which includes large reserves of cobalt, copper, and diamonds, and for the extravagance of its dictator Mobutu Sese Seko, but not for violence or depravity. Then, in 1996, a conflict began that has thus far cost the lives of over five million people.”

—Jason K. Stearns<sup>104</sup>

The polycentric nature of the PRR Framework is an important and elegant feature of SRSR Ruggie’s work. The ultimate success or failure of the PRR Framework and Guiding Principles depends upon whether they will spawn well-functioning, issue-specific polycentric governance regimes. This Part is devoted to a case study of an emerging, issue-specific, polycentric governance regime. Because it emulates the ideals for a polycentric system, incorporates the norms elucidated in the Guiding Principles, and confronts a number of the most troublesome governance gaps, the approach to supply chain transparency and conflict minerals in the Democratic Republic of Congo (DRC) may well portend how lasting and meaningful the PRR Framework and Guiding Principles will be.

#### A. *Background on the Conflict Minerals Issue*

Significant swaths of the African continent are rich in natural resources but poor in stable governance, the hallmarks of civil society, and the rule of law. In these areas, local communities are often dominated—and even terrorized—by outside interests that seek to extract the value from those resources for their own gain with little regard for the effect on the local peoples.<sup>105</sup> The effects are devastating. Such groups can and do wreak havoc on the local populations and the environment, leave the community without a lucrative source of support, and rob communities of the right to self-determination. These interlopers can range from warlords and terrorists to knights of industry, sometimes, wittingly or not, working in concert.

In the eastern DRC, armed rebel groups, as well as some groups loosely affiliated with the official DRC military, profit and fund their operations in part through the domination and control of mineral mines as well as the unauthorized extortive taxation of trade routes

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104. JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* 4 (2011).

105. See, e.g., *id.* at 82 (“The province [of Katanga] harbored some of the richest mineral deposits in Africa, prompting Belgian businessmen to back a bid for secession of the province when the Congo became independent.”).

and facilities.<sup>106</sup> In turn, some of these groups terrorize the local populations, taking particular aim at women and girls.<sup>107</sup> They use rape as a tool of control and intimidation, making the eastern DRC perhaps the most dangerous place in the world to be female.<sup>108</sup>

The origins of the human rights travesty in the DRC are well known. Fighting between and among the armed rebel groups and government forces has led to the deaths of more than five million since the mid-1990s when the aftermath of the Rwandan genocide spilled across the border into the eastern DRC.<sup>109</sup> It is a zone of weak or nonexistent governance and nearly constant conflict.

No doubt such conflict is expensive. Thus, the DRC's vast supply of natural resources, estimated to be on the order of \$24 trillion,<sup>110</sup> is a natural source for rebel groups to tap for funding. The UN Security Council adopted a resolution in 2005 recognizing the link between illegal exploitation of natural resources, illicit trade in those resources, and arms trafficking as a significant factor exacerbating the continuing conflicts in the region.<sup>111</sup> The armed groups' occupation and exploitation of the mineral mines have provided a rich source of funding for guns, ammunition, and other conflict-sustaining supplies. Along with gems and other precious metals, the DRC has a rich supply of gold, cassiterite, wolframite, and coltan.<sup>112</sup> The latter three minerals are refined into the metals tin, tungsten, and tantalum.<sup>113</sup> Gold, tin, tungsten, and tantalum are widely used in numerous industries, but they are particularly important in the

106. See Delphine Schrank, *Tin Fever*, VA. Q. REV., Fall 2010, at 24, 32 (describing the interlocking military and rebel groups engaging in this type of exploitation at a cassiterite mine in eastern DRC), available at <http://www.vqronline.org/essay/tin-fever> [<http://perma.cc/FLD9-34YB>] (archived Jan. 27, 2014).

107. See generally Fiona Lloyd-Davies, *Why Eastern DR Congo Is 'Rape Capital of the World,'* CNN (last updated Nov. 25, 2011), <http://www.cnn.com/2011/11/24/world/africa/democratic-congo-rape/> [<http://perma.cc/T7DX-V2VV>] (archived Jan. 27, 2014) (discussing the difficult choices women in the DRC face—to “stay home and face starvation” or venture “out to the fields for food and be raped”).

108. See generally Amber Peterman, Tia Palermo & Caryn Bredenkamp, *Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo*, 101 AM. J. PUB. HEALTH 1060 (2011) (reporting on a study of sexual violence in the DRC that estimates “rape among women aged 15 to 49 years in the 12 months prior to the survey[, which] translate[s] into approximately 1150 women raped every day, 48 women raped every hour, and 4 women raped every 5 minutes”).

109. See generally GÉRARD PRUNIER, *AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE* (2009) (providing an exhaustive account of the history of the “African World War”).

110. *What Happens When the Sleeping Giant of Congo Awakes*, AFRICAN GLOBE (July 2, 2013), <http://www.africanglobe.net/business/sleeping-giant-congo-awakes/> [<http://perma.cc/JVV8-BUPN>] (archived Jan. 27, 2014).

111. S.C. Res. 1635, U.N. Doc. S/RES/1635 (Oct. 28, 2005).

112. See JOHN PRENDERGAST & SASHA LEZHNEV, *FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN 1*, available at <http://www.enoughproject.org/files/publications/minetomobile.pdf> (outlining the conflict minerals supply chain).

113. *Id.* at 9 n.4.

production of electronic devices.<sup>114</sup> Cell phones, laptop computers, and digital video cameras, among others, rely on these minerals for their operation.<sup>115</sup> Gold is used for wire coating.<sup>116</sup> Tin is a soldering agent.<sup>117</sup> Tungsten makes cell phones vibrate.<sup>118</sup> Tantalum capacitors store electricity in electronic devices.<sup>119</sup> These minerals have been dubbed “conflict minerals” to denote their role in the ongoing conflict and unrest in the Great Lakes Region of Africa, particularly in the DRC.<sup>120</sup> Though the DRC is not the sole—or even majority—supplier of these conflict minerals, their abundance has made the DRC a major global supplier.<sup>121</sup>

Artisanal mining is perhaps dangerous enough in and of itself for the local miners and the environment of the eastern DRC, but the violence and terror that the military and paramilitary groups inflict exacerbate these difficulties of life.<sup>122</sup> Only a multifaceted strategy of international pressure, support, and cooperation at the political, military, social, and economic levels has any hope to produce any long-lasting successful resolution to the tragedies caused by these entrenched and conflicting interests. Nonetheless, at least some part of the solution has to address the role that foreign businesses play in the cycle of conflict and violence. Markets create value in the minerals. That value drives the unauthorized exploitation of the mines and the local populations. Those value-creating markets would not exist without demand for the products that incorporate the minerals. Though the electronics manufacturers and consumers may be geographically far removed from the DRC mines, it would be shortsighted to ignore their role in any comprehensive strategy for bringing stability to the DRC.

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114. *Id.* at 1.

115. See Edward Wyatt, *Use of “Conflict Minerals” Gets More Scrutiny from U.S.*, N.Y. TIMES, Mar. 20, 2012, at B1, available at [http://www.nytimes.com/2012/03/20/business/use-of-conflict-minerals-gets-more-scrutiny.html?\\_r=0](http://www.nytimes.com/2012/03/20/business/use-of-conflict-minerals-gets-more-scrutiny.html?_r=0) [<http://perma.cc/BR5L-FMQS>] (archived Jan. 27, 2014) (describing the vital place of conflict minerals in the electronics industry, among others).

116. *Id.*

117. *Tin: Statistics and Information*, U.S. GEOLOGICAL SURV., <http://minerals.usgs.gov/minerals/pubs/commodity/tin/> [<http://perma.cc/XKF4-96JL>] (archived Jan. 27, 2014) (last modified Nov. 1, 2013).

118. Tristan McConnell, *Is Your New Mobile Phone Made with Conflict Minerals?*, GLOBALPOST, <http://www.globalpost.com/dispatch/africa/101214/mobile-phones-iphone-congo-war-conflict-minerals> [<http://perma.cc/45Z7-QV26>] (archived Jan. 27, 2014) (last updated Dec. 19, 2010).

119. *Id.*

120. See Conflict Minerals, 77 Fed. Reg. 56,274, at 56,275 n.6 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b) (referring to Dodd-Frank’s definition of *conflict minerals*, which includes gold, casiterite, wolframite, and coltan).

121. See generally PRENDERGAST & LEZHNEV, *supra* note 112 (noting the scale of the DRC’s conflict mineral trade).

122. For a description of the complex corruption and intimidation related to, as well as harrowing experience of miners at, cassiterite mining operations at the Bisie mine in North Kivu province in the DRC, see generally Schrank, *supra* note 106.

