



# Taming the Resource Curse: Implementing the ICGLR Certification Mechanism for Conflict-prone Minerals

By *Shawn Blore* and *Ian Smillie*

PARTNERSHIP AFRICA CANADA



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Photo credit: Sven Torfinn / Panos Pictures  
*Artisanal miners return home from digging coltan in eastern Democratic Republic of the Congo.*

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## About the Authors

Partnership Africa Canada (PAC) is a Canadian NGO with extensive knowledge of resource-driven conflicts in Africa, principally through its co-founding and ongoing involvement with the Kimberley Process Certification Scheme (KPCS) for rough diamonds. One of the authors (Ian Smillie) participated extensively in the negotiations leading to the founding of the KPCS, and in the subsequent development and management of the Kimberley Process. The other author (Shawn Blore) has engaged in detailed on-the-ground investigations of Kimberley Process diamond tracking and certification schemes as implemented in six different alluvial diamond producing nations, among them Liberia, Angola, and the Democratic Republic of the Congo (DRC).

## Forewords

### **Peter Maurer**

State Secretary for Foreign Affairs  
Bern, Switzerland

The recent World Investment Report 2010 lists in its annex the world's top 100 non-financial trans-national corporations, ranked by foreign assets. The global "top ten" companies are directly or indirectly linked to natural resources: four oil firms, three utility corporations, one metal and mineral producer, one car manufacturer and one telecommunications firm. A similar picture appears when one assesses all 100 of the largest non-financial companies. 13 out of 100 are either oil or mining companies. An additional 49 are either upstream or downstream in the supply-chain of the extractive industries or use natural resources, such as car or aircraft manufacturers (14), utility providers or producers of electrical and electronic equipment (18), non-metal mining (6) or others, such as telecommunications, metal production or engineering. None of these companies is based in a developing or transition country or has its headquarters in a post conflict country or a region where the rule of law is compromised. Clearly, not all of the almost two thirds of the 100 world's largest non-financial corporations are extracting, trading, dealing, processing or in other ways using natural resources linked to human rights violations or conflict. But one has only to dig deep enough and one will find traces of natural resources in the products we use daily. We usually don't know, but sometimes have to assume, that coltan in our mobile phones, tin in our cars and gold in our jewellery originates from conflict regions.

At the same time, business accepts its responsibility to respect human rights and to avoid fuelling conflict by conflict-sensitive business practices. Today, stakeholder-related risks are among the highest financial risks for extractive industries. Likewise, reputational risks increase the closer a business comes to the consumer. Many businesses have gone beyond voluntary and philanthropic projects towards a human rights assessment of their operations and management. Human rights due diligence starts with a human rights policy. Taking respect for human rights into the core of business will lead to less tort and liability claims in legal courts. Equally, it will result in less claims of being a conflict profiteer in the court of public opinion. Responsible businesses recognize their global corporate responsibility to deal with the root causes. Getting it right starts with taking a stand for the human rights of others. An example of this is the way the tin industry has developed its Tin Supply Chain Initiative. Another example is the electronic industry's Global e-Sustainability Initiative and the Electronic Industry Citizen Coalition.

This corporate responsibility to respect human rights and avoid fuelling conflict is seconded by the state's obligation to protect human rights. Furthermore, governments have the responsibility to cooperate in avoiding and ending conflict and in sustaining peace and development. This responsibility is echoed by the Swiss constitution which outlines as some of the objectives for Swiss foreign policy the respect for human rights, the promotion of democracy and peaceful coexistence. Within an international context, the implementation of these objectives is framed by the recognition of international law, international and regional cooperation and development assistance. With a focus on the Great Lakes Region, the International Conference on the Great Lakes Region as well as the Protocol against the Illegal Exploitation of Natural Resources in the Great Lakes Region was identified as a main actor and tool to bring together different initiatives and objectives related to the exploitation of natural resources in the region. As such Article 12 of this Protocol recognizes that a regional certification mechanism should be a tool for combating the illegal exploitation of natural resources. Although the article speaks of instituting "accredited standards", it states clearly that the mechanism shall include provisions on "certification of origin including labelling, monitoring, supervision, verification and implementation, and as appropriate, capacity development".

Together with Partnership Africa Canada, the idea was developed to first assess existing certification schemes and second to evaluate the political support needed by different stakeholders in order to put the political promise of the Protocol into practice. The result is this impressive study which concludes with concrete suggestions and recommendations for the creation of the regional certification mechanism. It is a forward-looking report, aimed at providing solutions for the set of problems affecting un-tracked mineral flows within and from the Great Lakes region. The quality of this study has been shown by the adoption of its main recommendations by the International Conference on the Great Lakes Region in April 2010. Furthermore, this work has significantly influenced ongoing work within the United Nations Expert Group on DRC and the Organisation for Economic Co-operation and Development's project on due diligence guidance for responsible supply chain management of minerals from conflict-affected and high-risk areas. But the report's recommendations go beyond these institutions and are addressed additionally to governments, the private sector and civil society. The report therefore has the potential to serve as a framework for dialogue between these different stakeholders.

**Ambassador Liberata Mulamula**

Executive Secretary  
ICGLR  
Bujumbura, Burundi

Mineral exploitation in the Great Lakes Region is often associated with the informal sector and the financing of armed rebellion. This destructive link between natural resources and armed conflict is a major factor of instability in the region and obstructs the potential contribution of natural resources towards sustainable development.

In response to this persistent problem the International Conference on the Great Lakes Region (ICGLR) aims at establishing a Regional Certification Mechanism which monitors the supply chain of conflict-prone minerals. This is to ensure that neither mine site nor channels of trade within this particular region are in predatory control of armed groups or criminal networks.

The Regional Certification Mechanism is the core tool of the ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources (RINR) and is supported by all ICGLR Member States. It was formally endorsed by the eleven heads of State at their Lusaka Summit on December 15, 2010. It is a home grown solution that involves actors from

the private sector as well as states and civil society. I am personally convinced that this comprehensive approach will make a major contribution towards peace and development in the Great Lakes Region as it addresses the root causes of instability on multiple levels.

This study is highly relevant to the ICGLR because it draws on experiences of other certification schemes that have been implemented on selected minerals in different parts of the world. Consequently, the findings of this study have an impact on the decisions and actions taken by the ICGLR in the implementation process of its Regional Certification Mechanism. Moreover, the study provides important results for further academic research on conflict minerals.

I would like to sincerely thank Partnership Africa Canada for this important work and their active engagement in this matter. Furthermore, I would like to express my gratitude to the Swiss Federal Department of Foreign Affairs for rendering the accomplishment of this study possible.

In conclusion, the recommendations of this study provide a viable basis for our efforts to break the link between minerals and armed conflict with a view to consolidating peace in the Great Lakes Region.

## Preface

This study deals with the challenges posed by mineral flows that may lack all of the requisite export and sourcing documentation, or that may before or during the process of mining and export financially benefit rebel groups, militias, or military groups in some way. This is, quite evidently, a controversial topic. However, the intent of this paper is not name names, assess responsibility or lay blame. There are other highly competent researchers and institutions pursuing those important tasks. Freed of that responsibility, this research has the more felicitous task of simply seeking solutions.

The study is thus intended solely for research and policy purposes. It is a forward-looking report, aimed at providing solutions for the set of problems afflicting un-tracked mineral flows within and from the Great Lakes region. It is not a legal document, nor could it or should it form the basis of any legal claims concerning mineral flows in the African Great Lakes region.

In light of this, some reviewers have suggested that the names of the various nations of the region should be replaced with labels (i.e. A, B, C) in order to eliminate even the slightest possibility of impugning the reputation of any of the countries of the region. After due consideration, it has been decided to maintain the names of the countries as is. The first step in fixing a problem is understanding just what that problem is; describing the situation on the ground with actual names is thus an essential first step in finding and describing a solution.

That said, in the description of various mineral flows, all care has been taken to avoid any suggestion or allegation that the flows may be illegal. For the purposes of this report, these mineral flows are simply 'untracked'. It is hoped that this will prove an acceptable solution, particularly for all those involved in the process of developing a system that will enable those mineral flows to change their status to that of 'tracked.'

# 1. Executive Summary

## 1.1 Lessons from Other Certification Mechanisms

### Purpose

It is important that the purpose of standard setting and supply chain monitoring be clearly established from the outset. Limited objectives aimed at solving an immediate problem such as 'conflict' may produce a system that is incapable in the longer term of dealing with underlying problems of governance, development or ethical mining practices. At a minimum, the relationships between conflict, governance and human rights abuse (now and potentially in the future) need to be considered.

### Administrative Considerations

What may appear administratively appropriate at the end of a lengthy period of difficult negotiation may not be adequate as the system matures. The system must be flexible enough to adapt to new conditions and realities as outliers seek ways to evade regulations.

The system needs secretariat services commensurate with the challenges it faces. Weak administrative systems, including data gathering, management and research, will hobble effectiveness; top-heavy administrative arrangements will do the same.

Decision making needs to be open, inclusive and non-obstructive, and it must be free of extraneous political interference<sup>1</sup>. Transparency is important to credibility and compliance.

### Operational Considerations

Producing areas must be free of military activity. That may seem self-evident, but even the presence of government forces may become problematic if prolonged.

It is essential that commodities from other areas cannot enter a controlled production area and be passed off as 'clean'. A reliable data base capturing production and trade statistics, and an exchange of official data on commodity trade, are important elements in effective regulation.

A variety of checks are possible for traders and exporters, but these are only as good as controls and data gathering in primary producing areas. If goods are dropped into the stream before checking takes place, no amount of downstream certification will remedy the problem.

Independent third-party monitoring, including supply-chain monitoring, gives the greatest assurance of equitable, system-wide effectiveness and credibility. This must be complemented by rigorous follow-up.

<sup>1</sup> The demand that decision-making within a regional tracking and certification scheme be free of political interference generated some significant discussion and reservations among members of the ICGLR Steering Committee, the body tasked with implementing the proposed tracking scheme. Steering Committee members note, correctly, that the ICGLR is a political body, that they themselves are political appointees representing their respective nations, and that the process of bringing control and transparency to regional mineral flows in an inherently political process. Given this, some clarifications are in order. In particular, it is important to make a distinction between 'political influence', which is a useful and necessary part of the process of accommodation and compromise that will accompany any negotiations around managing regional mineral flows, and 'political interference', which involves basing decisions mostly or solely on political criteria extraneous to the mineral trade. The particular example we cite in the 'Lessons Learned' section is that of Venezuela, which in 2006 was found to have completely lost control of its artisanal diamond sector; 100% of Venezuela's diamonds were being smuggled abroad, with no government control or oversight. In previous situations where it had become clear that a diamond producer did not have reliable control of its diamond sector, the producer was either ejected from the Kimberley Process pending reform (Republic of Congo, 2004), or required to accept external oversight of its diamond tracking procedures (Ghana, 2006) until such time as it could demonstrate full compliance with KP requirements. When Venezuela came before the KP, however, its government rejected debate on narrow technical criteria (i.e. Venezuela's diamonds were all being smuggled), and instead brought to bear the heated rhetoric of Bolivarian revolution, and more significantly the political heft of a major world oil producer. The result was that while poorer developing nations such as Ghana and the Republic of Congo were put under embargo and forced to enact reforms, an oil-rich nation such as Venezuela was given carte blanche by the KP to continue smuggling. This demonstrably unjust outcome severely damaged the KP's external reputation, and its internal cohesion. It is a lesser organization as a result. The recommendation that decision-making be free of 'extraneous political interference' is thus a recommendation that decisions be based only on narrow technical criteria, and where necessary on the regional politics of the mineral trade. If instead, national delegations bring to bear the relative diplomatic heft of their own countries, and the long history of grievance, real and perceived, between nations in the region, they will doom any scheme to a quick and ignominious failure.

In any system of certification, there must be credible sanctions for non-compliance, including de-certification. Without that as a serious possibility there is little reason to create or to follow the rules.

## 1.2 A Mineral Tracking and Certification System for the ICGLR

The lessons drawn from the Kimberley Process and other certification systems were used to formulate a set of principles upon which any effective tracking and certification system must be based. The principles are grounded in the *Protocol Against the Illegal Exploitation of Natural Resources*<sup>2</sup>. These principles, together with extensive field consultations, were in turn used to formulate the functional elements of a tracking and certifying system. Both principles and system elements are listed below.

### Principles:

#### 1. Transparency

Transparency is essential for the system to have legitimacy with member governments, civil society, industry end users, consumers and public.

#### 2. Burden of Proof Falls Primarily on Exporters, Secondly on Governments

In the ICGLR system, primary responsibility for assuring a verifiable chain of documents from dig site to export point will fall on industry. Penalties for non-compliance will also fall primarily on industry.

#### 3. Mandatory Third-Party Audits

Trust but check: quarterly third party audits should be mandatory for all participants in the mineral chain. Passing these audits should be obligatory for an entity to achieve and maintain certified status

#### 4. Adapt Current Systems

Business as usual, but with checks: where possible, adapt the current systems in order to increase compliance and reduce costs.

#### 5. Design for Adaptability

The system should be able to develop and incorporate new standards into the existing tracking and certifying framework.

### Implementation — Main System Elements:

#### 1. Chain of Custody Tracking from Mine Site to Export

- a. Implemented by national governments prior to export
- b. Successful export applications given ICGLR Regional certificate, which serves as proof of compliance throughout region

#### 2. Regional Tracking of Mineral Flows via ICGLR Database

- a. Data on regional mineral flows to be transmitted to ICGLR on a monthly basis
- b. For each industry participant, data will be processed and analysed to determine if exports equal legal imports
- c. Where mineral flows do not balance, industry participant will be given a short grace period to explain and correct the discrepancy. If the explanation is unsatisfactory, or the imbalance continues, the participant will be declared non-compliant
- d. All data and analyses will be stored on publicly accessible database

<sup>2</sup> One of 10 protocols included in the Pact on Peace, Stability and Development in the Great Lakes Region, signed December 15, 2006 by the heads of the 11 African states that form the International Conference on the Great Lakes Region (ICGLR).

### **3. Regular Independent third-party audits**

- a. All actors in mineral chain must submit to quarterly audits by independent third party auditors
- b. Industry participants must pass audits to be considered compliant (i.e. those failing audits will be declared non-compliant)
- c. An Audit Committee within ICGLR accredits auditors, sets terms of reference for auditors, commissions audits
- d. An Audit Committee composed equally of government, industry and civil society participants; initially, numbers could be 3 governments, 3 industry, 3 civil society.

### **4. Independent Mineral Chain Auditor**

- a. The Mineral Chain Auditor will monitor the full mineral chain for discrepancies and anomalies arising from data collected in system
- b. The Mineral Chain Auditor has authority and resources to initiate investigations at their own discretion
- c. The Mineral Chain Auditor's appointment is structured to provide full independence and freedom of action.

