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By Dr. Stephanie M. Burchard

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Residents protest after attacks in Kibaoni. (Source: AP.)

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ENHANCING TRANSPARENCY OR INCREASING ADMINISTRATIVE BURDENS: DODD-FRANK IN AFRICA

By Dr. Ashley Neese Bybee

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) is best known as the U.S. Congress’s attempt to reform the U.S. financial system in response to the 2008 financial crisis. Sections 1502 and 1504, however, contain provisions that have implications for Africa. Designed to stop trade in conflict minerals and promote transparency in the extractive industries sector, this legislation is widely supported by watchdog groups and organizations that focus on public oversight of natural resources. The legislation also has its detractors, who argue that the provisions are having unintended and negative consequences on those communities the law was designed to protect, while putting administrative burdens on U.S. firms operating in the Africa’s extractive sectors. [more...](#)



A Congolese miner sifts through ground rocks to separate out the cassiterite, in the town of Nyabibwe, eastern Congo, a once bustling outpost fueled by artisanal cassiterite mining. (Source: AP Photo/Marc Hofer.)

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The Institute for Defense Analyses is a non-profit corporation operating in the public interest.

IDA’s three federally-funded research and development centers provide objective analyses of national security issues and related national challenges, particularly those requiring scientific and technical expertise.

IDA’s Africa team focuses on issues related to political, economic, and social stability and security on the continent.

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Who is Responsible?

On June 15, two trucks full of masked assailants descended upon Mpeketoni. The assailants, who according to reports [spoke Somali and waved al-Shabaab flags](#), fired their AK-47s into crowds watching the World Cup, slit throats, and burned down large portions of the town. They attacked a bank, two hotels, and the police station. The siege lasted for more than 10 hours before the attackers absconded to a nearby forest. At least [48 people](#) were reported killed by the attackers. Majembeni, located just outside of Mpeketoni, was [attacked](#) a few nights later, and an additional eight to 15 were killed. One week later, an attack in neighboring [Witu](#) claimed the lives of five people.

Many believed the attacks bear some of the hallmarks of al-Shabaab, and, indeed, [the group did claim the attacks](#) to be retribution for the presence of Kenya Defense Forces (KDF) in Somalia. In a surprising twist, however, the government of Kenya stated that the attacks were not terrorist acts but rather an expression of ethnic violence orchestrated by local politicians. Because of the vagueness of the accusation, immediate speculation by the Kenyan press identified the opposition coalition [CORD](#) as the most likely “local politicians” being implicated. But several days later, the governor of Lamu, Issa Timamy, was arrested by the police. Timamy is a member of the opposition UDF, but not CORD. For a brief time before the 2013 election, the UDF found itself allied with Uhuru Kenyatta’s TNA [The National Alliance] until a dispute over who would run as president led to a falling out between Kenyatta and UDF leader Musalia Mudavadi.

Timamy is the only member of his party to win a gubernatorial seat. He defeated TNA candidate Fahim Twaha in the 2013 election, but [Twaha challenged Timamy’s win in court](#). A municipal court found that the election was marred by irregularities and called for a fresh election to be held in December 2013. On appeal, however, Timamy’s victory was upheld and the by-election canceled. Since then, Timamy, who is of the Banjuni ethnic group, has been accused of [ethnic favoritism](#) by his rivals, and members of the municipal county authority have [threatened in the past to impeach him](#). Timamy, [Mudavadi](#), and other [local leaders](#) have decried the arrest as baseless and politically motivated; they claim that the government will use his arrest as a pretense for taking over the county government. On June 30, a judge in Mombasa ordered Timamy [released](#) on bail from police custody.

What’s at Stake?

These attacks all took place in Lamu County, located on the coast of Kenya, some 60 miles south of the border with Somalia. Lamu Old Town, located on the island right off the coast, is a historic city believed to be one of the oldest Swahili

settlements. It was a popular tourist destination until a [spate of kidnappings](#) believed to have been perpetrated by al-Shabaab in 2011 led to significant decreases in tourism.

Beyond its historic importance, Lamu figures prominently in the Kenyan government's plans for infrastructure development. It is the planned site of (1) a new airport, (2) a new seaport, billed as East Africa's largest, and (3) the endpoint of an oil pipeline connecting Kenya's neighbors to the Indian Ocean. These developments are components of [LAPSETT](#) [the Lamu Port, South Sudan, Ethiopia Transport Corridor]. A groundbreaking ceremony for the Lamu port was held in 2012, but financing arrangements for the port and other LAPSETT components are not yet fully in place. In addition, in mid-June [offshore deposits of oil](#) were discovered near Lamu.

To further complicate matters, land ownership has long been a source of contention along the coast. In Lamu, specifically, a settlement program in the 1960s and 1970s saw locals forcibly evicted and an estimated 10,000 Kikuyus given [preferential land allotments](#) at the behest of former president Jomo Kenyatta. More than 40 years later, there are lingering resentments over who are the rightful owners of these lands.