As such, the conflict minerals issue embodies the governance gaps that Ruggie identified as plaguing the business and human rights space.<sup>123</sup> The Congolese government lacks sufficient capacity to deal with the issue because of its recent history—and, in some parts of the country, its current threat—of bloody and devastating violence.<sup>124</sup> Even if the Congolese government's capacity were not so limited, the complexity of the supply chain for these minerals is such that the challenge presented by legal fragmentation and the conundrum of extraterritorial application of any one nation's laws to a global industry is writ large. The number of actors involved in the process from the mine to the finished product is significant;<sup>125</sup> the number of home and host states that are touched by those actors' commercial activities is daunting. The situation presents a classic collective action problem<sup>126</sup> in that it takes a cooperative, comprehensive approach to starve the rebel groups of their sources of income. Defectors who continue to buy from conflict-affected mines and to fund the rebel groups can undermine governance efforts. Thus, any governance regime needs to be innovative, be adaptive, build trustworthiness and cooperation among the affected actors, and work at multiple scales. A polycentric approach is warranted.

In fact, a polycentric governance regime focused on supply chain transparency and due diligence and intended to limit the access of rebel groups to the deep pockets of the global market has emerged. The regime incorporates norms that are consistent with and, perhaps, inspired by the PRR Framework and Guiding Principles.<sup>127</sup> This polycentric regime involves a growing network of state and nonstate regulators acting interdependently to complement each other and to add value with their strengths while counterbalancing each other's weaknesses.

The causes and continuing dynamics that fuel the instability in the eastern DRC and lead to the gross human rights abuses are many. It is unlikely that halting illicit trade in conflict minerals will, by itself, remedy all that afflicts the region. Nonetheless, the success or failure of the efforts to curb the trade in rebel-financing conflict

123. See *supra* notes 95–99 and accompanying text (describing the concept of governance gaps and noting specific governance gaps present in the role of businesses in protecting against human rights abuses).

124. See generally PRUNIER, *supra* note 109 (providing background on the recent and ongoing conflict in the DRC).

125. See *infra* note 210 and accompanying text (describing the complexity of the supply chain for just one mineral for just one company).

126. See *supra* notes 62–63 and accompanying text (giving the basic theory of the collective action problem and the tragedy of the commons).

127. See Mark B. Taylor, *The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility*, 5 ETIKKI I PRAKSIS: NORDIC J. APPLIED ETHICS 9, 23–25 (2011) (discussing how the Ruggie idea of due diligence and reporting—“knowing and showing”—has been incorporated in the approach to conflict minerals).



minerals may provide some evidence for how a polycentric approach to issues of business's participation and complicity in violations of human rights will fare.

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

While it is outside the scope of this Article to give a complete account of all the various actors in this emerging governance regime, it is worthwhile to map some of the activities of the major state and nonstate players at various levels in the process. After creating this map, this Article will consider whether well-intentioned, state-based legislative action will “crow[d] out” the voluntary, cooperative creation of a truly effective polycentric system of governance<sup>128</sup> or whether the legislation will catalyze the propagation of various regulatory and decision-making centers to more quickly create a fully polycentric regime. Ultimately, careful field study and application of mature analytical tools, such as the IAD framework from the Ostrom Workshop,<sup>129</sup> will be necessary to measure the effectiveness of these efforts and to improve and encourage subsequent initiatives. The PRR Framework's legitimacy and longevity will likely hang on the success of these types of efforts.

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

At the urging of several civil society NGOs, most notably the Enough Project and Global Witness,<sup>130</sup> the U.S. Congress took notice of the conflict mineral supply chain. In 2010, Congress somewhat uncomfortably included § 1502,<sup>131</sup> which addresses conflict minerals, within the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>132</sup> a financial reform bill. Section 1502's goal is to starve the armed rebel groups of the essential funding source that comes from trading in conflict minerals.<sup>133</sup>

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128. See *supra* note 72 and accompanying text (discussing the problem of central regulation crowding out creative, voluntary cooperative behavior).

129. See generally McGinnis, *supra* note 17 (describing the IAD framework and the language of the Ostrom Workshop).

130. See Taylor, *supra* note 127, at 24 (“In the United States, advocacy organisations such as Enough and Global Witness had managed to raise attention to the issue of conflict minerals with legislators.”).

131. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 1502, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78m(p) (2012)).

132. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

133. *Id.* § 1502(a).

Without banning the purchase or use of conflict minerals from the DRC or its neighbors, even if the minerals can be shown to have funded armed rebels, § 1502 instead incorporates the due diligence and reporting norm that SRSR Ruggie says requires companies to “know and show” that they are respecting human rights.<sup>134</sup> Congress chose to force companies to disclose information about their behavior and choices rather than to regulate that behavior directly. Section 1502 regulates the flow of information in three complementary ways.<sup>135</sup> First, it affects publicly traded corporations and their activities by requiring that they engage in due diligence and reporting about their sourcing of conflict minerals. In addition, it directs government officers, including the secretary of state, the comptroller general of the United States, and the secretary of commerce, to assist in the compilation and sharing of information related to conflict minerals trade. The U.S. State Department is required to create a map detailing mines, routes, and facilities that are controlled by armed rebel groups. The comptroller general and the secretary of commerce are charged with reporting to Congress on aspects of the effectiveness of the reporting requirements, including the activities of firms not required to file conflict minerals reports.

i. Due Diligence, Reporting, and Disclosure

Most significantly, § 1502 forces certain companies—primarily publicly traded technology, automotive, mining, jewelry, and aerospace companies—to disclose to the U.S. Securities and Exchange Commission (SEC) and to make available through their websites information related to their supply chain monitoring and use of conflict minerals. Specifically, the covered companies must disclose and make available through their websites whether conflict minerals that are “necessary to the functionality or production of a product” they manufacture originated in the DRC or the countries sharing an internationally recognized border with the DRC (i.e., Angola, Burundi, the Central African Republic, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda, and Zambia).<sup>136</sup> In addition, the companies must provide “a description of the measures taken . . . to exercise due diligence on the source and chain of custody of conflict

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134. See RUGGIE, *supra* note 6, at 99 (“To discharge the responsibility to respect human rights requires that companies develop the institutional capacity to *know* and *show* that they do not infringe on others’ rights.”).

135. See generally Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT’L L. 129, 134–37 (2011) (describing the conflict minerals legislation and the legislation’s objectives).

136. 15 U.S.C. § 78m(p)(2)(B).

minerals.”<sup>137</sup> Companies must also submit to the SEC a private audit of those efforts, as well as

a description of the products manufactured or contracted to be manufactured that are not DRC conflict free . . . [and] the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.<sup>138</sup>

To be “DRC conflict free,” a product cannot contain minerals “that directly or indirectly finance or benefit armed groups in the [DRC] or an adjoining country.”<sup>139</sup> Essentially, covered companies must audit their supply chains to ensure that the mines from which the minerals are extracted, the trade routes, and the trading facilities through which the minerals pass are neither under the control of nor financing armed groups.

In August 2012, following an extensive and extended notice and comment period, the SEC issued its final rule on the conflict minerals provision, implementing the Dodd-Frank Act requirements.<sup>140</sup> The final rule, numbering more than 300 pages, lays out a three-step process for covered companies to determine whether and what to report regarding their use of conflict minerals and the minerals’ origin.<sup>141</sup> Figure 1 provides a flowchart of the processes.

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137. *Id.* § 78m(p)(1)(A)(i).

138. *Id.* § 78m(p)(1)(A)(ii).

139. *Id.* § 78m(p)(1)(D).

140. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b).

141. *Id.*



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

**First Step:** A company must determine if it is subject to the rule.<sup>142</sup> Only those companies for which conflict minerals are necessary to the functionality or production of a product they manufacture are covered.<sup>143</sup> If a company does not fall within this definition, it need not engage in any further investigation or due diligence, make any disclosures, or file any reports under the rule.<sup>144</sup>

**Second Step:** If a company determines that it is subject to the rule as required in the first step, then it must conduct a reasonable country-of-origin inquiry.<sup>145</sup> This inquiry must be reasonably designed to determine if the conflict minerals originated in the DRC or its neighboring countries, and it must be done in good faith.<sup>146</sup> The results of this inquiry can be any of the following: (a) a determination that the conflict minerals did not originate in the covered countries, (b) a determination that the conflict minerals are from recycled or scrap sources, (c) an inability to determine the origin of the conflict minerals, or (d) a determination that the conflict minerals *did* originate in the covered countries.<sup>147</sup> A company that determines either of the first two is required to disclose that fact in a new, specialized disclosure, Form SD, and to describe the process it utilized in its reasonable country-of-origin inquiry.<sup>148</sup> Such companies need not proceed to the third step. If a company is unable to determine the origin of the conflict minerals, it too must file a specialized disclosure stating its conclusion and describing its inquiry, but it need not proceed to the third step unless it has reason to believe

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142. As an initial matter, only companies that are publicly traded via a listing on a U.S. stock exchange are subject to the rule, as only they are governed by the periodic reporting requirements of the Securities and Exchange Act of 1934. *See* 17 C.F.R. § 200.1 (2006) (providing reporting requirements of the 1934 Act). The final SEC rule makes this clear, stating: “[T]he final rule applies to any issuer that files reports with the [SEC] under Section 13(a) or Section 15(d) of the Exchange Act.” Conflict Minerals, 77 Fed. Reg. at 56,287. Therefore, privately held corporations and, obviously, corporations not listed and traded in the United States are not subject to the conflict minerals legislation or the SEC’s rule. However, the SEC decided, despite objections to the contrary, that foreign private issuers who are listed on U.S. securities markets are covered by the rule and must, therefore, file appropriate reports and engage in due diligence when the rule requires. *Id.* at 56,287–88.