## **1.3 Principle of Transparency**

- a. To establish the credibility of the ICGLR Tracking and Certification Scheme with African populations, foreign governments and corporations, consumers and the larger NGO community, audits and mineral flows are to be made freely available on a publicly accessible website managed by the ICGLR.

## **1.4 Adoption of the System**

This proposal was presented by Partnership Africa Canada to the ICGLR Steering Committee at a meeting in Bujumbura in April, 2010, and adopted as part of the ICGLR's Regional Initiative on Natural Resources (RINR). This in turn was then approved by a conference of the ICGLR mining ministers in Nairobi in September, 2010, and formally adopted by the ICGLR heads of state, as noted in the Lusaka Declaration of December 15, 2010. The ICGLR is thus now fully committed to bringing a regional tracking and certification scheme into being.

## 2. Introduction

### 2.1 Untracked Minerals — A Regional Problem

The African Great Lakes Region faces a number of interrelated challenges stemming from the trade in minerals. Topping the list is the conflict minerals phenomenon, whereby minerals and mine sites are used as a source of financing by armed groups, be they rebels, local militias or military forces acting independently of government control<sup>3</sup>. While this phenomenon occurs primarily within the borders of the DRC, the deleterious effects are felt throughout the region<sup>4</sup>. Political spillovers include the influx of refugees and temporary or prolonged incursions by armed groups into neighbouring countries<sup>5</sup>.

For the mineral trade, the spectre of conflict financing scares off customers and depresses trade throughout the region; some buyers have already disengaged from the region<sup>6</sup>. More significantly, governments outside the region have begun to take action on the problem of conflict minerals. On 21 July 2010 the U.S. president signed into law the *Dodd–Frank Wall Street Reform and Consumer Protection Act*, which contains a series of provisions designed to control US companies' use of 'conflict minerals'.

For the purposes of the act, 'conflict minerals' are defined as coltan (columbite-tantalite), cassiterite, wolframite, gold and their derivatives<sup>7</sup>. The new law requires US reporting companies<sup>8</sup>— companies traded on US exchanges which are required to file quarterly reports to the Securities and Exchange Commission (SEC) — to disclose as part of their regular reporting whether any conflict minerals are used in the production or functionality of any of their products, and if so whether those conflict minerals were sourced in the DRC or any adjoining country.

If a conflict mineral was used, and was sourced in the DRC or adjoining country, the company is required to prepare and submit to the SEC a report describing the measures taken by the reporting company to exercise due diligence on the source and chain of custody of the conflict mineral, along with an independent audit of the above report, and a description of the products manufactured by the company that are not 'DRC conflict free'.

The company is further required to file a description of the efforts employed by the company to determine the mine or location of origin of the conflict minerals 'with the greatest possible specificity'. Finally, the law requires the reporting company to make all of this information publicly available on the company's website on the Internet.

The law is likely to have a significant effect on US manufacturers of consumer electronics. Faced with the possibility of some of their consumer products being publicly labelled as DRC conflict products, these companies are likely to put heavy pressure on their suppliers to make sure of their sourcing, with the results cascading up the mineral chain. Some smelters and purchasers may disengage from the region. Those that remain will certainly demand that mineral exporters be in a position to thoroughly document the sources of the materials they're selling, and be able to demonstrate these sources do not involve conflict.

Other countries are considering legislation similar to that of the US law<sup>9</sup>. Even without formal prohibitions and consumer boycotts, the lack of security with respect to the mineral trade frightens investors, who might

3 *Final report of the Group of Experts on the Democratic Republic of the Congo*, UN Security Council (Document S/2009/603), 23 November 2009; *Accompanying note on the interactive map of militarized mining areas in the Kivus*, Steven Spittaels & Filip Hilgert, IPIS, August 2009; *"Faced With A Gun, What Can You Do?": War And The Militarisation Of Mining In Eastern Congo*, Global Witness, July 2009.

4 *"You Will Be Punished" Attacks on Civilians in Eastern Congo*, Human Rights Watch, December 2009.

5 *Mapping Conflict Motives: Eastern DRC*, Steven Spittaels & Filip Hilgert, March, 2008; *"Faced With A Gun, What Can You Do?": War And The Militarisation Of Mining In Eastern Congo*, Global Witness, July 2009.

6 The Belgian smelter Traxys ceased sourcing minerals from the eastern DRC on May 11, 2009 (*Traxys Suspends Sourcing Of Minerals From Eastern Democratic Republic Of Congo*, Traxys Press Release, May 11, 2009). The AMC subsidiary Thaisarco followed suit, announcing it was suspending purchases of DRC tin ore on 18 September 2009. (*Thaisarco Suspends Tin Ore Purchases from the Congo*, AMC Press Release, 18 September 2009).

7 Note that under Dodd-Frank, these four metals are conflict minerals no matter where in the world they are sourced. The further reporting requirements then commence for conflict minerals sources in the DRC and its neighbors.

8 Reporting companies are companies traded on US exchanges with at least 500 shareholders and \$10 million in assets.

9 The Canadian parliament is currently considering Bill C-571, The Trade in Conflict Minerals Act

otherwise invest in projects including formal mines in producer countries and secondary processing and smelting in neighbouring countries.

A second and related challenge is the problem of untaxed and undocumented mineral flows. Producer countries throughout the region are deprived of much needed revenue as a result of mineral shipments that exit their countries without paying due taxes. No country in the region is exempt from this problem, and while some countries benefit with some minerals, the lack of controls often means they lose out with other minerals. The result is a beggar-thy-neighbour free-for-all, where overall tax revenue across the region winds up being much lower than it could be if governments worked together<sup>10</sup>.

Though not currently a front line priority, the challenge of the social and environmental conditions in which minerals are produced is beginning to assume a far greater importance for mineral end-users, and will come in the very near future to carry as much weight as the current emphasis on conflict sourcing.

All countries in the region would thus stand to gain by the implementation of tracking and certification system for minerals from the region. Such a system would, at a minimum, allow governments and producers to demonstrate – and independent monitors to verify - where and under what conditions minerals were produced. The primary purpose of the present study, then, is to examine in some detail what such a system might look like, and to gauge what level of support exists among affected stakeholders in industry, government and civil society for the implementation of such a system.

The starting point for this study was an analysis of existing systems for tracking and certifying natural resource exports, with a view to determining what lessons these schemes might hold for the African Great Lakes Region. Particular attention was paid to the Kimberley Process Certification Scheme (KPCS) for rough diamonds. The KP is the most extensive and – despite certain significant shortcomings – the most successful system currently in place for certifying the origins of high value natural resources, and the only scheme in place with a track record of addressing conflict situations.

The successes and failures of the KP were analysed, with a view to incorporating those lessons into the design of a new tracking and certification system. Close attention was also paid to the architecture of other current and proposed tracking or certifying schemes, with a view to extracting relevant lessons pro and con. That analysis forms the first major section of the present study (**Section 3 — Lessons from other Certification Mechanisms.**)

The analysis in the 'Lessons Learned' section was then used to elucidate a set of guiding principles, which would provide the intellectual bedrock upon which a practical tracking system would be built. The formulation of these principles is described in **Section 4.1 — Principles for an ICGLR Mineral Tracking And Certification System.**

Analysis and principles in hand, extensive consultations were then undertaken with key stakeholders in industry, government and civil society, both in the region and abroad, with a view to developing a practical mineral tracking and certification system. The four key elements of the system that resulted from that process are described in detail in **Section 4.2 — Elements of the ICGLR Mineral Tracking And Certification System.**

In mid-April, 2010, at a meeting of the Steering Committee of the International Conference on the Great Lakes Region (ICGLR) in Bujumbura, Burundi, the Steering Committee discussed and then adopted the four key elements of this proposed tracking and certification scheme as the basis of the ICGLR Regional Initiative on Natural Resources. The Steering Committee further set the December, 2010, meeting of the ICGLR heads of state as the target date by which the system should be inaugurated.

<sup>10</sup> Uganda, for example, has one royalty rate for domestically produced gold (1.5%) and a second rate for imported gold (4%). However, in practice, the lower rate has become the defacto standard, as domestic producers refuse to accept being paid less for their product than importers. Uganda thus loses 2.5% of royalty revenue on all its domestically produced gold.

A great deal of work remains to be done to meet this target. **Section 5: Discussions and Recommendations** outlines the constructive roles that can be played by actors all along the chain, including producers, exporters and smelters, international and local civil society, governments in the region, regional government associations (i.e. the ICGLR) and foreign governments with an interest and will in helping to cement peace in the region by bringing mineral flows fully under verifiable government oversight and control.

## 2.2 Research Questions and Objectives

The specific objectives of this study were as follows:

- a) Analyse lessons learned from the Kimberley Process Certification Scheme and other initiatives that may be applied to the ICGLR regional certification mechanism.
- b) Identify interests, support for, and potential obstacles to, a regional certification mechanism among different stakeholders in specific countries – DRC, Burundi, Rwanda and Uganda. These stakeholders will include producers, traders and exporters, and civil society representatives.
- c) Share the findings of this research with the various stakeholders and with the ICGLR through a series of workshops.
- d) Based upon the findings of the research and workshops, delineate the key elements that will need to be incorporated in the proposed new regional certification mechanism.
- e) Based upon the research findings, evaluate the potential support for a regional certification mechanism among international organizations, including the UN Security Council's Peace Commission and Sanctions Committee, the ICGLR, its members and the Friends of the Great Lakes Region, and suggest future steps towards the implementation of the regional certification mechanism.
- f) Based upon the research with stakeholders, suggest which mineral(s) might prove the most viable initial candidate(s) for certification.
- g) Work closely with the ICGLR, in particular its Secretariat and the regional Steering Committee, in order to provide demand-driven facilitation of the implementation of the regional certification mechanism.

## 2.3 Methodology of Study

### I. Desk-based Research and Analysis

#### i. Lessons from the Kimberley Process and other systems

As noted above, the starting point of this study was an analysis of existing certification and tracking schemes, with a view to extracting principles, system elements and examples (good and bad) that could be usefully be brought to bear in the design of a new tracking and certification system for the African Great Lakes region. The results of that work are given in **Section 3 – Lessons from other Certification Mechanisms**.

#### ii. Development of System Principles

The results of the *Lessons from Kimberley phase*, in combination with a desk-based review of existing literature on the region<sup>11</sup> were used to inform the elaboration of a set of system principles, intended to serve as the

<sup>11</sup> Of particular use: *Final report of the Group of Experts on the Democratic Republic of the Congo*, UN Security Council (Document S/2009/603), 23 November 2009; *Walkale: Artisanal Cassiterite Mining and Trade in North Kivu Implications for Poverty Reduction and Security*, Nicholas Garrett, Resource Consulting Services, June, 2008; *Mapping Conflict Motives: Eastern DRC*, Steven Spittaels & Filip Hilgert, IPIS, March 2008; *"Faced With A Gun, What Can You Do?" War And The Militarisation Of Mining In Eastern Congo*, Global Witness, July 2009.

underlying theoretical bedrock, upon which the later practical structures of a tracking and certification system could be erected. Both principles and later practical implementation measures drew particularly on the positive and negative examples from the Kimberley Process, from other current schemes, and from other current proposals for African mineral tracking<sup>12</sup>. These underlying system principles are given in **Section 4.1 — Principles for an ICGLR Mineral Tracking And Certification System**

## II. Field Research

### i. System Development

Extensive consultations were then undertaken on the ground in the African Great Lakes Region, from February to May, 2010. The consultations involved stakeholders from industry stakeholders (both within the region and internationally), national governments, regional government institutions, development organizations, civil society (regionally and internationally), the UN and the OECD.

The result of this phase was a draft proposal for a mineral tracking and certification scheme, to be housed at and administered by the International Conference on the Great Lakes Region (ICGLR) in Bujumbura, Burundi<sup>13</sup>.

### ii. Stakeholder Workshops

The next step involved soliciting comment and feedback on the proposed tracking and certification system from the regional stakeholders who would be tasked with implementing and administering the system, including critically the Steering Committee of the ICGLR. To facilitate this process, a draft of the proposed scheme was circulated to members of the ICGLR Steering Committee, along with selected government, industry and civil society stakeholders in the region.

A series of workshops were then held in Kinshasa, Bukavu, Goma, Kigali and Kampala, at which the proposed tracking and certification scheme was explained in some detail, and comment solicited from workshop participants.

The proposed certification and tracking scheme was further presented to the Steering Committee of the ICGLR, at a meeting held on April 12-15, 2010 in Bujumbura, Burundi. During this meeting, the ICGLR Steering Committee discussed and then adopted the four key elements of the proposed scheme as the basis of the ICGLR Regional Initiative on Natural Resources.

The Steering Committee requested an updated version of the ICGLR Mineral Tracking and Certification Scheme, incorporating the suggestions and feedback received from Steering Committee members and regional stakeholders. This updated version is given in **Section 4.2 – Elements of the ICGLR Mineral Tracking and Certification System**

The Steering Committee further set the November 2010 heads of state meeting as the target date by which the system should be inaugurated, with functional mechanisms for the four system elements ready to be implemented by that date.

## 2.4 Existing Political Structures and Existing Initiatives

### I. The ICGLR – International Conference on the Great Lakes Region

The ICGLR came into being in November, 2004, when 11 African heads of state<sup>14</sup> met in Dar Es Salaam under the auspices of the African Union and the United Nations, and declared their determination to transform the

12 *Conflict Minerals Trade Act*, H.R. 4128, US House of Representatives; *ITRI Tin Supply Chain Initiative, Discussion Paper Version 2*, ITRI, October, 2009.

13 A more detailed description of the ICGLR is given in **Section 2.4 — The International Conference on the Great Lakes Region**.

14 The ICGLR member countries are Angola, Burundi, Central African Republic, Democratic Republic of the Congo, Kenya, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia.

Great Lakes from a region of endemic conflict and insecurity into a region 'of sustainable peace and security for States and peoples', a space 'of political and social stability, shared growth and development'<sup>15</sup>.

The heads of state met again on December 15, 2006, in Nairobi and adopted the Pact on Peace, Stability and Development in the Great Lakes Region. The Pact is intended to provide a legal framework governing relations between the Member States, and create the conditions for security, stability and sustainable development between the Member States. A legally binding document, the Pact entered into force on June 21, 2008.

While the Pact contains 10 protocols, four programmes areas and 33 priority projects, and addresses a variety of key issues including peace and security, democracy and good governance, and economic develop and regional integration, the key document for the purposes of mineral tracking and certification is the Protocol Against the Illegal Exploitation of Natural Resources (the 'Protocol')<sup>16</sup>.

