



Pole Institute

Institut Interculturel dans la Région des Grands Lacs

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NO KIVU, NO CONFLICT? The misguided struggle against “conflict minerals” in the DRC

Dominic Johnson, Senior Analyst

Dossier

April 2013

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Pole Institute is an intercultural institute in the Great Lakes region.

The Institute is based in Goma, in the eastern North Kivu province of the Democratic Republic of Congo (DRC). The Institute was established by a group of people originating from North and South Kivu provinces who took up the challenge of exchanging views in a crisis context marked by many unfortunate events, and which is characterized by cycles of violence, poverty, bad governance and insecurity.

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- Creation of a new type of independently minded PERSON who is anchored in his/her identity but remains open to the world.

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- Initiate the emergence of a culture of negotiation (as opposed to a culture of death) based on the common interests of each and every one.

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	Onesphore Sematumba

Pole Institute
Avenue Alindi number 289, Quartier Himbi I
City of Goma / North Kivu Province
Post box 72 Goma (DRC) / Post box 355 Gisenyi (Rwanda)
Tel.: (+243) 99 86 77 192 (+243) 99 72 52 216 (+250)788 51 35 31
Web site: www.pole-institute.org
E-mail : poleinst@free.fr

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About the report: This desk study enriched by local interviews is part of a wider Pole Institute research project examining and monitoring the impact of international mining policy and natural resource exploitation on communities in Eastern Congo. It is accompanied by ongoing further field studies.

About the author: Dominic Johnson is a senior analyst with Pole Institute and Foreign Editor of the German newspaper „die tageszeitung“ (taz). He is author of several Pole Institute research papers and of a German-language history of the Congo, *Kongo: Kriege, Korruption und die Kunst des Überlebens* (Brandes & Apsel, Frankfurt 2009)

Preface

The international efforts to institute a regulatory system for the mining sector in eastern DRC are progressing at a slow pace. The various initiatives involved are all maturing, but only very slowly cohering into a single policy which makes sense on the ground.

After several years of multiple and partly contradictory efforts, however, 2013 could be a year in which the various initiatives start to be tested in reality and in which three years of chaos in Eastern Congolese mining begin to come to an end. When in 2010 the US Congress passed the Dodd-Frank law on reforming Wall Street, including a section on „conflict minerals“, and shortly afterwards the DRC government „suspended“ legal mining in Eastern Congo, the sector was thrown into a crisis from which it has yet to recover. The implementation of existing tracability and transparency initiatives in Kivu, which had only just begun, was abruptly cut short. The government suspension was lifted in 2011, but without the safeguards in place which had been developed earlier by local stakeholders. Legal trade remained low and was thrown further into chaos by the renewed outbreak of war in North Kivu in 2012.

The Dodd-Frank law has dominated international debate, and since the beginning of 2013, companies are obliged to comply with it; but the rules for implementation were only published recently, their precise meaning remains unclear in various respects and they are still subject to legal challenge. Compliance depends on a revival of traceability initiatives as developed by ITRI and others. These are being piloted mostly outside Kivu, and in the meantime, legal mining in Kivu remains all but inexistent.

Thus, a pattern is emerging in which Kivu's mining sector is being asphyxiated in the name of reform. Before 2010, Kivu's mineral traders had willingly participated in moves to strengthen formal and legal channels and to safeguard Kivu livelihoods by creating „conflict-free“ production and trading chains within Eastern Congo. The mining ban killed this off, and today the focus has moved to Katanga and Maniema, increasingly apparently favouring a nexus of mining firms

closely linked to the powerholders in Kinshasa. Because they do not finance armed groups, these firms are seen as „conflict-free“, but no criteria exists to judge the wider political ramifications of their activities, their benefits for local development and the possible exacerbation of local conflict caused by favouring certain firms in collusion with international partners to the detriment of others. Especially worrying is the fact that these firms themselves finance the schemes which are supposed to validate their activities as „conflict free“.

In a previous paper, it was argued that the „conflict minerals“ debate suffered from a series of false assumptions – namely, that conflict in Kivu was primarily about minerals, and also, that the central government of the DRC was a stabilising force and that strengthening it would reduce conflict. Experiences with security sector reform in the DRC have disproved the latter assumption, but in mineral policy it still holds sway.

However, current developments give rise to questions. If the internationally accepted consensus that the trade in coltan and cassiterite in the DRC favours conflict is correct, there is no reason to assume that this cannot hold outside Kivu. Favouring certain actors in the mineral trade in Katanga and Maniema and excluding others such as those from Kivu should in this analysis be expected to give rise to new conflicts. The fact that in 2013 Katanga and Maniema are becoming increasingly violent, with rapidly rising internal displacement and the spread of militia from the Kivu provinces, makes this question pertinent.

At the same time, while Kivu's mining sector has plunged into crisis, more young people in the Kivu provinces than ever before are joining armed groups and illegal militias. The resulting conflicts, which have caused displacement in the DRC to reach levels not seen since the formal end of the Second Congolese war in 2003, are not primarily about mining, despite efforts by international lobbyists to narrow every conflict analysis in the Congo down to conflicts around natural resources. The M23 rebellion, the best known of the new armed groups in the Kivus, does not control any mines, has not attempted to

do so and does not conduct mineral exports through the areas it controls.

The rise of the M23, but also other groups such as Raia Mutomboki and the large array of new Mai Mai militias, coincides with the downturn in mining in the Kivus – which itself is an unintended, but logical consequence of the new policies on Congolese mining being driven by international concern about „conflict minerals“. Mining is not at the root of these new armed activities. It is the absence of mining that fuels conflict: by depriving the region of foreign earnings, by removing economic opportunities, by driving young people to seek a living through violence instead, by exacerbating competition between local stakeholders over ever scarcer revenues.

It should be recalled that warring parties, warlords, politicians and other powerholders in Eastern Congo are not interested in minerals as such. They are interested in money. If they can earn it with mining, fine; if not, they will earn it with something else, even if this means destroying the few livelihoods and institutions that exist.

Removing mining from „conflict finance“ in Kivu and marketing non-Kivu mining as „conflict free“ may sharpen conflict around the revenue sources that remain in Kivu while turning mining outside Kivu into a battleground for financial-political interests. Without a fundamental reform of governance in the DRC, the result is unlikely to be positive.

This is why it's important to analyse the impact of the initiatives as they stand. Well conceived and implemented they could contribute to peacebuilding by showing that lucrative business opportunities need not fuel conflict. Badly conceived and implemented they could cause new tensions and conflicts. Pilot projects in „clean“ mining and „responsible“ sourcing can be models of efficiency and transparency - or they can be kernels of new power struggles in areas hitherto at peace.

This paper does not attempt to give an exhaustive account of the principles, workings and effects of all the international initiatives.

Most of them already publish detailed guidelines on their implementation and reports on their activities, and there are enormous quantities of NGO reports, independent studies and articles which have attempted to look further into the actual effects from various angles. What is missing in all these studies, however, is independent evaluation of the effects of all these projects beyond their own terms of reference.

This paper aims to look at some of these wider effects starting from the state of play of the initiatives themselves. Case studies from various Kivu mining sites form the rest of this report.

Introduction

The number of different international initiatives to deal with Congolese minerals is astounding. An ITU report of 2012 lists the following, without claiming it to be an exhaustive list¹:

- the OECD (Organisation for Economic Cooperation and Development) Due Diligence Guideline
- the ITRI (International Tin Research Institute) and TIC (Tantalum-Niobium Study Group) International Tin Supply Chain Initiative (ITSCI)
- the BGR (Bundesanstalt für Geowissenschaften und Rohstoffe – German Federal Institute for Geosciences and Natural Resources) Certified Trading Chains (CTC) – to which should be added the BGR's Analytical Fingerprint
- the ICGLR (International Conference of the Great Lakes Region) Regional Certification Mechanism
- the WGC (World Gold Council) Conflict-Free Gold Standard
- the EICC/GeSI (Electronic Industry Citizenship Coalition and Global e-Sustainability Initiative) Conflict Free Smelter Cheme (CFS)
- the RJC (Responsible Jewellery Council) Code of Practice and Chain of Custody standards
- the ARM/FLO (Alliance for Responsible Mining and Fairtrade Labelling Organisation) Standard for Artisanal and Small-Scale Mining including Associated Precious Metals
- the LBMA (London Bullion Market Association) Responsible Gold Guidance.

This list does not include the monitoring carried out under UN Security Council resolutions by the UN Group of Experts on the Democratic Republic of Congo; the DRC government's own Promines programme and other relevant national legislation; the EITI (Extractive Industries Transparency Initiative) – and, last but not least,

¹ „Greening ICT supply chains: Survey on conflict minerals due diligence initiatives“, United Nations University, Institute for Sustainability and Peace (UNU-ISP), published by International Telecommunications Union (ITU), September 2012

the structures and procedures arising out of the implementation of Section 1502 of the US Dodd-Frank act and all the various pressure groups and NGO-industry networks associated with it.

Here is an incomplete chronology of the development and progress of all these initiatives:

- 2002: Launch of „Publish What You Pay“ (PWYP), a campaign urging disclosure of private sector payments to governments; UN Panel of Experts names companies accused of financing conflict in DRC through buying Congolese minerals and thereby breaking OECD rules
- 2003: Launch of the Extractive Industries Transparency Initiative (EITI), a voluntary agreement by governments to publish their revenues from the mining and oil/gas sectors
- 2006: Adoption of OECD „Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones“ to adapt existing OECD guidelines to conflict areas. German BGR starts work on coltan „fingerprint“ to distinguish DRC tantalum from other sources
- November 2006: ICGLR adopts Protocol Against the Illegal Exploitation of Natural Resources
- June 2007: G8 summit in Germany decides to develop international certification systems for minerals from developing countries
- September 2007: Launch of „Trading for Peace“ project to encourage legal cross-border trade in the Great Lakes by DFID, USAID, Comesa and others including Pole Institute and Kivu's mineral traders
- November 2008: Certified Trading Chain (CTC) pilot started by German BGR in Rwanda; UN Group of Experts report on DRC recommends due diligence measures for DRC mineral sector
- February 2009: ITRI drafts first due diligence paper for the tin industry, basis for pilot projects to tag minerals in Kivu and „iTSCi“; DRC government launches Promines programme to reform mining sector including formalisation of artisanal mining
- April 2009: Congo Conflict Minerals Act introduced in US