143. Conflict Minerals, 77 Fed. Reg. at 56,290.

144. *Id.* at 56,279.

145. *Id.* at 56,280.

146. *Id.* at 56,310–14.

147. *Id.*

148. *Id.* at 56,280.

its conflict minerals may have originated in a covered country and may not be from recycled or scrap sources.<sup>149</sup>

**Third Step:** Companies whose reasonable country-of-origin inquiry has led to the determination that the conflict minerals originated or may have originated in the covered countries and did not come from recycled or scrap materials must exercise due diligence on the source and chain of custody of the conflict minerals. They must file an extensive report about their due diligence measures along with SEC Form SD.<sup>150</sup> Ultimately, if the due diligence process reveals that a company's conflict minerals financed or benefited armed groups in the covered countries, the company must disclose as much,<sup>151</sup> presumably subjecting it to significant social and market pressure to avoid such complicity in the future.

The due diligence process must comport with a nationally or internationally recognized framework.<sup>152</sup> Furthermore, the rule requires an independent, external private audit of the report.<sup>153</sup> The objective of the audit is to express an opinion or conclusion as to whether the report describes due diligence measures that comply with an appropriate due diligence framework and whether it accurately describes the due diligence process the company actually undertook.<sup>154</sup>

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149. If such a company proceeds to the due diligence process in the third step and, through that process, determines that the origin of the conflict minerals was not a covered country or that the conflict minerals came from recycled or scrap material, it does not have to complete the third step. *Id.* Rather, it can simply complete the specialized disclosure and briefly describe its reasonable country-of-origin inquiry and the due diligence efforts that led to its conclusion that the conflict minerals were not from the covered countries. *Id.*

150. *Id.* at 56,316–29.

151. *Id.* at 56,316–24.

152. *Id.* at 56,326.

153. *Id.* at 56,328–29.

154. *Id.* at 56,329. The rule provides a two-year transition period (four years for smaller companies), during which companies may certify their conflict minerals “DRC conflict undeterminable” in either of two circumstances. First, a company may do so if it is unable to determine whether its conflict minerals that originated in the covered countries financed or benefited armed rebel groups. Alternatively, a company may certify its conflict minerals “DRC conflict undeterminable” if its reasonable country-of-origin inquiry gave it reason to believe the conflict minerals may have originated in the covered countries and the due diligence failed to provide additional clarification as to whether the conflict minerals financed or benefited armed rebel groups. *Id.* at 56,321. A company whose reports conclude “DRC conflict undeterminable” during the transition period need not have the report audited but must file the report along with a description of steps the company will take or has taken to mitigate the risk that its conflict minerals will benefit armed groups. *Id.*

## ii. Government Information Gathering

In addition to the public company reporting requirements, the second way that the Dodd-Frank Act addresses the conflict minerals issue is that it instructs the State Department to develop a strategy to address “the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products”<sup>155</sup> and to create a map detailing conflict minerals in the DRC.<sup>156</sup> In particular, the map is intended to provide up-to-date and publicly available information about what mines, routes, and facilities are considered to be under the control of armed groups.<sup>157</sup> Complying with this requirement, however, has proven difficult for the State Department. The most recent iteration of the map is based on information in reports dated June and November 2012 from the UN Group of Experts on the DRC.<sup>158</sup> As noted on the map, the State Department continues to be hampered in its efforts to produce a comprehensive representation of the conflict-affected mines, routes, and facilities because verifiable data regarding conditions in the DRC is difficult to obtain.<sup>159</sup> The State Department indicates that locations of mine sites, whether sites are active or inactive, and the activities of armed groups in relation to those mines are all difficult to confirm with current data sources.<sup>160</sup> As a result, the State Department warns that the “map should not by itself be considered a source of sufficient information to serve as a substitute for the exercise of effective due diligence on companies’ supply chains.”<sup>161</sup>

Third, § 1502 requires the U.S. comptroller general and the secretary of commerce to provide baseline and ongoing reporting of commercial activities in conflict minerals, notably including the commercial activities of companies not required to file reports with the SEC.<sup>162</sup> This additional information will fill information gaps created as a result of the reporting requirements only applying to publicly traded companies.

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155. Dodd-Frank Act §1502(c)(1)(A), Pub. L. No. 111-203, 124 Stat. 2213 (2010).

156. *Id.* § 1502(c)(2)(A).

157. *Id.*

158. Humanitarian Information Unit, *Democratic Republic of the Congo Mineral Exploitation By Armed Groups & Other Entities*, U.S. DEP’T OF STATE (June 7, 2013), available at [https://hiu.state.gov/Products/DRC\\_ConflictMinerals\\_2013Jun07\\_HIU\\_U828.pdf](https://hiu.state.gov/Products/DRC_ConflictMinerals_2013Jun07_HIU_U828.pdf).

159. *Id.*

160. *Id.*

161. *Id.*

162. Dodd-Frank Act § 1502(d); see also Conflict Minerals, 77 Fed. Reg. at 56,288 n.110 (discussing the interplay between the SEC’s final rule regarding conflict minerals and the Comptroller General’s reports).

### iii. Relation to PRR Framework

The U.S. conflict minerals legislation reflects a number of the challenges and goals identified in the PRR Framework and Guiding Principles. As Professor Taylor notes, § 1502 is an early indication that these goals are taking root.<sup>163</sup> The legislation's incorporation of the know and show style of due diligence, auditing, and reporting clearly comports with SRSG Ruggie's vision of a human rights due diligence norm.<sup>164</sup> Section 1502 is likely evidence that human rights due diligence has entered the "norm cascade" phase of the norm life cycle in international relations.<sup>165</sup> Moreover, Congress and the SEC are clearly limited in what they can do to extend regulatory efforts extraterritorially.<sup>166</sup> Yet, as Ruggie has argued, domestic measures that force publicly traded companies to report on a variety of risks, regardless of where the risks are incurred, can have extraterritorial implications without charging headlong into the controversial realm of directly regulating actors or actions that take place extraterritorially.<sup>167</sup>

In essence, § 1502 and the SEC's final rule force the dissemination of information that is otherwise difficult or impossible to discover.<sup>168</sup> Trade in conflict minerals is not prohibited or sanctioned in any way. Rather, the filings and reports by covered

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163. Taylor, *supra* note 127, at 23–25.

164. Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

165. See RUGGIE, *supra* note 6, at 128–29 (citing Martha Finnemore & Kathryn Sikink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998)) (describing the life-cycle of norm uptake). In contrast, the relative paucity of nationally or internationally recognized due diligence frameworks that can be used by companies to comply with the SEC rule and the resistance that business groups have exhibited to the due diligence requirement are both evidence that the human rights due diligence norm has not advanced to the internalization stage, where the norm takes on a "taken-for-granted quality." See *id.* (describing norm internalization). Indeed, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Business Roundtable recently filed an unsuccessful petition to invalidate the SEC rule and find § 1502 unconstitutional. See *Nat'l Ass'n of Mfrs. v. SEC*, Civil Action No. 13-cv-635 (RLW), 2013 U.S. Dist. LEXIS 102616, at \*3 (D.D.C. July 23, 2013) (granting summary judgment for the SEC and interveners).

166. Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1660–61 (2013) (holding that the presumption against extraterritorial application of U.S. law applies to the Alien Tort Statute and that nothing in the text, history, or purpose of the statute rebuts the presumption).

167. See RUGGIE, *supra* note 6, at 109 ("The Commentary summarizes a distinction . . . between domestic policy measures that have extraterritorial effects, and actually adjudicating conduct in one's own courts that took place within another jurisdiction . . .").

168. See Ochoa & Keenan, *supra* note 135, at 138–42 (discussing the information-forcing nature of the legislation).



companies, the secretary of state, the comptroller general, and the secretary of commerce will distribute information about the use and exploitation of conflict minerals up the supply chain and, ultimately, to the consumer. The SEC rule recognizes that government entities are not always in the best position to extract information on the ground. As such, it anticipates that an independent yet interconnected system of public and private regulative actors will need to assist in that work, bringing to bear their greater technical capacities and expertise. In other words, it relies on the development of a polycentric system, of which § 1502 and its implementing regulation are only part. The other components of this network are discussed in the following subparts.

