



ICGLR-OECD-UN GoE JOINT MEETING

ON IMPLEMENTATION OF DUE DILIGENCE FOR RESPONSIBLE MINERAL SUPPLY CHAINS IN THE GREAT LAKES REGION

29-30 November 2011

Summary Report

The meeting was conducted under Chatham House Rule: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed."

I. Introduction

The ICGLR-OECD-UN GoE joint meeting provided the opportunity to bring together various stakeholders involved in implementing and/ or supporting efforts to implement, the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*¹ (for the sake of convenience hereafter referred to as the "OECD Guidance") and the due diligence guidelines of the UN Group of Experts on the DRC.²

Participants in the ICGLR-OECD-UN GoE joint meeting included OECD, ICGLR and other partner countries, international organisations, industry at several levels of the mineral supply chain, international and Great Lakes-based civil society organisations, expert consultancy groups and other independent experts. The meeting followed the launch of the pilot implementation phase of the OECD Guidance at the ICGLR-OECD-UN GoE joint meeting held on the 5-6 May 2011,³ where participants agreed on the objectives and approved the Terms of Reference for the implementation phase.⁴ Upon adoption on 25 May 2011 by the OECD Council of the OECD Recommendation on Due

¹ The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* was finalised and approved by the OECD Investment Committee and OECD Development Assistance Committee in December 2010. To download the OECD Guidance and get background information, see www.oecd.org/daf/investment/mining.

² On 29 November 2010, with the unanimous adoption of resolution 1952 (2010), the United Nations Security Council supported taking forward the detailed guidelines on due diligence for individuals and entities trading, processing and consuming minerals from eastern Democratic Republic of the Congo ("DRC"), as contained in the recommendations of the Group of Experts on DRC in its final report (S/2010/596). The UN Group of Experts on the DRC and the OECD-hosted working group on due diligence collaborated closely in 2010 to ensure that the OECD Guidance and the guidelines of the UN Group of Experts on the DRC were consistent with one another.

³ For information on the first ICGLR-OECD-UN GoE meeting, including key outcomes, the summary report and the adopted action plan, see http://www.oecd.org/document/11/0,3746,en_2649_34889_47684171_1_1_1_1,00.html

⁴ The text of the approved Terms of Reference are available at <http://www.oecd.org/dataoecd/26/5/48593004.pdf>. For further details on the pilot implementation phase of the OECD Guidance, see http://www.oecd.org/document/15/0,3746,en_2649_34889_48584143_1_1_1_1,00.html

Diligence Guidance, the OECD Investment and Development Assistance Committees were instructed to report on the implementation of due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas. The multi-stakeholder forum will serve as a peer-learning platform and iterative process whereby companies can know and show that they are implementing due diligence, learn by doing, share experience, identify best practices, and engage in open dialogue with other stakeholders with a view to finding practical solutions to concrete challenges.

As the contribution of all stakeholders was crucial to design the common framework for responsible supply chains of minerals from conflict affected and high risk areas and its Supplement on Tin-Tungsten-Tantalum, the constructive participation of stakeholders in the implementation phase is intended to assist companies with the implementation of due diligence with a view to effectively promote legitimate trade of minerals from the Great Lakes Region, including through appropriate incentives, opportunities for market access and the creation of the necessary enabling conditions.

II. Meeting objectives

The objectives of the ICGLR-OECD-UN GoE joint meeting were to:

- i. Discuss the baseline reports on due diligence implementation in the 3Ts supply chain. These reports are intended to lay down the foundations for the future building blocks of the implementation exercise to ensure continuous improvement of corporate due diligence practices;
- ii. Share experience for mutual learning purposes, identify bottlenecks and brainstorm on possible practical solutions;
- iii. Distil emerging practices, including implementing tools and innovative initiatives designed to operationalise the OECD Due Diligence Guidance and the UN GoE's due diligence guidelines;
- iv. Coordinate action amongst existing initiatives on conflict-free and responsible mineral sourcing as well as donor-supported programs in the Great Lakes Region to maximise positive development impact through effective coordination.

Questions were posed to the participants in the annotated agenda to inform the discussion and meet these objectives. The annotated agenda, the upstream and downstream baseline reports of the implementation phase, the presentations given during the meeting and all background materials are available online on the meeting web page.⁵

III. Summary Conclusions

The forum gave constructive feedback on the baseline reports of the implementation phase, clarifying the specific challenges to the implementation of due diligence and the emerging practices. The baseline reports were generally regarded as helpful illustrations of where industry currently stands on implementing the OECD Due Diligence Guidance. Some participants felt the reports should look at the effectiveness of due diligence to stop conflict financing through mineral trade. While recognising that lack of funding continues to be a limiting factor, some participants felt that industry could do more to speed up due diligence implementation. Participants also thought that while aggregate data was useful for context and benchmarking, the reports could be improved by highlighting more specific emerging practices and evaluate their effectiveness.