Congress

- May 2009: Belgian firm Traxys suspends mineral purchases from Kivu as a reaction to the UN Group of Experts 2008 report
- September 2009: First GESI/EICC workshop with representatives of the tantalum supply-chain decides to develop a smelter certification programme and to work with ITRI on iTSCI
- October 2009: Katanga bans export of Katangan minerals through other provinces; DRC government endorses iTSCI
- February/March 2010: German BGR launches CTC pilot extension into DRC
- July 2010: Dodd Frank Act on Wall Street reform signed into law in the USA, including Section 1502 which contains the thrust of the Congo Conflict Minerals Act provisions
- September 2010: Ban on all mining activities in North Kivu, South Kivu and Maniema; iTSCI launched in Rwanda
- December 2010: Launch of the „conflict-free smelter“ programme (CFS), „intended to help companies satisfy reporting requirements under Dodd-Frank“; signature of ICGLR „Protocol on the Fight Against the Illegal Exploitation of Natural Resources“ involving a Regional Certification Mechanism (RCM)
- March 2011: Lifting of the mining ban in Eastern Congo; Rwanda bans transport of untagged minerals; iTSCI launched in Katanga
- April 2011: Conflict-free requirement under Dodd Frank unofficially in place, resulting in a de facto embargo on the Kivu provinces and Maniema
- May 2011: OECD publishes its Due Diligence Guidelines for multinational enterprises
- June-August 2011: DRC government missions to Mugogo and Rubaya with a view to the establishment of conflict-free „centres de négoce“
- July 2011: Motorola and AVX launch „Solutions for Hope“ to source „conflict-free“ tantalum from DRC, with MMR in Katanga also partner under iTSCI
- September 2011: DRC government asks all economic

- operators to adhere to OECD Due Diligence guidelines
- November 2011: USAID launches Public-Private Alliance for Responsible Minerals Trade (PPA) as an information hub for companies buying from the Great Lakes; ICGLR adopts Regional Certification Manual (RCM)
- February 2012: DRC includes ICGLR RCM into its legislation
- March 2012: Rwanda includes ICGLR RCM into its legislation; DRC government publishes list of „validated“ mining sites in Kivu provinces
- April/May 2012: Start of armed conflict with M23 rebels in North Kivu
- June 2012: DRC government bans all mineral transfers across provincial borders
- September 2012: Launch of Conflict-free Tin Initiative (CFTI) by Traxys, Motorola and RIM to buy „conflict-free“ cassiterite from Kalimbi/Nyabibwe South Kivu; publication of SEC rules for the implementation of Dodd Frank
- December 2012: iTSCi launched in Maniema
- January 2013: Legal challenge to Dodd Frank filed in USA

It has become increasingly clear that the parallel development of a range of different international standards, which in the end all have to be applied by the same actors, is a problem.

The main platform for dialogue and harmonisation is the „joint forum“ of OECD, ICGLR and the UN Group of Experts which has been meeting in Paris every six months since 2011 to discuss implementation of the OECD due diligence guidelines, the ICGLR certification schemes and the UN GoE recommendations. At the first such meeting in May 2011, the „implementation phase of the OECD Due Diligence Guidance Supplement on Tin, Tantalum and Tungsten“ was launched.

A second meeting took place in November 2011 – at the weekend of the DRC elections, not a propitious time for looking ahead. A third took place in May 2012 and a fourth in November 2012.

A main focus of this process has been a series of „interim progress

reports“ based on questionnaires addressed to the stakeholders: 51 companies in the first phase until 2011, 18 further companies since, as well as local participants. These reports are published every six months. According to the OECD 2nd Interim Report, this network is broader than that of iTSCi. The research for it was carried out by IPIS. A positive development in these discussions appears to be the growing recognition that artisanal mining in the Kivus is not a nuisance to be suppressed, but an activity that needs to be recognised and reactivated in order to provide livelihoods, and that local civil society should play a central role in monitoring the progress of international implementation programmes.

„During the first cycle of the implementation phase of the OECD Guidance, the IPIS team often encountered a sceptical attitude towards due diligence from economic actors, especially in the Kivu Provinces. Findings from this cycle of the implementation phase show some early signs of a change in attitude“, the 2nd OECD Interim Report notes². „Roughly over 80% of the officially registered economic actors in the 3T (Tin, tantalum, tungsten) sector of Eastern DRC are now working with the team in order to learn about due diligence and report on steps taken.“

The ICGLR regional committee met on 20-22 November 2012 in Bujumbura, a week before the 28-29 November OECD meeting in Paris.

In January 2013, the OECD published its „Final Report on one-year pilot implementation of the Supplement on Tin, tantalum and Tungsten“, giving a conclusive overview of all the various steps undertaken within the DRC by government bodies and international programmes³. The report distinguishes various stages of progress: the

² Upstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Cycle 2 Interim Progress Report on the Supplement on Tin, Tantalum and Tungsten, OECD, June 2012, p. 7

³ Upstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Final Report on one-year pilot implementation of the Supplement on Tin, Tantalum and Tungsten, OECD, January 2013

„early stages“ around the lifting of the DRC government's mining suspension in Eastern Congo in March 2011; the „piecemeal approach, during which due diligence was implemented by a range of different actors in a fragmented way“ between April 2011 and April 2012; and the current third phase, marked by action on the part of the DRC government and donors and the consolidation of industry programmes in which „potential for harmonisation is being explored“⁴.

At the OECD meeting of November 2012, the German BGR, whose pilot project in Rwanda for a „Certified Trading Chain“ serves as the model for the wider ICGLR programme, had strongly argued that there was simultaneously overlap and lack of coordination between the various schemes. „Too many audits and inspections“, „too much paperwork“, „costs of audits and inspections are too high“, „there is actually no coordination, no alignment“ were some of the BGR conclusions⁵.

BGR recommended that duplication should be avoided, that audit schedules should be coordinated and findings shared. For this, BGR proposed a „common checklist for mine sites assessment“, „data exchange and access to the databases and exchange of audit findings“ and „mutual recognition“ of the various schemes („ITSCI, CFS, CTC, ICGLR, OECD, etc“, as BGR put it. It was also pointed out that funding audits by donor governments was not sustainable in the long run.

At the May 2012 meeting already, deficiencies in the existing schemes had been discussed⁶. „Some participants noted that merely relying on a list of sites or on an industry programme was insufficient on its own“, the report notes. „Actual implementation of due diligence upstream in the supply chain still varies considerably, and the high-level findings showed that there is a strong need for capacity-building among upstream actors“. Also: „Participants noted an increase in short visits from donors and downstream industry players to mine

⁴ Ibid., p.10

⁵ This and the following: BGR/Coopération Germano-Congolaise Ressources Naturelles: Audit Standardization & Harmonization, Paris, 28 November 2012

⁶ Report of OECD meeting 4-5 May 2012

sites in the DRC. The multiplication of uncoordinated visits for many different purposes are generally regarded by economic operators on the ground as auditing activities with related increase of audit fatigue. Participants warned against the increase in 'conflict minerals tourism' that fails to deliver concrete results." Data collection and sharing was seen as deficient and as a priority for the immediate future.

Good intentions: Dodd-Frank and the consequences

The Dodd-Frank Act, a major piece of US legislation on „Wall Street Reform and Consumer Protection“, was passed by US Congress on 30 June and 15 July 2010 and signed into law by US President Barack Obama on 21 July 2010. Its Section 1502, included after lobbying by evangelical Republicans and NGOs, contains the first formal framework for industry on how to buy Congolese minerals. According to the Act, any company registered at the US stock exchange is obliged to disclose whether it uses „conflict minerals“ from the DRC or neighbouring countries - „conflict minerals“ being „columbite-tantalite (coltan), cassiterite, wolframite, gold, or their derivatives, or any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country“. If it uses such minerals, it has to exercise due diligence „on the source and chain of custody of such minerals“ and describe products derived from them as either „not DRC conflict free“ or „DRC conflict free“ if they do not contain such minerals⁷.

Implementation of this was made subject to the elaboration of rules by the Securities and Exchange Commission (SEC). The SEC made a proposal in December 2010 and passed a final rule on 22 August 2012. This was published on 12 September with the „effective date“ of coming into force of 13 November 2012, meaning that compliance is obligatory from the beginning of 2013⁸. The SEC explained what it originally proposed in December 2010 and what changes it made to these proposals following consultation.

⁷ The full text of the Act is published by the US government and is available on many specialised websites such as www.dodd-frank-act.us or section1502.com (together with many other pertinent texts). For a fuller presentation and discussion, see: Dominic Johnson, „Who's in Charge? Putting the Mineral Trade in Eastern DRC under International Control: an overview“, in: Pole Institute, „Blood Minerals: The Criminalization of the Mining Industry in Eastern DRC“, Pole Institute Dossier, Goma, November 2010

⁸ All details and citations according to: Federal Register, Vol 77, No 177, September 12, 2012, Part II: Securities and Exchange Commission, 17 CFR Parts 240, 249 and 249b: Conflict Minerals. The SEC has published the rules on www.sec.gov/rules/final/2012/34-67716.pdf.

The original SEC proposal

In its final rule, the SEC set out what it originally proposed and what was modified subsequently.

„We proposed a disclosure requirement for conflict minerals that would divide into three steps. The first step would have required an issuer to determine whether it was subject to the Conflict Minerals Statutory Provision... (this would be if) conflict minerals were 'necessary to the functionality or production of a product manufactured' or contracted to be manufactured by such a person.“
If so, „the second step would have required the issuer to determine after a reasonable country of origin inquiry whether its conflict minerals originated in the Covered Countries“.

If „the issuer determined that its conflict minerals did originate in the Covered Countries, if it was unable to conclude that its conflict minerals did not originate in the Covered Countries, or if it determined that its conflict minerals were from recycled or scrap sources, „the issuer would have been required to disclose this conclusion in its annual report: Also, the issuer would have been required to note that the Conflict Minerals Report, which included the certified independent private sector audit report, was furnished as an exhibit to the annual report“.

In this Conflict Minerals Report, the issuer should provide „a description of the measures it had taken to exercise due diligence on the source and chain of custody of its conflict minerals“, „a description of its products manufactured or contracted to be manufactured containing conflict minerals that it was unable to determine did not 'directly or indirectly finance or benefit armed groups' in the Covered Countries“ - which would have to be described as 'not DRC conflict free'; and finally in the report the issuer should „disclose the facilities used to process those conflict minerals, those conflict minerals' country of origin, and the efforts to determine the mine or location of origin with the greatest possible specificity.“

Consultations on the SEC proposal

Public comment on these proposals should originally have ended on 31 January 2011 but was extended until 2 March, followed by further discussion including a public roundtable on 18 October 2011. The SEC received „approximately 420 individual comment letters“, including from the DRC Minister of Mines, and „approximately 13.400 form letters from those supporting 'promptly' implementing a 'strong' final rule“ - these forming part of an NGO campaign.

Only the Chamber of Commerce recommended that the proposed rules be withdrawn entirely. A range of companies active in the Great Lakes Region, NGOs and government bodies from the region argued in their submissions „that the provision and/or rule could lead to a de facto boycott or embargo on conflict minerals from the Covered Countries“ - AngloGold Ashanti, Comimpa, Somima; FEC, Best, ITRI, PACT; the Mining Ministries of Uganda and Tanzania.