## 2. Subnational-Level State Actors: State and Municipal Enactments

Since the enactment of § 1502, two states and several cities have enacted complementary legislation aimed at reducing their exposure to the human rights risks associated with conflict minerals. Maryland's State Procurement and Congo Conflict Minerals Bill prohibits state government units from knowingly procuring supplies or services from any company that has failed to comply with § 1502.<sup>169</sup> Likewise, California's legislation, an amendment to a public contracting act focusing on the genocide in Darfur, makes companies that are noncompliant with § 1502 ineligible to bid on contracts with a state agency to provide goods or services.<sup>170</sup>

The Massachusetts House of Representatives is currently considering a similar procurement bill, which would prohibit any "scrutinized company" from bidding or submitting a proposal for a contract for goods or services with a state agency.<sup>171</sup> *Scrutinized company* is defined as follows:

[A company] that is required to disclose information relating to conflict minerals originating in the Democratic Republic of the Congo, or its adjoining countries, pursuant to [Section 1502] . . . , where the [company] has filed an 'unreliable determination,' . . . reported false information in their report . . . , or failed to file a report . . . and which the [SEC] has, upon the completion of the commission's processes, determined that [the company] has made a report that does not satisfy the requirements of due diligence described in [Section 1502].<sup>172</sup>

Some cities, such as Pittsburgh, Pennsylvania; St. Petersburg, Florida; and Edina, Minnesota, have passed resolutions calling on

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

170. CAL. PUB. CONT. CODE § 10490 (Deering 2013).

171. An Act Relative to Congo Conflict Minerals, MASS. H.B. No. 2989, 188th Gen. Court (2013), available at <https://malegislature.gov/Bills/188/House/H2898> [<http://perma.cc/9Z6-XCYX>] (archived on Jan. 27, 2014).

172. *Id.* § 2(a).

companies in their cities to engage in due diligence and to take any necessary remedial steps to remove from their supply chains any conflict minerals that fund armed groups.<sup>173</sup> Pittsburgh's proclamation also supported the development of international certification systems to ensure minerals from Central Africa are not contributing to conflict,<sup>174</sup> providing another example of the burgeoning polycentric regime regulating firms that potentially trade in conflict minerals.

These enactments and proclamations reinforce the norms related to due diligence and reporting on conflict minerals. They address one of the priorities that SRSR Ruggie enumerated in his 2010 report to the UN Human Rights Council to help bridge the coherence-based governance gaps—namely, that governments should consider human rights when they do business with business.<sup>175</sup>

### 3. National-Level State Actors: Other National Laws

Other countries have indicated some willingness to follow the lead of the United States with regard to domestic legislation like § 1502, highlighting the United States' status as a potential norm entrepreneur. For instance, in March 2013, Canadian member of Parliament (MP) Paul Dewar introduced a bill that would impose due diligence and reporting requirements similar to § 1502.<sup>176</sup> Bill C-486, MP Dewar's bill, would require Canadian corporations that have "processed, purchased, traded in, used or extracted a designated [conflict] mineral, or contracted to do so" to "exercise due diligence in respect of any extraction, processing, purchasing, trading in or use of designated [conflict] minerals that it carries out in the course of its

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173. See Appendix D—Legislative and Other Initiatives, HEADS UP (Deloitte, New York, N.Y.), Sept. 11, 2012, at 11 (compiling legislation).

174. See File # 2011-1639, CITY OF PITTSBURGH (Apr. 19, 2011), <https://pittsburgh.legistar.com/LegislationDetail.aspx?ID=873982&GUID=53DB676C-7643-4948-A56D-6731D4925634> [<http://perma.cc/TW4T-2YK6>] (archived Jan. 27, 2014) ("BE IT FURTHER RESOLVED, that the Council of the City of Pittsburgh calls on US executive leadership in helping to establish an international certification system for minerals coming from Central Africa to ensure they are not contributing to conflict.").

175. See Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶¶ 26–32, Hum. Rts. Council, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie) ("[T]he State's role as an economic actor is a key—but underutilized—leverage point in promoting corporate human rights awareness and preventing abuse."); see also *supra* text accompanying note 97 (discussing Ruggie's conception of governance gaps).

176. *An Act Respecting Corporate Practices Relating to the Extraction, Processing, Purchase, Trade and Use of Conflict Minerals from the Great Lakes Region of Africa*, Bill C-486, First Reading, Mar. 26, 2013 (41st Parliament, 1st Sess.), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6062040&File=4&Col=1> [<http://perma.cc/KZ5C-B7NS>] (archived Jan. 27, 2014).

activities, or that it contracts to have carried out.”<sup>177</sup> Such companies would be required to submit reports to the minister of foreign affairs and publish the reports on their websites. The reports would include a description of the due diligence process used by the companies and would be required to be independently audited by a third party.<sup>178</sup>

Similarly, in March 2013, the European Commission Directorate-General for Trade commenced a public consultation to explore the possibility of an EU initiative similar to § 1502.<sup>179</sup> A public questionnaire was opened to solicit views on an initiative for responsible sourcing of conflict minerals.<sup>180</sup> The questionnaire sought feedback on whether a due diligence and reporting framework should be adopted.<sup>181</sup> In addition, the questionnaire asked whether an EU conflict minerals initiative should operate in the same manner as the EU Timber Regulation.<sup>182</sup> The consultation was completed in June 2013, and the contributions will be published online.<sup>183</sup> The results of the questionnaire are likely to be used to determine whether to support ongoing due diligence initiatives related to conflict minerals and how to reasonably and effectively do so if such support is warranted.<sup>184</sup>

#### 4. Intergovernmental Actors: OECD Guidance

The SEC rule implementing § 1502 requires that companies use a nationally or internationally recognized due diligence framework to conduct their conflict mineral due diligence.<sup>185</sup> The rule specifies that, at the time of its adoption, the Organisation for Economic Cooperation and Development (OECD) had issued the only known internationally recognized framework that would allow companies to

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177. *Id.* §§ 3–4.

178. *Id.* § 4.

179. Kirsten Wallerstedt, *EU and Canada Consider Conflict Minerals Rules*, 3E COMPANY (Apr. 4, 2013), <http://3ecompany.com/blog/?p=172> [<http://perma.cc/TDG7-3QVL>] (archived Jan. 27, 2014).

180. *Id.*

181. *Id.*

182. *Id.* The EU Timber Regulation prohibits illegally harvested timber or products produced from such timber from being placed on the EU market. *Timber Regulation*, EUROPEAN COMM’N, [http://ec.europa.eu/environment/forests/timber\\_regulation.htm](http://ec.europa.eu/environment/forests/timber_regulation.htm) [<http://perma.cc/9CV7-59FF>] (archived Jan. 27, 2014) (last updated Jan. 14, 2014). It also requires firms who place timber on the EU market to “exercise due diligence” and to “keep records of their suppliers and customers.” *Id.*

183. See *Public Consultation on a Possible EU Initiative on Responsible Sourcing of Minerals Originating from Conflict-Affected and High-Risk Areas*, EUROPEAN COMM’N, [http://trade.ec.europa.eu/consultations/?consul\\_id=174](http://trade.ec.europa.eu/consultations/?consul_id=174) [<http://perma.cc/RT3J-GG7E>] (archived Jan. 27, 2014) (last updated Feb. 14, 2014) (providing information and links related to the consultation).

184. Wallerstedt, *supra* note 179.

185. Conflict Minerals, 77 Fed. Reg. 56,274, 56,326 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240).

comply with the rule.<sup>186</sup> Thus, this subpart will describe the OECD and its due diligence framework.

The OECD is an intergovernmental economic organization consisting of thirty-four of the most developed nations in the world, all of which are committed to democratic government and the market economy.<sup>187</sup> Another twenty-five nonmember countries participate as regular observers or full participants in OECD committees,<sup>188</sup> and fifty nonmembers participate in other OECD activities but are less extensively engaged.<sup>189</sup> The OECD's mission is to "promote policies that will improve the economic and social well-being of people around the world,"<sup>190</sup> and it is "a forum in which governments can work together to share experiences and seek solutions to common problems."<sup>191</sup> To achieve these goals, the OECD focuses mostly on the generation of knowledge and best practices.<sup>192</sup> Its consensus-based programs are typically nonbinding but are meant to be dispersed and adopted to the extent that member and nonmember states have the political will to do so.<sup>193</sup> Because of the collective and individual influence and global market power of the Member States, OECD programs and standards tend to be adopted broadly and exert significant influence.<sup>194</sup>

Relevant to this discussion, the OECD has long provided leadership by example in the promulgation of corporate governance initiatives. For instance, the OECD Principles of Corporate

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186. *See id.* ("The OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" satisfies our criteria and may be used as a framework for purposes of satisfying the final rule's requirement that an issuer exercise due diligence in determining the source and chain of custody of its conflict minerals.")

187. *See About the OECD*, ORGANISATION FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/about/> [<http://perma.cc/RPQ8-77UV>] (archived Jan. 20, 2014) ("The common thread of our work is a shared commitment to market economies backed by democratic institutions . . .").

188. *See Members and Partners*, ORGANISATION FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/about/membersandpartners/> [<http://perma.cc/PJ2M-B2ZN>] (archived Jan. 20, 2014) ("Over time, OECD's focus has broadened to include extensive contacts with non-member economies and it now maintains co-operative relations with more than 70 of them.")

189. *Id.*

190. *About the OECD*, *supra* note 187.