Some observers requested that findings from the pilot should lead to the possibility of amending the Guidance. It was stated that the OECD Council Recommendation on Due Diligence instructed the OECD "Investment Committee and Development Assistance Committee to monitor the implementation of the Recommendation and to report to Council [...]". For the time being, neither the OECD Council nor the Investment and Development Assistance Committees contemplated a

⁵ Available at http://www.oecd.org/document/38/0,3746,en_2649_34889_49079014_1_1_1_1,00.html.

revision of the Guidance and the Supplement on Tin, Tungsten and Tantalum as a result of the implementation phase. The objectives of the implementation phase, reflecting the mandate set by Council, were laid out in the Terms of Reference adopted at the first ICGLR-OECD-UN GoE joint meeting on implementation of due diligence, held on 4-5 May 2011. As a precondition for participation, all participants in the pilot agreed to the Terms of Reference

Participants clarified the relationships between various national, regional and industry initiatives on responsible and conflict-free minerals, and how they may be used to operationalise aspects of the OECD Due Diligence Guidance. Questions still remained on how to reduce unnecessary audits or improve efficiency in resource intensive activities.

Open and frank discussions were held on how to re-open responsible and legitimate trade of minerals from Africa's Great Lakes Region, after the significant disruption seen throughout 2011. In that regard, participants discussed (i) possible solutions to outstanding practical challenges, such as the disposal of existing mineral stocks, setting up chain of custody and traceability systems in qualified mine sites and the lack of buyers in the region; and (ii) creating incentives for upstream companies to carry out due diligence by creating in-region programs that help mineral exporters, traders and smelters to demonstrate conformance with the OECD Guidance.

Various OECD countries represented at the meeting supported the joint ICGLR-OECD-World Bank efforts to advance donor coordination to enable effective implementation of due diligence.

Some participants noted that while these development discussions are of interest when in the presence of the aggregate group of participants, they detracted from the primary purpose of the meeting – the Guidance implementation phase and evaluation. It was suggested these discussion be moved to adjacent meetings.

IV. Summary of main issues in each session

a. SESSION 1 – High level findings

During this session, presentations were delivered on high level findings of the pilot implementation phase of the OECD Due Diligence Guidance and the 2011 final report of the UN Group of Experts on the DRC.

The high-level findings showed that in the Great Lakes region, the OECD Guidance and UN GoE due diligence recommendations have been used as a reference point within the context of the ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources and related donor programs as well as for the establishment of islands of traceability and verified supply chains, resulting in improved mining sector governance. Where private sector actors are not undertaking due diligence, where regulatory pressure has disincentivised sourcing from the region, and/or where the security situation is still unstable, there has been major trade disruption and significant official export drops. Participants noted that some comptoirs in the DRC are making some efforts not to source from conflict mines, while others are still sourcing minerals from areas without any qualitative assessment of the circumstances of mineral extraction and trade. The high level findings showed how many artisanal miners have moved to gold mines, where due diligence is nonexistent (note: the Gold Supplement was not finished at the time the baseline report was submitted) and where direct and indirect support to armed groups is noted to be on the rise. Almost all gold exports from the region were said to be fraudulent.

Participants agreed that some mines and transportation routes in eastern DRC are conflict-free and accessible, and that there is a need to get trade started now from those places in order to create the right incentives.

Participants discussed various factors that in their view contributed to trade disruptions in eastern DRC, including Dodd Frank Section 1502, the EICC-GeSI Conflict Free Smelter program as well as various decisions taken by DRC (temporary mining ban) and Rwanda (accepting only tagged minerals). Participants also sought to emphasize that iTSCi is not just a traceability system, but also undertakes on the ground risk assessments and audits of its members, and that all iTSCi members are required to apply the OECD Guidance. Incident and mine-transport route iTSCi baseline reports allow for regular updating on human rights abuses and instances of direct or indirect support to non-state armed groups.

The OECD baseline reports highlighted the varied levels of implementation by the participating companies both upstream (see below under Session 2), and downstream (see below under Session 5). Downstream participants indicated that companies not taking action were primarily waiting on the SEC, and upstream participants noted they are challenged economically and from a volume standpoint. Participants also recommended that the next progress reports should show how the various initiatives fit together, and should also coordinate between the upstream and downstream parts of the pilot for alignment.

b. SESSION 2 – Upstream implementation of due diligence: *Step-by-Step* Presentation by IPIS on the detailed findings and practical challenges for upstream implementation of due diligence

Individual experiences and practical challenges

Participants noted varied levels of implementation of the Guidance upstream, with little implementation by comptoirs based in the Kivus, while industry schemes currently operating outside of the Kivus (such as iTSCi in Katanga), as well as some international traders and mining companies, have shown real progress. Some participants attributed the low levels of implementation by comptoirs to the lack of buyers, and explained that without demand, companies will not spend resources to carry out due diligence. Other participants noted that comptoirs will need to carry out due diligence *in order to create demand, because there is only demand for legitimately mined and traded minerals*; that they need to demonstrate good faith efforts to carry out due diligence for buyers to return.