During this debate, this view was put quite forcefully. „For artisanal miners, the damage has been done“, Tony Hilvers, Vice President of Industry Programs (IPC) wrote in May 2011. „No OEM (Original Equipment Manufacturer) in their right mind – or members of their supply chains – will willingly source metals from Africa, let alone the DRC.“ As no one would take the risk to oppose the law, no one would take any risk which could be interpreted as non-compliance. „If you oppose the law, then obviously you support rape and murder in the DRC by the rebel miners and criminal network“, he continued ironically⁹. Hilvers was not the only one to point out that Dodd-Frank had in practice prevented further implementation of existing „bag and tag“ schemes by ITRI on the ground.

More rarely, the opposite criticism was raised that Dodd-Frank does not actually stop anyone from buying Congolese minerals. „The intended effect of the legislation is that the public disclosure of mineral chain of custody from extraction to production – and the prospect of steep fines for noncompliance – would discourage

⁹ „IPC's Tony Hilvers Comments on Recent Avnet Conflict Metals Editorial“, IPC Blog, 10 May 2011

companies from supporting the production of 'conflict minerals' but rather encourage ethical sourcing. The law however does not ban or prohibit the purchase/use of conflict minerals, nor are there any legal penalties for purchasing/using conflict minerals"¹⁰.

Concern was expressed on what exactly the SEC meant by conflict minerals „necessary to the functionality or production of a product“, and what „contracted to be manufactured“ may or may not mean precisely.

Modifications in the final SEC rule

It was decided that the latter provision does not apply if an issuer does not exercise influence over the manufacturing process, affixes its own logo to products manufactured by someone else or services someone else's product.

„Necessary to the functionality“ was determined to mean that „the conflict mineral is intentionally added to the product or any component of the product and is not a naturally-occurring by-product“ and „necessary to the product's generally expected use, function or purpose“. „Necessary to the production“ was determined to mean that „the conflict mineral is intentionally included in the product's production process“ as opposed to being part of a tool or piece of equipment such as a computer, and that additionally it „is included in the product“. If it is only used during manufacturing but not part of the final product, the rule no longer applies.

The final rule lays down that „conflict minerals“ which have been smelted, fully refined or are already outside the Covered Countries on 31 January 2013 are deemed „outside the supply chain“ and not covered by the rule.

Questions also arose during consultation on what a „reasonable country of origin inquiry“ means, as this is not defined – a point

¹⁰ Chris Bayer/Tulane University, „A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3rd Model in view of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act“, Tulane University, 17 October 2011

raised, among others, by the Tantalum-Niobium International Study Centre in Belgium, by Global Witness and by the ICGLR. The final rule still does not define it, but requires an issuer to describe it.

A significant change between the original proposal and the final rule affected the provision that a Conflict Minerals Report is necessary not just if a company knows it is using minerals from the Covered Countries, but that „it was unable to conclude that its conflict minerals did not originate in the Covered Countries“. The benefit of the doubt is now reversed: it is now sufficient that „an issuer has no reason to believe that its conflict minerals may have originated in the Covered Countries“; and recycled and scrap minerals are exempted. In a similar spirit, the Conflict Minerals Report describes products as those that „have not been found to be DRC conflict free“, rather that they are simply „not DRC conflict free“. This removes one area of legal uncertainty.

The final rule specifies „due diligence“ by clarifying it „requires an issuer to use a nationally or internationally recognized due diligence framework, if such a framework is available.“ The only one available, says the SEC, appears to be the OECD Due Diligence Guidelines. Finally, the SEC sets a two-year transition period for all companies and a four-year transition period for smaller reporting companies. „During this period, issuers may describe their products as 'DRC conflict undeterminable' if they are unable to determine that their minerals meet the statutory definition of 'DRC conflict free'“ - on condition that a country of origin inquiry has not clarified the origin of the minerals or whom they benefit. „Such issuers, however, must still file a Conflict Minerals Report describing their due diligence, and must additionally describe the steps they have taken or will take... to mitigate the risk that their necessary conflict minerals benefit armed groups.“

This means that in fact the full provisions will not take effect until 2015, or 2017 for smaller companies.

Reactions to the SEC rule and legal challenge

There was widespread criticism of the new rules. One was the long delay, as originally the rules should have been ready by April 2011. Critics pointed out that the relevant SEC committee only passed the rules by a narrow vote of 3-2. Also, „SEC staffers estimated section 1502 would cost companies \$3 billion to \$4 billion initially to meet compliance with the new rules and would cost \$206 to \$609 million for annual compliance. The SEC previously said it would cost companies \$71 million to comply with the rule“¹¹.

While the SEC spoke of \$71m costs and 1199 affected companies, the National Association of Manufacturers had, in its SEC submission, estimated total costs at \$9-16 billion and that in total close to 12 million companies could be affected¹².

The SEC rules were immediately applauded by the NGOs around „Enough“ which had lobbied for Dodd-Frank and had been closely involved in the consultation process. „We applaud the SEC for issuing a final rule“, the Multi-Stakeholder Network around Enough and other organisations wrote in a letter to SEC Chair Mary Schapiro. „This is a significant milestone in our collective efforts to eliminate the link between violence and human rights abuses and the mineral trade in the Democratic Republic of Congo and surrounding countries“¹³.

In response, a group of self-styled „industry leaders“ in the US and other countries announced the formation of a „conflict minerals consortium“ with the aim „to provide a suite of solutions that enable companies across industries and supply chains to meet the requirements“¹⁴. However, this consortium does not appear to include firms actually working with minerals from DRC.

On 19 November 2012, the US Chamber of Commerce and the

¹¹ „SEC Narrowly Approves Reporting Rules on Resource Extraction, Conflict Minerals“, Wall Street Journal „Corruption Currents“ Blog, 22 August 2012

¹² Cited in Chris Bayer (op-Cit.), p.6

¹³ MSN Letter to Mary L. Schapiro, Chairman, SEC, 22 August 2012

¹⁴ „Global Cross-Industry Conflict Minerals Consortium Formed“, Resource Consulting Services, 25 September 2012

National Association of Manufacturers filed a legal challenge against the SEC rules over the implementation of the Dodd-Frank provisions, requesting „that the rule be modified or set aside in whole or in part“. „The business community understands the seriousness of the strife occurring in the Democratic Republic of Congo and the need to implement solutions to bring an end to the violence“, the plaintiffs said. „However, while well-intentioned, the SEC's final rule on conflict minerals is not an effective approach to this complex issue“. The rule „imposes an unworkable, overly broad and burdensome system“¹⁵.

The plaintiffs filed their legal brief – a 75-page document setting out the reasoning behind their challenge – on 16 January 2013. Their main argument was that the SEC should have first found out what the costs of its rules would be. According to a press report, „companies have said the requirement would be burdensome and expensive. In August, the SEC estimated the rules would cost companies a total of \$3 to \$4 billion upfront to comply, plus more than \$200 million a year. The SEC also estimated around 6,000 U.S. and foreign companies would have to comply with the conflict-minerals rules, affecting manufacturers of a range of products, including smartphones, light bulbs and footwear“¹⁶.

This legal challenge prompted an immediate response from concerned NGOs and investors grouped together in the „Multi-Stakeholder Group“ (MSG) which has lobbied for Dodd-Frank and a strict interpretation of the Conflict Minerals provisions. On 19 November 2012, the MSG published a letter urging „transparency to the supply chain for these minerals“ and commenting on the legal challenge with the observation that „as early as 2007, companies and industry associations have developed programs that advance responsible sourcing of minerals“; that „by establishing expectations within our supply chains, we are creating demand for responsibly sourced minerals“ and that „a cross-industry approach to this issue is

¹⁵ „US Chamber, NAM Take Legal Action Against Conflict Minerals Rule“, Compliance Week, 22 October 2012

¹⁶ „Business Groups Fully Brief 'Conflict Minerals' Legal Challenge, Wall Street Journal „Corruption Currents“ blog, 17 January 2013

needed¹⁷. Further responses and positionings are due, eg by the SEC itself.

In support of the NAM challenge, a group of DRC experts has filed a brief giving further arguments¹⁸. The paper details how the Eastern Congolese mining sector has collapsed, how this has undermined existing traceability initiatives, increased smuggling and corruption and harmed livelihoods, and how armed groups have thrived as a result. „The SEC failed to minimize the inordinate compliance costs of its rule for issuers, who must undertake burdensome yet possibly inconclusive investigations into whether even trace amounts of tin, tantalum, tungsten and gold in their products came from mines controlled by armed groups. The SEC thereby all but guaranteed that the de facto embargo will become permanent“¹⁹. „Rather than addressing significant questions as to whether the rule would attain Congress's intended objectives, the SEC ducked the issue... Avoiding a permanent de facto embargo should have been among the SEC's highest priorities, given the numerous comments stressing that the consequences of such an embargo would render the rule disastrously counterproductive“²⁰. In summary, „the SEC should have considered the benefits as well as the costs of its rule“, „the SEC cannot satisfy this obligation merely by asserting that its rule necessarily advances section 1502's objectives“, „the rule incentivizes a permanent de facto embargo, as the SEC has itself acknowledged“ and „the SEC's phase-in period does not mitigate this risk“²¹.

¹⁷ MSG Statement on 1502 Lawsuit, circulated by e-mail 19 November 2012

¹⁸ Brief of Amicus Curiae Experts on the Democratic Republic of Congo in Support of the Petitioners, US Court of Appeals/District of Columbia Circuit, USCA Case #12-1422, Document #1416913, 23 January 2013, <http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Experts%20on%20the%20Democratic%20Republic%20of%20the%20Congo%20amicus%20brief%20--%20NAM%20and%20Chamber%20of%20Commerce%20v.%20SEC%20%28D.C.%20Circuit%29.pdf>,

¹⁹ Ibid., p.14

²⁰ Ibid., p.15-16

²¹ p.17 ff.

Implementation of the SEC rule

Implementation of the SEC rules is continuing despite the legal challenge, no stay having been demanded.

Some firms are already publishing their own data on the „DRC conflict free“ status of minerals used in the electronics industry. Thus SiliconExpert Technologies, a manufacturer of electronic component management tools, said in February 2013 that „only 52% of parts potentially containing conflict minerals have a published conflict mineral status and these parts come from only around 15% of suppliers. Of the suppliers who have a published status, 37 are listed as conflict free, 40 are listed as in progress, and 4 are listed as not clear. Only 30% of parts containing tin, tungsten, tantalum, and gold are confirmed as conflict free minerals“²². It does not specify how this was calculated and what data was used.

On 29 January 2013, the industry website Metal Miner published a „manufacturers' guide to conflict minerals compliance“ called „The Definitive Guide to Conflict Minerals Compliance for Manufacturers“²³. „It's Harder Than It Looks“ is the title of one of chapters and this summarizes the gist of the 13-page guideline. „Our interviews suggest OEMs (Original Equipment Manufacturers) might not place much emphasis or credibility in systems that try to track the source of 3Ts/G raw materials“, the reports says (3T refers to tantalum, tin and tungsten, G to gold – the DRC's „conflict minerals“ in their usual definition) and points out: „At the exchange level, particularly for base metals (London Metal Exchange, Shanghai Metal Exchange), sources constantly change. Historically, as long as the alloy maker bought certified metal, few OEMs controlled where the metal came from.“ The SEC, the report continues, allows manufacturers to rely on what their first-tier suppliers say regarding the origin of their materials; „but information requests from customers may require the company to push deeper into the supply chain than currently

²² „SiliconExpert Provides the Latest Conflict Minerals Data“, company press release, 4 February 2013

²³ „The Definitive Guide to Conflict Minerals Compliance for Manufacturers“, downloaded 9 February 2013

mandated under the regulation“.