The Protocol is the key legal foundation upon which efforts to establish mineral tracking and certification in the Great Lakes region are being built. The 37 Articles of the Protocol require, among other things, that Member States cooperate in the fight against the illegal exploitation of natural resources, protect of human rights, criminalize both the illegal exploitation of natural resources and the laundering of the proceeds of illegal natural resource exploitation, and put an end to impunity for entities and individuals found guilty of such exploitation.

On the proactive side, the Protocol calls for Member States to take preventive measures, specifically the creation of a Mechanism for the Certification of Natural Resources from the region, and furthermore creates and empowers a committee composed of representatives of the Member States to bring this certification system into being.

As an integral part of the Pact, the 37 Articles of the Protocol have the force of law in member countries, and equally importantly the political support of the presidents, prime ministers and executives of the 11 Members States.

The Executive Secretariat of the ICGLR is headquartered in Bujumbura, Burundi. The Secretariat serves as the technical and coordinating body of the ICGLR.

The committee called for in the Protocol – the Steering Committee – has been established and has been working to implement the certification scheme as outlined and required in the Protocol. As noted previously, a version of this analysis and proposal for a tracking and certification scheme was presented to the Steering Committee during its meeting in Bujumbura on April 12-15, 2010; the four main structural elements of the proposed scheme were adopted by the Steering Committee as the basis of an ICGLR Mineral Tracking and Certification Scheme, to be integrated into the ICLGR's Regional Initiative on Natural Resources (RINR).

The RINR and its certification and tracking scheme were in turn approved by a conference of the ICLGR mining ministers in Nairobi in September, 2010, and then formally adopted by the ICGLR heads of state, as noted in the Lusaka Declaration of December 15, 2010. The ICGLR is thus now fully committed to bringing a regional tracking and certification scheme into being.

## II. Explanation of Existing Schemes

In response to the challenge posed by untracked minerals, a number of agencies, some government, some private sector, have developed proposals and schemes for certifying or tracking minerals of Central African origin. The sheer number of initiatives has led to some confusion as to the scope of each initiative, the minerals covered, the sponsoring agency, the mechanics, and so forth. The brief explanations below attempt to clarify the most salient points of each of the current or planned schemes.

15 *Dar Es Salaam Declaration on Peace, Democracy and Development in the Great Lakes Region*, First Summit of Heads of State and Government, Dar Es Salaam, 19-20 November, 2004.

16 The Pact, Protocol and other key documents available for download on the ICGLR website: [www.icglr.org](http://www.icglr.org).

Figure 5 below, shows graphically how the various schemes fit together, and where they overlap. Tables 1 through 3 provide a side-by-side comparison of various scheme elements such as scope, minerals covered, transparency, auditing procedures, and non-compliance mechanisms.

#### **BGR/ DRC:**

The German Federal Institute for Geosciences and Natural Resources (BGR) is working with the government of the DRC on a certification system for artisanal mine sites. The system will feature a mapping database (using GPS and satellite imagery) of active artisanal sites in the DRC, plus standards for artisanal production. An audit or inspection process will verify that the standards are being followed at each site. Mine sites failing the certification process will not be permitted to contribute material to mineral exports. For the tracking element, the BGR mine site certification programme is intended to work in concert with the mineral tracking system currently being developed and implemented by the DRC government. The system will apply to all DRC minerals. Data will be held by the DRC government. The system is intended to be brought on line and turned over the DRC authorities by the end of 2011.

The BGR initiative is entirely compatible with the ICGLR initiative. BGR/DRC determinations of mine site certification will serve as the basis for decisions as to which mineral sources are acceptable. BGR/DRC data on mineral flows will feed into the ICGLR database, thus serving to track mineral flows across the region.

#### **BGR/Rwanda (CTC):**

In Rwanda, the German Federal Institute for Geosciences and Natural Resources (BGR) has been working in conjunction with the Office of Geology and Mines of Rwanda (OGMR) and selected Rwanda mineral producers on a pilot project to establish Certified Trading Chains (CTC) for a selected number of the country's larger mineral producers. The CTC involves measuring company compliance to a set of five guiding principles. The first principle covers traceability<sup>17</sup>: origin and volumes of produced and traded goods as well as company payments to host governments are transparent. An outside auditor assesses the companies for their compliance to the five principles, giving them a rating from 0 to 4<sup>18</sup>. Given the importance of mineral tracking in light of the requirements of the US Dodd-Frank act, the CTC scheme requires companies to have a perfect score for the mineral tracking requirement.

For all other principles and standards, companies must receive an acceptable score to continue operation, but once certified are left to operate unsupervised between audits. Periodically, auditors return to monitor continued compliance with the five principles, as well as improvements in criteria with lower scores.

The BGR/Rwanda (CTC) initiative is also fully compatible with the ICGLR initiative. BGR determinations of producer certification will help to determine which Rwanda mineral sources are acceptable. Further work will be needed in order that data on mineral flows can be generated, to feed into the ICGLR database.

#### **ITRI/ITSCi:**

ITRI, the International Tin Research Institute, is a London-based tin industry association made up of tin smelters and cassiterite traders. In response to market campaigns pressuring tin end-users (notably in the electronics industry)<sup>19</sup>, ITRI has been working to develop ways to assure tin end users that the tin being sourced by ITRI members in Africa does not come from conflict-related mine sites. The ITRI program is known as ITSCi – ITRI Tin Supply Chain Initiative.

The program has two current phases. ITRI phase 1 is directed at establishing licensing and documentation standards from the level of comptoirs upwards: thus from comptoirs in the DRC and Rwanda up through re-processors (largely in Rwanda) to smelters. Phase 1 is now complete<sup>20</sup>. Results are difficult to assess, as ITRI has not published any data or results from this project, nor allowed any outside oversight of methods, procedures or resulting data. ITRI policy is to retain this information as confidential, though an outside auditing procedure is envisaged.<sup>21</sup>

17 The other four principles involves working conditions, company security and respect for human rights, community consultation, and environmental performance

18 *Certified Trading Chains in Mineral Production: Principles and Standards*, Dr. Gudrun Franken, BGR, November, 2008

19 *From Mine to Mobile Phone: The Conflict Minerals Supply Chain*, John Prendergast and Sasha Lezhnev, The Enough Project, December 2009

20 *ITRI Tin Supply Chain Initiative, Discussion Paper Version 2*, ITRI, October, 2009

21 personal communication, Kay Nimmo, February, 2010

ITRI phase 2 is geared towards establishing cassiterite and tantalum tracking within the DRC from the mine site to the comptoir. To accomplish this task, ITSCi has developed a plan for a system of numbered seals, tamper proof sacks, and computerized data collection<sup>22</sup>. In early May, 2010, ITSCi undertook two 6-month pilot projects to try out this technology, one in South Kivu, one in North Kivu<sup>23</sup>. The ITSCi plan is to track and reconcile these mineral flows via a proprietary database. As with ITRI Phase 1, ITRI policy is not to divulge the contents of the database. Verification of the results of the ITSCi tracking system is envisioned as taking place via a system of audits, through a procedure as yet undefined.

ITSCi has begun these projects in cooperation with the government of the DRC; one of the conditions of that cooperation is that the data collected by ITSCi belongs to the DRC government, to use as DRC authorities determine.<sup>24</sup> In September, 2010, ITSCi also entered into an agreement with the government of Rwanda to begin implementing mineral tracking for Rwandan mineral producers.

The ITRI Phase 2 initiative (mine to comptoir) is thus fully compatible with the ICGLR initiative. The ITSCi mineral tracking data, should the pilot prove successful, can be fed into the ICGLR database, thus serving to track mineral flows across the region.

The ITRI Phase 1 initiative (from comptoir to smelter) covers a similar stretch of the mineral chain as the regional tracking element of the ICGLR initiative. However, the ITRI initiative is concerned principally with licensing and documentation standards, and not with data collection or data-based tracking of mineral flows. Verifying these mineral flows will thus require on-the-ground audits to collect and examine documentation stored with assorted actors in the mineral chain<sup>25</sup>.

The ICGLR initiative will record these regional mineral flows in the ICGLR database, allowing for ongoing tracking and scrutiny of regional mineral flows, via a process open to public oversight. The ICGLR initiative further provides for regular third party audits. These differences do not render the two systems incompatible. Indeed, the documentation standards established by ITRI phase 1 will facilitate the process of data collection for the ICGLR system. Over time, industry, African and foreign governments, and civil society may find that only one system is required in order fully assure the sourcing of minerals from the Great Lakes region. This paper argues that the ICGLR system, which involves greater transparency, and public involvement and oversight, will likely prove the more robust of the two systems.

#### **OECD:**

The Paris-based Organisation of Economic Cooperation (OECD) has recently completed work on a project of due diligence for supply chain management for minerals from conflict and high risk areas. The final document, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, was adopted and approved by the OECD in late 2010.

The intent of the Guidance is to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices. The Guidance is also intended to cultivate transparent mineral supply chains. In terms of concrete tools, the Guidance provides a model mineral supply chain policy, suggested measures for risk mitigation, and indicators for measuring improvement. In addition, the Guidance contains a supplement on tin-tantalum-tungsten tailored to the challenges associated with the structure of the supply chain of these minerals. Though voluntary and not legally enforceable, the Guidance and the OECD carry substantial weight in the corporate and government sectors.

The OECD initiative provides a welcome complement to the ICGLR system. In particular, the requirement for due diligence and independent audits at the smelter level will extend this necessary oversight to the top of the mineral chain, one step beyond the limits of the authority vested in the ICGLR. In view of this, the OECD Due Diligence Guidance was endorsed by the eleven member states of the International Conference on the Great Lakes Region (ICGLR) in their Lusaka Declaration, adopted on 15 December 2010.

22 *ITRI Tin Supply Chain Initiative, Discussion Paper Version 2*, ITRI, October, 2009

23 Interview with Manasse Shubazi, Consultant, ITSCi project, Goma, April 21, 2010

24 Personal communication, Paul Mabolia Yenga, Ministère des Mines, DRC Government, April, 2010

25 As noted above, the ITRI process does envisage a process of audits, though the details remain as yet undefined

**GeSI/EICC:**

The Global e-Sustainability Initiative (GeSi) and the Electronic Industry Citizen Coalition are two electronics industry associations that have, in response to pressure from consumer groups and non-governmental organizations, begun work on a sourcing and auditing standard for tantalum smelters source material from the DRC. The project began in December, 2009, and is as yet still in the very early stages. Further details on this initiative can be found in Section 5 of the present report.

**ICGLR:**

The ICGLR Mineral Tracking and Certification system, part of the ICGLR's Regional Initiative on Natural Resources (RINR) is the subject of the present study. The four key elements of the system are as follows:

1. Chain of custody tracking from mine site to export;
2. Regional mineral tracking using an ICGLR database;
3. Independent third-party audits;
4. An Independent Mineral Chain Auditor

The underlying principles and functional working element of this system are described in some detail in Section 4.

## 3. Lessons from Other Certification Mechanisms

### 3.1 Clarity of Purpose

*It is important that the purpose of standard setting and supply chain monitoring be clearly established from the outset. Limited objectives aimed at solving an immediate problem such as 'conflict' may produce a system that is incapable in the longer term of dealing with underlying problems of governance, development or ethical mining practices.*

#### The Kimberley Process:

'The Kimberley Process (KP) is a joint governments, industry and civil society initiative to stem the flow of conflict diamonds – rough diamonds used by rebel movements to finance wars against legitimate governments.'<sup>26</sup>

#### The Responsible Jewellery Council:

Responsible Jewellery Council Members 'are committed to promoting responsible ethical, human rights, social and environmental practices in a transparent and accountable manner throughout the industry from mine to retail. Their commitment aims to reinforce consumer and stakeholder confidence in jewellery products.'<sup>27</sup>

#### Diamond Development Initiative International:

DDII's 'Development Diamond Standards' currently under development 'will set minimum performance standards in regards to social, economic, environmental, labour, trading and/or governance issues for operations in developing countries.'<sup>28</sup>

#### The Forestry Stewardship Council:

The Forestry Stewardship Council 'is an independent, non-governmental, not-for-profit organization established to promote the responsible management of the world's forests.'<sup>29</sup>

#### Action by the US Congress:

The Congo Conflict Minerals Act (S. 891, introduced 23 April 2009) and the Conflict Minerals Trade Act (H.R. 4128, introduced 11 November 2009) aimed 'to promote peace and security in the eastern Democratic Republic of the Congo by supporting efforts of the Government of the Democratic Republic of the Congo, other governments in the Great Lakes Region of Africa, and the international community to:

1. Monitor and stop commercial activities involving the natural resources of the Democratic Republic of the Congo that contribute to the activities of armed groups and human rights violations in the Democratic Republic of the Congo; and
2. Develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving the natural resources of the Democratic Republic of the Congo in order to reduce exploitation by armed groups and promote local and regional development

<sup>26</sup> Kimberley Process website: <http://www.kimberleyprocess.com/>

<sup>27</sup> RJC website: <http://www.responsiblejewellery.com/>

<sup>28</sup> The DDII standards project is described at <http://www.ddiglobal.org/pages/projects-dds.php>

<sup>29</sup> FSC website: <http://www.fsc.org/about-fsc.html>

Elements from these two bills were later combined and added into Title XV, Section 1502 of the *Dodd–Frank Wall Street Reform and Consumer Protection Act*, which was passed and signed into law 21 July 2010. Section 1502 contains a series of provisions designed to control US companies' use of 'conflict minerals'. (For the purposes of the act, 'conflict minerals' are defined as coltan (columbite-tantalite), cassiterite, wolframite, gold and their derivatives.)

The US law applies to only to reporting companies, that is US public companies with \$10 million in assets, which are required to file quarterly reports to the Securities and Exchange Commission (SEC). The law requires affected companies to disclose as part of their regular reporting whether any conflict mineral used in the production or functionality of any of their products was sourced in the DRC or any adjoining country. If a conflict mineral was used, and was sourced in the DRC or adjoining country, the company is required to prepare and submit to the SEC the following:

1. a report describing the measures taken by the reporting company to exercise due diligence on the source and chain of custody of the conflict mineral;
2. an independent audit of the above report (including the name of the auditor);
3. a description of the products manufactured by the Reporting Company or manufactured for it by a contractor that are not 'DRC conflict free' (that is, the products that do contain conflict minerals from the DRC or one its immediate neighbours);
4. a description of the facilities used to process the conflict minerals;
5. the country of origin of the conflict minerals;
6. a description of the efforts employed by the Reporting Company to determine the mine or location of origin of the conflict minerals 'with the greatest possible specificity'.

Finally, the law requires the reporting company to make all of this information publicly available on the company's website on the Internet.