Some participants highlighted that in order for a smelter sourcing from the region to be eligible for the Conflict-Free Smelter program, they will need to get third party assurance that they have conducted due diligence in accordance with the OECD Guidance. Comptoirs that wish to sell their minerals to those smelters should therefore take immediate steps to carry out due diligence. In addition, participants welcomed the move by the Government of the DRC to integrate the OECD Guidance and UN due diligence guidelines into the national regulatory framework, and noted that undertaking due diligence was no longer voluntary.

Some participants thought that the DRC industry associations could play a more substantive role in raising awareness of due diligence among comptoirs, disseminating the Guidance and ICGLR certification expectations, training of comptoirs, and providing other helpful information for companies (e.g. on status of mine site validation and coordination of risk assessment) to conduct due diligence.

Some participants expressed the view that a pre-condition for the implementation of due diligence in eastern DRC was the disposal of existing stocks: that trade would remain blocked, regardless of due diligence efforts, so long as those stocks remained. One participant explained that in addition to the question of how to dispose of existing stocks, there were also challenges surrounding how to dispose of stocks of minerals seized by the governments when issues of fraud arose. Some participants felt that discussing the disposal of existing stocks extended beyond the mandate of the ICGLR-OECD-UN GoE joint forum and is not part of the terms of reference. Others believed it presented a significant

practical challenge for the implementation of due diligence, and therefore required a multi-stakeholder agreement to be effectively addressed.

One participant proposed a solution that all existing stocks of minerals held in Maniema before the mining ban in eastern DRC (Sept 2010) should be labelled/tagged as “stocks” and disposed of. A portion of the revenues from the disposal of these stocks should then go towards funding community development, traceability projects and other due diligence initiatives.

It was pointed out that it is possible that the final rules of the U.S. Securities and Exchange Commission (SEC) pursuant to section 1502 of the Dodd-Frank Act may allow for a different treatment, including exemption from the need for reporting of existing stocks. In that regard, participants asked whether the UN GoE and the government of the DRC could issue a Statement of ‘Reasonable Assurance’ on the stocks that are “reasonably” deemed from non-conflict sources so that these stocks can be swiftly disposed. Some participants noted that details around exact quantity and types of materials, as well as cut off dates would have to be drawn up to ensure this is truly a one-time action. Interested participants agreed to convene separately to discuss possible next steps.

Participants highlighted some specific challenges surrounding child labour at mine sites. It was clarified that only the worst forms of child labour are dealt with in the Guidance. However, one participant sought more guidance on which types of work would be regarded as “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children” under Article 3(d) of the ILO Convention on the Elimination of the Worst Forms of Child Labour. Some participants felt that child labour was a regional problem, and should be dealt with through regional and local approaches that consider the entire socio-economic implications. Interested participants agreed to convene separately to discuss the possible next steps, and to involve the ILO, working through existing partnerships and programs.

Interpretations of “armed groups”, “direct or indirect support”, and “contributing to conflict” in section 1502 of the Dodd Frank Act and the OECD Guidance and UN due diligence guidelines

Participants discussed the compatibility of describing products as not “DRC Conflict Free” (and related notions of “armed groups”) under section 1502 of the Dodd Frank Act, with the conflict nature of minerals provided by smelters that source from the Great Lakes region and carry out the OECD Guidance and UN GoE due diligence guidelines (and thus have identified, assessed and managed risk in accordingly). Some participants explained that the approaches could be consistent if the risk response strategies recommended in the Guidance (Annex II) would prevent companies from accepting minerals that are considered not “DRC conflict free” according to section 1502 of the Dodd Frank Act.

The OECD Guidance is silent on whether companies describe or label their products as “not DRC conflict free” or “DRC conflict free”, but does provide guidance of the various ways the mineral trade “directly or indirectly” contributes to conflict, which affects how companies should respond when confronted with such risks. Annex II of the OECD Guidance recommends the following:

- A company should **immediately suspend or discontinue engagement with specific (direct) upstream suppliers** where identify a reasonable risk that they are sourcing from, or linked to, **any party**:
 - **committing serious abuses**, as defined in paragraph 1 of Annex II. (Para. 2, Annex II)
 - **providing direct or indirect support to non-state armed groups**, as defined in paragraph 3 of Annex II. (Para 4, Annex II)
- A company should **immediately devise, adopt and implement a risk management plan with upstream suppliers and other stakeholders** to prevent or mitigate the risk of **direct or indirect support to public or private security forces** (as identified in paragraph 5, Annex II) **that are not responsible for serious abuses** where they identify that such a reasonable risk exists. In such cases, where the company has a business relationship with the supplier, it should suspend or

discontinue engagement with that upstream supplier after failed attempts at mitigation within six months from the adoption of the risk management plan. (Para 10, Annex II)

Under section 1502 of the Dodd Frank Act, “DRC conflict free” is defined as “products that do not contain minerals that directly or indirectly finance or benefit armed groups in the DRC or adjoining countries”. The term “armed group” means an armed group that is identified as **perpetrators of serious human rights abuses** in the annual 11 Country Reports on Human Rights Practices from the U.S. State Department.

