International Law Meeting Summary

The Search for a Normative Framework Governing Conflict Minerals

Lahra Liberti
Head of Project, Directorate for Financial and Enterprise Affairs, OECD

Ruth Crowell
Deputy Chief Executive, London Bullion Market Association and Co-Facilitator of the OECD Gold Supplement Drafting Committee

Chair: Louise Arimatsu
Associate Fellow, International Law Programme, Chatham House

21 September 2012
INTRODUCTION

Tin, tantalum, tungsten and gold (3TG minerals) have, in recent years, been classified as ‘conflict minerals’. The belief that the conflicts in the eastern provinces of the Democratic Republic of the Congo (DRC) have been perpetuated by the income generated from the trade in such minerals sourced from the region has brought together a broad coalition of interests in seeking to regulate the trade of conflict minerals.

This meeting was convened to introduce and to discuss a number of initiatives that have been adopted with a view to reducing the market for, and trade in, such minerals. The speakers, both having played a pivotal role in the development of the regulatory regimes under scrutiny, reflected on the collective response of international and regional organizations, states, industry associations and civil society organizations. Focusing in particular on the work done by the Organization for Economic Co-operation and Development (OECD) and the London Bullion Market Association (LBMA), the participants discussed, among other things, the challenges facing different stakeholders and the future prospects for the implementation and effectiveness of the different initiatives that have evolved in response to conflict minerals.

At the meeting, a new Chatham House paper, Conflict Minerals: The Search for a Normative Framework, was launched.¹ It examines how measures enacted at international, regional and domestic levels attempt to mediate the interests of multiple stakeholders in the regulation of minerals sourced from conflict affected and high-risk areas.

Participants included industry representatives, NGOs, government officials, academics and practising lawyers.

This meeting was not held under the Chatham House rule.

SUMMARY OF MEETING AND DISCUSSION

Louise Arimatsu

In recent years the issue of ‘conflict minerals’ has captured the attention of civil society, prompted by, and prompting, the activities of the NGO sector and interest among the media. Interest in the issue has been propelled, in part, by the globalization of communication and information technologies although the conflict minerals debate has found greater momentum in the United States than in Europe. Considerable benefit has accrued from the publicity that this issue has garnered. Nevertheless, one unfortunate consequence of this trend is that a complex and contentious topic has often been reduced to a series of overly simplified narratives, which, although useful to captivate the attention of the target audience, may in fact undermine the work being carried out by some in this area.

A principal objective behind the publication of Conflict Minerals: The Search for a Normative Framework was to convey the complexity of the issue but, in doing so, also clarify the manner in which the law has been invoked at the international, regional and domestic levels (through legally binding measures or through soft law) to mediate between multiple interests, actors and trends.

Before turning to the main focus of enquiry, it is useful to provide a brief outline of the broader context within which these initiatives have evolved.

Stakeholders

At the international level, a number of organs of the UN have taken an interest in, and advanced measures to address, the conflict minerals problem arising out of the situation in the DRC. However, each of these organs, be it the Security Council or the UN human rights machinery, have been guided by different objectives and governed by different responsibilities including, for example, conflict prevention, the promotion of better governance and the fostering of human rights.

International organizations such as the OECD and regional institutions such as the African Union, the International Conference for the Great Lakes Region (ICGLR) and the EU, have adopted strategies to varying degrees that are intended to address in one way or another the problem of conflict minerals in the context of the DRC and the wider Great Lakes region. In addition to these
measures, laws have been adopted at the domestic level, most notably in the DRC itself, and now also the United States.\(^2\)

Other key actors include the corporate sector and wider industry-based bodies, such as the LBMA. Although the former plays a critical role in promoting investment abroad, growing scrutiny, not least by consumers, has led businesses to revisit their activities, particularly in respect of their sourcing practices.