191. *Id.*

192. *See* Larry Catá Backer, *Part 1; The U.S. National Contact Point—Corporate Social Responsibility Between Nationalism, Internationalism and Private Markets Based Globalization*, LAW AT THE END OF THE DAY (Feb. 2, 2013, 10:24 PM), <http://lbackerblog.blogspot.com/2013/02/part-1-us-national-contact-point.html> [<http://perma.cc/X3RE-RB65>] (archived Jan. 20, 2014) ("As thus constituted, the OECD tends to focus on knowledge production and consensus based programs that are meant to be adopted . . .").

193. *Id.*

194. *See id.* ("[B]ecause it is made up of the most developed states on the planet, programs and standards adopted through the OECD tend to be quite influential, and are likely to trickle down to both other states and private regulatory bodies.")

Governance provide a framework for effective corporate governance, including a chapter devoted to disclosure and transparency.<sup>195</sup> Growing out of this commitment to corporate governance and recognizing the need to provide guidance regarding conflict mineral due diligence in light of the increased attention to the abuses in the DRC, the OECD adopted the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (Due Diligence Guidance) in May 2011.<sup>196</sup> Subsequently, in 2012, the Supplement on Gold was developed as a complement to the Due Diligence Guidance, and the Due Diligence Guidance was updated to include references to the Supplement on Gold.<sup>197</sup>

The Due Diligence Guidance was developed in concert with representatives from eleven countries of the International Conference on the Great Lakes Region (ICGLR), which include Angola, Burundi, the Central African Republic, the Republic of Congo, the DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda, and Zambia.<sup>198</sup> In addition, representatives from industry, civil society, and the UN Group of Experts on the DRC consulted in its development.<sup>199</sup> The Due Diligence Guidance has received broad-based support from the ICGLR countries, the OECD itself (at both committee and ministerial levels), and UN organizations, including the Security Council.<sup>200</sup> As with most OECD guidance, the Due Diligence Guidance is not legally binding, but it has received sufficient OECD endorsement to “reflect[] the common position and political commitment of the OECD members and non-member adherents.”<sup>201</sup>

The Due Diligence Guidance provides a detailed framework for due diligence in responsible supply chain management regarding conflict minerals. *Due diligence* is defined in the guidance as “an ongoing, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict.”<sup>202</sup> Although a full description of the Due Diligence Guidance

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195. See ORGANISATION FOR ECON. CO-OPERATION & DEV. [OECD], PRINCIPLES OF CORPORATE GOVERNANCE 22–23 (2004), available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf> [<http://perma.cc/4ZGH-XL9Q>] (archived Jan. 20, 2014) (providing guidelines for disclosure and transparency in the corporate government framework).

196. See ORGANISATION FOR ECON. CO-OPERATION & DEV. [OECD], OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS 3 (2d ed. 2013), available at <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf> [<http://perma.cc/KFJ2-EBHP>] (archived Jan. 20, 2014) (describing reasons behind the creation of the guidance document).

197. See *id.* at 4 (providing an overview of the amendment process that led to the incorporation of reference to the *Supplement on Gold*).

198. *Id.* at 3.

199. *Id.*

200. See *id.* (describing sources of support for the initiative).

201. *Id.* at 4.

202. *Id.* at 13.

is beyond the scope of this Article, it is worth noting that it provides a five-step framework for risk-based due diligence. According to the framework, performing due diligence requires (1) establishing strong company management systems; (2) identifying and assessing risk in the supply chain; (3) defining and implementing a strategy to respond to identified risks; (4) carrying out independent third-party audits of supply chain due diligence at identified points in the supply chain; and (5) reporting on supply chain due diligence.<sup>203</sup> In essence, the Due Diligence Guidance provides the expert guidance for the development and implementation of the due diligence requirements in § 1502 and other regulatory efforts aimed at conflict mineral supply chain management.

Acting independently, but with knowledge of the governance efforts of other actors, particularly Congress, to regulate information regarding the use of conflict minerals, the OECD has contributed its broad-based consultation and expertise to provide nonlegally binding regulation to the polycentric governance system for conflict minerals. Because the conflict minerals issue represents a challenge to responsible corporate participation in the global economy, the matching principle<sup>204</sup> would suggest that an intergovernmental economic organization ought to be involved in addressing the problems associated with it. However, as discussed in Part V, it is possible that the SEC's adoption of the Due Diligence Guidance as the only compliant due diligence framework under § 1502 will actually stifle the effective functioning of the polycentric governance system by crowding out smaller-scale local, regional, or national due diligence systems that might have been more appropriately tailored to the needs of regulated actors at that scale.<sup>205</sup>

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

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

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203. See *id.* at 17–19 (providing detailed descriptions of appropriate actions within each of these steps).

204. See *supra* note 82 and accompanying text for a discussion of the matching principle.

205. For a discussion of the risk of “crowding out,” see *supra* note 72 and accompanying text.

### i. Conflict-Free Smelter Program

Among the more daunting challenges to implementing any transparency and traceability regime for conflict minerals is the unique nature of the supply chain. To grossly oversimplify a complex process,<sup>206</sup> unrefined minerals come from a huge number of different mines and intermediate sources to a significantly smaller number of smelting companies to be refined into the minerals that are ultimately used in products like electronics.<sup>207</sup> Thus, the smelters represent a choke point in the supply chain.<sup>208</sup> As such, they can play a vital role in helping with the traceability challenges that are inherent in an inquiry of origin process or in performing due diligence. If companies can trace their conflict minerals to specific smelters and those smelters can credibly certify that their inventories of conflict minerals did not finance or benefit armed rebel groups, tracing the minerals back to their countries of origin and completing the due diligence process becomes substantially less complicated. Smelters can do so by knowing from where and from whom they source their unrefined stock, keeping track of their inputs, and matching that to their outputs.<sup>209</sup>

Yet, tracking the source of conflict minerals is still daunting for any one company to tackle on its own. For instance, after mapping over 90 percent of its supply line for microprocessors between 2009 and 2012, Intel found that it had approximately two hundred suppliers, more than six thousand line items involved, and approximately 140 unique smelters who were engaged in that supply chain.<sup>210</sup>

Industry groups have stepped into this gap by assisting companies and coordinating cooperative behavior to encourage

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206. See INTEL, ELECTRONIC INDUS. CITIZENSHIP COALITION [EICC], *ASSESSING THE SUPPLY CHAIN FOR CONFLICT MINERALS* at 1 (2011), available at [http://www.eicc.info/documents/Intel\\_CSFinal\\_09\\_2011.pdf](http://www.eicc.info/documents/Intel_CSFinal_09_2011.pdf) [<http://perma.cc/GML-43ZU>] (archived Jan. 20, 2014) (“The electronics industry supply chain is deep and wide, with many layers of suppliers and multiple countries. As a result, it is difficult for many companies to verify the origin of all the metals used in manufacturing products—some of which enter the supply chain dozens of levels away from many different sources . . .”).

207. See PRENDERGAST & LEZCHNEV, *supra* note 112, at 1 (outlining the basic conflict mineral supply chain).

208. See, e.g., ENOUGH PROJECT, *GETTING TO CONFLICT FREE 3* (2010), available at [http://www.enoughproject.org/files/corporate\\_action-1.pdf](http://www.enoughproject.org/files/corporate_action-1.pdf) [<http://perma.cc/ZJQ2-7QBV>] (archived Jan. 20, 2014) (“The smelters represent the crucial chokepoint in the supply chain, where minerals are processed into metals, and are therefore key to ethical sourcing.”).

209. See Carolyn Duran, *Intel and Conflict Minerals: A Journey of Learning, Challenges and Leadership: Progress in Driving Conflict Free Sourcing* (2012) (unpublished PowerPoint slides) (on file with author) (describing Intel’s experience working with smelters in its supply chain).

210. *Id.*

smelters to credibly assert their conflict-free status.<sup>211</sup> Moreover, the groups coordinate cooperative action among mineral buyers and end-users, which helps to lessen the collective action problem that would otherwise arise when noncompliant companies source from smelters who do not want to expend the money or effort to become certified as conflict-free.<sup>212</sup> Without a critical mass of demand and pressure from up the supply chain, an insufficient number of smelters would have the incentive to cooperate.<sup>213</sup>

In the wake of the move toward conflict mineral regulatory initiatives, the Electronic Industry Citizenship Coalition (EICC) and the Global e-Sustainability Initiative (GeSI) joined forces to create the Conflict-Free Sourcing Initiative (CFSI).<sup>214</sup> The EICC is a coalition of leading electronics companies that coordinates global supply chain initiatives to improve efficiency and social, ethical, and environmental outcomes.<sup>215</sup> The GeSI is a coalition of information and communication technology companies that focuses on sustainability issues.<sup>216</sup> Together, the EICC and GeSI spearheaded a working group—along with stakeholders in the Automotive Industry Action Group, the Japanese Electronics and Information Technology Industries, and the Retail Industry Leaders Association, among others—reminiscent of the small clubs of like-minded stakeholders discussed above.<sup>217</sup> This interindustry working group launched the

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211. See generally ELECTRONIC INDUS. CITIZENSHIP COALITION, GLOBAL E-SUSTAINABILITY INITIATIVE, EICC-GE SI CONFLICT-FREE SMELTER (CFS) ASSESSMENT PROGRAM: FREQUENTLY ASKED QUESTIONS (Mar. 30, 2012) [hereinafter FREQUENTLY ASKED QUESTIONS], available at <http://share.pdfonline.com/f9e64b7de13342ea9f87e279448055b1/Conflict-FreeSmelterFAQ.pdf> [<http://perma.cc/8Y2J-HFC4>] (archived Jan. 20, 2014) (providing detailed information on the Conflict-Free Smelter (CFS) assessment program).