In sum, there is a lot at stake in Lamu, and a number of actors could benefit from the instability and chaos the recent attacks have brought. At the same time, insecurity is a particular vulnerability for this regime, which faces pressure from multiple sources, both international and domestic. On July 7, the CORD coalition and its leader Raila Odinga have planned a large rally and protest in Nairobi. Some observers are [concerned](#) over what exactly CORD has in store. Certainly, the government's handling of the twin issues of terrorism and insecurity will be on the agenda.

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Section 1502, “Conflict minerals”

[Section 1502](#) requires companies registered with the U.S. Securities and Exchange Commission (SEC) to disclose whether their products contain conflict minerals. Specifically, cassiterite, columbite-tantalite, gold, and wolframite originating in the Democratic Republic of the Congo (DRC) and adjoining countries must be disclosed to the SEC. Where origins of minerals are not known, companies are required to describe what due diligence they have exercised on their supply chains to ensure they are not indirectly financing or benefiting armed groups in the DRC. Section 1502 is not an outright ban, the [theory](#) being that a value-chain verification process that “names and shames” guilty parties and the reputational risk associated with that will be enough to dissuade companies from obtaining their minerals in regions that warlords are known to control.

Reactions to this new requirement have been mixed. In October 2011, the [United Nations Security Council](#) noted that since the law was enacted, fewer revenues from minerals extraction were being used to fund conflict, in part because companies aspiring to be Dodd-Frank-compliant were not purchasing minerals from the conflict-ridden regions. The watchdog group [Global Witness](#) has sought to debunk what it considers to be fear-mongering and misconceptions about the legislation, particularly the claim that it places a *de facto* embargo on minerals from the DRC. In May 2013, however, a [group of experts](#) reported that because there is no system to verify that the sources of minerals from the DRC are conflict-free, Dodd-Frank has effectively created an embargo on the DRC. One [leading expert](#) on the DRC has also cited negative economic consequences of the law in eastern Congo, where up to 2 million miners were out of work, and there has been little improvement in the security situation.

Section 1504, “Disclosure of payments by resource extraction issuers”

[Section 1504](#) requires companies registered with the SEC to publicly report how much they pay foreign governments for access to oil, gas, and minerals projects. The requirement includes disclosure of [all payments](#), including taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends, and payments for infrastructure improvements. Given that many African countries are highly dependent on exports from these sectors, the burdens of this reporting requirement for their business dealings are potentially significant.

Reactions to this provision have also been mixed. A major bone of contention has been [defining the threshold](#) above which these payments must be disclosed. After it was set at \$100,000, a coalition of industry groups brought a lawsuit against the SEC [alleging](#) that the rule would impose unnecessary costs on U.S. firms, putting them at a disadvantage to foreign competitors who do not have such requirements, such as China.

Unnecessary Administrative Burdens?

Others argue that such a provision is unnecessary, given the many existing initiatives also designed to promote transparency in extractive industries, including the [Extractive Industry Transparency Initiatives](#) (EITI), [Publish What You Pay](#), the [Kimberly Process](#) for the certification of diamonds, [OECD Due Diligence Guidelines](#), and the [IMF Resource Revenue Transparency Guidelines](#). The main difference is that compliance with Dodd-Frank is mandatory for SEC-registered firms, unlike the other programs, which are voluntary.

In June 2013, the European Union (EU) followed suit and passed a [law](#) requiring the disclosure of payments made to governments by resource-extraction companies. Other similar laws include the U.S. Foreign Corrupt Practices Act (FCPA), the UK Bribery Act, and the OECD Anti-Bribery Convention. FCPA prohibits U.S. firms from paying foreign government officials to attract or retain business (i.e., it prohibits bribes). The [level of detailed information](#) required by Dodd-Frank, however, is far greater than what is required by the FCPA. The disclosure required by Dodd-Frank includes the type, currency, financial period, business segments, and specific project associated with a payment. Even if greater transparency is achieved, providing this level of detail will likely require a significant investment in a compliance program to include more data collection, even for companies that already have stringent compliance programs in place. As a result, a cottage industry in Dodd-Frank compliance appears to be forming, with [law](#) and [consulting](#) firms offering their [services](#) to companies in the extractive industries that may not have sufficient expertise in house.

Looking Ahead

It remains to be seen how effective these provisions will be in terms of depriving Congolese warlords of revenues and promoting transparency in extractive sectors. As Dodd-Frank is implemented and enforced, it will be important to monitor its effectiveness in central Africa and reconcile any unintended consequences. It will also be important to watch how the law is affecting U.S. firms and whether reporting requirements are impeding their ability to operate in Africa.

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