**International law**

The evolving notion of legal responsibility is one of the sub-themes running through the paper. In addition to state responsibility and the responsibility of individuals (albeit criminal) under international law, there are now mounting calls for business enterprises to be held accountable under international law for their activities abroad. The obligations (legal and otherwise) on states, individuals and business all vary. Moreover, the nature of relevant legal obligations can alter with the characterization of the context. In particular, different obligations apply in peace-time than in war-time. In armed conflict, the predominant body of applicable law is international humanitarian law, or the law of armed conflict. Accordingly, when considering the legal obligations and responsibilities of the different stakeholders, it is necessary to take into consideration this further layer of complexity.

**The international level: the UN Security Council**

The UN Security Council has been seized of the situation in the DRC since the outbreak of the Second Congo War in 1998. The council’s involvement with minerals originating from the Great Lakes region was prompted by the belief that the armed conflicts in the DRC were being perpetuated by the income from the illegal trade in minerals sourced from the country’s resource-rich eastern provinces. The view thus began to form that if organized armed groups were prevented from raising funds through the illicit trade in minerals, their capacity to wage war would be diminished. This would in turn reduce the overall level of violence. However, given the unregulated nature of the sector, one of the fundamental challenges faced by the Security Council was how to distinguish between the lawful and unlawful extraction of, and trade in, such minerals.

\(^2\) See discussion section on p. 14 below.
To assist it better understand the nature of the problem, the Security Council established the United Nations Expert Panel on Illegal Exploitation of Natural Resources and other Forms of Wealth in the Democratic Republic of Congo.\(^3\) The panel made a number of recommendations based on its findings including to introduce an embargo and sanctions regime applicable to states and armed groups involved in the illicit trade. Critically, in two of its three reports, the panel referred to the OECD’s *Guidelines for Multinational Enterprises* as the measure by which a distinction could be drawn between what was acceptable and unacceptable practice insofar as multinational enterprises sourcing minerals from the region were concerned.\(^4\) At around this time, significant progress was being made to bring the international armed conflicts to an end and, consequently, the council’s attention was diverted away from the ‘problem’ of minerals. This effectively paved the way for other organizations, including the OECD, to take a far more active role in addressing the issue.

In 2004, the Security Council established the Group of Experts on the Democratic Republic of the Congo to support the work of the Sanctions Committee on the DRC.\(^5\) Working in close collaboration with the Group of Experts and various stakeholders in the DRC (most notably the ICGLR), in 2011, the OECD issued its Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas to assist companies involved in the mineral sector to source responsibly in high risk and conflict-affected areas.\(^6\)

**Lahra Liberti**

There was a concern among a number of companies that the OECD *Guidelines for Multinational Enterprises* referred to by the UN Panel of Experts did not provide them with actual guidance on how to manage risks when operating in conflict-affected and high-risk areas.\(^7\) In other words, companies were being judged against standards with which they did not know how to comply. Furthermore, there were concerns surrounding the level of

---

\(^3\) Statement of the President of the Security Council requesting the Secretary-General to establish a panel of experts (S/PRST/2000/20).
\(^4\) The OECD has regularly updated the guidelines, the most recent version being available at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf.
\(^7\) See *supra*, n. 4, paras 170–78, and Annexes.
coordination between the Panel of Experts and National Contact Points\(^8\) calling into question whether the Panel of Experts had been furnished with the appropriate information necessary to make objective assessments.

In the light of these concerns, the OECD embarked upon the development of sector-specific guidance for multinational enterprises on how to manage risks associated with sourcing minerals from conflict affected and high-risk areas. Working with the ICGLR, it was tasked with the job of developing a common approach to conflict minerals, conscious of the limits of dealing with such a complex issue with numerous dimensions and implications extending beyond the geographical area directly affected by the conflict.