## Discussion

An initial strength of the Kimberley Process was its narrowness of purpose: basically it aimed to halt the use of diamonds as fuel for war waged by rebel armies against legitimate governments. It had no ambitions with regard to the environment, labour standards, gender, development or sustainability. Conflict diamonds were a genuine human security problem fuelling hugely destructive wars in several countries, and they had become a focus of concern for the UN Security Council.

While reaching an agreement among some four dozen countries, industry and campaigning NGOs was not simple, it was easier than it might have been for four basic reasons:

- There was a clear and *urgent* humanitarian purpose;
- Media-savvy NGO campaigns posed a commercial threat to the diamond industry;
- The UN Security Council was apprised of the issue and produced reports that corroborated what NGOs were saying;
- The objectives of the Kimberley Process were narrow and easily understood.

Problems developed within two or three years of KPCS implementation, however, when it became clear that the humanitarian *problematique* could not be fully divorced from development issues, governance or human rights. The roots of conflict diamonds lie primarily in the alluvial diamond fields of Africa where some 1.3 million artisanal diggers work, mostly under very poor conditions, often informally, and usually for about a dollar a day. As a regulatory system, the Kimberley Process did not address the economic and development motivation of people who were eminently vulnerable to economic and military predators.

When it became clear that some governments in the Kimberley Process had no desire to expand the KPCS mandate, however, two new organizations emerged. The Diamond Development Initiative International (DDI) was formed as a joint NGO-industry-government body aimed at addressing the underlying economic problems of artisanal diamond mining in the countries most affected by conflict diamonds. In addition to research, evaluation, on-the-ground projects and policy development, DDI is creating standards for 'development diamonds'. The aim is to develop labour, environmental and other standards that are accessible to small producers, allowing them to sell their goods for fair prices into a supply chain that wants ethically produced goods.

The second organization, the Responsible Jewellery Council, is an industry body made up primarily of larger companies ranging from mining through to retail sales. The RJC mandate includes gold and diamonds. Like the Forestry Stewardship Council, RJC's aim is enhanced consumer confidence through the promotion of sustainable development and respect for human rights in the extraction and production processes.

When human rights became an issue in the expulsion of illegal diamond miners from Angola and from the diamond fields of Marange in Zimbabwe, the Kimberley Process was divided in its response. Although human rights abuse is mentioned in the basic KP document, several governments have stated strong opposition to specific reference to human rights in KPCS minimum standards. But when some 200 artisanal miners were killed by Zimbabwean armed forces at the end of 2008, a loud media campaign developed through 2009. The November 2009 KP Plenary meeting became deadlocked over the issue, however (**this is discussed in greater detail below**).

It is important, therefore, in working towards an agreement on other commodities, to be clear in the purpose, and to think beyond the immediate. It may be more appropriate for industry than for a multi-stakeholder body to deal with definitions and details of 'sustainable development' in particular commodities and processes.

If the fundamental problem around a commodity is conflict, however – rather than basic theft and illegality – it is important in devising solutions to understand what fuels the conflict. If elements include poverty, bad governance, corruption and illicit behaviour, these perhaps need to be taken into consideration from the start.

At a minimum, the relationships between conflict, governance and human rights abuse (now and potentially in the future) need to be considered. It did not occur to the framers of the KPCS, for example, that some participating governments might abuse basic human rights in the management of their diamond industries. The subsequent uproar, still unresolved, has brought the KP into public disrepute and diverted it from other pressing matters.

## 3.2 Operational Considerations

*A variety of checks are possible for traders, exporters and processors, but these are only as good as controls and data gathering in primary producing areas. If goods are dropped into the stream before checking takes place, no amount of downstream certification will remedy the problem.*

### In Mining Areas:

Areas where minerals are extracted or where renewable resources are harvested must be free of military activity. That may seem self-evident, but even the presence of government forces may become problematic if prolonged.

Beyond their reference to human rights, the RJC and FSC are silent on this subject, as is the Kimberley Process. Government forces in Zimbabwe's diamond fields and across Angola have exacerbated rather than diminished

to the problem of human rights abuse. As of mid-2009, 12 of 13 major tin, tungsten and tantalite mines (the '3Ts'<sup>30</sup>) in the eastern DRC were controlled by military forces – either the Democratic Forces for the Liberation of Rwanda (FDLR), or the Congolese army, the latter mainly for purposes of personal enrichment.<sup>31</sup>

Beyond the question of military activity and whether a resource is being produced sustainably or in a developmentally sound way (see 'purpose' above) there is a basic requirement that production be properly monitored and documented so that commodities from other areas cannot enter a controlled production area and be passed off as 'clean'.

The KPCS states that all participants must 'establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory.' That much is **required**, but the details are left to each participant, in **non-binding recommendations**:

- Participants are encouraged to ensure that all diamond mines are licensed and to allow only those mines so licensed to mine diamonds;
- Participants are encouraged to ensure that prospecting and mining companies maintain effective security standards to ensure that conflict diamonds do not contaminate legitimate production;
- All artisanal and informal diamond miners should be licensed and only those persons so licensed should be allowed to mine diamonds;
- Licensing records should contain the following minimum information: name, address, nationality and/or residence status and the area of authorized diamond mining activity.<sup>32</sup>

These are all good recommendations, but in most of the countries worst affected by conflict diamonds they have not been applied, or they have been applied badly.

KP review visits to Guinea, Sierra Leone, DRC and Angola have repeatedly recommended tighter internal controls to almost no effect. In DRC in 2008, 43% of the diamonds exported entered the legal system through *comptoirs* in Kinshasa where it is impossible to verify their provenance.<sup>33</sup> Production figures are extrapolated from export figures and are often identical in some countries, demonstrating a complete lack of information about volumes and values actually produced. This means that the government cannot say with any certainty whether the diamonds being exported are 'clean', or whether they were even produced within the national borders.

## Discussion

There are several problems with the Kimberley Process system:

- A vague definition of what is **required** in the way of internal controls;
- Weak government oversight (untrained and/or ill-equipped mine monitors);
- Corruption (a mine monitor earning \$50 a month may be expected to report on operations which produce hundreds of thousands of dollars' worth of diamonds in that period);
- Weak KPCS monitoring (more on this below);
- Weak or non-existent KPCS follow-up on clearly identified problems.

The legislation currently before the United States Congress is more specific on the requirement for field monitoring. It specifies that facilities processing conflict minerals must subject themselves to random audits by approved auditors at least every four months if the mineral in question is to be imported into the United States. Facilities will be defined as 'conflict mineral free' or a 'conflict mineral facility'. Auditing determinations and reports will be published. Facilities may request additional, private audits. Audit protocols are defined in the bills.

30 Tin is produced from cassiterite ore, tungsten is produced from wolframite ore and tantalum is produced from columbite-tantalite ore, known colloquially as coltan.

31 Steven Spittaels & Filip Hilgert, 'Accompanying note on the interactive map of Militarized mining areas in the Kivus', IPIS, August 2009, <http://www.ipisresearch.be/news.php?id=264>

32 KPCS core document: [http://www.kimberleyprocess.com/documents/basic\\_core\\_documents\\_en.html](http://www.kimberleyprocess.com/documents/basic_core_documents_en.html)

33 DRC statistics cited in Diamonds and Human Security Annual Review 2009, Partnership Africa Canada, Ottawa, p. 12

If this legislation becomes law, determination of the adequacy of internal controls will lie with third party monitors and with officials of the *importing* country, rather than with the producer government or a multi-stakeholder group that is prone to political calculation and weak follow-up.

In designing future certification systems for 'conflict minerals', the burden of proof properly lies with the producing authority, but the determination must be professionally and politically unimpeachable. Weaknesses in the Kimberley Process demonstrate that independent, third party verification is a *sine qua non*. This should not be as contentious as it has become. Independent third party verification is standard practice for products, services and management systems throughout the world. It is only resisted where individuals, companies and governments cannot or will not meet agreed standards.

A note (**below**) outlines conformity assessment as defined and managed by the International Organization for Standardization (ISO).

In its promotion of standards for members, the Responsibly Jewellery Council will use third party verification and expects to accredit organizations similar to those used by the ISO. Third party verification is also required by the Forestry Stewardship Council for verification of its standards and chain of custody.

## The Traders:

### In Producing Countries

Most minerals that are mined artisanally, including diamonds, gold and the 3Ts, are purchased by middlemen before they reach the point of export. These traders, dealers, *négociants*, *maisons d'achat*, and *comptoirs* are usually required to purchase an annual license, although many do not. Most transport their goods as well, either to the capital city or across borders for onward trade.

These traders are often the first step in formalizing the artisanal trade, and most know the product much better than miners and diggers. They know the quality of the goods they purchase and their value, and because they are usually close to mining areas, they often know where it came from.

The traders are often the weakest link in the chain, however. The cost of a trading license is usually high, leading to evasion and illicit behaviour. Traders could be required to know and verify the source of the goods they purchase ('*know your supplier*'), but this is rarely the case. They could be audited, but this rarely happens, and their records are rarely complete or transparent. Many are members of minority communities (e.g. the Lebanese diaspora; the Madingo traders of West Africa), with secretive and widespread cross-border family connections. Those engaged in smuggling may simply seek better prices elsewhere, but they may also be involved in low-level money laundering or transfer pricing, using exported minerals to finance the import of goods used in another line of business. Government officials are sometimes placed in their offices to oversee their activities, but this is usually for taxation purposes rather than part of a holistic monitoring process, and it quickly becomes an opportunity for extortion and bribery respectively among underpaid government officials and traders seeking to minimize taxation.

### In Trading Countries

Rough diamonds and coloured gemstones may travel through two or three countries before they reach the processing stage. The same may be true for other minerals, in which case the role of traders in transit countries must also be addressed. The KPCS probably has the most thorough set of recommendations on rough diamond buyers, sellers and exporters, with generic application to those in both producing and transit countries:

- 'All diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed by each Participant's relevant authorities;
- 'Licensing records should contain the following minimum information: name, address and nationality and/or residence status;
- 'All rough diamond buyers, sellers and exporters should be required by law to keep for a period of five years daily buying, selling or exporting records listing the names of buying or selling clients, their license number and the amount and value of diamonds sold, exported or purchased;
- 'The information [regarding licensing records] should be entered into a computerized database, to facilitate the presentation of detailed information relating to the activities of individual rough diamond buyers and sellers.'

In addition:

- 'Participants are encouraged to make known the names of individuals or companies convicted of activities relevant to the purposes of the Certification Scheme to all other Participants through the Chair;
- 'Participants are encouraged to ensure that all cash purchases of rough diamonds are routed through official banking channels, supported by verifiable documentation.'

Further, when the KPCS was being negotiated, the World Diamond Council announced a 'voluntary system of industry self-regulation' which aimed to 'provide for a system of warranties underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry, which will help to facilitate the full traceability of rough diamond transactions by government authorities.'

## Discussion

These KPCS provisions make sense, and some have been followed, resulting in better records and a major increase in official diamond exports from some countries. But there are several weaknesses:

- They are simply recommendations; there is no requirement that any be adopted;
- Over six years of KPCS application, many have simply been ignored. Licensing requirements are variously applied; records in many cases are inadequate, incomplete or nonexistent; and there has been almost no exchange of information about individuals or companies convicted of relevant crimes;<sup>34</sup>
- The 'voluntary system of industry self-regulation' is weak in the extreme. It is applied in a handful of industrialized countries, and consists mainly of a statement of warranty applied to invoices with a rubber stamp. It is likely that 'verification by independent auditors of individual companies' has never taken place within the diamond industry, and independent audits by governments are noticeable by their absence. Belgium may be the only country that has actually carried out such audits in connection with KPCS provisions, and even there it is not done with great frequency.

In all of this, the problems are similar to those that relate to mining areas:

A set of 'voluntary' provisions that are rarely applied with any diligence;

- Weak government oversight (untrained and/or ill-equipped inspectors);
- Corruption;
- Lack of transparency;
- Weak KPCS monitoring;
- Weak to non-existent KPCS follow-up on clearly identified problems.

<sup>34</sup> When challenged on this, governments usually say that they cannot discuss cases that are before the courts, and in cases of conviction – even cases that have been widely reported in the media – they say that they cannot reveal confidentialities.

## Exporters, Data, and Transit Countries:

Most mineral exports require permits of some kind. If the price is too high, it will encourage smuggling. There may also be an export tax which, if pegged too high, will also encourage smuggling.

Where diamonds are concerned, most governments have learned that the higher the export tax, the greater the likelihood of smuggling. Usually rough diamond export taxes in Africa are pegged at 3% per cent. When the DRC imposed a 4% tax, large volumes of diamonds were immediately smuggled across the River Congo to Brazzaville where the tax was a point lower. High taxes on Venezuelan diamond exports accounts at least in part for the fact that the country's entire production has been smuggled out for more than three years.<sup>35</sup>

Where the Kimberley Process is concerned, in addition to the general provisions for traders and exporters noted earlier, there are some that are specific to the export process. The most notable is that participating governments must issue a certificate to accompany each export, certifying that the diamonds in the package meet KPCS minimum standards. The export process includes the following provisions:

- The Exporting Authority is encouraged, prior to validating a certificate, to require an exporter to provide a declaration that the rough diamonds being exported are not conflict diamonds;
- Rough diamonds should be sealed in a tamper-proof container together with the certificate or a duly authenticated copy. The Exporting Authority should then transmit a detailed e-mail message to the relevant Importing Authority containing information on the carat weight, value, country of origin or provenance, importer and the serial number of the Certificate;<sup>36</sup>
- The Exporting Authority should record all details of rough diamond shipments on a computerized database.

The first provision is only as effective as the internal controls that precede it. If these are weak, as is often the case, no 'declaration', whether 'encouraged' or required will make much difference.

The use of tamper-proof seals and the exchange of data with importing authorities at the other end of the transaction have been useful, however, in several ways, especially when combined with the Kimberley Process statistical data base. All participating governments must submit semi-annual production statistics (if diamonds are mined within their borders) and quarterly trade statistics. The data base records and compares trade between countries as well, which means that if Country A says it exported 100,000 carats valued at \$100 million to Country B, the import statistics for Country B should show roughly the same figures.<sup>37</sup> The data base is available on a members-only website that can be accessed at any time. Annual reviews of each country's data are carried out, and anomalies or spikes of plus/minus 15% are queried.

## Transit Countries

Before KPCS implementation, diamonds lost their original identity as they passed from one country to another, a problem common with other minerals. For KPCS purposes, 'transit' refers only to diamond shipments that leave the territory in a state identical to the one in which they arrived, meaning that shipments must remain unopened and not tampered with in any way. If shipments are to be opened, the diamonds must be re-exported with a new certificate issued by the government of the country where they have been opened. This rather simple arrangement solved what had been a complex problem.<sup>38</sup>

35 The Venezuela case has been widely documented. The official Venezuelan explanation is that production and exports have been halted, but the government has renewed mining licenses and Venezuelan diamonds are readily available for sale in border towns with no questions asked.