Some participants considered the two understandings compatible, since the OECD Guidance recommends that companies terminate a relationship with upstream suppliers when they discover through their due diligence that suppliers or sub-suppliers source from, or are linked to, **any party committing serious abuses** (i.e. in Dodd Frank terms, “directly or indirectly financing or benefiting” a perpetrator of serious abuses). Thus, if a smelter has identified, assessed and managed risk in accordance with the Guidance, they wouldn’t accept minerals that are not “DRC conflict free” for the purposes of the Dodd Frank Act. In such a case, mitigation is not allowed under the OECD Guidance.

Some participants however questioned the specificity under which an armed group is identified as perpetrators of serious human rights abuses in the U.S. State Department’s annual Country Reports on Human Rights Practices, notably whether the term would apply, for example, to an entire public security force, or rather abusive units within the public security force. Some participants felt that identifying the specific units responsible for perpetrating human rights abuses would create better incentives for the public security forces to address abusive behaviour, and would align better with the OECD Guidance and UN GoE due diligence guidelines.

Participants noted how these issues were communicated by the signatories of the multi-stakeholder letter to the SEC (transmitted by the ICGLR, OECD and the UN GoE on 29 July 2011), which recommended alignment of approaches **beyond directly or indirectly financing perpetrators of serious abuses**, to include due diligence on sourcing minerals from any party providing direct or indirect support to non-state armed groups and public or private security forces that are not involved in serious abuses. The multi-stakeholder letter recommends specifically that issuers should be allowed to label their products as “DRC conflict free” only when they and the smelters from which they source know (by assessing the due diligence of smelters/refiners) and can show that they do not tolerate nor by any means profit from, contribute to, assist with or facilitate the commission by any party of serious human rights abuses associated with the extraction, transport or trade of minerals (paragraphs 1 and 2, Annex II) **and (thus going beyond Dodd-Frank requirements)** do not provide any direct or indirect support to non-state armed groups (paragraphs 3 and 4, Annex II) or public or private security forces (paragraphs 5 and 10, Annex II).

At the same time, the signatories of the multi-stakeholder letter recommend that companies implementing a time-bound risk management plan for risks of direct or indirect support to public or private security forces that are not perpetrators of serious human rights abuses should not describe their products as “not DRC conflict free” in their Conflict Minerals report during the time-bound period when risk mitigation efforts are underway.

How national and regional traceability and certification initiatives can be relied upon to implement specific elements of due diligence, and the challenges associated with relying on such schemes

Participants discussed the ongoing work by the Government of the DRC (with the support of MONUSCO, BGR, and through multi-stakeholder commissions coordinated by provincial authorities) to assess and validate mine sites and transportation routes. In particular, some participants recognised the efforts made in some locations where assessments and validation were carried out against criteria designed to be consistent with OECD Guidance and UN due diligence guidelines. They clarified that while full mine site audits may happen once a year, the projects include ongoing monitoring (every 3 months) and random spot checks (by MONUSCO and others) as recommended in the OECD Guidance and UN GoE due diligence guidelines, to ensure that any change of circumstance is caught. However, other participants noted that these validation reports were not available, the

validation criteria used were not clear. The likelihood that follow-up checks would occur was questioned.

Some participants explained that the results of validation efforts should be made publicly available, so that companies could source immediately from those validated mine sites. Some participants felt that the multi-stakeholder validation efforts could reduce individual companies due diligence burdens, and help to streamline efforts by undertaking risk assessments at mine sites and along transportation routes.

In response to some criticism and perceived lack of trust in ongoing validation efforts, some participants emphasized that the Centres des Négoce and Certification Nationale *were multi-stakeholder efforts relying on information provided and assured, among others, by MONUSCO*, and therefore should be considered credible. Further, the Certification Nationale is part of the DRC's national implementing program of the ICGLR Regional Certification Mechanism, which was developed through regional cooperation of ICGLR member countries, in consultation with upstream industry and civil society entities. The ICGLR Regional Certification Mechanism can help to assure buyers that due diligence has been conducted on certified exporters of minerals, since the standards and processes of the OECD Guidance were integrated into the ICGLR Regional Certification Mechanism in 2011. However, participants did recognise that the ICGLR Regional Certification Mechanism relied on the capacity of governments to implement, and therefore there is a need to ensure sufficient training and resources. Participants acknowledged that it would be beneficial to evaluate the levels of implementation of the ICGLR Regional Certification Mechanism by member countries once the mechanism is put into place.