The multi-stakeholder drafting process led to the development of the OECD Due Diligence Guidance. A supplement on tantalum, tin, and tungsten was also developed, as was a specific supplement on gold.\(^9\) The decision to develop a separate gold supplement was based on the recognition that a common set of guidelines could not be elaborated given the different structures of supply chains involving gold. Whilst the drafting of the Due Diligence Guidance was heavily influenced by the experiences of multinational enterprises in the Great Lakes region, the guidance is intended to be applicable to any conflict-affected or high-risk area in the world. The shared objective among all stakeholders involved in the drafting process was to sever the links between armed groups and the trade of minerals sourced from conflict-affected and high-risk areas, while enabling continued access to the market for responsibly sourced minerals. A key objective guiding the drafters of the Due Diligence Guidance was to create economically viable opportunities for responsibly sourced minerals, and in doing so, avoiding the stigmatization of specific resources, commodities and countries. To this effect, it is important to note that the OECD itself does not use the term ‘conflict minerals’.

A cornerstone principle of the OECD Due Diligence Guidance is the incremental approach adopted. The five-step framework constitutes a dynamic process through which companies can build information about the factual circumstances on the ground and the risks within their supply chain in order to mitigate or manage risks associated with operating in or sourcing from conflict affected and high-risk areas. Companies are encouraged to

\(^8\) Each OECD member state is required to identify a National Contact Point – typically a team/individual within the relevant government ministry – tasked to assist enterprises and stakeholders implement and further the objectives of the guidelines.

\(^9\) The Supplement on Tin, Tantalum and Tungsten can be found appended to the Due Diligence Guidance, supra, n. 6, and the Gold Supplement is available at

www.chathamhouse.org
engage with their suppliers with a view to progressively effecting change in their sourcing practices should risks contributing to conflict or serious human rights violations be identified. The guidance applies to all actors in the supply chain, from the mine sites to the end users, meaning that there is a consistent standard conducive to the smooth functioning of the supply chain. Given the global nature of the 3TG market, it is vital for its efficiency that recommended measures are adopted in a standardized manner in order to avoid the imposition of conflicting requirements on actors throughout the supply chain. Thus, the Due Diligence Guidance acts as a common reference point for all enterprises in the 3TG supply chain operating in or sourcing from conflict-affected or high-risk areas. Moreover, the incorporation of the five-step framework into Security Council Resolution 1952 constitutes a significant recognition of the legitimacy of the multi-stakeholder process of which the Due Diligence Guidance was the product.

The Due Diligence Guidance identified risks including: serious abuses associated with the extraction, transport or trade of minerals providing direct support to non-state armed groups and public or private security forces, bribery, fraudulent misrepresentation as to the origin of minerals, money laundering, illegal taxation and corruption. Thus, the primary focus is on the identification of risks that contribute to perpetuation or instigation of armed conflict and how these can be managed. However, the guidance also addresses the reputational risk associated with the sourcing of minerals from conflict-affected areas.

The Due Diligence Guidance identifies the specific risks involved in the hiring of public or private security forces and their role within the mineral supply chain. The model supply chain policy emphasizes that the role of public or private security forces is to provide security and to maintain the rule of law, including the safeguarding of human rights. Enterprises are encouraged to scrutinize the working practices and human rights records of the public or private security forces they hire in accordance with the Voluntary Principles on Security and Human Rights. In addition, the model supply chain policy encourages companies to support efforts to engage with central and local authorities, international organizations and civil society organizations to contribute towards developing workable solutions for transparency, proportionality and accountability for payments made to public or private security forces.

The OECD has begun a pilot implementation of the Tin, Tantalum and Tungsten Supplement with over 100 enterprises participating. Initially, there were some concerns that the due diligence recommendations would have a negative impact on the ground – creating additional burdens for companies that would constitute disincentives for trade. Furthermore, the initial assessment of the implementation of the Due Diligence Guidance was hampered by a number of factors that affected the situation on the ground; the initial one-year period of implementation coincided with the announcement of Section 1502 of the US Dodd-Frank Act, the imposition of a ban on the trade of minerals by the government of the DRC and the incorporation of due diligence standards into the national legal framework, all of which had a bearing on the ability to assess the impact of the OECD Due Diligence Guidance. Notwithstanding the initial scepticism towards it among many local economic actors, a realization emerged that in order to create a demand for their minerals, it was necessary to build the confidence of their buyers that minerals are sourced responsibly and do not expose their customers to the risk of being associated with conflict and human rights abuses. There has also been a shift in participating companies approach to risk. 75 per cent of downstream companies participating in the OECD pilot now aim to source from the region, mainly through participating in industry collaborative initiatives, like the Conflict Free Smelter Program. Cross-sector collaboration and the acceptance of the ICGLR regional certification scheme as a reliable in-region sourcing scheme has been critical to advancing responsible sourcing in the region and encouraging harmonization of approaches.