36 The use of emails has been somewhat curtailed for security reasons. Other forms of notification are used as a substitute.

37 The Kimberley Process gathers data on diamonds that fall under three HS customs codes: unsorted diamonds; partially sorted diamonds and industrial diamonds.

38 Switzerland, for example, hosts duty free zones where diamonds had historically arrived from producer countries for sorting, repacking and re-export. Because they did not enter Switzerland, these diamonds were not recorded in Swiss trade statistics. On leaving Switzerland, however, their origin was obscured and they arrived at their next destination as 'Swiss' diamonds. Under the KPCS, any package of diamonds being opened in Switzerland for any reason must be supervised by the relevant Swiss authorities. If diamonds are re-exported, they must be accompanied by a Swiss KP certificate. That way a clear trail is created, even if the diamonds do not officially enter Switzerland.

## Discussion

*A reliable data base capturing production and trade statistics, and the exchange of official data on commodity trade, are important elements in effective regulation. It is essential that commodities from other areas cannot enter a controlled production area and be passed off as 'clean'.*

The export certification and KPCS data gathering have been useful in identifying rogue shipments, disappearing shipments, the misidentification of customs codes, clerical errors and other difficulties. Counterfeit and forged certificates have been identified and accompanying shipments seized. Non credible statistics have been queried, and in one case, (Republic of Congo) a country was expelled from the Kimberley Process because it could not explain where large volumes of exported diamonds had originated.

There is an additional problem that the KPCS has largely resolved: 'ghost production'. Prior to the KPCS, during the 1990s, Belgium recorded billions of dollars' worth of diamond imports from countries with limited or zero diamond resources: Liberia, Gambia and Zambia, among others. That stopped with KPCS implementation. But the problem of ghost production is rampant today in other commodities. For example in 2008, DRC produced an estimated 5.5 tons of gold but officially exported only 270 pounds. Uganda officially produced less than \$600 worth of gold in 2007, but exported more and \$74 million. Rwanda produced \$8 million worth of tin ore but exported at least \$30 million.<sup>39</sup>

A reliable data base capturing production and trade statistics would be helpful in identifying more clearly a problem that is obviously significant for several minerals. And an exchange of official data on commodity trade would help as well. As noted earlier, however, the system is only as good as the original production data and internal controls. If goods are dropped into the stream before effective checking takes place, no amount of downstream certification will remedy the problem.

Tax harmonization among neighbouring countries could also be a useful tool against smuggling.

But, of course, the system is only as good as its ability and willingness to enforce compliance. The Venezuelan problem and major anomalies in the statistics of Guinea and Lebanon have been discussed without resolution in meetings of the KP.

### **The Refiners, Cutters and Polishers:**

Companies that process tin, tantalum, tungsten and gold are located in many countries, but most of these minerals are processed by a few large companies. A high percentage of the world's diamonds are cut and polished in India, with lesser amounts processed in Israel, China, Belgium and the United States. In most cases, however, refiners, cutters and polishers have been ignored in the effort to curtail conflict minerals.

Proposals were developed by the International Tin Research Institute (ITRI) in 2009 to trace the origin of DRC tin supplies. The ITRI's proposals, which would require traders and middlemen to declare the origin of minerals, do not appear, however, to include a mechanism for independent verification of information provided by suppliers. The proposals also fail to take into account the fact that one container-load of ore could be sourced from as many as 10,000 artisanal miners, making simple declarations somewhat meaningless.

Where diamonds are concerned, cutting and polishing factories remain a convenient laundry for rough diamonds that have evaded KPCS scrutiny. The volume of illicit goods is growing: 100% of Venezuela's production; conflict diamonds from Côte d'Ivoire; plus an unknown volume of smuggled and stolen goods. Major seizures of illicit diamonds in India, Dubai and elsewhere in recent months may be the tip of an iceberg. Repeated calls for the inclusion of cutting and polishing factories in KPCS oversight, however, have been ignored.

39 Various sources cited in John Prendergast and Sasha Leznev, 'From Mine to Mobile Phone: The Conflict Minerals Supply Chain', Enough, pp. 4-5

Once a drop of water has fallen into a bucketful, it is indistinguishable from the rest. It is essential, therefore, that companies smelting conflict-prone minerals, as well as those that cut and polish diamonds, document their sources, and that their records be made subjected to independent audit.

### End User Companies and Retailers:

Some companies have decided to source their materials from known suppliers in countries without conflict. Tiffany & Co. purchases all of its gold from a single mine in Utah. Some jewellers deal only in Canadian diamonds, or make Canadian diamonds a clear option for concerned customers.

Avoidance of African suppliers may be an option for some minerals and for a small number of companies. But it is not a viable option for the wider diamond industry, because almost 60% of the world's gem diamonds are produced in Africa. It is not a viable option for an electronics industry that relies heavily on coltan,<sup>40</sup> a significant proportion of which is produced in the DRC. And avoidance of African minerals by prominent end-users only makes life more difficult for very poor people in very poor countries. They continue to mine and sell, but at discounted prices to ever-present predators with dubious provenance and few scruples.

In recent months, more and more trade associations have asserted their commitment to legality. For example the Tantalum-Niobium International Study Center (TIC) states that 'as a trade association [it] is following closely the developments relating to "coltan". This is obviously an important and sensitive matter, and the TIC, as an industry association, wants to reiterate its commitment to **lawful and ethical trade practices**. We have consistently insisted that our members adhere to these principles... [But] the TIC is **not a policing body** and... it is not in a position to prohibit or restrict lawful trade of "coltan" originating in Africa (*emphasis in the original*).

Lack of transparency in the supply chain, however, creates significant problems and suggests that statements of probity and propriety, even from well-known companies, cannot always be taken at face value. In December 2009, a Nevada company, Niotan, said categorically that it does not source tantalum from the Democratic Republic of the Congo and takes every possible step to ensure that tantalum tainted by conflict – in the form of 'coltan' or any other form – does not enter its supply chain. Furthermore, the company said, Niotan has a policy against the purchase of any tantalum precursor material originating from Democratic Republic of the Congo ore.<sup>41</sup> The Enough Project, however, responded almost immediately with detailed facts and figures showing that Niotan imports tantalum from a Hong Kong company which sources its ore in the DRC.<sup>42</sup>

### The Responsible Jewellery Council

As noted earlier, the Responsible Jewellery Council has developed a system to certify its members for responsible ethical, social and environmental practices throughout the diamond and gold jewellery supply chain.<sup>43</sup> The standards are tough. The certification system is open to all organizations in the diamond and gold supply chain, from mine to retail, and their trade associations. And the core of the RJC system is the use of independent, third-party auditing to verify compliance with the RJC Code of Practices. RJC members as of December 31, 2009 must undergo independent verification by December 2011, or December 2012 if they have mining facilities. New members must undergo independent verification within two years of becoming members.

This is one of the toughest and clearest industry certification systems so far, and as such it is highly commendable. Its weakness is that there is, as yet, no chain of custody tracking system. This means, for example that AngloGold Ashanti and De Beers on the mining end will ensure that there is no child labour in their mines, and at the retail end, Piaget and Cartier will ensure that there is no child labour in their shops.<sup>44</sup> But Piaget and Cartier are not limited to RJC members for their gold and diamonds, either directly or through the trading, refining and

40 'Coltan' is an abbreviation or nickname used only in parts of Africa for 'columbo-tantalite'. Mineral concentrates containing tantalum are usually referred to as 'tantalite'. Columbite contains the element columbium, another name for niobium; tantalite contains tantalum.

41 [http://www.mbandi.com/a\\_sndmsg/news\\_view.asp?l=104736&PG=35](http://www.mbandi.com/a_sndmsg/news_view.asp?l=104736&PG=35)

42 <http://www.enoughproject.org/blogs/niotan-inc-fails-address-concerns-about-conflict-minerals>

43 The certification mechanism and the standards were unveiled in December 2009: <http://www.responsiblejewellery.com/certification.html>

44 For a list of RJC's 140 members, see <http://www.responsiblejewellery.com/members.html>

manufacturing companies that are also members of the RJC. So child labour might still be a feature in products sold by Piaget and Cartier. The flaw in the system is its stovepipe nature and the absence of a chain of custody.

The weakness is acknowledged, and the RJC says 'In 2010, the RJC will investigate the applicability of such tracking systems to jewellery products. It is not the intention of the RJC to develop its own system of product tracking but to investigate the possibility of certifying the effectiveness, validity and claims made by proprietary tracking systems.'

### 3.3 Administrative CONSIDERATIONS

*What appears appropriate at the end of a lengthy period of difficult negotiation may not be adequate as the system matures. A basic tenet of law enforcement is that regulators must be flexible and they must be able to adapt to new conditions as outliers and criminal elements seek ways to outsmart the system.*

#### General:

At the beginning of 2010, the KP had 49 participating governments ('participants'), representing 75 countries.<sup>45</sup> The membership also includes observers: the diamond industry, represented by the World Diamond Council (WDC), and a civil society coalition.<sup>46</sup> The KPCS is not based on an international treaty; each participating country must make its provisions legally binding within its own borders. Where an international treaty might have been difficult to implement, the KPCS has the force of national law in each of its participants' jurisdictions.

A major KP strength is its tripartite nature, with the full participation of industry and civil society, along with governments.

The Kimberley Process is in many ways a virtual organization. The Chair of the Kimberley Process changes each year and serves mainly in a convening capacity, hosting two meetings annually – a plenary meeting and an 'intersessional' meeting. There is no secretariat beyond whatever administrative setup the Chair of the day deems necessary for its own purpose.

There are several 'working groups', each with the participation of governments, industry and civil society. A statistics working group, currently chaired by the United States, manages all data gathering, a statistical web site, and annual reviews of each country's data.

A monitoring working group, currently chaired by the European Commission, organizes review visits and follow-up, and deals with issues of non-compliance. Other working groups deal with rules and procedures, membership and technical issues. Working groups 'meet' as often as necessary by conference call, and at the semi-annual face-to-face meetings.

There is no budget as such for the KP or the KPCS. All participants and observers pay their own way to meetings and for their own participation on review visits.<sup>47</sup> The KP Chair covers the costs of the semi-annual meetings, and the Chairs of Working Groups cover their costs.

#### Discussion

The KPCS administrative arrangements were the product of concern that creation of a permanent secretariat could lead to an expensive, top-heavy body that might soon take initiative away from the participants. As a result, the lean arrangements make the Kimberley Process and the KPCS relatively inexpensive. They also ensure participation and a strong sense of 'ownership' from participants, industry and civil society.

<sup>45</sup> The European Community, representing EU member states, counts as a single participant.

<sup>46</sup> Observers play an active role in all committees, reviews and KP meetings.

<sup>47</sup> A small fund has been created to assist with the participation of Southern civil society organizations.

It has limitations, however, that have become more apparent with time. First, burden sharing is far from equal. The governments of many developing countries find the cost of participation high, and as a result, their participation in reviews and committees is limited. The civil society coalition, with limited resources and a relatively small number of organizations, bears a disproportionately higher cost in placing a member on each review team and participating in each working group.

Secondly, several of the essential functions of a global certification system are not managed well. There is weak follow-up on the recommendations of review teams. The annual review of statistics is handled on a voluntary basis by members of the statistics working group. Depth and follow-up are patchy. Complaints about problems of non-compliance may be shuffled among working groups for months, and difficult decisions are postponed and avoided (**see more on decision making, below**).

Third, the annual rotation of the KP Chair ensures that there is effectively no central authority and little continuity in the Kimberley Process. It takes a new Chair several months to become acquainted with the issues and to begin to grapple with one or two of the inevitable problems. By the time the Chair has started to become confident in the position, it is time for a new Chair to take over.

In contrast, other regulatory bodies have created full-time secretariats. This is true of the Extractive Industries Transparency Initiative (EITI), the International Campaign to Ban Landmines (ICBL), and the Forest Stewardship Council (FSC), which has a 40-person secretariat in Bonn and 50 regional and national affiliates globally.

## Decision Making:

*Decision making needs to be open, inclusive and non-obstructive, and it must be free of political interference.*

The Kimberley Process works on the basis of 'consensus' which it defines as unanimity. If one government (or an observer) objects to a proposal or to wording in a document, it will not go forward.

This version of consensus was important in the negotiations that led to the adoption of the KPCS. If a majority vote had been used to ram through provisions that were unacceptable to a major participant, the entire process might have collapsed. The United States, Russia, Israel, Australia and China all had serious problems with some of the proposals that were debated between 2000 and the KPCS adoption at the end of 2002. All of these countries were essential to reaching a global agreement, and were therefore permitted what amounted to a veto.

That approach to decision making has come to hobble the KP over the ensuing years in a variety of ways. It has prevented the imposition of sanctions against participants in cases of serious non-compliance; it has halted a wide variety of reform measures that could have made the KPCS more efficient and effective; it has allowed parochial political agendas to trump badly needed change; it suppressed many of the recommendations in a review of the KPCS after its first three years of operation; it has ensured that there is little or no transparency; and it has even caused the UN General Assembly to pass completely misleading resolutions (**see below**).

## Discussion

Consensus was probably important in reaching the basic KPCS agreement at the end of 2002, although it is debatable whether one or even two or three major players in the diamond world could have 'walked away' from the agreement that was eventually reached. The United States, for example, was then in the early days of the Bush Administration when several longstanding multilateral agreements to which the US was party were being abrogated. Although the Bush Administration was disinclined to join any binding new multilateral

### INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) INITIATIVES

The ICT industry is a major consumer of several minerals that are prone to conflict. Two bodies, the Global e-Sustainability Initiative (GeSI)<sup>48</sup> and the Electronic Industry Citizenship Coalition (EICC)<sup>49</sup> were created during the 2000s to develop codes of conduct for industry members. These are not unlike dozens of corporate codes, but they do not deal with source and supply chain problems, and member companies have been at the forefront of growing public criticism.

In 2009, the two organizations commissioned a joint study on 'Social and Environmental Responsibility in Metals Supply to the Electronic Industry'.<sup>50</sup> The overall objective of the study was 'to help these organizations understand how aluminium, cobalt, copper, gold, palladium and tin are mined, recycled, purchased and where they are used in electronics products' and to make recommendations on 'whether and how the members of these organizations can effectively influence social and environmental issues associated with production of metals used in electronic products.' Shorthand: how can companies guarantee clean supplies?