A more practical challenge to sourcing from the validated mine sites is the need to ensure adequate chain of custody or traceability of the minerals from those sites. Participants agreed that this was urgently needed. In that regard, participants highlighted the differences between *chain of custody systems* and *traceability systems*, and how the Guidance recommends companies use either approaches.

Companies need to ensure that the information described under Step 1(C) is collected and maintained, either through chain of custody documentation (which may already be partially generated by applying the DRC Traceability Manual) or through traceability systems (e.g., bagging and tagging, or alternative systems creating at least the same information, such as electronic ones). Regardless, the information collected through chain of custody or traceability should be complemented and verified with on the ground assessments, which will look for anomalies and potential sources of fraud, and also qualitatively assess the circumstances of extraction, transport, trade, handling and export against Annex II.

While most upstream industry participants stated they rely on iTSCI as “the” industry traceability and due diligence scheme to meet almost all OECD and Dodd-Frank requirements, other participants felt that a one size fits all approach may not be appropriate, and encouraged stakeholders to look for other potential chain of custody or traceability systems, potentially embedded into an overarching mineral certification scheme, that are robust and cost-efficient, taking into account all conditions of the region/area of mining. Other participants however believed that more efforts should be made to implement iTSCI, referring to its expertise and workability.

Participants also explained that there is clearly a willingness on the part of the Government of the DRC to address these issues, and that they also have funds available for this work and will partner with the ICGLR and the OECD to carry out due diligence training and certification workshops throughout the DRC.

c. SESSION 3 - Opportunities for downstream involvement in upstream due diligence: Creating the right incentives and building trust and credibility in upstream due diligence efforts

Participants recognised that there has been a growing interest amongst companies to extend their influence and control over the supply chain further upstream through strong contractual relationships and partnerships with suppliers, and bypassing intermediaries. Participants noted that the OECD Guidance and the UN GoE due diligence guidelines expect companies to assume responsibility for assessing risks related to the circumstances of mineral extraction, transport, trade and export. As a result, some industry participants have found that one way to identify and manage risk is to take ownership and create a “closed pipe” supply chain, which simplifies chain of custody, makes risk assessments more straightforward and attempts to prevent minerals of unknown provenance from entering the supply chain.

Participants noted that this approach has been successfully piloted through the Solutions for Hope project. Participants highlighted however that the producers of minerals still go through multiple risk assessments/audits from customers, and that further work may be necessary to streamline the assessment process so that one credible assessment can be used by all actual or potential partners in the supply chain. Others questioned the possibility to replicate this model on a large scale.

Participants also discussed the Conflict Free Smelter program and the ways that smelters could become eligible to pass the CFS audit.

However, some participants expressed concern that even if they were assured as meeting the OECD Guidance, smelters still may not pass the CFS audit because of different conceptions of “DRC Conflict Free”. It was clarified that in order to pass a CFS audit, smelters will have to demonstrate that 100% of incoming materials are “reasonably” considered conflict-free. If there are gaps in information on incoming minerals, then the smelter is allowed 3 months of “corrective action” to fix the issue before another audit. Participants noted how this process allows smelters to improve and address outstanding issues *after* they have been independently determined to meet the OECD Guidance.

Participants had no choice but to postpone addressing the challenges of harmonisation of approaches and terminology until after the final rules of the SEC implementing section 1502 of the Dodd Frank Act. However, some participants emphasized that even if approaches were to be harmonised, section 1502 of the Dodd Frank would in their view still create market disincentives to source from the Great lakes region because it requires “issuers” to file additional disclosures if they source from the region (in the form of a Conflict minerals report). The additional disclosure in turn may open the “issuer” to additional liability and risk, particularly if problems are found in the in-region sourcing practices of smelters.

Participants welcomed the collaborative and constructive approach taken by the Public-Private Alliance (PPA) for Responsible Minerals Trade, which presented an opportunity for downstream companies to become involved in supporting and enabling upstream companies’ due diligence. Participants recommended that the PPA should support programs that assist upstream companies to demonstrate conformance with the OECD Guidance and UN due diligence guidelines, also in the frame of the regional certification mechanism of the ICGLR, so that the smelters sourcing from those upstream companies can become eligible for the CFS program, and market disincentives are reduced.

d. SESSION 4 – Progress report by the OECD and GIZ on donor coordination for enabling in-region due diligence and certification efforts

Participants were updated on ongoing work of the ICGLR, OECD and the World Bank to identify avenues for optimizing donors’ involvement and coordination in the Great Lakes region, in support of current international efforts to promote responsible sourcing of minerals.

Participants welcomed the initiative. One participant recommended that efforts on development cooperation should also involve the private sector, as a significant driver of development in the region.

One participant also highlighted how the objectives of the program on donor coordination and development cooperation fell squarely within the DRC PROMINES objectives, and that therefore the project should look to build on those synergies.