The Metal Miner guideline distinguishes between a „supplier-centric“ and a „part-centric“ approach to conflict minerals compliance. „Supplier-centric“ refers to who you buy from; „part-centric“ refers to what you buy. In the context of conflict minerals, „supplier-centric“ compliance means buying only from suppliers whom one can rely on to supply „conflict free“ minerals only.

This is where existing industry-wide programmes like the EICC-GeSI template become useful – but „this approach remains risky“, the guideline says, because even a supplier guarantees that all its goods come from conflict-free materials, „that may not provide truly complete assurance“. It also means checking all suppliers, which is a considerable effort.

The „part-centric“ revolves around a legal requirement to identify „conflict minerals“ in a purchasing order and only if such minerals are part of a purchased component to specifically target those suppliers – a „laser focusing“ approach which produces a „significantly streamlined implementation process“ which excludes those suppliers from whom the company is not buying parts or components containing potential conflict minerals anyway.

The report also recommends to suppliers: „By becoming a better-documented, more knowledgeable supplier of parts, components and other elements, one can strengthen competitive positioning... One can turn the 3Ts/G investment into a sales edge.“

However, the Bayer paper published in 2011 identifies a host of practical problems which are not addressed in the MetalMiner guideline²⁴. Thus, there is likely to be extensive duplication of work as different manufacturers each carry out their own checks on the same suppliers, and there are no provisions for information sharing. The reliability of suppliers' information regarding conflict minerals cannot be relied upon as there is no requirement in the SEC rules for

²⁴ Chris Bayer, op. Cit., various sections

suppliers' reports to be audited unless the customer requires this – which imposes additional costs. The independent audit of the issuers' Conflict Mineral Reports cannot by their nature include fact-checking on the ground: „A CMR audit is not intended to confirm the technical accuracy of the material content, product certifications, supply chain linkages or other supporting data. Instead, the CMR audit will determine what, if any, internal processes exist to obtain appropriate technical information“²⁵. The paper proposes using the tested ITRI processes and resorting to information sharing between companies.

An OECD report on „downstream implementation of the OECD guidelines“ gives an overview of practices within industry, based on questionnaires to participating companies. This made clear that companies prefer to rely on defined processes. „Most pilot participants do not have direct relationships with smelters and therefore are relying on industry processes rather than engaging directly with smelters to obtain information and undertake due diligence. Some have thus far been unable to identify all of the smelters in their supply chain... Pilot participants are using contractual clauses and terms and conditions to ensure compliance with data disclosure and/or required policies as a prerequisite to doing business. A majority of the respondents are still working with their suppliers to overcome the issue of confidentiality.“²⁶. This report was prepared before the issuance of the SEC's final rules on the implementation of Dodd-Frank and reflects a degree of uncertainty about future legal requirements.

In March 2013, MetalMiner published a critical review of the OECD „Final Report“ of January, highlighting and discussing the findings about Dodd-Frank implementation²⁷. This review notes that „the EICC/GeSI Conflict-Free Smelter Program appears to have broader support“ and „the EICC/GeSi reporting template appears to have

²⁵ Chris Bayer, op.cit., p. 22

²⁶ OECD, Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Cycle 2 Interim Progress Report on the Supplement on Tin, Tantalum and Tungsten. OECD, June 2012. p.8

²⁷ MetalMiner, „Conflict minerals: Building Responsible Manufacturing Supply Chains“, March 2013

emerged as the de facto reporting standard“. Also, „companies have begun to prioritize suppliers based upon the amount of 3TG in their products“ and „validating supplier responses to questionnaires and templates remains both time-consuming and a challenge“²⁸.

In a series of general critical points, MetalMiner notes that

- „OECD conformance in and of itself does not ensure SEC compliance, and SEC compliance does not encourage positive engagement in the region“;
- „information from suppliers has been of inconsistent quality and can require significant effort to validate“;
- „there are still gaps in identifying material transit routes“²⁹.

The general thrust of industry discussion in the first months of 2013 appears to be that companies are unsure what they need to do, spend a lot of time trying to find out and a whole new consultancy and seminar has sprung up to initiate companies into the complexities of Dodd-Frank, OECD compliance and „conflict minerals“.

An industry website notes that the SEC guidelines fail to identify many important details of their own requirements „but until the SEC releases further guidance on the conflict minerals rule, companies will have to continue making decisions based on reasonable or good faith inquiries“ and „further guidance in advance of the May 31, 2014 filing date is unlikely“³⁰.

In the meantime, the US government appears to be content with companies making up the practicalities of implementation as they go along. In a statement on Dodd-Frank, the US State Department in February 2013 noted that „as a number of companies have begun to demonstrate through their own efforts and through participation in implementation of pilot projects, the OECD due diligence framework can be implemented in a manner that enables companies to monitor

²⁸ Ibid., p.2

²⁹ Ibid., p.4-7

³⁰ Conflict Minerals Rule Weekly Recap 16, March 1, 2013, www.conflictmineralslaw.com

supply chains appropriately and, if necessary, to adjust them in response to identified risks“³¹.

EU and Canada follow suit

Meanwhile the European Union has begun to debate the adoption of similar rules to Dodd-Frank on the EU level. Following pressure to this effect in the European Parliament, the European Commission's Directorate-General for Trade on 3 April 2013 launched a „public consultation on a possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas“. The closing date for the consultation is 26 June 2013³². The questionnaire sent out for this consultation seeks, among other things, information on the impact of Dodd-Frank, the OECD Due Diligence Guidelines, other due diligence schemes and regulatory schemes on the national level in mineral producing countries. The central question is: „Is there a need for the EU to promote responsible sourcing of minerals through actions focused on transparency of the supply chain, in addition to what already exists in the policy landscape?“

And lastly, on 26 March 2013 a Conflict Minerals Act was introduced in the Canadian parliament which „requires Canadian companies to exercise due diligence in respect of the exploitation and trading of designated minerals originating in the Great Lakes Region of Africa in seeking that no armed rebel organisation or criminal entity or public or private security force that is engaged in illegal activities or serious human rights abuses has benefited from any transaction involving such minerals“³³. The bill was introduced by the left-wing New Democratic Party. According to press reports, a similar bill had been introduced in 2010 but fell when parliament was dissolved early³⁴.

³¹United States Department of State, Statement Concerning Continued Implementation of Conflict Minerals Due Diligence pursuant to Section 1502 of the Dodd-Frank Act, Washington, 28 February 2013

³² European Commission, Directorate-General for Trade, „Public consultation on a possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas“, 3 April 2013, trade.ec.europa.eu/consultations/?consul_id=174

³³ House of Commons of Canada, Bill C-486, www.parl.gc.ca

³⁴ Globe & Mail, „NDP to introduce federal bill on conflict minerals“, 26 March

The Canadian bill goes much further than Dodd-Frank as it explicitly covers Great Lakes governments; it is specified that „public security force“ means „a lawful armed unit that is part of an army or a police force or other national force“. „Serious human rights abuses“ mean „any form of torture or other cruel, inhuman or degrading treatment; any form of forced or compulsory labour; child labour; sexual violence and any other gross human rights violation; and war crimes, crimes against humanity, genocide and other serious violations of international humanitarian law“. The requirements placed on companies are similar to those in Dodd-Frank but explicitly endorse the OECD guidelines, which gives the sort of much-needed clarity to the mining industry missing from Dodd-Frank.

According to an industry website, „the Canadian bill is similar to the SEC’s conflict minerals rule, but the Canadian bill differs in some key ways: additional mineral derivatives are covered, the covered countries are not identical, the bill adds extraction, purchasing and trading to the impacted activities, and reports are required on a fiscal year basis. These differences will make it more costly for companies to comply with US and Canadian requirements“³⁵. It is not clear if and when the bill will be passed into law.

2013

³⁵ Conflict Minerals Rule Weekly Recap 19, 22 March 2013, www.conflictmineralslaw.com

Reality check: Implementing due diligence and traceability in the DRC

The SEC recommends that companies use the OECD Due Diligence Guidelines, adopted in 2011, as a tool to determine the “conflict-free” status of their minerals. These guidelines form the basis of the ICGLR (International Conference of the Great Lakes) efforts to institute harmonised standards across the Great Lakes region which can be applied and enforced by governments. These efforts led to the ICGLR Regional Certification Scheme of 2010 and the Regional Certification Mechanism of 2011 which were integrated into DRC law on 29 February 2012 and into Rwandan law on 23 April 2012. According to OECD, „the Arrêté (in the DRC) obliges any actor involved in the chain of custody in the DRC to adopt and respect the OECD-compliant standards... (and) requires these actors to exercise due diligence to ensure that they do not contribute to human rights abuses or conflict in the Democratic Republic of Congo“³⁶. ICGLR audits are then supposed to take place.

On 23 March 2012, the DRC Mining Ministry published a list of „green“ and „red“ mining sites in North and South Kivu – the former being open to „independent audits“ either through national or international bodies „involved in the implementation of CTC, OECD or ICGLR standards“³⁷. „Red“ sites are closed to mining. The South Kivu list includes 8 „green“ sites, the North Kivu list 11. A peculiarity of the North Kivu list is that it consists exclusively of mining sites held by MHI, the mining and trading firm of CNDP senator Edouard Mwangachuchu, as well as three sites forming part of the planned Rubaya „centre de négoce“. Rwanda has listed three mine sites, which are already certified by BGR.³⁸

The IPIS research for OECD notes critically: „It is problematic that the

³⁶ OECD, June 2012, p.8

³⁷ Arrêté Ministériel No 188& 189 of 23 March 2012, published on www.mines-rdc.cd

³⁸ This according to report of OECD Meeting May 2012

lists were published over eight months after the validation months were carried out. Security situations, being subject to constant flux, might have since been superseded.”³⁹. It could further be added that during these eight months, the DRC elections took place which have since resulted in rapidly changing local security situations and power relationships in parts of the Kivu provinces, including mining areas.

The report further notes that some validated sites are situated in a national park (Kahuzi-Biega), some are within private concessions. Also, the validation reports on which the lists are based remain unpublished. Nevertheless, these lists are now being used by some companies in „due diligence“ as lists of „conflict free“ mining sites, as was discussed at the OECD meeting on May 2012⁴⁰.