Perhaps as a result of the study and growing pressure, EICC and GeSI have decided to tackle one of the more controversial minerals, tantalum. With representatives of the tantalum supply chain, they plan to 'develop a process certifying smelters who (sic) obtain tantalum through responsible sources. [They] also agreed to pilot a procurement process used by smelters down to the miners to ensure materials... originate from socially and environmentally responsible mines. This process initially will be used in the Democratic Republic of Congo and surrounding countries. Agreed upon next steps include development and launch of the certification program, and definition of the procurement pilot scope, methodology, success criteria and participants.'

The scheme was only announced in December 2009, and has yet to be developed or implemented.

arrangement, the American jewellery industry, which sells half of the world's gem diamonds in a year, made it clear how important the KPCS was to its continued health.

Regardless of the rationale for 100% consensus in the basic agreement, the day-to-day management of the Kimberley Process has been weakened by this kind of decision making, which has resulted in lengthy debate on almost every issue it confronts, and frequent vetoes. Just as a reasonable consensus was required to reach agreement on the core document, it makes little sense to perpetuate an arrangement where each decision can – and often is – blocked by one or two participants.

A different kind of voting system should have been devised for change and reform following the system's start-up. Creative ways could have been found after a two-year moratorium on change, for example, to use simple and super majorities for issues of varying importance.

### Monitoring:

In any system dealing with standards and supply chains, monitoring is essential. This is especially true where conflict minerals are concerned.

From the beginning, monitoring was a highly contentious subject in Kimberley Process negotiations. Diamonds were regarded as a 'strategic mineral' in Russia, for example, and data regarding production and trade was classified. In many countries there were commercial sensitivities and security issues. There were also worries about change in an industry that had operated for generations in a certain way: one large cartel; hundreds of small family-owned businesses; bourses that operated like clubs; transactions based on handshakes and cash, and not very much documentation.

In the initial KPCS agreement, there was provision only for monitoring in cases of 'significant non-compliance', a term that was never defined. A year after the KPCS came on stream in 2003, a stronger monitoring arrangement was agreed. The current KPCS 'peer review mechanism' takes a systems approach to monitoring. A team, usually comprising three representatives from other governments and one each from industry and civil society, reviews

48 An international partnership of companies involved in the ICT industry. Full members include Verizon, Nokia, AT&T, Hewlett-Packard and others. NGO associate members include the Carbon Disclosure Project and WWF: <http://www.gesi.org>

49 A group of companies 'working to create a comprehensive set of tools and methods that support credible implementation of the EICC Code of Conduct throughout the Electronics and ICT supply chain'. Some of the membership overlaps with GeSI; includes companies such as Sony, Dell, Xerox, Phillips and Samsung. <http://www.eicc.info/Home.html>

50 <http://www.gesi.org/LinkClick.aspx?fileticket=anlAuBauWU8%3d&tabid=75>

a participating country's KP-related systems and controls for compliance. It does not audit companies. Reviews usually take about three days and occur approximately once every three years for each participant. A written report with recommendations is discussed with the government of the country under review and then it is made available to all KP participants.

When it works well, the system is adequate, although three-day reviews are not enough in some cases to develop a comprehensive understanding of a country's diamond industry. In many cases, however, it is far from adequate. Worst case examples include a review of Ghana where the report, a year in production, was superseded by a much tougher UN report revealing the transit through Ghana of conflict diamonds from Côte d'Ivoire (missed entirely by the KP team). A bloated nine-member Guinea review team spent less than two hours outside the capital city and did not complete its report for more than a year. A Potemkin review of Venezuela was orchestrated by the non-compliant host government, and the team was never allowed near diamond mining or trading areas.

While some reviews have been more thorough and have made tough recommendations, there is a chronic lack of follow-up. Review teams have repeatedly stated that some of the countries worst affected by conflict diamonds – notably Angola, DRC and Sierra Leone – have extremely weak internal controls. In six years of KPCS operation, little progress has been made on the issue. Getting a grip on internal controls was and remains the single most important issue for conflict-prone commodities in conflict-prone countries.

Well documented issues of 'serious non-compliance' have been brought to the attention of the Kimberley Process on several occasions, mainly by civil society representatives and the media, but the KP has been either slow to act, or has not acted at all. Smuggling of diamonds from Brazil, Venezuela, Guyana and Zimbabwe have elicited weak, slow or no response. The same has been true in cases where gross statistical anomalies suggest the need for urgent action: Guinea and Lebanon are two cases that were 'pending' through most of 2009, and which remain unresolved.

### **INTERNATIONAL ORGANIZATION FOR STANDARDIZATION: CONFORMITY ASSESSMENT**

Conformity assessment is the name given to the processes that are used to demonstrate that a tangible product or a service or a management system or body meets specified requirements.

Certification/registration is when a third party gives written assurance that a product, process, personnel, organization or management system conforms to specific requirements.

The most well-known examples are the certification of quality management systems and environmental management systems as conforming, respectively, to ISO 9000 and ISO 14000 standards. More than 800,000 organizations worldwide have been certified to ISO 9001 and/or ISO 14001. ISO itself does not assess for conformity, nor does ISO issue certificates of conformity. Certification is carried out independently of ISO by the many certification or registration bodies active nationally or internationally.

Although ISO does not control the certification bodies, it contributes to best practice and consistency in their activities through the development of standards and guides which give general requirements for bodies providing audit and certification of management systems.

(ISO: [http://www.iso.org/iso/resources/conformity\\_assessment/mechanisms\\_for\\_performing\\_conformity\\_assessment.htm](http://www.iso.org/iso/resources/conformity_assessment/mechanisms_for_performing_conformity_assessment.htm))

The most recent case of inaction, or unrequited action, is the case of smuggling, questionable statistics and human rights abuse in Zimbabwe, widely documented by NGOs, the media and an eventual KP review mission. A limp KP response<sup>51</sup> seriously damaged the reputation of the KPCS as a meaningful certification body.

Clearly the KP 'peer review' monitoring mechanism is not working, especially in cases where it is most needed. If the KPCS is to regain lost credibility and become a credible and effective certification system, it will require independent, third party monitoring. This must be complemented by rigorous follow-up, credible sanctions in cases of continued non-compliance, and a decision-making process on non-compliance that is not hostage to political interference (see **decision-making, below**).

## Transparency

*Transparency is important to credibility and compliance.*

There is very little transparency in the Kimberley Process. Under the heading 'cooperation and transparency' its core document lists seven provisions, dealing only with the exchange of information among participants. The reports of review visits are confidential.<sup>52</sup> The explanation is that governments would not open themselves to full peer scrutiny if all blemishes were to be made public. Most 'blemishes' are self-evident to most observers, however, and are hardly a secret. By hiding the reviews and their recommendations and by failing to follow-up on the recommendations itself, the KP effectively removes the one other tool that might improve matters: publicity. Confidentiality, of course, also obscures the KP's own lack of follow-up.

For several of its early years, the KPCS statistics website was accessible to members only. There was very strong resistance to making any of the data public.<sup>53</sup> It is only in the past two years that greater – although not complete – openness has been achieved, without any ill effect.

The problem of Kimberley Process confidentiality was raised in December 2009 by Martin Rapaport, a major player in the diamond industry and one of the architects of the Kimberley Process. Angered

### **FOREST STEWARDSHIP COUNCIL: CERTIFICATION AND CHAIN OF CUSTODY**

Forest management certification is a voluntary process for verifying responsible forest practices around the world. It is up to a forest owner, or representative of a group of forest owners and operators, to request an independent certifier to inspect the forest against FSC requirements. Only an FSC-accredited certification body can evaluate, monitor and certify companies to FSC standards.

A certificate is awarded for good management practices that include strong social, environmental and economic activities. Forest management must be compliant with national legislation, respect local use rights and the rights of indigenous people, maintain the ecological functions of the forest and its biodiversity, and carry out adequate management planning and monitoring. FSC accredited certification bodies certify and audit each individual forest management operation. Once certification is awarded, FSC-accredited certification bodies audit each FSC certificate at least once a year.

Once a forest is certified it is important to be able to trace its output through the supply chain to ensure that any claims on the origin of the product are credible and verifiable. The FSC chain of custody certification tracks the flow of certified wood through the supply chain and across borders through each successive stage – including processing, transformation and manufacturing – through to the final product. Only FSC-accredited certification bodies can certify companies to FSC standards. FSC has developed rigorous standards to evaluate certification bodies.

FSC's work is supported by some NGOs such as the World Wide Fund for Nature and Greenpeace, while others such as Friends of the Earth UK have withdrawn their support. FSC-Watch offers extensive criticism of the FSC.

51 Despite its finding and despite written allegations that the Government of Zimbabwe had lied to the KP review team, Zimbabwe was offered 'technical assistance', a work plan to remedy its failings and an external monitor to review progress over six months. The KP debate over Zimbabwe, which began in 2008, continued at the time of writing.

52 In some cases a summary is placed on the KP's public website.

53 'Commercial sensitivity' was a regular refrain, but there is nothing whatsoever in the KP statistics that is commercially sensitive. Another issue was the possibility that KP statistics might differ from those of a country's customs agency or trade ministry.

by the confidentiality of the KP Review Report on Zimbabwe and the KP's subsequent inaction, he took issue with the World Diamond Council:

'It is entirely unacceptable for the WDC to cover up human rights violations in the diamond sector by withholding detailed information about severe human rights violations in Marange. The WDC has not

### A CAUTIONARY TALE

'In 1999, Reebok, Nike, and three other brands founded the Fair Labor Association (FLA), which describes itself as "a nonprofit organization dedicated to ending sweatshop conditions in factories worldwide" and claims to have "helped improve the lives of thousands of workers around the globe." FLA "affiliates" are required to establish rigorous codes of conduct, to submit their plants to inspection by "third-party monitors," and to correct any abuses or shortcomings uncovered. Since then, an entire monitoring industry has emerged: a profusion of auditing firms, consulting companies, NGOs, and multilateral organizations that apparel makers pay handsomely to develop monitoring tools, offer expert advice, and write up countless glossy reports. For workers at apparel plants, though, the benefits have proved elusive. A recent academic study—whose lead author, Richard M. Locke, is the deputy dean of MIT's business school—reviewed Nike's own data and found that conditions had "stagnated or deteriorated" at 78 percent of the company's supplier factories between 1998 and 2005.

'Which is not to say that monitoring is inherently useless. When factory inspections are genuinely independent, unannounced, and thorough, they can uncover serious abuses. But one gets what one pays for, as the old saying goes; and since the apparel companies' dues pay for the monitoring firms that inspect their plants, they tend to get the lax policing that they want.'

*From 'Shopping for Sweat: the human cost of a two dollar T-shirt' by Ken Silverstein, Harper's Magazine, January 2010.*

communicated to the diamond trade the fact that Marange blood diamonds have been issued KP certificates and legally exported to the cutting centers... The WDC has not only failed to stop the flow of these blood diamonds, it has also failed to communicate the existence of "KP approved legal" blood diamonds. I am shocked and sickened by the fact that the WDC has not made public or notified the diamond trade about the contents of the 'Review Mission to Zimbabwe – 30 June to 4 July, 2009' even though the WDC participated in the mission...

Clearly, a red line has been crossed and I believe the WDC has lost its moral compass... The WDC must decide if its primary loyalty is to the KP, the diamond industry, or the principles of human decency. The WDC cannot continue to use KP confidentiality as an excuse to cover up severe human rights violations. Failure to disclose such human rights violations does not protect the trade. It results in higher diamond sales at the unbearable cost of human lives, murder, rape and slavery.'<sup>54</sup>

The issue of confidentiality does not stop there. Each year the Chair of the Kimberley Process circulates a draft resolution about the KPCS to be presented at the UN General Assembly for adoption. In 2009, Venezuela insisted that all reference to Venezuela be dropped. China insisted that all reference to human rights be dropped. And Zimbabwe insisted that all reference to Zimbabwe be dropped. An anodyne UNGA resolution was passed, therefore, without a single reference to the issues that had most consumed the Kimberley Process over the previous two years.<sup>55</sup>

### Discussion

One of the primary weaknesses of the Kimberley Process is its lack of transparency. Greater openness might be uncomfortable because it would be easier for the media, civil society and others to hold it more accountable for timely follow-up on reviews and action on issues of serious non-compliance. But all of these stories are finding their way into the media

54 Letter, Martin Rapaport to Eli Izhakoff, President of the World Diamond Council, Dec. 2, 2009

55 Echoing the growing dissidence from civil society and some industry players, several governments, including Switzerland, Sweden, Canada and the United States challenged the official KP version of events in the UNGA debate; see <http://ca.reuters.com/article/topNews/idCATRE5BA3OI20091211>

anyway. Greater transparency would help to make the KPCS the regulatory body it says it is, and the one the industry and African producer countries so badly require.

In creating any certification system, careful thought should be given to this issue.

### **Sanctions:**

*There must be credible sanctions for non-compliance, including decertification.*

The Kimberley Process has only one sanction that seems to carry any weight: suspension and/or expulsion. Only one country has been expelled from the KPCS as a punitive measure (Republic of Congo in 2004). Suspension/expulsion is a serious matter because it means that a participant's diamond industry will be unable to trade legally with any other member country, and will effectively go into eclipse.

Suspension has been debated in other cases, but KP consensus decision-making blocked the possibility. Venezuela 'self-suspended', admitting that its internal controls were in disarray. Although it stated that it would not export any diamonds until matters had been remedied, mining and exports (smuggling) have continued. By agreeing to the fiction of 'self-suspension' the KP has effectively endorsed diamond smuggling. By refusing to sanction Zimbabwe in 2009, and by suppressing its own review, it gave the impression that it has endorsed human rights abuse in that country's diamond industry.

### **Discussion**

In developing any system of certification, there must be credible sanctions for non-compliance, including decertification. Without that as a serious possibility, there is little reason for any participant to follow the rules.

## 4. The ICGLR Mineral Tracking and Certification System

### 4.1 Principles for an ICGLR Mineral Tracking and Certification System

#### Introduction:

The analysis from Section 3 (Lessons Learned from the Kimberley Process) was fundamental to the formulation of a number of bedrock principles, upon which the functional mechanism of a Great Lakes mineral tracking and certification scheme could then be built. The principles draw also on lessons from other proposed mineral tracking schemes, such as the *U.S. Conflict Minerals Trade Act*, and the *ITRI Tin Supply Chain Initiative*. The principles are also firmly grounded in the articles of the *Protocol against the Illegal Exploitation of Natural Resources*, thus assuring their legal validity and political viability throughout the region.

#### Principles:

##### 4.1.1 Transparency

Transparency is essential for the system to have legitimacy with member governments, civil society, industry end users, consumers and public<sup>56</sup>.