212. See Duran, *supra* note 209 (discussing the resistance of smelters to undertake the cost of certification and developing monetary incentives to encourage them to do so).

213. *Id.*

214. See *Conflict-Free Smelters & Refiners*, ELECTRONIC INDUS. CITIZENSHIP COALITION, GLOBAL E-SUSTAINABILITY INITIATIVE, available at <http://www.conflictreesourcing.org/conflict-free-smelter-refiner-lists/> [<http://perma.cc/EX8N-PHMH>] (archived Jan. 20, 2014) (last visited Feb. 16, 2014) (providing the names and locations of smelters and refiners compliant with the program).

215. See *About Us*, ELECTRONIC INDUS. CITIZENSHIP COALITION (Aug. 4, 2011), [http://www.eicc.info/about\\_us.shtml](http://www.eicc.info/about_us.shtml) [<http://perma.cc/H3Z-QSD4>] (archived Jan. 20, 2014) (providing an overview of the organization as a whole and its purpose).

216. See *About GeSI: Overview*, GLOBAL E-SUSTAINABILITY INITIATIVE, [http://gesi.org/About ICT\\_sustainability](http://gesi.org/About ICT_sustainability) [<http://perma.cc/AE4H-4XRM>] (archived Jan. 20, 2014) (last visited Feb. 16, 2014) (providing basic information and purpose of the organization).

217. See Press Release, Electronic Indus. Citizenship Coalition, Global e-Sustainability Initiative, EICC and GeSI Launch Conflict-Free Sourcing Initiative (Apr. 30, 2013), available at <http://eicc.info/documents/PRCFSILaunchFINAL.pdf> [<http://perma.cc/4PBJ-VAXU>] (archived Jan. 20, 2014) (announcing the launch of the Initiative); see also *supra* note 30 and accompanying text (describing the formation of “clubs” to address larger-scale problems).



CFSI in April 2013. Today, the CFSI incorporates a Conflict-Free Smelter Program (CFS Program), a Conflict Minerals Reporting Template,<sup>218</sup> conflict-free minerals supply chain workshops, conflict minerals training and best practices dissemination, and research on conflict minerals and metals used in the electronics sector.<sup>219</sup> By the end November 2013, the growing list of conflict-free tantalum smelters numbered twenty-three.<sup>220</sup>

Thirty gold refiners were certified by the CFS Program as of mid-December 2013.<sup>221</sup> While by the end of 2013 no tungsten smelters had yet achieved compliance,<sup>222</sup> eight tin smelters had gained certification by mid-December 2013.<sup>223</sup> Compliant smelters and refiners have taken steps to document their sourcing and sales to ensure conflict-free status of their inventories. They also submit to rigorous third-party auditing to ensure their compliance.<sup>224</sup>

Becoming conflict-free certified is not a cheap process. Individual members of the EICC and GeSI developed an “Early-Adopters Fund” to incentivize smelters to undergo the certification and audit process.<sup>225</sup> Intel, HP, and the GE Foundation donated \$225,000 to the program, which was managed by the EICC and RESOLVE,<sup>226</sup> a well-respected NGO that is active in working to solve diverse natural

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218. See *Conflict Minerals Reporting Template*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/conflict-minerals-reporting-template/> [<http://perma.cc/F64X-VQH7>] (archived Jan. 20, 2014) (providing links to the template form, instructional documents and videos, and dashboard tools for use with the template).

219. See Press Release, *supra* note 217, at 1 (describing programs associated with the CFSI).

220. See *Conflict-Free Tantalum Smelters*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/tantalum-conflict-free-smelters/> [<http://perma.cc/5M8T-R5GT>] (archived Jan. 20, 2014) (last updated Feb. 11, 2014) (providing comprehensive list of conflict-free tantalum smelters).

221. *Conflict-Free Gold Refiners*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/gold-conflict-free-smelters/> [<http://perma.cc/4VZM-5975?type=pdf>] (archived Jan. 20, 2014) (last updated Feb. 14, 2014).

222. *Conflict-Free Smelter Program Compliant Tungsten Smelter List*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/tungsten-conflict-free-smelters/> [<http://perma.cc/3TU6-4UWK>] (archived Jan. 20, 2014) (last updated Jan. 9, 2014).

223. *Conflict-Free Tin Smelters*, CONFLICT-FREE SOURCING INITIATIVE, <http://www.conflictreesourcing.org/tin-conflict-free-smelters/> [<http://perma.cc/VZN5-P8GF>] (archived Jan. 20, 2014) (last updated Jan. 28, 2014).

224. See FREQUENTLY ASKED QUESTIONS, *supra* note 211, at 9–10 (explaining the auditing process required for compliance).

225. See generally Press Release, RESOLVE, Intel, HP, GE Foundation Create Fund to Encourage Participation in Conflict-Free Smelter Program (Apr. 3, 2012), available at <http://www.resolve.org/wp-content/uploads/2012/04/CFS-Early-Adopters-Fund-Launch-Press-Release-FINAL.pdf> [<http://perma.cc/KYR7-FJXN?type=pdf>] (archived Jan. 20, 2014) (discussing the launch of RESOLVE’s funding program).

226. *Id.*; Duran, *supra* note 209.

resource, environmental, and public health problems.<sup>227</sup> The Early-Adopters Fund promised reimbursement for half the audit costs, or about \$5,000, to smelters or refiners that passed their conflict-free audit.<sup>228</sup> This cooperative problem solving is a hallmark of polycentric governance.

## ii. IPC Due Diligence Guidance

Industry-specific trade organizations have supplemented the foregoing efforts of other actors. They provide education and guidance to their members to assist with the uptake of the due diligence norm. For example, IPC—Association Connecting Electronics Industries has promulgated its Conflict Minerals Due Diligence Guidance.<sup>229</sup> IPC is a global trade organization focused on the electronic interconnection industry.<sup>230</sup> Though its guidance does little of substance beyond synthesizing the requirements of § 1502 and the guidance provided by the OECD Due Diligence Guidelines, it provides additional education, exposure, and operational capacity to incorporate the investigation, due diligence, and reporting requirements.

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

Any truly polycentric system will have local decision-making centers involved in the process. This is one area where the RPP Framework is arguably ill-fitted to the polycentric governance model. SRSG Ruggie has been criticized for failing to adequately and explicitly include civil society and multistakeholder initiatives in the RPP Framework.<sup>231</sup> He has indicated that their participation is

227. See *About*, RESOLVE, <http://www.resolv.org/about> [<http://perma.cc/E3A2-BVBB>] (archived Jan. 20, 2014) (last visited Feb. 16, 2013) (discussing the history and mission of RESOLVE).

228. Press Release, *supra* note 217, at 1.

229. See *New IPC Guide Spells out Electronics Manufacturers' Conflict Minerals Due Diligence Obligations*, IPC—ASS'N CONNECTING ELECTRONICS INDUS. (Feb. 12, 2013), <http://www.ipc.org/ContentPage.aspx?pageid=New-IPC-Guide-Spells-Out-Electronics-Manufacturers-Conflict-Minerals-Due-Diligence-Obligations> [<http://perma.cc/3FHC-NW3A>] (archived Jan. 20, 2014) (describing the IPC Conflict Minerals Due Diligence Guide and explaining its purpose).

230. See *Our Mission*, IPC—ASS'N. CONNECTING ELECTRONICS INDUS., <http://www.ipc.org/ContentPage.aspx?pageid=Mission-Statement> [<http://perma.cc/F44R-ZCNA>] (archived Jan. 20, 2014) (describing IPC as a “global trade association” designed to assist members of “the electronic interconnection industry through its dramatic changes”).

231. See Tara J. Melish & Errol Meidinger, *Protect, Respect, Remedy and Participate: “New Governance” Lessons for the Ruggie Framework*, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION* 303, 303–05 (Radu Mares ed., 2011) (arguing that there should be a fourth

incorporated and assumed in both the second and third pillars of the framework.<sup>232</sup> Perhaps belying that criticism, civil society actors and NGOs have had significant influence on the development of § 1502, the complementary state and local legislation, and other initiatives. The Enough Project, for instance, was instrumental in mobilizing grassroots support and providing testimony and anecdotal evidence to support the need for the state-based initiatives.<sup>233</sup> In addition, Enough Project affiliates have spearheaded small-scale and local initiatives to raise awareness about the sourcing of conflict minerals. In particular, the Enough Project's conflict-free campus programs took root at a large number of college and high school campuses, including fifteen campuses where official resolutions encouraging conflict-free sourcing have been passed.<sup>234</sup> At the least, these initiatives serve an educational purpose; moreover, they also likely co-opt these educational institutions—themselves influential civil society organizations and market actors—to the polycentric governance project and provide additional opportunities for creative thinking, market pressure, and norm diffusion.