QUESTIONS ON THE OECD DUE DILIGENCE GUIDANCE FROM DOWNSTREAM COMPANIES

How is Annex II (Model Policy) relevant for downstream companies?

As part of due diligence (Step 1(A)), companies should have a policy that sets out common expectations throughout the supply chain that covers a commitment to upholding certain standards in the extraction, transport, trade and export of minerals, *coupled with a commitment to a management process that outlines how the company plans to respect these standards.* Annex II lays out circumstances that upstream companies should *directly use* when identifying, assessing and managing risk in the supply chain. Annex II is directly relevant for upstream companies because they are responsible for identifying and managing risks with on-the-ground information and risk mitigation (See Step 3(B)(2)(a)(i) of the Supplement on Tin, Tantalum and Tungsten).

Downstream companies may use Annex II to *indirectly* identify, assess and manage risk. Downstream companies should identify the smelters in their supply chain and assess whether the smelter's due diligence practices conform to the Guidance, *which includes ensuring that smelters have relied on Annex II to identify risk and responded in accordance with the recommended strategies.* Where there are gaps in the smelters due diligence, downstream companies then *indirectly operationalise* the recommended risk management strategies in Annex II by engaging in capability training and corrective action to boost the smelter's due diligence practices (See Step 3(B)(2)(a)(ii) of the Supplement on Tin, Tantalum and Tungsten). As noted in the Guidance, downstream companies without a direct relationship with smelters will be more effective in managing risk as described through collaborative industry efforts.

Another participant requested that the International Trade Union Confederation be included in the exercise, since they have significant knowledge of ongoing donor work to improve conditions of workers in the region.

e. SESSION 5 – Downstream due diligence implementation: *Step-by-Step* Presentation by BSR on the detailed findings and practical challenges for downstream implementation of due diligence followed by discussion on practical challenges and clarifications of the OECD Due Diligence Guidance

The implementation phase

Participants recognised that the implementation exercise has been helpful in getting a better understanding of what is necessary for due diligence and in engaging with suppliers. Some participants felt that the reports should do more to collect emerging practices and targeted guidelines that enable practical implementation for companies.

Participants highlighted that the downstream industry participation in the pilot should be diverse to reflect the entire supply chain, companies based in different geographies and the various sectors concerned. Participants agreed that there was significant involvement already from original equipment manufacturers (OEMs) and component manufacturers, but more efforts should be made to involve metal traders, exchanges, as well industries from other impacted sectors (e.g. medical devices, tooling) and companies based in non-OECD countries (e.g. China). Furthermore, participants questioned how to involve small- and medium-sized enterprises (SMEs) effectively, since many may not be aware of due diligence expectations, or have the resources to participate in the pilot. Participants agreed that more awareness-raising, developing a survey suitable for associations to administer to non-pilot participants, and broader engagement were necessary to cover the various gaps of participation in the pilot.

Some participants suggested that the best way to reach SMEs, as well as metal traders, exchanges and companies based in non-OECD countries was through industry associations, where those companies already feel comfortable. However, SMEs in particular need targeted, focused and practical assistance, and they may not feel the benefit of large multi-stakeholder meetings. The participants therefore suggested having meetings closer to them (for costs) and also having specific and targeted break-out

What is the relationship between Step 1(C) and Step 2 for downstream companies? Why does the Supplement on Tin, Tantalum and Tungsten recommend downstream companies “introduce a supply chain transparency system” in Step 1 (C) while upstream companies should “introduce a chain of custody and/or traceability system”?

Due diligence is an ongoing, proactive and reactive process. This means that the various steps of the Guidance interact with one another through regular efforts of the company. Step 1(C) is a recommendation about *data management and record keeping*, outlining the type of information that should be maintained as part of the company’s strong internal system of controls over the supply chain. Step 2 is a recommendation about *collecting and assessing information* for purposes of a supply chain risk assessment. As a dynamic process, the information collected in Step 2 should naturally feed into the internal systems of control over the supply chain and data management, as recommended under Step 1(C) (see for example, footnote 4 and footnote 18 of the *Supplement on Tin, Tantalum and Tungsten*).

The recommendations differ whether the company is upstream or downstream in the supply chain. Step 1(C.4) recommends that upstream companies introduce a “*chain of custody and/or traceability*” system that regularly maintains detailed information on the upstream supply chain. Step 1(C.5) for downstream companies uses different language, recommending that downstream companies introduce a “*supply chain transparency system*” that allows for the identification of smelters/refiners in the supply chain, as well as “the identification of the all countries of origin, transport and transit for the minerals in the supply chain of each smelter/refiner”. The recommendation for downstream companies *does not* specify that downstream companies establish a “*chain of custody and/or traceability system*” that would identify and track all companies in the supply chain between the smelters/refiner and themselves.

sessions that provide the opportunity to discuss in detail specific due diligence challenges and emerging practices.