An immediate first step for companies seeking to comply with Dodd-Frank is to use only such suppliers who have already done the „due diligence“ on „conflict-free“ sourcing. This is the thrust of iTSCI: the Tin Supply Initiative of the International Tin Research Institute (ITRI) in collaboration with the Tantalum-Niobium International Study Centre (TIC) - „a tracability, tracking and due diligence programme that also allows risk management of the supply chain from mine to smelter“ with as „three key elements“ tagging, risk management and audits⁴¹. The idea is that mining and trading companies which are part of iTSCi can be safely assumed to be supplying „conflict-free“ minerals from the DRC.

Basically, iTSCi involves tagging minerals at source, logging their custody along the chain and feeding this data into an iTSCi database, demanding companies involved to undergo risk assessment and allow their clients to access data in accordance with the OECD Due Diligence Guidelines and submit themselves to yearly independent audit⁴². On the ground it works through the international NGO PACT; it is financed by the companies involved.

³⁹ OECD, June 2012, p.10

⁴⁰ Report of OECD meeting 4-5 May 2012

⁴¹ „The iTSCi Traceability and Due Diligence System for Tin, Tantalum and Tungsten from the Great Lakes Region of Central Africa“, Development of Guidance Documentation, July 2011, www.tanb.org

⁴² ITRI publishes all details in its iTSCi Project Overview on www.itri.co.uk

The initiative began in Rwanda and in South Kivu 2010 but the Congolese part had to be abandoned before it really got off the ground when mining in Kivu was suspended by the DRC government in September of that year. It has since restarted in Katanga and at the end of 2012 it was announced to be expanding into Maniema⁴³.

A summary of „lessons learnt“ of three years of iTSCi at the November 2012 OECD meeting praised the programme for evolving into a fully-fledged due diligence programme, but warned against „assumed best practice“ and against „imposing a 'first world' approach“. It recommended working with existing actors, not against them; not underestimating the complexity of mining and the mineral trade in the Great Lakes Region; being „practical“ and flexible and not expecting 100% perfection; building local capacity; and: „Traceability isn't the be all and end all. Other due diligence actions are actually sometimes more important. For example, a key part of the programme is incident reporting and solving (mitigation). These 'incidents' – anything from child labour, mine face cave-ins, the presence of armed groups in the area, mistagged bags, right up to fraudulent activity – have occurred and each has to be addressed.“⁴⁴

iTSCi in Katanga

The first mine in DRC where iTSCi became operational was Kisengo, Katanga's biggest coltan mine, from which the US-based capacitor manufacturer KEMET sources its tantalum. This is an interesting case, as parts of North Katanga are a war zone and many actors in Eastern Congolese mining moved their activities there after the mining ban of 2010.

The Northern Katanga district of Tanganyika was part of RCD territory during the war 1998-2003 and subsequently the theatre of widespread Mayi-Mayi activities, facing first a non-integrated government army heavily involved in mining and then from around

⁴³ „iTSCi expands into Maniema Province bringing more Conflict-Free Minerals to the market“, ITRI press release, 18 December 2012

⁴⁴ Richard Burt, „Artisinal Mining: Lessons Learnt in formalisation and building responsible practice“. 29 November 2012

2008 onwards with partly integrated FARDC units continuing with this activity in the former Congo-Étain concessions in Manono territory. Neighbouring Nyunzu territory became the scene of a „coltan rush“ from 2007 onwards, according to various NGO reports. Kisengo is cited as the main coltan mining site. „In a few months Kisengo grew from a village into a town of about 20.000 people, with miners coming from across eastern DRC“, a SIPRI report notes about the situation in 2007; Bukavu traders paid a premium for Kisengo coltan with its high tantalum content of 30-40%⁴⁵.

In 2007, IPIS and Fatal Transactions also published a highly critical report on Kisengo, noting that coltan mining was taking place under de facto control of a local FARDC officer from Kongolo military base, Captain Mamadou Ndala. „They rule at gunpoint and defy any other authority“⁴⁶. The SIPRI report names him as a former MLC commander – in 2003, the MLC received the command of the 6th military region comprising Katanga and Nyunzu is commanded from Lubumbashi, not Kalemie as in RCD times although it is closer; thus there is tension between integrated soldiers reporting to Lubumbashi and non-integrated ones reporting to Kalemie; also, many non-integrated local Mayi-Mayi stayed in the area and were reinforced by FDLR and Raia Mutomboki militia expanding from neighbouring areas of South Kivu and Maniema⁴⁷.

There was also, the IPIS report said, conflict between local communities around the coltan; agriculture had collapsed because of the run on mining. In a mine close by, Mayi Baridi (Cold Water), the military was organising forced labour. In a follow-up report of 2008, IPIS said the situation was worsening. By 2009 Kisengo was in decline, the population shrinking to 12.000⁴⁸ SIPRI notes in its study published in 2010 that North Katangan mining remained highly militarized: „Within their separate areas of control, FARDC units have become part of an informal political and economic governance system that

⁴⁵ Ruben de Koning, Demilitarizing Mining Areas in the DRC: The Case of Northern Katanga Province, Sipri Insights on Peace and Security 2010/1, p.5

⁴⁶ IPIS, Mapping Interests in Conflict Areas: Katanga

⁴⁷ Ruben de Koning, various pages

⁴⁸ Ruben de Koning, *ibid.*, p.5h

incorporates other state agencies and local authorities as long as they do not challenge the FARDC units rent-seeking⁴⁹.

In this situation, the Katanga provincial government on 25 May 2010 handed the monopoly on buying minerals from Kisengo, Mayi Baridi, Lunga and Katonge to the mining company MMR (Mining Mineral Resources), in a five-year-contract.⁵⁰ And MMR is now the model partner for iTSCi in making Northern Katanga a pilot region for „conflict-free“ tantalum from the DRC.

According to a German audit of MMR carried out for BGR, MMR is part of Vinmart conglomerate founded in Tanzania in 1997, „predominantly funded by Indian capital“ and further including MCS (Mining Chemical Suppliers), SOMIKA (Société Minière du Katanga, a copper miner), SOTRAFER, TERRA (agriculture) and „Solutions for Africa“ (Borewell and geological drilling)⁵¹.

SOMIKA is one of the most controversial mining companies in the DRC due to environmental concerns about its activities near Katanga's capital Lubumbashi and questions around the way it came into existence.

MMR buys on site from an artisanal miners' cooperative, CDMC (Coopérative des Artisans Minéraux du Congo), which buys from the diggers. MMR transports the stuff to Kalemie and from there via Lake Tanganyika either to Kigoma and Daressalam, or to Pweto and Lubumbashi. MMR pays CDMC cash on site. CDMC is based in Kalemie and is the biggest miners' cooperative in Northern Katanga. According to a local study, it simultaneously acts as „syndicat“ and „négociant“, it gives artisanal miners' permits, runs the mining sites, prefinances the miners, gives them equipment on credit and carries out preliminary treatment of the mineral before tagging and subsequent transport to MMR. „CDMC recoit de MMR un préfinancement pour achat et donne ensuite à ses agnts acheteurs

⁴⁹ Ruben de Koning, p.15

⁵⁰ Mining Mineral Resource au Tanganyika, tanganikanews, 29 May 2010, reproducing an RTGA publication

⁵¹ Baseline Audit of Mining Companies in DRC for CTC Certification: Mayi Baridi, Kalemioe, Tanganyika, Katanga by MMR, BGR, April 2012

des crédits pour acheter des minerais de coltan sur place en mine. Une fois la somme d'argent épuisée, l'agent acheteur remène au dépôt de CMDC le minerai acheté correspondant au crédit reçu et prend de nouveau un autre crédit. CMDC à son tour, après traitement du minerai acheté en mine (élimination des particules magnétiques à l'aide des rouleaux magnétiques), le remet à MMR de qui il a reçu le préfinancement achat qu'il a donné à ses agents et qui est considéré ici comme un comptoir pour exportation⁵². Also, CMDC membership gives the miners rights to various benefits such as medical care and mining equipment. According to this report, MMR also owns the exploitation rights to the mining sites.

CMDC, despite calling itself a miners' cooperative, is headed not by a miner but by a communications professional: Serge Mulumba who between 2003-06 was director of RTGA (Radio-Télévision de Groupe L'Avenir) in Kinshasa, of the very pro-Kabila media group of the same name, and from 2004-12 director of Mathys Media company, thus overlapping with his CMDC presidency⁵³.

In 2010, the local press reported that local traders were revolting against this arrangement. They denounced „intimidation and arrests by security forces which they accused of being in connivence with MMR“⁵⁴.

Studies indicate that the MMR contract of 2010 was part of a move by the Katanga government to push Shi and Nande Kivu traders out of the mineral trade in Northern Katanga⁵⁵. According to this IPIS/Alert study by Steven Spittaels, „until late 2009, traders originating from, and operating through, North and South Kivu provinces dominated the minerals trade in Northern Katanga“. This may be a relic of the time when RCD-Goma controlled the area. At any rate the Katanga

⁵² Alidor Mwamba Ilunga, „Rapport de mission effectuée dans les mines de coltan de Kisengo du 29 juillet au 02 août 2011“, Diamond Development Initiative 2011, p.4

⁵³ According to Serge Mulumba's LinkedIn profile.

⁵⁴ „Les négociants de Kisengo au Nord-Katanga dénoncent le contrat d'exclusivité“, Le Potentiel, 31 May 2010

⁵⁵ Steven Spittaels, „The Complexity of Resource Governance in a Context of State Fragility: An Analysis of the Mining Sector in the Kivu Hintrelands“, IPIS/International Alert, November 2010

government first in 2009 instituted a – technically illegal – \$5/kg tax on exporting Katangan minerals to other provinces and then gave the monopoly to MMR. Protests by Kivu traders in Northern Katanga were suppressed.

Spittaels links this directly with the „conflict minerals“ campaigns in the US and gives evidence that Katanga was being given more favourable treatment than the Kivu provinces, which provided an incentive both for Kivu comptoirs to expand to Lubumbashi and for Katanga's government to lock them out of the lucrative trade with „conflict-free“ minerals⁵⁶.

„The trade in Katangese cassiterite and coltan is now almost monopolised by a single trader“, Spittaels writes. „Whereas before September 2009 the trading system was similar and inextricably linked to mineral business in the Kivu provinces, since March 2010 it has been transformed by the provincial authorities into a system of their own making. The province has acted on its own in this matter, which is exceptional and raises questions of legality... Channelling most of the trade through a single company brings some clarity to an opaque situation where a plethora of middlemen intervened, and may offer an opportunity to reduce local corruption. The other side of the coin is that négociants and transporters are almost forced out of the trading chain. This has created real tension... Meanwhile little will change for the creuseurs and the local population. Although MMR has certain social obligations that are included in its contract with the provincial Minister of Mines, it seems these are not its priority. The trading routes have also changed and except for gold they have become rather clear. In general, most cassiterite is transported by road to Lubumbashi, and most coltan is trucked to Kalemie.“⁵⁷

The situation does not appear to have changed substantially since this was written in 2010. In 2012, it was reported that the Tanganyika district administration proposed to close Kisengo mine because of persistent rioting by artisanal miners complaining that MMR was paying low prices. MMR buildings and government offices were

⁵⁶ Ibid., p.18-24

⁵⁷ Ibid., p.23-24

destroyed, and the district administrator said the miners were „acting like a militia“. Previously, MMR's buying price had been halved from FC 45.000 to FC 22-24.000 per kg coltan⁵⁸.