The pilot implementation of the supplement has led to the creation of ‘islands of traceability’ in the DRC and Rwanda, leading to some positive developments in the governance of the mining industry within the two countries.

In the DRC (notably in 100 mine sites in the Katanga province and more recently in South Kivu) and Rwanda (500 mine sites) the pilot implementation of the Supplement on Tin, Tungsten and Tantalum through industry programmes has enabled 45,000 artisanal miners – who in turn provide support for 225,000 dependents – to bring the minerals they dig to the legitimate market, thus providing a concrete alternative to the vicious circle of poverty and exploitative practices associated with informal exploitation (including serious human rights abuses, extortion and illegal taxation by armed groups). Opportunities for responsible mineral trade from Central Africa have been demonstrated through market-based projects such as
Solutions for Hope, the Dutch-sponsored Conflict-Free Tin Initiative, Kemet Partnership for Social and Economic Sustainability and iTSCI supply chain initiative. Where the Due Diligence Guidance is implemented, artisanal miners can sell at ‘world prices’ and benefit from increased security, human rights protection, safety, environmental awareness, and alleviation of poverty. The private sector is also supporting host governments’ efforts to enhance transparency, build capacity of local officials, improve governance in the mineral sector and enable host governments to increase official exports and taxes.

The OECD Due Diligence Guidance is increasingly seen as a common framework for responsible supply chains of minerals, with a general shift in attitudes among local companies from reluctance to acceptance of due diligence, as a way to meet host government and market expectations as well as new regulatory requirements, such as Section 1502 of the Dodd-Frank Act. The US Securities and Exchange Commission reference to the guidance in its final rule on conflict minerals, as well as the incorporation of OECD standards into the ICGLR certification scheme have been instrumental in building momentum for the implementation of due diligence worldwide, resulting in an increasingly coherent framework that covers the entire mineral supply chain. These certification schemes are binding on all economic enterprises operating in the Great Lakes region and will encourage processors and smelters in Far East Asia to consider improving their sourcing practices, as customers in the United States and Europe will require their suppliers to disclose the origin of the minerals they buy.

The combination of voluntary and binding initiatives, in conjunction with increased cooperation amongst stakeholders in the mineral mining industry has resulted in partnerships being developed between local economic actors in the Great Lakes region: artisanal miners, smelters and downstream users. However, given the progressive approach adopted by the Due Diligence Guidance, additional time is required to fully implement the framework in order to ensure that downstream companies continue to source minerals responsibly from conflict-affected and high-risk areas.
THE OECD SUPPLEMENT ON GOLD

Ruth Crowell

The OECD Supplement on Gold: the key challenges

The Supplement on Gold to the Due Diligence Guidance is designed to provide enterprises with a framework to ensure the responsible sourcing of gold from conflict-affected and high-risk areas, while seeking to minimize any adverse impact on artisanal miners.

The supplement identifies refineries as the key choke point within the gold supply chain. As such, it encourages downstream users to focus their due diligence efforts on the identification to the best of their efforts of the refinery they source from and as to whether the upstream suppliers carry out due diligence in accordance with the requirements set forth by the supplement.

The OECD drafting committee faced four key challenges throughout the drafting process: to avoid unintended and negative consequences for artisanal miners; to balance the imperative of transparency with that of commercial confidentiality; to address the issue of recycled gold within the gold supply chain; and to tackle the ‘grandfathering’ of existing stocks.