On the other hand, stakeholders on the ground in the DRC have seemingly had less involvement in the conflict minerals regulatory process than one might expect. Some local NGOs have been instrumental in studying chain-of-custody and cross-border transactional issues in the conflict minerals space.<sup>235</sup> As the regime has developed, it has presented a potential threat, at least in the short term, even to the meager sustenance local populations receive from mining operations, both legitimate and illicit. Indeed, a group of local miner cooperatives expressed in their comments on the proposed conflict mineral rules to the SEC a concern about the effects that

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"Participate" pillar to the RPP framework to account for the need to have formal involvement of civil society actors).

232. *Id.* at 12.

233. See, e.g., *Enough Project Applauds Maryland Conflict Minerals Law*, ENOUGH (May 2, 2012), <http://www.enoughproject.org/news/enough-project-applauds-maryland-conflict-mineral-law> [<http://perma.cc/EQ6D-BYM6>] (archived Jan. 20, 2014) (noting Enough Project's involvement in getting the Maryland law enacted).

234. See *Participating Schools*, RAISE HOPE FOR CONGO, <http://www.raisehopeforcongo.org/content/participating-schools> [<http://perma.cc/JC5Z-UUYF>] (archived Jan. 18, 2014) (last visited Feb. 16, 2014) (listing the schools that have passed resolutions).

235. See, e.g., ALOYS TEGERA & DOMINIC JOHNSON, POLE INSTITUTE, *RULES FOR SALE: FORMAL AND INFORMAL CROSS-BORDER TRADE IN EASTERN DRC* (2007), available at [http://s3.amazonaws.com/zanran\\_storage/www.dfid.gov.uk/ContentPages/5045613.pdf](http://s3.amazonaws.com/zanran_storage/www.dfid.gov.uk/ContentPages/5045613.pdf) [<http://perma.cc/74N9-BS2G>] (archived Jan. 18, 2014) (reporting a study of cross-border trade in the eastern DRC); Aloys Tegera, *Blood Minerals (The Criminalization of an Economic Sector in Eastern DRC)*, POLE INST. (Mar. 2010), <http://pole-institute.org/index.php/archive/148-blood-minerals-the-criminalization-of-an-economic-sector-in-eastern-drc> [<http://perma.cc/9JV2-49J9>] (archived Jan. 18, 2014) (providing information about the Pole Institute's initiatives in studying the conflict minerals issue).

§ 1502 will have on the ground.<sup>236</sup> Concerns have been raised that the process will do little to alleviate the conflict and the concomitant violence and abuse suffered by local populations.<sup>237</sup>

There have been initiatives on the ground in the DRC and neighboring countries to assist traceability efforts in the mine-to-smelter stage of the supply chain. These include the “iTSCi Bag and Tag” initiative, which is focused on tin mines;<sup>238</sup> Solutions for Hope, which deals with tantalum mining;<sup>239</sup> and the Public-Private Alliance for Responsible Mineral Sourcing, which provides funding and support for building capacity in the DRC for supply chain transparency and chain-of-custody programs.<sup>240</sup> The extent of these initiatives’ incorporation of in-region communities and organizations is, however, unclear, and, regardless, the instability on the ground in the DRC has made these initiatives difficult to sustain. For example, the iTSCi initiative, which focused on piloting tin traceability in several mines in the eastern DRC, had to be abandoned when the DRC government suspended mining operations in certain regions between September 2010 and March 2011.<sup>241</sup> Thus, instability at the local level has prevented local organizations from being as active at the local level in the polycentric governance regime as one might expect or hope.

#### IV. SUMMARIZING THE POTENTIAL OF POLYCENTRIC GOVERNANCE TO PROMOTE HUMAN RIGHTS IN BUSINESS

There is no perfect forum in a multipolar world; both top-down and bottom-up regulatory approaches have benefits and drawbacks.

236. See Marc Choyt, *Democratic Republic of Congo: Mining Cooperatives Speak Out Critically About Dodd-Frank*, AFRICAFILES (Mar. 1, 2011), <http://www.africafiles.org/article.asp?ID=25062> [<http://perma.cc/K4AE-HDRZ>] (archived Jan. 18, 2014) (last visited Feb. 16, 2014) (describing the miners’ concerns).

237. See generally Laura E. Seay, *What’s Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* (Ctr. Global Dev. Working Paper No. 284, 2012) (outlining the case against § 1502).

238. See *iTSCi Project Overview*, ITRI, [https://www.itri.co.uk/index.php?option=com\\_zoo&task=item&item\\_id=2192&Itemid=189](https://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=2192&Itemid=189) [<http://perma.cc/ZXN8-MYCK>] (archived Jan. 18, 2014) (last visited Feb. 16, 2014) (explaining the iTSCi project). iTSCi stands for “ITRI Tin Supply Chain Initiative.” *Id.* “ITRI is the only organisation dedicated to supporting the tin industry and expanding tin use. It is largely funded by tin producers and smelters.” *Welcome to ITRI*, ITRI, <https://www.itri.co.uk> [<http://perma.cc/93H5-6C5J>] (archived Jan. 18, 2014) (last visited Feb. 16, 2014).

239. SOLUTIONS FOR HOPE, <http://solutions-network.org/site-solutionsforhope/> [<http://perma.cc/XFK7-3486>] (archived Jan. 18, 2014) (last visited Feb. 16, 2014).

240. *Public-Private Alliance for Responsible Minerals Trade*, RESOLVE, <http://www.resolve.org/site-ppa/> [<http://perma.cc/8RZ4-TYQP>] (archived Jan. 18, 2014) (last visited Feb. 16, 2014).

241. *iTSCi Project Overview*, *supra* note 238.

In the business and human rights context, focusing exclusively on multilateral treaties such as the Norms discussed in Part II would help manage free riders but would risk stalling progress, given geopolitical and socioeconomic divides. However, relying on bottom-up regulations such as the Conflict-Free Sourcing Initiative, or even § 1502, promises informality, flexibility, and promotes experimentation even as the absence of hierarchical control threatens gridlock. A true polycentric approach would be an all-of-the-above effort that includes the best of both worlds, but determining how this could work in practice first requires an analysis of the literature on polycentric governance, particularly the IAD framework.

Professor Ostrom created an informative framework of eight design principles for the management of common-pool resources that helps to guide discussion. These principles include (1) “clearly defined boundaries for the user pool . . . and the resource domain”;<sup>242</sup> (2) “proportional equivalence between benefits and costs”;<sup>243</sup> (3) “collective choice arrangements ensur[ing] that the resource users participate in setting . . . rules”;<sup>244</sup> (4) “monitoring . . . by the appropriators or by their agents”;<sup>245</sup> (5) “graduated sanctions” for rule violators;<sup>246</sup> (6) “conflict-resolution mechanisms [that] are readily available, low cost, and legitimate”;<sup>247</sup> (7) “minimal recognition of rights to organize”;<sup>248</sup> and (8) “governance activities [that] are organized in multiple layers of nested enterprises.”<sup>249</sup> Not all of Professor Ostrom’s design principles are applicable in the context of business and human rights given that they were designed primarily for managing small-scale, common-pool resources, such as forests and lakes. However, some of the principles do have salience and are addressed in turn.

#### A. *Defined Boundaries*

According to Professor Ostrom, “The boundary rules relate to who can enter, harvest, manage, and potentially exclude others’ impacts. Participants then have more assurance about trustworthiness and cooperation of the others involved.”<sup>250</sup> The literature on boundary rules suggests that group-defined boundaries can help foster trust and collaboration but narrowly focused

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242. BUCK, *supra* note 19, at 32.

243. Ostrom, *supra* note 70, at 118 tbl.5.3 (citing ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 90 (1990)).

244. BUCK, *supra* note 19, at 32.

245. *Id.*

246. *Id.*

247. *Id.*

248. Ostrom, *supra* note 70, at 118 tbl.5.3.

249. *Id.*

250. *Id.* at 119.

communities can also ignore other interests, stakeholders, and the wider impact of their actions.<sup>251</sup> To overcome such apathy, communities must have a defined stake in the outcome to effectuate good governance, which can in part be accomplished by educating managers about the importance of adhering to internationally recognized human rights practices.

The conflict minerals regime is narrowly focused on a particular issue of importance, in a particular region, and with a particular goal in mind. However, it has attempted to include communities—for example, the publicly listed manufacturers for which conflict minerals are necessary to the manufacture of their products—that may not have a clearly defined stake in managing conflict minerals when they can adequately source their minerals from nonconflict-affected areas. Section 1502 may help create that stake, which has resulted in community and trust building along the supply chain. This movement may be further strengthened depending on the outcome of the proposed regulations in Canada and the European Union.<sup>252</sup>

### B. Proportionality

This design principle underscores the need for equity in a system so that some of the “users [do not] get all the benefits and pay few of the costs.”<sup>253</sup> Such a principle echoes in the business and human rights space in the form of measures that seek to prevent human rights violators from profiting from their practices by defining a level playing field.