Participants also suggested involving the industry associations more in the pilot directly. Associations could be involved in two ways: first by reporting on the steps the industry associations are taking to raise awareness and develop due diligence implementing tools; and second by having the associations collect information on the due diligence practices of their members and transmit that information, or findings, to BSR for the reports.

Emerging practices, progress made and remaining practical challenges for the implementation of the OECD Due Diligence Guidance

The baseline reports highlighted the varied levels of implementation by the participating downstream companies. Participants attributed this in part to the varied levels of awareness within industries, as well as to the great differences in the complexities of supply chains.

In general, participants noted that one of the major challenges for the implementation of due diligence related to the breadth (i.e. the large number of transactions involving 3Ts and the large supply base) and the depth (the number of supplier tiers between the participating company and the smelter) of OEM supply chains.

Participants noted various ways that companies are currently overcoming the challenges of identifying and assessing smelters in their supply chains, both through individual and collaborative means. Examples include the “*dear supplier*” letters currently prepared by industry associations such as the Automotive Industry Action Group and the Aerospace Industry Association. Other helpful examples included lists of components containing 3Ts for companies to use when beginning their scoping exercise and model contract “*information flow down*” provisions that some membership organisations will prepare for their industries that will require suppliers to engage with their supply base to obtain information on the identity of smelters in their supply chains. Participants recognized that downstream companies need to establish their policy, engage the suppliers they have a business relationship with to identify the smelters they use, and ask these suppliers to do the same with their suppliers. In this way, downstream companies that do not have business relationships directly with smelters, respond to risk by understanding what smelters are used in their supply chain, and requesting changes if some of those smelters are known to process minerals that are not conflict free.

Overcoming commercial confidentiality was also identified as a major challenge, particularly when customers of smelters do not wish to divulge the smelter’s identity for fear of being

bypassed, losing competitive advantages or giving away proprietary information. A participant noted

This distinction made in the Guidance reflects the complexity of downstream supply chains, and allows for due diligence flexibility that respects the diverse individual and collaborative methods that companies will use to identify and evaluate smelters in their supply chain.

Under Step 2, downstream companies should identify, to the best of their efforts, the smelter in the supply chain, and then assess risk by evaluating the due diligence practices of the smelter. The Guidance recognises “downstream companies who may find it difficult (due to size or other factors), may engage and actively cooperate with other upstream companies with whom they share suppliers or downstream companies with whom they have a business relationship to carry out the recommendations in this section in order to identify the smelters/refiners in their supply chain and assess their due diligence practices or identify through industry validation schemes the smelters/refiners that meet the requirements of this Guidance in order to source therefrom.” Step 2(A) expands on this and recommends that companies identify smelters “through confidential discussions with the companies’ immediate suppliers, through the incorporation of confidential supplier disclosure requirements into supplier contracts, by specifying the smelters/refiners that meet the requirements of this Guidance, by using confidential information-sharing systems on suppliers and/or through industry wide schemes to disclose upstream actors in the supply chain”. Therefore the challenges encountered while trying to identify and assess smelters may be met through both individual and collaborative means, and may include sharing information about, and then ensuring suppliers source from, smelters with due diligence practices collaboratively evaluated to be in line with this Guidance.

one way to overcome this challenge was to use electronic information-sharing systems that would not disclose the smelter identity to their immediate customers, but would disclose the information to the customers of customers. Participants noted that work was underway to support disclosures. However it was clear that, there is considerable resistance to this from several of the larger OEMs, who have massively complex multi-product supply chains.

Participants also recognised that disclosure of information and depth of supply chains varies across the relevant minerals. In one participant’s experience, it was not difficult to identify and disclose the tantalum smelters, but more challenging with tin and tungsten smelters.

Participants recognised the responsibility downstream companies have to identify and assess smelters, but questioned how OEMs can take steps to do this when they do not have direct relationships with the smelters. Participants agreed that OEMs can encourage smelters to join industry audit schemes like the CFS program, and one participant suggested putting together a list of the critical mass of smelters in the 3Ts sector to enable that process. Associations could be particularly useful to help to identify 3T smelters (e.g. ITIA for tungsten; TIC for tantalum; and World Steel Association; ITRI for tin, and the LME). One participant said they had already prepared a letter to encourage them to submit themselves for CFS audits. Regardless, participants agreed that OEMs have the most impact and leverage when they act collaboratively, within the confines of anti-trust law, to identify and manage risks that smelters conform to the OECD Guidance (as recognised in Step 2 and 3).

One participant raised a concern about how companies would respond when problems have been identified at the smelter level after they have been audited (by the CFS program) and prior to their next annual audit. In particular, the participant asked how the minerals from those smelters would be identified as per section 1502 Dodd Frank requirements (“DRC Conflict Free” or not “DRC Conflict Free”). Another participant clarified that due diligence is not a guarantee, and that the objective of due diligence is to identify and then address risks as they arise.