The committee was sensitive to the risk that artisanal miners would be further marginalized by measures designed to promote the responsible sourcing of gold from conflict-affected and high-risk areas. They addressed this concern by making risk assessments for artisanal mining enterprises more flexible and by including specific recommendations in the supplement to assist artisanal miners. The drafting committee also created an appendix with the intention of creating islands of traceability and closed pipelines to enable artisanal miners to enter the legitimate market.

In drafting the supplement, it was necessary to strike a balance between promoting transparency and communication within the gold supply chain, with the industry’s need to maintain commercial confidentiality and security. The solution reached was that multinational enterprises would be permitted to exclude from their due diligence disclosures information pertaining to price, supplier identities and relationships, transport routes, and the identity of information sources and whistle blowers, where revealing their identity would threaten their personal safety.

The high price of gold in recent years has resulted in recycled gold feedstock accounting for nearly 50 per cent of annual gold production. Thus, any
regulatory system that seeks to ensure the responsible sourcing of gold has to also deal with recycled gold in a rational and efficient manner. It was recognized by the drafters that while the focus should be on regulating the responsible sourcing of fresh gold stocks from conflict-affected and high-risk areas, recycled gold represented a possible loophole that could contribute directly or indirectly to the financing of armed groups.

Given the high percentage of recycled gold as a proportion of total annual gold production, the Due Diligence Guidance and the Supplement on Gold do not require the mine of origin to be identified for every piece of recycled gold. Certain systems, such as those operated by the Responsible Jewellery Council and the World Gold Council, enable the identification of the exact mine of origin for recycled gold stocks. Rather, companies should be focussing on not dealing with criminals and not contributing directly or indirectly to armed groups involved in conflict. Given the high percentage of recycled gold as a proportion of total annual gold production, it is not in the interest of the Due Diligence Guidance or the Supplement on Gold to trace the mine of origin for all gold stocks produced from recycled gold feedstock. The Supplement on Gold provides enterprises in the gold supply chain with specific criteria that they should adopt to ensure that gold produced from recycled stocks is not contributing towards the financing of armed conflict. In particular, the supplement advocates a risk-based approach that requires the analysis of the value of transaction, place of transaction, type of material and supplier. Although it is accepted that it cannot be guaranteed that recycled gold will not contribute to conflict, the Supplement on Gold raises the standard and should certainly reduce the likelihood that recycled gold will contribute to conflicts.

The final challenge faced by the drafting committee was existing stocks of gold investment products (ingots, bars, coins and grains) held by bullion bank vaults, exchanges and refineries, which may have been sourced from conflict-affected or high-risk areas. The drafting committee agreed that gold sourced prior to 1 January 2012 should be considered to be out of the scope of the supplement and should not require a determination as to its origin. The date of origin of existing stocks would have to be verified through markings on the bars themselves or through inventory lists.

As to the adoption and implementation of the Gold Supplement, a key development has been the determination by Signet Jewellers, one of the largest jewellers in the world, that it is possible for it to observe the due diligence standards in the supplement. It is particularly encouraging that such a large industry player has adopted protocols to implement the supplement in
light of some concern expressed by a number of other companies that doubt the feasibility of implementing the supplement in practice.

**The London Bullion Market Associations’ Responsible Gold Guidance**

The gold industry’s involvement in the responsible sourcing of gold has changed dramatically in recent years. For instance, in 2010, it was difficult to get the UN Group of Experts to address the London Bullion Market Association’s (LBMA) Special Metals Conference, largely because it was viewed as irrelevant to the legitimate market. However, since then, there has been a dramatic cultural shift in attitude towards responsible sourcing, and in this time the question of conflict gold has changed from being a matter of irrelevancy to being the focus of a multi-stakeholder, global initiative. As such, it is useful to examine what this change has brought about.

By way of introduction, the LBMA is a trade association that was set up at the behest of the Bank of England in 1997. Its primary role is to maintain the quality of the London bullion market through controlling membership of the market and controlling the quality of metals entering the London market. The LBMA maintains a Good Delivery List (GDL), which comprises of 63 of the world’s leading gold refineries. Annual production for these refineries accounts for approximately 85–90% of annual world gold production. The London bullion market is the largest and most important gold market in the world, with an average turnover of $240 billion a day. There are roughly 720,000 400-oz bars stored in London’s vaults, with a combined worth of approximately $511 billion.