#### Implementation

- A. Data on mineral flows and third-party audits to be made publicly available via ICGLR website, not just to system stakeholders, but to civil society and to general public
- B. Making data public harnesses public and civil society as watchdogs – allows for more efficient oversight, at no additional cost.
- C. To protect commercial sensitivity, price data can be stripped out (i.e. négociants, comptoirs, processing plants, smelters would have to report date of shipment, material, concentration (if known), weight/volume, source/destination of shipment, but not price paid or price received)

##### 4.1.2 Burden of Proof Falls Primarily on Exporters, Secondly on Governments

In the ICGLR system, primary responsibility for assuring a verifiable chain of documents from dig site to export point will fall on industry. Penalties for non-compliance will also fall primarily on industry<sup>57</sup>.

#### Implementation

- A. With KP, primary responsibility for certification falls on governments; Producing countries set up internal controls, which industry often complies with either reluctantly or not at all. NGO and civil society criticism for non-compliance is levelled at producing country governments, which often lack funds and capacity to implement improvements. This dynamic must be altered in new system.
- B. National governments will design and set up procedures that, if followed, will allow products to be tracked and certified. The onus to follow these procedures, and the penalties for non-compliance, will fall on industry.
- C. Civil society will then be able to direct their watchdog efforts towards monitoring and improving the compliance of industry participants, instead of focussing primarily on governments

<sup>56</sup> Supported by Articles 2 (Objectives), 3 (Sovereignty), 7 (International Cooperation), 10 (Preventive Measures), 11 (Certification), 14 (Protection of Witnesses), 22 (Harmonization), and 25 (Committee Mission) of the *Protocol against the Illegal Exploitation of Natural Resources*.

<sup>57</sup> Supported by Articles 2 (Objectives), 3 (Sovereignty), 5 (Investors), 8 (Human Rights), 9 (Combating Impunity), 11 (Certification), 15 (Sanctions), 17 (Legal Liability), and 25 (Committee Mission) of the *Protocol against the Illegal Exploitation of Natural Resources*.

### 4.1.3 Mandatory Third-Party Audits

Trust but check: quarterly third-party audits should be mandatory for all participants in the mineral chain. Passing these audits should be obligatory for an entity to achieve and maintain certified status.<sup>58</sup>

#### Implementation

- A. Independent auditors accredited by ICGLR Audit Committee
- B. Audit reports made publicly available through ICGLR website
- C. Substantive and automatic penalties for non-compliance
- D. ICGLR Audit Committee made up equally of government, industry and civil society representatives
- E. Audits paid for by industry, commissioned and administered by ICGLR Audit Committee

### 4.1.4 ADAPT CURRENT SYSTEMS AS MUCH AS POSSIBLE

Business as usual, but with checks: where possible, adapt the current systems in order to increase compliance and reduce costs<sup>59</sup>.

#### Implementation

- A. Many négociants and exporters already have ad-hoc systems in place for tracking their products from start to finish. Rather than create new government systems, let us try to adapt the systems in place, with as light a touch as possible, so as to reduce expense and increase compliance.

### 4.1.5 Design for Adaptability

The system should be able to develop and incorporate new standards into the existing tracking and certifying framework.<sup>60</sup>

#### Implementation

- A. Initially, the system will focus on a limited number of goals and standards – tracking minerals from source to final destination, ensuring that minerals do not originate from conflict zones or enrich armed groups, ensuring that taxes on minerals are paid.
- B. In the near to medium term (2-5 years) ongoing market pressure will necessitate the adoption of additional standards (child labour, reasonable environmental standards, respect for human rights, living wages). Stakeholders should be aware at the beginning that these standards are coming, and that the system will have to adapt to incorporate them.
- C. Standards should be adopted region-wide. While labour and environmental and other mining standards are set by national governments, the ICGLR should develop standards for important criteria (i.e. child labour, environmental impact, wages) that can then be adopted by governments across the region.

## 4.2 Elements of the ICGLR Mineral Tracking and Certification System

### Introduction:

The guiding principles elucidated in the previous section, the lessons learned from the Kimberley Process, and the analysis of other proposed mineral tracking schemes such as the *U.S. Conflict Minerals Trade Act and the ITRI Tin Supply Chain Initiative*, along with extensive consultation with government, industry and civil society

<sup>58</sup> Supported by Articles 2 (Objectives), 3 (Sovereignty), 5 (Investors), 7 (International Cooperation), 8 (Human Rights), 9 (Combating Impunity), 10 (Preventive Measures), 11 (Certification), 14 (Protection of Witnesses), 15 (Sanctions), 25 (Committee Mission), and 34 (Investigations) of the *Protocol against the Illegal Exploitation of Natural Resources*.

<sup>59</sup> Supported by Articles 2 (Objectives), 3 (Sovereignty), and 11 (Certification) of the *Protocol against the Illegal Exploitation of Natural Resources*

<sup>60</sup> Supported by Articles 2 (Objectives), 3 (Sovereignty), 5 (Investors), 7 (International Cooperation), 8 (Human Rights), 11 (Certification) and 25 (Committee Mission) of the *Protocol against the Illegal Exploitation of Natural Resources*

actors within the region, lead to the formulation of a tracking and certification system containing four principle elements.

1. Chain of custody tracking from mine site to export point;
2. Regional tracking of mineral flows via an ICGLR database;
3. Regular third party audits;
4. Independent investigations as required into problems and anomalies.

These elements are explained in greater detail below.

#### 4.2.1 CHAIN OF CUSTODY TRACKING FROM MINE SITE TO EXPORT

##### Purpose

The first key element in the ICGLR Mineral Tracking and Certification scheme will be a comprehensive mineral tracking system, to be put in place within each mineral producing or mineral trading country in the region. In order to ensure that minerals do not originate in conflict areas, and that minerals have not been illegally transferred from one country to another, these in-country mineral tracking systems must be able to accurately track each sack or load of minerals from the mine or dig site through to the point of export.

Note that it will be up to national governments in member countries to create and manage these mineral tracking systems, often though not always with outside assistance. The DRC, for example, has a basic but reasonably paper-based tracking system in place for its Bissie cassiterite mineral chain. ITRI has recently decided to try out its experimental 'tag and bag' tracking system on the same mineral chain. From the perspective of the ICGLR system, either one of these initiatives would be acceptable<sup>61</sup>, provided it can be shown they can successfully track minerals from mine site to export, and transmit that data to the ICGLR.

##### Function

Figure 1 provides a schematic diagram of the domestic and regional mineral flows, beginning in the DRC (other nations are covered in country-specific sections in Part V). Minerals originate in an artisanal pit, and are then transported to a regional centre de négoce or trading centre. From there, the minerals are transported to a comptoir or reprocessing centre in a larger city such as Goma or Bukavu. (Some minerals skip the trading centre and are transported straight to a comptoir). At the comptoir, minerals undergo some basic processing, and are then exported.

The mineral tracking system has to be able to track and document the path taken by each sack or container of minerals along every step in the chain. To their credit, DRC authorities are in the process of creating a tracking system capable of fulfilling this task. While the system is still being developed, it looks very promising.

SAESSCAM, the DRC artisanal mining agency, uses paper forms to register and track bags of ore as they exit the mine site and travel to the trading centre. From the trading centre to the comptoir, the Division de Mines and SAESSCAM use a more comprehensive system of paper forms to track bags of ore (colis) as they travel from the trading centre to comptoir.

During the export process, several DRC agencies examine the comptoir's chain of documents to ensure that all the material being exported can be tracked back to a known and approved mine site.

Currently, DRC authorities signify their approval of these documents by issuing an export permit and a certificate of origin. Once the ICGLR system is in place, the certificate of origin can be replaced with an ICGLR Regional Certificate.

61 Provided always that persistent concerns about the degree of military and or CNDP control of the Bissie mine site can be answered.

In Rwanda, authorities will likely have to expand their tracking systems so that all minerals that exit a mine or artisanal dig can be tracked to a reprocessing centre. Before allowing an export, Rwanda authorities will have to review these chain of custody documents for domestic production, as well as the ICGLR Certificates for imported material, to ensure that the volume of material imported or bought locally matches the volume of material to be exported (taking processing losses into account). If all is in order, Rwanda authorities would then issue their own ICGLR Regional Certificate for the export.

(Note that an intermediate country such as Rwanda would only issue its own ICGLR Regional Certificates in cases where an incoming shipment has been opened and the material re-processed or combined, either with domestic production or with imported material from another shipment. For shipments that merely transit the country and are thus never opened, the certificate from the producing country will suffice).

### **Role of ICGLR Regional Certificates**

The ICGLR Regional Certificates will serve as a recognized guarantee region-wide that minerals were mined under acceptable conditions, in areas free of conflict, and have exited their country of origin in a legal fashion with all dues and taxes paid.

Currently, government officials in a transit or reprocessing country often have difficulty determining whether a shipment of minerals has legally exited its country of origin. The export procedures and documents used in the producing country are often unfamiliar, difficult to understand, and usually written only in the language of the country of origin. As a result, mineral shipments of doubtful or illegal status are sometimes accepted in transit countries.

Figure 2 shows this situation schematically. Mineral flows of uncertain legality include gold flows from the DRC into Uganda, and coltan and cassiterite flows from Uganda into Rwanda. Many others may also exist.

The creation of the ICGLR Regional Certificate should solve this problem. The Certificate will be printed in English, French and Swahili, and will contain all relevant information to identify the mineral shipment (i.e. exporter, importer, mineral type, weight, purity, etc.<sup>62</sup>).

The ICGLR Certificate will serve as the sole acceptable document for intra-regional mineral shipments – if a shipment has an ICGLR Certificate, it can legally be imported, processed and later re-exported. If a mineral shipment does not have an accompanying ICGLR Certificate, it has not been legally exported, and cannot be legally processed, re-exported or otherwise incorporated into the transit country's mineral stream.

<sup>62</sup> Note that current export certificates contain the declared value of the shipment. For customs purposes, the ICGLR Regional Certificates may also have to list the value of the shipment. However, as it has been agreed not to collect price information for the regional database, this information could be restricted to the certificate and not be transmitted to or included in the database.

Figure 1: Great Lakes Mineral Flows in the Congo Region

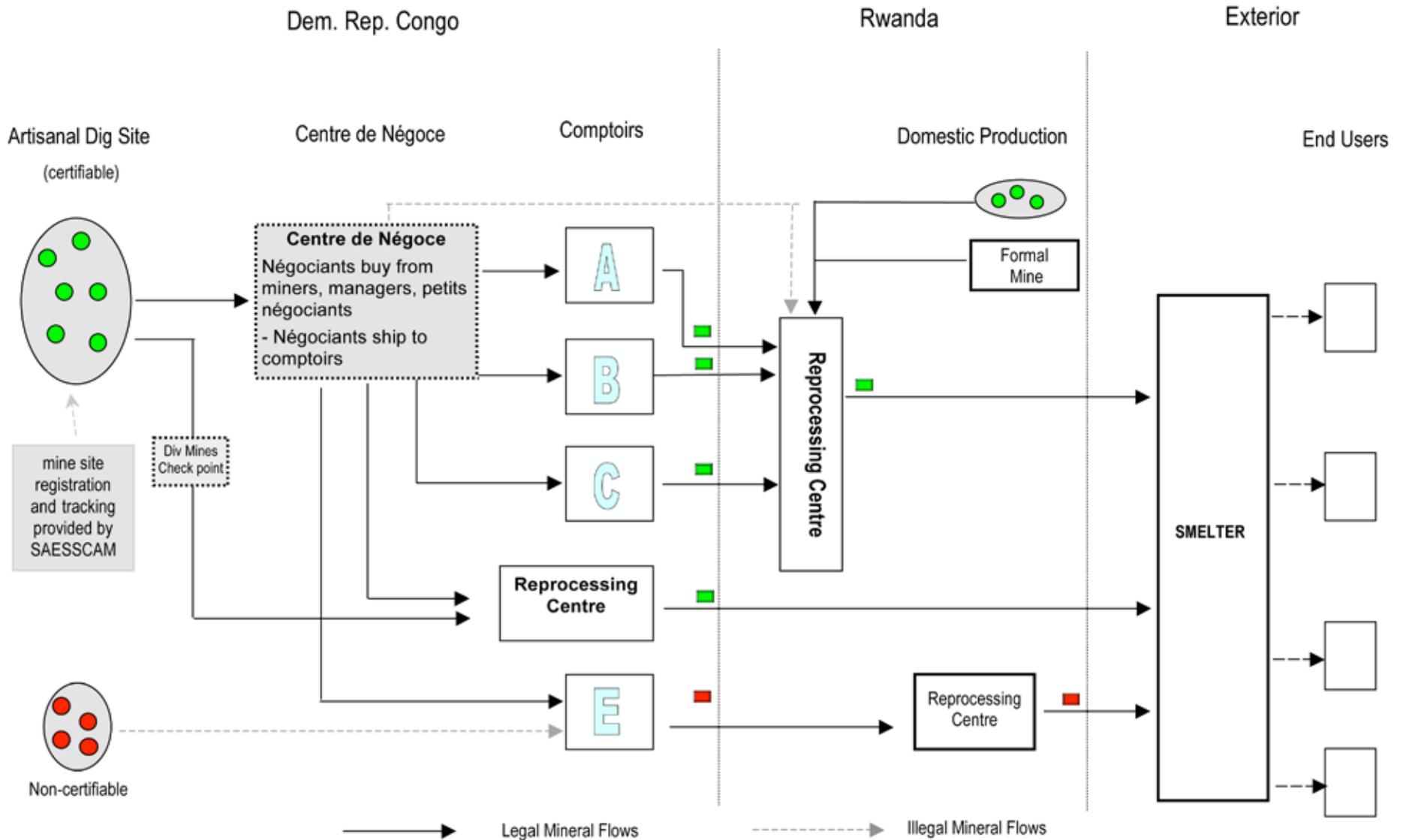
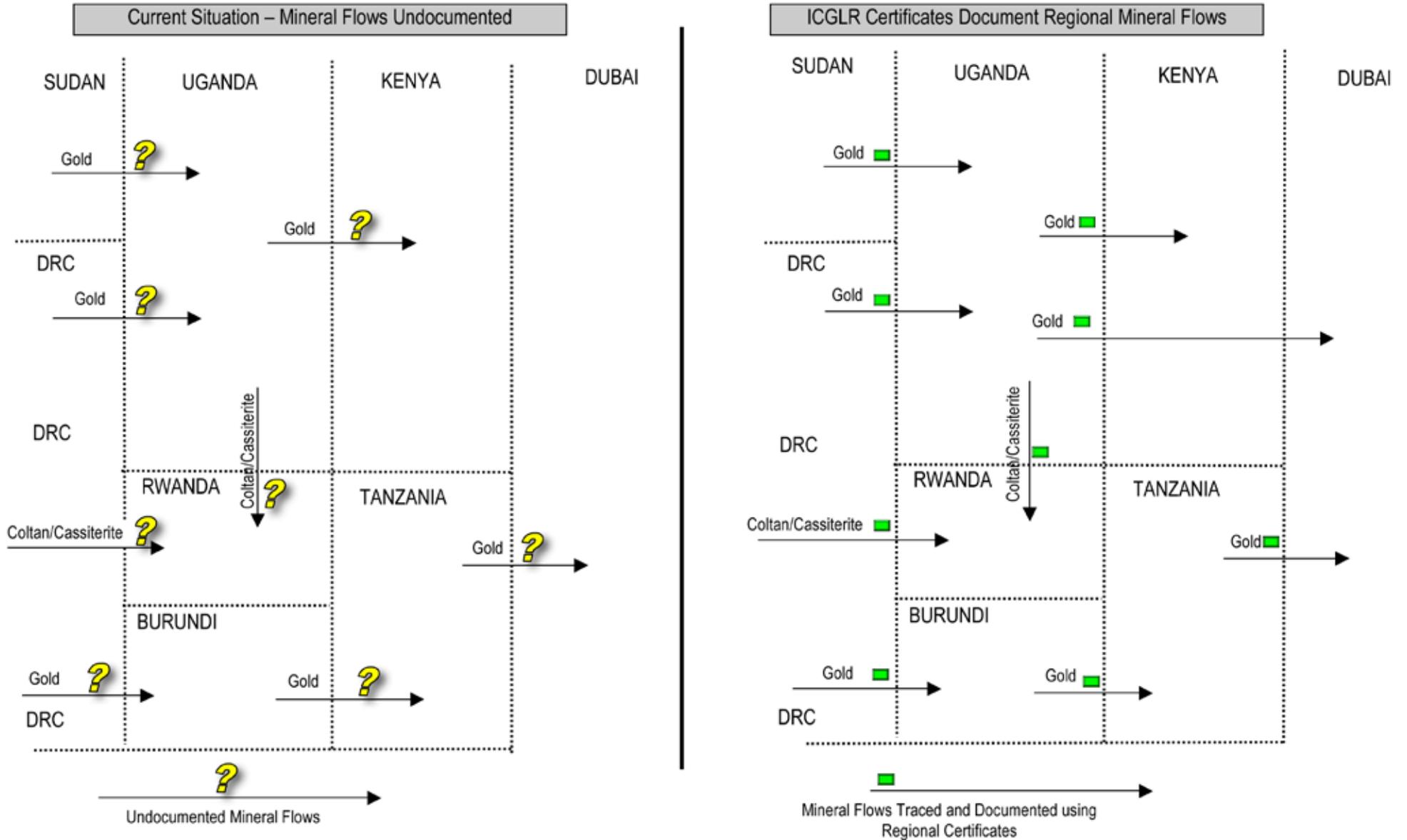