The UN Group of Experts on the DRC said in its 2012 report that MMR pays lower prices to miners in Kisengo than they would receive in Masisi - \$34/kg for coltan in Kisengo regardless of quality as opposed to \$36/kg plus \$1.8 per tantalum content percentage above 20% in Masisi - , justifying this with the additional costs of the tagging programme and its investments for the benefit of miners⁵⁹.

In a due diligence report on MMR, Network Solutions notes that „a risk has emerged of violent confrontations at MMR mine sites due to the absence of a suitable means for mineral buyers and sellers to negotiate prices“⁶⁰. The report recommends diplomatically that MMR „still needs to make clearer to Katanga public officials its strong opposition to extortion and bribery“. It was found that MMR pays the mining police directly in cash.

In a 2012 report, ITSCI notes a worsening security situation in Katanga, but does not yet call its programme into question. „The ITSCI programme continued to strengthen and grow over the first half of 2012, as State agents and other local stakeholders became more familiar with and more experienced in their roles in the system... The programme has also expanded to include new sites... Unfortunately, the first half of 2012 has also been marked by increased Mai-Mai activity in Central Katanga and FARDC response to this...The ITSCI system in Mitwaba was seriously affected by these movements. An armed attack on the FARDC headquarters in April led to the decision to suspend tagging activities, which were halted for almost two months“. They resumed on 7 June 2012.⁶¹

From January to June 2012, 2251 tonnes of minerals were tagged

⁵⁸ „Le site minier de Kisengo menacé de fermeture“, Radio Okapi, 18 January 2012

⁵⁹ UN DRC Group of Experts Final DRC report, S/2012/843, §230

⁶⁰ „The conflict-free status of minerals from Mai-Baridi and Luba, and the due diligence of MMR and CDMC: a follow-up evaluation“. Solutions Network, February 2012

⁶¹ Status Report ITSCI Katanga, January-June 2012. ITRI, 2012

under the iTSCi scheme in Katanga and it was planned to expand to 19 new sites⁶²

In its latest Katanga report of October 2012, published in April 2013, ITRI gives a much more critical assessment of the political situation and its effect on the iTSCi programme⁶³. Thus, „armed groups have attempted to enter mine sites or force people to work for them in several locations; iTSCi incident reports take account of periodic but infrequent visits by FARDC“⁶⁴. iTSCi also notes critically the lack of competition to MMR and the continuing dissatisfaction of miners with the low prices paid to them. „iTSCi has been reporting all incidents relating to this issue as human rights abuses, because there is no opportunity for workers to bargain“⁶⁵. It is also noted that child labour continues in the mines, including children as young as six; that prostitution around mining areas and rape by FARDC continues.

Already in its 2011 audit of iTSCi, Channel Resources highlighted a number of risks associated with minerals from North Katanga⁶⁶. Thus the escape of Mai-Mai commander Gédéon from prison in September 2011 made the area a „high-risk area“, and also it was still possible to transport non-tagged minerals from Kivu through Katanga. When Gedeon escaped, iTSCi activities had to be suspended and evacuated for three days⁶⁷. Since 2011, Kisengo and Mayi-Baridi are reported to be „not conflict-affected“ and sources of „conflict-free“ tantalum, without the general situation in this part of Katanga having fundamentally changed, it still being classed as a „high-risk area“⁶⁸.

The criteria used for establishing the „conflict free“ status of these mines are extremely narrow and appear to consist mainly in observing the presence or not of FARDC soldiers in and around the mines. The Channel Resources report mentions that minerals from

⁶² OECD Report, January 2013, p.35

⁶³ This and the following: ITSCi Katanga Governance Assessment, October 2012

⁶⁴ Ibid., p.12

⁶⁵ Ibid., p.14

⁶⁶ ITSCi Field Governance Assessment Katanga, April 2011-February 2012

⁶⁷ Ibid., p.9

⁶⁸ „The conflict-free status of minerals from Mai-Baridi and Kisengo, and the due diligence of MMR and CDMC: an evaluation“. Solutions Network, July 2011

Mayi-Baridi and Kisengo have to pass FARDC checkpoints. It also mentions that iTSCi in the area „has been implemented due to guaranteed up-front financing by MMR“ and that „iTSCi implementers had to use MMR support for logistics, transport, communication for an initial period“⁶⁹. It is also mentioned that „there is no analysis so far that the social projects undertaken by MMR were proportional to the exports“⁷⁰.

The report does however conclude that „risk of mineral extraction, transport or trade being associated with conflict are minimal while buying from Katanga mines through the iTSCi system because there is no serious political conflict in Katanga and instances of military presence are relatively easily identified and dealt with“⁷¹.

The latest ITRI report also notes that Katanga's mining policy is heavily skewed towards certain companies and can be very difficult for companies which do not get favourable treatment. According to the report, „the team did not find any text detailing procedures such as the export certificate at the provincial level“. Yet while on the one hand all mining companies in Katanga are supposed since the beginning of 2012 to prove they have treatment or processing entities, including minimum investment of \$200.000, blanket provisional export authorizations have been provided by the Katanga Mining Division against payment of \$10 per exported ton as an anticipated bloc payment, with no application being ever refused and no rationale given for these authorisations⁷². Significant delays in obtaining export permits from Katanga nevertheless occur and have „affected the entire supply chain, particularly négociants working for companies that could not export“⁷³.

„Between the requirement to become an “entité de traitement” and October 2012 two exporters were able to overcome all hurdles and managed to operate, after receiving treatment license and export

⁶⁹ ITSCi Field Governance Assessment Katanga, p.11 and 19

⁷⁰ Ibid., p. 12

⁷¹ Solutions Network, p.29

⁷² ITSCi Governance Assessment Katanga, October 2012, p.21

⁷³ Ibid., p. 22

authorizations“, the iTSCi report notes. „Two new exporters were in the final stages, though the process has taken over a year... De facto, the companies caught up in these delays were not able to export and stopped all activities, including the purchase of minerals.⁷⁴“ For this reason, Kivu traders who have attempted to enter the business in Katanga have found it impossible and have returned to Kivu. Even for companies which do export, traceability is hampered by CEEC refusing or delaying the signature of export logbooks⁷⁵.

All this militates against the idea that Katanga mining exports can be seen as a model of traceability and good governance. However, this is how companies claiming to observe US and OECD guidelines present their purchases in Katanga.

In July 2011, Motorola and AVX (a Czech capacitor manufacturer) launched the buying of „conflict free“- minerals from the Kisengo and Mayi-Baridi mines as the „Solutions for Hope“ project, being subsequently joined by other leading electronics companies such as Nokia, Hewlett Packard, Intel and Foxconn. „Mining is conducted under concession from MMR – the diggers sell through their cooperative CDMC. AVX take ownership of material directly from MMR – AVX buys the ore at worked market prices“, according to Solutions for Hope⁷⁶. „Since December 1st 2011, AVX has only sourced the tantalum powder and wire used in its tantalum capacitors from smelters that have been found compliant“ to EICC/GeSI and CFS⁷⁷

In June 2012, OECD reported: „The first lot (10 tonnes from the Mayi Baridi and Kisengo mines) has been processed by AVX into tantalum capacitors and has been by Motorola Solutions where it will be incorporated into components. A second shipment has been released from the MMR warehouse in Kalemie, DRC and is in transit to the F&X smelter in China“⁷⁸.

In January 2013, Solutions for Hope said that „over 127 tonnes“ has

⁷⁴ Ibid., p.22

⁷⁵ Ibid., p.25

⁷⁶ Solutions for Hope – Achieving a truly conflict free tantalum supply chain for the electronics industry, AVX presentation, 7 January 2013

⁷⁷ Ibid.

⁷⁸ OECD, Upstream, June 2012, p.15

been shipped, that Mayi Baridi was the „first BGR Green Flag tantalum site in Katanga, and that the project had „moved from a pilot to a credible, sustainable and expandable program“⁷⁹.

Nonetheless, KEMET speaks of „the conflict-free Katanga province“⁸⁰ and explains: Coltan from Kisengo goes to K-Salt Tantalite Resources in South Africa and from there to KEMET. At the mine, it is „bagged and tagged“ by iTSCI and certified „conflict free“. KEMET has pledged \$1.5m over two years for local development around Kisengo.

In February 2013, KEMET received Conflict-Free Smelter Certification from EICC-GeSI based on this work. „KEMET's supply chain begins with tantalum ore sourced from the conflict-free Katanga Province of the Democratic Republic of Congo, through processing and smelting in South Africa and the United States, all the way through capacitor manufacturing in Mexico. The result is the delivery of guaranteed 100% conflict-free capacitors to customers“⁸¹.

iTSCi in Maniema

iTSCi is now expanding into Maniema province. According to the January 2013 iTSCI New Bulletin, „the first tags were applied at a launch ceremony held on 18 December 2012 in the presence of the Provincial Governor and Provincial minister of Mines of Maniema“⁸². No details were given. In a press release about this event it was specified that the programme would begin in Central Maniema „including the Kalima and Kailo territories which have already been the subject of independent assessments confirming that there are no concerns over conflict related issues, as well as Government validation of specific sites“⁸³. The launch was „facilitated by local companies; Maniema Mining Company SPRL (MMC), a Malaysia

⁷⁹ Solutions for Hope, January 2013

⁸⁰ Conflict Free and Socially Sustainable – A Practical Discussion of Conflict Minerals Compliance Rules and the KEMET Case History. Presentation, 2012

⁸¹ KEMET Receives Conflict-Free Tantalum Smelter Certification, press release, 25 February 2013

⁸² iTSCi News Bulletin 22: January 2013

⁸³ „iTSCi expands into Maniema province bringing more Congolese conflict-free minerals to market“, ITRI Press Release, 18 December 2012

Smelting Corporation (MSC) led consortium, and Societe Miniere du Maniema (SOMIMA) and their partner Metmar Trading (PTY) Ltd, and of course all involved upstream trading companies will be providing on-going funding⁸⁴.

In other words: as in Katanga with MMR, in Maniema local companies due to profit from iTSCi will pay for iTSCi and thereby for their own monitoring. In 2011, iTSCi had already proposed kick-starting its activities in Maniema by allowing MSC to sell existing stocks of cassiterite, „reported to be 1000 to 1500 tonnes“, which had accumulated as a result of the 2010-11 mining ban. „It is proposed that this stock is collected and tagged as 'stock'... this material would then be sold through the iTSCi member supply chain and smelted under the CFS (Conflict-Free Smelter) programme, provided there is an appropriate waiver in requirements... The trade arrangements for this stock, which would comprise mainly of cassiterite, would be managed by MSC together with its partners. The proposal suggested that „since the mineral has already been extracted, and cannot be destroyed, any benefit to armed groups, if any, will already have occurred“. It also explains that „if the evacuation of stock can be agreed, industry is willing to provide separate funding for start-up of iTSCi in a proportion of sites in Maniema⁸⁵.