Given the importance of the London market, the quality of the refiners on the GDL and the high standards of accreditation, the GDL is the de facto international standard for gold. The GDL is used by gold exchanges and governments around the world to determine the quality of gold that is to be imported into the domestic market. The LBMA has made the responsible sourcing of gold a key priority and has been joined in this effort by several industry associations around the world. Through the introduction of the Responsible Gold Guidance, the LBMA has taken its role as the accreditor of world gold refiners and expanded its scope, making the responsible sourcing of gold a mandatory commercial requirement for all major gold refiners worldwide.

---

10 Available at [http://www.lbma.org.uk/assets/LBMA_RGG_20120928WEB.pdf](http://www.lbma.org.uk/assets/LBMA_RGG_20120928WEB.pdf).
The Responsible Gold Guidance makes compliance with the OECD Due Diligence Guidance mandatory for all refiners on the GDL. This means that if a refiner on the GDL wishes to introduce gold stocks into the London market, or by extension any major commercial market around the world, they would have to comply with the Due Diligence Guidance. The Responsible Gold Guidance programme builds upon the Due Diligence Guidance by introducing anti-money laundering requirements to which refiners must adhere. As of January 2012, all 63 refiners on the GDL have accepted the requirements of the LBMA’s Responsible Gold Guidance and are working towards an audit of their 2012 production.

The LBMA is looking to extend its work to assist its bullion bank members in conforming to the OECD Due Diligence Guidance in all the markets they operate. Thanks to the LBMA’s Responsible Gold Guidance, its members can source gold from the London market with confidence that they are conforming to the Due Diligence Guidance as well as US and EU regulations. Although the LBMA is confident of the GDL, it acknowledges that its members operate in gold markets across the world (including the United States, China, Japan and many others). To ensure that there is consistency in conforming with the Due Diligence Guidance, the LBMA is encouraging gold exchanges to adopt similar standards, requiring their refiners to implement the guidance. Given the global nature of the financial gold market, it is vital for its efficiency that regulatory measures are adopted in a standardized manner. The LBMA makes its Responsible Gold Guidance and recent Third-Party Audit Guidance available publicly and encourages exchanges and other non-GDL refiners to use it as a best practice document.
DISCUSSION

One participant noted some of the practical challenges faced by companies operating in ‘fragile states’. It was noted that the emphasis placed upon the responsibility of the individual company to conduct due diligence, which would include a judgment as to the existence of a situation of conflict within a host State, can prove sensitive, where that company depends on the goodwill of the host government to grant it a licence to operate within that state. Accordingly, it was stated that there is a need for an authoritative body to monitor high risk and conflict affected situations that companies could look to when forming an assessment pursuant to their due diligence obligations.

Participants also discussed the effects of the Dodd-Frank Act and to what extent it was a catalyst for change. In July 2010, the US Congress introduced the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 1502 of the act aims to prevent the perpetuation of armed conflict in the DRC by ensuring that trade in conflict minerals does not fund the activities of armed groups in the region. Under the legislation, all public listed companies are required to disclose whether any of the minerals utilized in their manufacturing processes originate from the DRC and adjoining countries.

One of the key challenges hindering the implementation of the OECD’s Due Diligence Guidance has been that many multinational enterprises have been waiting for the SEC to issue their Final Rule for Section 1502.11

However, despite the limitations and criticisms of the Dodd-Frank Act, it has provided a catalyst for the mining industry to take the initiative and introduce measures to ensure the responsible sourcing of minerals from conflict affected and high-risk areas. In particular, there has been a cultural shift in the perception of this issue among host governments in the Great Lakes region. There has been recognition among the authorities and actors in the region that access to international markets could be threatened if they did not undertake measures to prevent the trade of minerals from financing armed groups operating in the region.

11 The Final Rule was released on 22 August 2012, over a year after the expiration of the statutory deadline.