Participants also discussed whether it would be beneficial to develop an audit protocol through the pilot that could be used to audit the conformity of the smelters due diligence practices with the Guidance. The working group on gold had already made such a request. However, many participants strongly felt that the tin, tantalum and tungsten industry had already devoted significant time and resources in negotiating audit protocols, and therefore felt that another protocol was unnecessary.

Some participants felt that participating companies should show more progress on reporting as indicated in Step 5, and urged industry to take reporting seriously. Many downstream company participants indicated in the baseline report that they are waiting for the SEC rules.

Participants also discussed whether indicators, benchmarks and metrics could be developed through the implementation phase to assist companies with implementing the Guidance, as already described in paragraph 7 of the pilot's Terms of Reference. There was no agreement amongst the participants on this point. Some participants felt that it was vital to maintain the flexibility of the Guidance, and that developing indicators and benchmarks to assess due diligence progress may undermine that flexibility, since anything produced in this forum could have normative value. These participants noted how indicators and benchmarks are very specific to the company, and that many have developed matrices on their own for internal purposes.

Other participants felt that indicators and metrics need not restrict the flexibility of the Guidance, particularly if the indicators focus on efforts of the company rather than result. These participants felt that indicators could be very beneficial for companies understand to self-assess progress, and evaluate progress of suppliers and smelters.

Some participants requested the requirements of section 1502 of the Dodd Frank Act be considered in the pilot. It was clarified that once the final rules are promulgated, the pilot will look at how companies can meet their reporting obligations through the OECD Guidance.

As a follow up to the action plan adopted during the first ICGLR-OECD-UN GoE joint forum meeting on 5-6 May 2011,⁶ the ICGLR, the OECD and the World Bank have undertaken a joint - study on the feasibility of an international multi-stakeholder mechanism to support due diligence (as recommended under Step 4 of the Guidance). The second meeting ICGLR-OECD-UN GoE joint forum provided the opportunity to consult further with participants on the issue.

A couple of participants suggested the idea of having a body accredit auditors, and pointed to examples of other industries (e.g. NADCAP in the aerospace industry) where such bodies added value through establishing one audit process, increasing efficiency and cost. One participant felt that any global institutionalised mechanism should carefully consider the cost and benefits for industry and should also consider its relationship with the ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources while another one expressed concerns about the interaction of the new mechanism with existing industry programmes. It was clarified these aspects were already being considered in the study.⁷

V. Proposed Next Steps

During the last session, the following action plan was proposed to and discussed by participants in the ICGLR-OECD-UN GoE joint forum:

⁶ Available at <http://www.oecd.org/dataoecd/28/61/48600581.pdf>. See also the discussion note on the potential structure and mandate of such a mechanism, available at <http://www.oecd.org/dataoecd/14/40/46080693.pdf>

⁷ See paragraph 5 of the Action Plan adopted at the first ICGLR-OECD-UN GoE Meeting on implementation of due diligence held on 5-6 May 2011: "The International Conference on the Great Lakes Region, the OECD and the World Bank will **jointly develop the terms of reference and carry out a feasibility study** on the establishment of an institutionalised mechanism to support the implementation of the OECD due diligence Guidance and audits under the ICGLR regional certification mechanism, drawing lessons from the successful experience of the Extractive Industries Transparency Initiative." Available at: http://www.oecd.org/document/11/0,3746,en_2649_34889_47684171_1_1_1_1,00.html

- The ICGLR, OECD and UN GoE on the DRC will carry out awareness-raising and due diligence training / capacity building upstream in the supply chain, as a means of enabling certification under the ICGLR Regional Certification Mechanism. As part of the upstream training, participants recommended to reach out to smelters based in Asia, and in particular in China. In this respect, engagement with the Chinese government would be needed as most of the smelters in China are state-owned enterprises.
- Develop easy-to-use and simple day-to-day handbook of the Guidance for upstream companies and in-region economic actors that enable companies to implement due diligence and become certified under the ICGLR Regional Certification Mechanism. Translate materials into multiple languages.
- Consider appropriate ways, including through the recently launched Public-Private Alliance for Responsible Minerals Trade, to support programs that assist upstream companies to demonstrate conformance with the OECD Guidance and UN due diligence guidelines, in particular to enable their eligibility for the CFS program. In this regard, the forum welcomed the offer of EICC-GeSI to review the possibility that they could provide a list of entities operating in the region capable of reliably determining the conformance of upstream companies with the OECD and UN due diligence recommendations.
- Consider how BSR and IPIS can work with industry associations to help SMEs and companies situated in other parts of the supply chain become involved in the implementation efforts.
- Explore opportunities for cooperation with ILO in-country projects and build on existing structures to address the worst forms of child labour at mine sites in Africa's Great Lakes Region.
- Advance donor-supported programs coordination enabling effective implementation of due diligence including in the frame of the regional certification mechanism of the ICGLR.