MSC in 2011 had positioned itself as the main international partner for the cassiterite mines of North Kivu and Maniema, expressing interest and signing preliminary agreements both for the Bisie tin mines of North Kivu and for the concessions of the defunct Sakima mining company (Société Aurifère du Kivu-Maniema) around Kalima in Maniema. In May 2011, the DRC government announced that MSC would contribute \$10 million towards the tagging programmes in Eastern Congo and would create a joint-venture with the government for the liquidation and take-over of Sakima⁸⁶. MSC at the time was working together with the Belgian trading firm Traxys.

⁸⁴ Ibid.

⁸⁵ „Maniema Mineral Stock Disposal: Discussion Paper“, iTSCi, October 2011

⁸⁶ „Malaysia Smelting Agrees to Create Joint Venture for Tin Mining in Congo“, Bloomberg, 21 May 2011

In 2012, however, MSC turned towards Katanga instead, becoming the client of MMR and then agreeing to build a tin smelter in Lubumbashi by taking a 40% stake in Africa Smelting Corporation⁸⁷. 150 tonnes of stocked cassiterite in Kindu were exported via Kalemie in Katanga on 5 November 2012⁸⁸. It is worth noting that the exporting company was Metachem, a non member of ITRI and its iTSCi system, thus non-tagged minerals, but applying OECD guidelines⁸⁹.

One company in Maniema hoping to gain from the iTSCi expansion into the province is SOMIMA (Société Minière du Maniema), a newcomer to the Eastern Congolese mining scene. Claiming to have a history going back to 1946 with a tin foundry which had to close in 1998, the company started in its present form in 2010, as „a new Congolese company which now has Congolese and German shareholders all from the same family“. Chairwoman of Somima is Odette Krempin, officially „Princesse Odette Maniema Krempin“, a well-known Congolese socialiste based in Frankfurt with strong personal connections to the family of president Joseph Kabila. Somima opened a minerals buying office in Kindu in April 2011 and joined iTSCi in June 2012⁹⁰.

It is not clear from the published company information that Somima actually operates any mines or produces anything at all; it simply claims to have the „capacity“ to produce specific quantities of tantalum, tin and wolframite. Somima does not figure on any of the DRC Ministry of Mines' lists of officially recognised holders of mining titles.

Somima chairwoman Odette Krempin, born 1976 and resident in Paris from 1984, has a colourful background. Born in 1976, resident in Paris since 1984 and trained as a fashion designer in Marrakesh/Morocco, her fashion became prominent in South Africa and Namibia and,

⁸⁷ „MSC to invest in DR Congo smelter“, ITRI, 6 June 2012

⁸⁸ OECD report, January 2013, p.22.

⁸⁹ Interview with John Kanyoni owner of Metachem Company, Goma, 5 April 2013.

⁹⁰ All information according to the Somima website, www.somima.com

being married to various Germans, she moved to Frankfurt and was named as DRC honorary consul to Frankfurt by President Kabila in 2006⁹¹. In 2009, the mass-market Bild newspaper visited her in her luxury villa and gushingly described her as „Frankfurt's prettiest diplomat“⁹². Congolese in Frankfurt remember her luxury parties where she collected money for her charity „Deutsch-Afrikanisches Jugendwerk“ and videos show her visiting the DRC and being greeted by women dancing in T-shirts bearing her portrait. She subsequently became the object of criticism which led to her downfall. The NGO „Cap Anamur“ claimed that she was using a Cap Anamur-operated hospital in the Congo as publicity for her charity despite having nothing to do with it; others said that she was fraudulently claiming to be a Unesco goodwill ambassador and misusing donor logos, and in 2011 the German authorities opened investigations into her for embezzling donations. She lost her diplomatic status and newspapers speculated whether she was really a „princess“ at all⁹³.

Nothing much more was heard of her until she reappeared first as president of a „German-Congolese Chamber of Commerce“ which is not known to exist outside a press release claiming the signature of a partnership agreement with the DRC investment agency Anapi⁹⁴ and a Kinshasa newspaper article claiming that the Chamber was founded in 2008 offering to help German businesses register with DRC ministries⁹⁵. The Chamber's website is defunct.

Subsequently, Krempin reappeared as chairwoman of Somima, which her father had given her according to the company website, with an office in Frankfurt. She operated a stall at the Francophone Summit in Kinshasa 2012 which was visited by President Kabila in person and in

⁹¹ See eg „Odette Maniema Krempin: Prinzessin, Designerin, Konsulin“, FAZ, 21 July 2009;

⁹² „Hausbesuch bei Frankfurt schönster Diplomatin“, bild.de, 7 September 2009

⁹³ For all this see eg „Gar keine Prinzessin?“, Frankfurter Rundschau, 11 December 2009; „Odette Krempin und die Fallhöhe“, Frankfurter Rundschau 1 April 2011, „Staatsanwaltschaft prüft Ermittlungen gegen Krempin“, FAZ, 13 December 2009

⁹⁴ „Die ANAPI und die CCIGC unterzeichnen ein Partnerschaftsabkommen“, Presse-Ticker-Info, 18 November 2011

⁹⁵ Le Potentiel, 25 August 2011

2011 paid for Maniema provincial ministers to travel to Germany and Belgium and to participate in ITRI activities⁹⁶.

„The Princess is back“, a Frankfurt newspaper reported with critical mention of the previous controversies and quoting Odette Krempin as saying that she knew nothing at all about mining, had „never really worked in her whole life“ and that her hobbies were „shopping in Paris“. However, she said she had „excellent advisers“. According to this report, just recently President Kabila's sister had been to visit her together with the wife of the Maniema governor; they had come to buy BMW luxury cars (price 55.000 Euros). She herself was due to travel to DRC with six bodyguards⁹⁷. In November 2012, she was billed at the regular OECD Paris meeting on Congolese conflict minerals as Somima president and head of the FEC mineral negotiators of Maniema.

MMC (Maniema Mining Company) is not identical to Somima despite having the same name in a different language. It is in fact part of the MMR/Somika business empire; its director Hitesh Chug was previously director of Somika in Lumumbashi. On 10 September 2012 MMC signed a contract with Sakima giving it the exclusive right to market Sakima production of cassiterite, coltan and wolframite from specific areas of Kailo and Kalima⁹⁸. The contract commits MMC to export these products via Kalemie or Kasumbalesa (Katanga) or Matadi (Bas-Congo) and forbids transport by air; this is designed to stop exports via Kivu. The concerned Sakima sites are to be guarded by Sakima's security services, and MMC is to organise the artisanal miners. Sakima obtains \$250.000 commission plus \$0.35/kg tin, \$1/kg tantalum and \$0.30/kg wolframite.

This is the tableau on which ITRI is now turning Maniema into a showcase for „conflict-free“ mining. It is an approach which exposes the limitations of the debate about „conflict-free“ minerals in the DRC

⁹⁶ „Somima entend mettre sur pied une procédure de tracabilité“, Forum des As, 27 July 2011

⁹⁷ „Rückkehr einer Prinzessin“, Frankfurter Neue Presse, 17 August 2012

⁹⁸ Contrat de Vente entre la Société Aurifère du Kivu et du Maniema et Maniema Mining Company, 10 September 2012, as published by the DRC Ministry of Mines

when the only criteria used is whether armed groups are involved in, or profit from, the production and sale of minerals.

The iTSCI „Governance Assessment Maniema“, carried about by Channel Research in July 2012, makes this clear inadvertently by attempting to explain all worrying phenomena away as irrelevant. „Ordinary fraud, corruption and unofficial taxation regularly takes place in the mineral supply chain but is not linked to armed conflict“, the report says. Child labour also takes place but not in its „gravest forms“, the report continues; also, „other human rights abuses, in particular linked to the abuse of women, do occur in Maniema on a widespread basis but are linked to socio-cultural practices or ordinary deviant behaviour. Cases of abuse and sexual violence are hence not directly associated with mineral exploitation“. In general, „the issues linked to fraud and corruption are not unusual, nor particular to Maniema and neither exclusively found in the mineral sector, as it relates to a reality widely present in the whole of the DRC.⁹⁹“ Should this be taken to mean that the „conflict minerals“ debate only relates to issues that are unusual, particular to a province and exclusive to the mineral sector?

The Governance Assessment quotes some worrying developments¹⁰⁰. Thus between October 2011 and January 2012 – the period around the DRC elections – declared mineral exports by SAKIMA dropped sharply and undeclared mineral exports of 112 tonnes with a value of \$840.000 took place, „under the authorisation of and to the benefit of provincial authorities for funding their electoral campaign and securing their positions“. In February 2012, the head of the Division des Mines of Maniema Province was suspended, arrested and charged with embezzlement, before being released and moved to another post in the Ministry of Mines in Kinshasa. Further, trading companies suspended in Goma were still legally exporting minerals from Kalima/Maniema via Goma with Maniema provincial authorisation.

In 2012, the DRC government and Maniema's provincial government said that Maniema should no longer export minerals via the Kivu

⁹⁹ iTSCI Governance Assessment: Maniema. Channel Research, July 2012, p.8

¹⁰⁰ Ibid., p. 19-21

provinces but via Katanga. The Governance Assessment views this positively¹⁰¹. At the same time it notes that „the biggest buyers of minerals, CMM/TTT Mining and Huaying, have recently been suspended“ for buying and exporting non-tagged minerals from North Kivu¹⁰² – Huaying was suspended in North Kivu earlier.

Since 2011, comptoirs pay export duties for Maniema minerals in Maniema's capital Kindu, not the provinces of export. The report details the woesome condition of most provincial services involved in mining, the sometimes astounding consequences of which are alluded to for example in recommendations such as that „the practice of inverted declaration, whereby comptoirs obtain documents before having bought the load of minerals to be exported, is an issue that should receive attention“ and that it was necessary to „better differentiate real agents from those who can be considered fake agents“ on the part of state personnel¹⁰³.

CFTI in South Kivu

The electronics industry „Global e-Sustainability Initiative“ (GeSI) and „Electronic Industry Citizenship Coalition“ (EICC) held their 10th „Conflict Free Minerals Supply Chain Workshop“ in Brussels on 17-18 September 2012. The main event was the launch of the „Conflict-Free Tin Initiative“ (CFTI), a pilot programme centred on South Kivu „to introduce a conflict-free tin supply chain sourcing from South Kivu“¹⁰⁴.