The conflict minerals regime has not attained perfect proportionality. On one hand, the smelter Early-Adopter Fund is designed to level the playing field among the smelters, such that the costs that early adopters might otherwise have to shoulder to their detriment are offset.<sup>254</sup> On the other hand, only covered entities under the Dodd-Frank Act<sup>255</sup> are required to submit filings under § 1502. Moreover, as other countries and regions, like Canada and the European Union, enter the conflict minerals regulation space, foreign companies will be able to piggyback on the work that U.S.-listed companies have done to comply with the Dodd-Frank Act without

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251. *E.g.*, MURRAY, *supra* note 7, at 164 (“Each of these narrow community interests simply ignore the other so long as they do not impact directly on their activities.”).

252. *See supra* Part II.B.3.

253. Ostrom, *supra* note 70, at 120.

254. *See supra* text accompanying notes 225–28 (describing the early-adopter program).

255. *See supra* note 142 (noting that only public reporting companies under the Securities and Exchange Act of 1934 are required to submit reports pursuant to Section 1502).

having to invest in the creation of the tracing and reporting infrastructure.

### *C. Collective Choice Arrangements and Minimal Recognition of Rights*

Professor Ostrom's third design principle requires "that most of the individuals affected by a resource regime [be] authorized to participate in making and modifying the rules related to boundaries [and the] assessment of costs."<sup>256</sup> This principle implies the importance of rulemaking by engaging the private sector in a public-private dialogue before moving to codify best practices at various regulatory levels. Moreover, this principle recognizes the need to modify rules as the environment changes.<sup>257</sup> Indeed, the tremendously variable legal environment of business and human rights around the world, including in Africa, highlights the importance of a dynamic, context-specific approach that takes into account current conditions on the ground.

The lack of comprehensive and effective on-the-ground involvement of NGOs in the DRC suggests that the conflict minerals regime is challenged in this regard. However, NGOs were highly involved in lobbying Congress to write and pass § 1502.<sup>258</sup> Consequently, there has been significant involvement by some grassroots and civil society organizations in the crafting and design of the conflict minerals regime. Moreover, the notice and comment period for the SEC rulemaking process was extended and garnered hundreds of comments.<sup>259</sup> Thus, it is clear that a significant opportunity for involvement in the process of implementing § 1502 was available to interested parties of all types,<sup>260</sup> providing some encouragement to proponents of applying polycentric governance to promote human rights in business.

### *D. Monitoring*

As Professor Ostrom posits, trust can typically only do so much to mitigate rule-breaking behavior.<sup>261</sup> Eventually, some level of monitoring becomes important. In self-organized communities,

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256. Ostrom, *supra* note 70, at 120.

257. *Id.*

258. See *supra* text accompanying note 130 (discussing the involvement of the Enough Project and Global Witness, in particular).

259. See Conflict Minerals: Proposed Rule; Extension of Comment Period, 76 Fed. Reg. 6110-02 (Jan. 28, 2011) (announcing the notice and comment period extension).

260. See *supra* note 236 and accompanying text (discussing negative feedback from local miners).

261. Ostrom, *supra* note 70, at 120.

monitors are typically chosen from among the members to ensure “the conformance of others to local rules.”<sup>262</sup> The conflict minerals regime has incorporated some, but not all, of the monitoring principle. The monitoring principle manifests itself in the business and human rights context in the form of the various initiatives that implement SRSG Ruggie’s know and show ethic. Likewise, the conflict minerals regime is organized around that approach. Moreover, the certification schemes under § 1502 described above<sup>263</sup> facilitate this sort of monitoring. Going forward, however, industry groups should select certain enterprises engaged in norm entrepreneurship to monitor peer behavior,<sup>264</sup> such as supply chain transparency, as a step toward undergirding the PRR Framework.

### E. *Graduated Sanctions and Dispute Resolution*

Other insights from Professor Ostrom’s principles, such as the need for graduated sanctions for rule violators and effective dispute resolution, speak to the importance of addressing legal ambiguities and establishing norms of behavior in the business and human rights context. The former point underscores the significance of not “[l]etting an infraction pass unnoticed,”<sup>265</sup> meaning that some combination of market reaction and governmental action is needed to instill human rights best practices in a business setting. As described in Part III.A above, § 1502 relies almost entirely on market pressure to affect the conflict minerals regime. The proper combination of market pressure and governmental action, however, likely varies by industry and culture and requires additional research.

### F. *Nested Enterprises*

According to Professor Ostrom, “When common-pool resources that are being managed by a group are part of a larger set of resource systems, an eighth design principle is usually present in robust systems. The nested enterprise principle is that governance activities are organized in multiple layers of related governance regimes.”<sup>266</sup> Just as this multilevel system is imperative for environmental governance in large ecological systems with distinct local dynamics,<sup>267</sup> so too is it essential for promoting human rights in business. Though most applicable to common-pool resources, this principle is nonetheless relevant to human rights in business as it

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262. *Id.* at 121.

263. *See, e.g., supra* Part II.B.5.i.

264. ANNEGRET FLOHR ET AL., THE ROLE OF BUSINESS IN GLOBAL GOVERNANCE: CORPORATIONS AS NORM-ENTREPRENEURS 10 (2010).

265. Ostrom, *supra* note 70, at 121.

266. *Id.* at 122.

267. *Id.*



posits that larger institutions are important for “govern[ing] the interdependencies among smaller [governance] units,”<sup>268</sup> highlighting the need for effective multistakeholder governance at the national and international levels. Such a system of governance would assist in “handling some problems at a very small scale,” such as local labor code violations, “and other problems at ever larger scales,”<sup>269</sup> potentially including common industry codes of conduct consistent with the PRR Framework. As described in Part III.B., the conflict minerals regime is moving in this direction; however, substantial progress still needs to be made.

An effective polycentric management system for business and human rights would consist of a system of nested enterprises that would use law and norms, market-based incentives, self-regulation, public-private partnerships, and multilateral collaboration—some of which are alluded to in Professor Ostrom’s principles—to promote human rights in business. Heavy-handed efforts to crowd out such bottom-up initiatives, such as the Norms discussed in Part II, should thus be avoided, and multitype, multisector, and multiscale initiatives designed to instill the PRR Framework should be preferred in an effort to make the Guiding Principles a reality and eventually, perhaps, even a business necessity.

## V. CONCLUSION

SRSR Ruggie and others claim that the PRR Framework and the Guiding Principles create a system of polycentric governance. The implications of what distinguishes a polycentric governance regime from a state-based, monocentric governance regime have not been adequately explored in the literature addressing business and human rights. Legal scholars tend to view the polycentrism of the PRR Framework through the lens of international law; however, international relations, political science, and institutional design scholars have explicated and applied the concept far beyond its simple application in federalist legal systems. The interplay among the state’s responsibility to protect against human rights abuses, business’s responsibility to respect human rights, and both state and nonstate actors’ duty to address and remedy human rights risks and violations, as SRSR Ruggie has described them, provides a fertile ground for applying that broader polycentric governance literature. By providing a broad description of the characteristics and literature surrounding polycentric governance systems and giving an extended case example of one such nascent regime, this Article has set the stage for a more nuanced application and expansion of the IAD

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268. *Id.*

269. *Id.*

framework, which was briefly outlined in Part IV. Sophisticated fieldwork and empirical analyses can help ensure that the appropriate development and implementation of the PRR Framework and the Guiding Principles will result in a truly effective polycentric system of governance.

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

Still, it is worth considering whether the conflict minerals regime has been hindered by the central position occupied by § 1502 of the Dodd-Frank Act. As the driver of much of the above-described activity in the conflict minerals space, perhaps the system is more hierarchical than a truly polycentric regime ought to be. If § 1502 dominates and demands the focus and efforts of the other actors in the network, those actors are then unable to be truly creative in their approach to the problem and are robbed of the ability to make their own rules and develop their own norms within their respective domains of influence. As such, instead of the problem-solving Professor Black ascribes to polycentric governance systems,<sup>270</sup> perhaps the conflict minerals regime has come to be defined by § 1502's particular solution to the problem. In other words, it is important to determine whether—as occurred in laboratory experiments with externally imposed rules intended to maximize

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270. See Black, *supra* note 43, at 137–38 (noting that polycentric governance systems are typically defined by solving a problem rather than by implementing a particular solution).

joint returns<sup>271</sup>—§ 1502 has crowded out alternative creative and cooperative behaviors that would have emerged but for the mandate of an influential state actor. For example, perhaps § 1502 has entrenched the OECD Due Diligence Guidance as the singular standard by which conflict minerals due diligence will be conducted, even though other local, regional, national, or international schemes might have developed alternative schemes that are more appropriate to their domain of influence.

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

This area is ripe for careful application of rigorous theoretical and practical work on the optimum design of a polycentric governance system. If the PRR Framework, as filled out by the Guiding Principles, realizes its promise as an example and progenitor of polycentric governance, then the international community could be on the cusp of a new era of conceptualizing business and human rights with profound and far-reaching implications, both within and beyond the conflict mineral context.

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271. See *supra* note 72 (citing relevant authorities).