This Initiative is essentially a repeat of the ITRI/PACT programme of tagged cassiterite exports which had to be abandoned in September 2010 when the DRC government unilaterally closed down legal mining in Eastern Congo. It is focused on Kalimbi mine near Nyabibwe in South Kivu. According to the CFTI web page, „the first bags of conflict-free tin have left the mine“ on 24 October 2012 and in December 2012 „the first container with 24 tons of conflict-free tin is

¹⁰¹ Ibid., p.25

¹⁰² ibid., p.35

¹⁰³ Ibid., p.39

¹⁰⁴ GeSI & EICC Press Release, 11 October 2012

transported from the comptoir to the trader.¹⁰⁵ The lot is equivalent to around 14 tons of tin metal once smelted.“ - again no details are given. South Kivu's Mining minister is seen attaching the first tag. The launch of the „bag and tag“ programme in Kalimbi had immediate positive effects: prices recovered from under \$1 to around \$3.5/kg and within a week 3.3 tonnes of minerals were tagged¹⁰⁶.

„The mine has been validated as conflict-free by a multistakeholder team including officials of the DRC Government, the United Nations, the German Geological Service (BGR), the local project manager of the ITRI Tin Supply Chain Initiative (iTSCi), representatives of local business and civil society. This is the first step in the pilot. A robust traceability system, the ITSCI Programme, has been put in place by the field teams of Pact, a nongovernmental organization. There are at least six levels in this supply chain from mine to end-user, all of which are needed to make this pilot project a success. The Netherlands Government is the neutral broker that brought the partners along the supply chain together, from mine to smelter to end-user. The industry partners participating in the CFTI pilot consist of Royal Philips Electronics, Tata Steel, Motorola Solutions, Fairphone, HP, Research In Motion (RIM), Alpha, AIM Metals & Alloys, Malaysia Smelting Corporation Berhad (MSC), Traxys, ITRI and the local exporters and mining cooperatives. Also, the United States and the South African Government through the Department of Trade and Industry's Regional Spatial Development Initiatives Program (RSDIP) are involved in the establishment of the CFTI.¹⁰⁷“

In a recent announcement, CFTI says that „in the period between 24 October (2012) and 24 January (2013) 210 tons of material have been produced in the Kalimbi mine. There have been five exports from the comptoir to traders and the first shipment is soon to be expected.“¹⁰⁸ Even more recently, it was announced that the first refined tin from Kalimbi was expected by the end of March 2013¹⁰⁹. Seven containers

¹⁰⁵ Press releases on solutions-network.org/site-cfti

¹⁰⁶ 'Conflict-free' tags help revive Congo minerals trade, Reuters, 8 November 2012

¹⁰⁷ Ibid. „First Bags of Conflict-Free Tin Leave a Congolese Mine“

¹⁰⁸ <http://solutions-network.org/site-cfti/results/>

¹⁰⁹ „First conflict-free tin metal from Congo due in March“, Reuters, 27 February 2013

of tin worth around \$1.7m had so far been exported to the Malaysia Smelting Corporation, a CFTI partner. This is only the first step, it is further explained. „The Conflict Free Tin Initiative will have three phases. Phase one includes the identification of a conflict-free mine and tracking of the minerals from the mine to the smelter while managing any associated risks. Phase two is linking with the Conflict-Free Smelter Program. Phase three is building downstream demand.“¹¹⁰ At present, the project is still in phase One.

And North Kivu?

In recent years, official and recorded mineral exports from North Kivu collapsed drastically recently after a brief period in which the formalisation and registration of exports had made great strides, following the implication of local traders and services in international programmes to incite to greater transparency. Official statistics give the following numbers for registered cassiterite exports:

North Kivu mineral exports (Source: Division des Mines, Nord-Kivu)

<i>Year</i>	<i>Cassiterite (tonnes)</i>	<i>Coltan (tonnes)</i>
1999	71,33	5,2
2000	23,25	15,44
2001	550,25	89,56
2002	496,85	27,95
2003	938,35	26
2004	4672,05	41,6
2005	3598,95	26
2006	2904,08	38,8
2007	10175,26	74,2
2008	13310,8	64,93
2009	10543,7	280,7
2010 (incl. suspension from Sept.)	6689,47	236,32
2011 (from March to 15 Dec.)	2296,2	96,77

Parallel to declining volumes, prices collapsed from \$5.5/kg in Mubi 2010 to \$2 in May 2012. The numbers of miners in Bisie and other

¹¹⁰ <http://solutions-network.org/site-cfti/process/>

mining sites declined too, as did miners' incomes: according to a fact-finding mission by Enough and others, dropping from \$8 to \$2.50/kg¹¹¹.

Enough appears to regard the drop in prices as an indication of the success of Dodd Frank, claiming that „the passage of the conflict minerals legislation within the Dodd-Frank Wall Street Reform law and new tech industry sourcing policies have helped lead to a 65% drop in armed groups' profits from the trade in tin, tantalum and tungsten – the '3 Ts' – over the past two years“¹¹². The calculations behind this figure are difficult to follow as raw data are not provided, but Enough says that, first, mine production is „65-80% of 2010 levels“; second, that 35% of these are exported officially at „25-35% of the 2010 export price“; and third, that the other 65% are smuggled „and the amount generated by armed groups from smuggling these minerals is 150% of the 2010 price“. All three factors together work out at armed groups' profits being at 35% of 2010 levels¹¹³. However, the obvious conclusion can also be drawn that since 2010 the proportion of mining revenues going to armed groups has significantly increased to the detriment of official and miners' revenues – surely not an indication of success in curbing the trade in „conflict minerals“.

Many traders are sitting on piles of unsold stock which they might try and feed into the supply chain as soon as trade picks up again, according to critics who also point out that the main profiteers of the illegal trade are military officers in the cities, not armed groups in the countryside and that thus even the legal certified trade may end up providing conflict finance¹¹⁴.

According to the UN Group of Experts in its final 2012 report, official mineral exports from Kivu slightly recovered after the lifting of the mining ban in March 2011 but subsequently „nearly disappeared“ for

¹¹¹ Resolve.org ...

¹¹² „From Conflict to Congo: Turning the Tide on Conflict Minerals, Closing Loopholes, and Empowering Miners“, Enough Project report, August 2012, Executive Summary

¹¹³ Ibid., p.4

¹¹⁴ See Reuters, 8 November 2012 for quotes to this effect

three reasons: the suspension of the trading houses Huaying and TTT in Goma and Bukavu; the ban on flying minerals from Maniema into Kivu and forcing traders to transport them to Katanga instead; and the integration of Chinese traders into iTSCi. Due to the resumption of war, however, mineral tagging and the establishment of certified trading centres ceased and „for the moment there is no legal market for untagged mineral production in the Kivus and Maniema Province. Consequently, cross-border smuggling is again on the increase“¹¹⁵. However, according to the same report comptoirs from Goma were allowed to export again from July 2012¹¹⁶.

The GoE estimates official exports as running at around 10% of production, less than for many years. As mining from inaccessible sites such as Bisie decreases and shifts to sites on Lake Kivu, smuggling to Rwanda and official exports from Rwanda increased.

Pro-governmental parts of North Kivu civil society – which is divided on this issue, as on every other – have become business associates in mining in preparation for a possible extension of iTSCi or other such schemes into the province. Thus on 13 February 2012, the Goma-based NGOs „Bedewa“ (Bureau d'Études pour le Développement de Walikale) led by Prince Kihangi and „Creddho“ (Centre de Recherche sur l'Environnement, a Démocratie et les Droits de l'Homme) founded the non-profit organisation „Save Act Mine DRC“ in partnership with the North Kivu mineral traders' association „Anemnki“, the Bisie miners' cooperative „Comimpa“, the cooperative „Comider“ and the North Kivu mineral transporters' association, based on „the imperious necessity of ensuring broad diffusion of the guidance recommendations of the OECD, the ICGLR, of all pertinent Un Security Council resolutions and national mining regulations“¹¹⁷.

„Save Act Mine“ organised a workshop in Goma on 8 December 2012 to inform local stakeholders of the OECD meeting in Paris and the ICGLR meeting in Bujumbura. The report of this workshop notes critically that North Kivu's provincial government was absent at both

¹¹⁵ UN GoE Final Report, November 2012, §160

¹¹⁶ Ibid., §199-200

¹¹⁷ Founding Act reproduced as Annex 6 to OECD, June 2012 (p. 93-96)

meetings¹¹⁸.

Meanwhile...

Since January 2013, a spate of theft of certified coltan from the Great Lakes region has been reported in Daressalam, Tanzania, involving DRC nationals. In February 2013, it was reported that 44 tonnes of tantalite minerals in a container coming from the Great Lakes region and due to be exported to Italy were stolen on the way to the port Daressalam (Tanzania); a DRC national supposedly gave the consignment to a group of Tanzania-based traders and officials, including the Principal Technologist with the Tanzania Mineral agency, who was arrested together with four others¹¹⁹. The cargo had been issued with documentation claiming that it was worth \$22.000, whereas in reality it was worth over \$9m¹²⁰. According to a report in the leading weekly „East African“, the tantalite came from Rwanda and its theft was part of „a web of theft and corruption involving officials of key agencies and departments in Tanzania’s government working in cahoots with cross-border criminals. So far, police have arrested senior officers at the Tanzania Intelligence and Security Services (TISS), the Tanzania Revenue Authority (TRA), Tanzania Minerals Audit Agency (TMAA) and the Tanzania Ports Authority (TPA)“¹²¹. Apparently, „at least 11 containers of tagged, conflict-free, ITSCI mineral have been affected by these thefts“¹²². The mineral has been stolen and illicitly exported to China, which has caused a drop in prices and disturbed world markets¹²³ but also caused a drop in supply. The method of theft is simple, according to one report: „A single band of minerals thieves have come up with a sophisticated method of tampering with portions of the doors to open shipping

¹¹⁸ „Séance de Restitution Jumelée des Conférences de Paris et de Bujumbura“, 8 décembre 2012, Goma, newsletter on www.saveactmine.org

¹¹⁹ „Five Held Over Stolen Export Minerals“, Daily News (Daressalam) online edition, 14 February 2013

¹²⁰ „TPA Denies involvement in Tantalite Container Theft“, Daily News (Daressalam) online edition, 17 February 2013

¹²¹ „Rwanda Pursues Tanzania Over Stolen Coltan Worth \$10m“, The East African, 16 February 2013

¹²² „Tanzania Government officials arrested in stolen minerals investigation“, ITRI website, 18 February 2013

¹²³ Tantalum Market Update 7 February 2013, Tantalum Investing News

containers so that the damage is difficult to detect. Once the doors have been opened, valuable tantalite is removed with heavy equipment, and replaced with cement“¹²⁴.

Companies scrambled to deny that this would affect its supply of „conflict-free“ minerals: „AVX has a longstanding policy of maintaining considerable stocks of validated conflict-free raw tantalum materials to ensure that occasional disruptions in the tantalum supply chain, like this one, have zero impact on our customers“¹²⁵. A similar declaration was issued by Kemet.

¹²⁴ „Stolen Tantalite Causing a Supply Shortage“, Asian Metal, 30 January 2013

¹²⁵ AVX's Supply of Tantalum Ore Not Affected by Dar es Salaam Mineral Thefts“, Business Wire, 15 February 2013