Figure 2: ICGLR Certificates – Carrying Information Across the Region



## 4.2.2 Regional Tracking of Mineral Flows via ICGLR Database

### Purpose

The Tracking Database is the second key element in the ICGLR Mineral Tracking and Certification System. Developing and operating this database will be a critical task of the ICGLR Secretariat in Bujumbura.

Tracking and reconciling mineral flows via the ICGLR database will ensure that cross border mineral flows travel through approved and registered channels. By balancing exports and imports, purchases and sales for all industry actors from the top to the bottom of the mineral chain, the database will account for all minerals produced, traded within and exported from the region. This comprehensive coverage should negate the possibility of minerals being smuggled into or out of the system.

Making the data publicly accessible will secure the legitimacy of the system in the eyes of stakeholders, governments, civil society, and the wider international community.

### Function

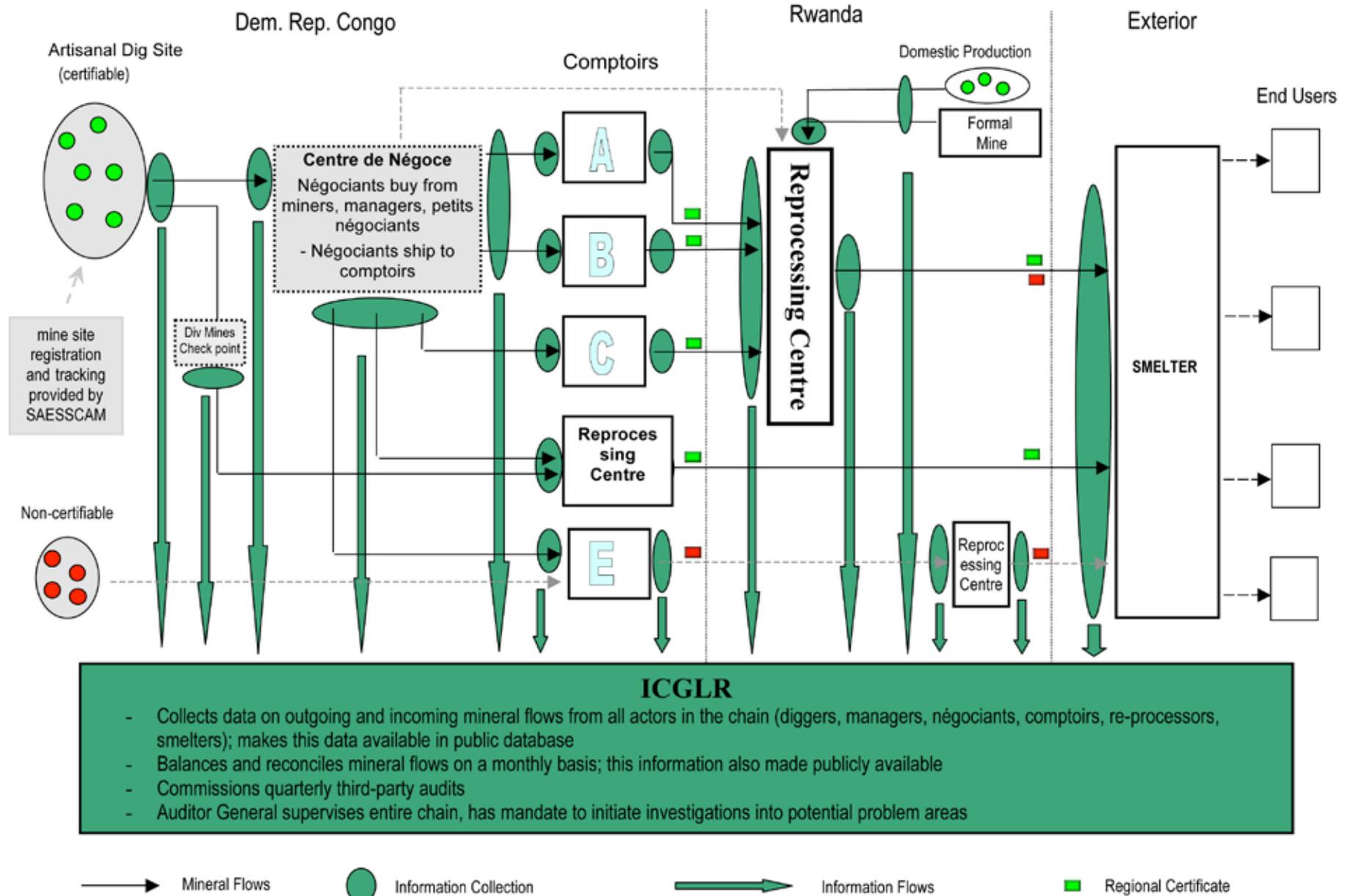
A schematic diagram of mineral flows in the Great Lakes region is shown in Figure 3. The diagram is based on mineral flows from the DRC, travelling through Rwanda to a final destination abroad. (While this example focuses on the Congo, the principle is the same for all other mineral flows in the region. Examples for other countries in the region are given in Part V)

The basic methodology of the ICGLR database is quite simple. The data concerning all sales and purchases and all exports and imports, are transmitted on a regular basis to the ICGLR and stored in the ICGLR publicly accessible database. These data are then used to balance and reconcile mineral flows. The volume of minerals exiting a particular mine site are balanced with the minerals arriving at the nearest trading centre (centre de négoce). The volume of minerals exiting all the centres de négoce are balanced against the volume of minerals entering all the comptoirs. For each individual comptoir, the volume of minerals purchased by the comptoir is balanced with the volume of mineral exported by the comptoir (adjustments are made for processing).

For re-processing centres, the volume of material imported and purchased locally is balanced against the volume of material exported. Finally, on a region wide scale, the volume of material produced in the region is balanced against the volume that arrives at smelters, either within or outside Africa.

By calculating and publishing these balances, the ICGLR Tracking and Certification Scheme will allow all countries and all stakeholders in the region to follow with accuracy the routes by which their minerals are travelling to the international market. Discrepancies in these balances should demonstrate where there are leaks in the system, and over time allow governments and industry to put an end to contraband, undocumented mineral flows, and minerals sourced from unacceptable regions or mine sites.

Figure 3: ICGLR Monitoring of Great Lakes Mineral Flows



### 4.2.3 Regular Independent Third-Party Audits

#### Purpose

Independent third-party audits are one of the key innovations in the ICGLR Mineral Tracking and Certification Scheme. Conducted independently of government, industry and civil society, the audits will provide a regular check that the sourcing and chain of custody procedures demanded by the system are being adequately followed by all actors in the mineral chain. The regular performance of audits, and the publication of audit results, will cement the legitimacy of the ICGLR system in the eyes of end-users, consumers, civil society, and the international community.

The ICGLR scheme is a 'dual-key system'. Comptoirs and exporters cannot export without proving chain of custody and then being awarded a ICGLR Regional Certificate, but that in itself is not enough to be considered a 'certified exporter'. Exporters must also regularly pass third-party audits. Those that do not pass will be declared non-compliant, and will have their exports flagged as being non-compliant. It is anticipated that the market penalties for 'non-compliance' will be substantial.

#### Audit Committee –Tripartite Composition

The audits will be commissioned and managed from within the ICGLR. However, for the audits to have the confidence of system stakeholder and legitimacy in the eyes of end-users and the international community, they cannot be managed solely by government appointees. Instead, the audits will be managed by an Audit Committee, composed equally of members from government, industry and civil society. Initially, the Audit Committee should be composed of three members from each sector, with one of the civil society positions reserved for international civil society. The committee itself should be empowered to adjust its numbers as time goes on, so long as the principle of tri-partite representation is preserved.

The composition, election and voting procedures of the Audit Committee will be something for the ICGLR (and the Audit Committee itself, once it is established) to establish and modify as circumstances require.

The following discussion is offered as a suggestion.

#### Terms of Reference for Audits

The Audit Committee will set the terms of reference for auditors, including which industry actors should be audited, what methodologies should be used by auditors in order to produce an acceptable audit.

The challenge will be one of moving from principles to actual standards, and defining indicators and criteria sufficiently rigorous for auditing

The audit committee will also have to develop a set of rules for dealing with situations where information is lacking, or where there is some ambiguity in the audit results.

For example, in the initial phases of the system, it may well be impossible to track all material to source. The committee may want to develop a rule that a comptoir can have up to 10% of its material from untrackable sources, but if the percentage goes over 10%, the comptoir is non-compliant.

Obviously, these formulas will vary, and will require careful consideration by the Audit Committee. The point of this section is not to determine these rules, but merely to indicate that the committee should develop such rules, once it has been established.

## Scope and Frequency of Audits

The Audit Committee will determine the frequency with which third party audits are conducted. The interval between audits must be short enough that audits will catch errors and anomalies, and thus maintain the integrity of the system, but long enough so as not to overwhelm the capacity of participants and auditors. It is suggested that audits be conducted once per semester (3 times per year).

The scope of each audit will be largely determined by the role of the industry participant being audited. The audits must be comprehensive enough not only to balance the material entering and exiting an export house or comptoir, but also to verify that the minerals do in reality originate from the mining site claimed in the paperwork. A field component will thus be an essential part of every audit.

Figure 4 below shows the suggested scope for audits for different types of industry participants. A comptoir audit (solid red line) will reconcile the material exported with material purchased, and in addition follow the chain of custody documents and track the material purchased to source, to ensure that the material is, as claimed, coming from a certified mine site. A reprocessing centre audit (solid green line) will likewise reconcile exported material with purchased material, and track any domestic production back to its source. A full chain smelter audit (blue dotted line) will follow the document chain to track material from reprocessing centres, comptoirs, and from each of those back to the mine site, to verify that all material entering a smelter comes from a legitimate certified source.

## Accreditation and Commissioning of Auditors

The Audit Committee will have the authority to accredit third party auditors. Accredited auditors can then bid on and conduct third party audits. Having the auditors accredited by the Audit Committee will further reinforce the legitimacy of the auditing system, by preventing the engagement of auditors that either lack the requisite competence, or are known or suspected of bias either for or against industry.

The Audit Committee will oversee the tendering and awarding of audit contracts. It is suggested that the committee develop terms of reference for each type of audit, and then solicit for auditors through open public tenders. (For a city such as Goma, where there are some 20 comptoirs, each contract should encompass a number of comptoirs — say 3-4 — in order to limit bidding overheads and bring down the audit costs through economies of scale. Care should be taken to ensure that the same auditors are not paired with the same auditees every year, in order to avoid the appearance of bias that might creep in to a longer term relationship) The winners of the public tender will be awarded audit contracts and proceed to conduct audits.

The Audit Committee will also have the responsibility of receiving the audits, reviewing them for quality, and seeing that they are made publicly available on the ICGLR website.

## Administration of Auditing System

The ICGLR Secretariat will require additional staff and resources, both to run the database and its associated reports, and to administer, vet and publish the auditing results. Training for new and existing staff will also be necessary to establish and maintain the system. The numbers required to administer audits and databases will not be large, but they will need to be educated and motivated professionals. Donor countries may wish to earmark funds for supporting this effort.

## Paying for Audits

In keeping with the principle that industry should bear the primary responsibility for ensuring the traceability and certifiability of their products, industry should fund and pay for the third party audits. However, in order

to maintain the independence of auditors, payments cannot be made directly from the company under audit to the auditor. Instead, the audits will be commissioned by the ICLGR, which then becomes the client and paymaster.

Funding should be channelled from industry actors into an auditing fund housed at the ICGLR. A formula based on volumes of material exported will ensure that each industry participant contributes in proportion to his share of the market. Initial calculations indicated that audits could be amply funded via a contribution level of \$30/tonne, which is similar to what industry members already contribute towards the traceability scheme under consideration by ITRI.

To avoid any misuse of funds, the industry contributions should be placed in a reserve or escrow account, which will stipulate that withdrawals can be made for the sole purpose of paying third party auditors. The ICGLR administrators of the account will be explicitly prohibited from using these monies for any internal ICGLR purpose, even one related to the auditing system.

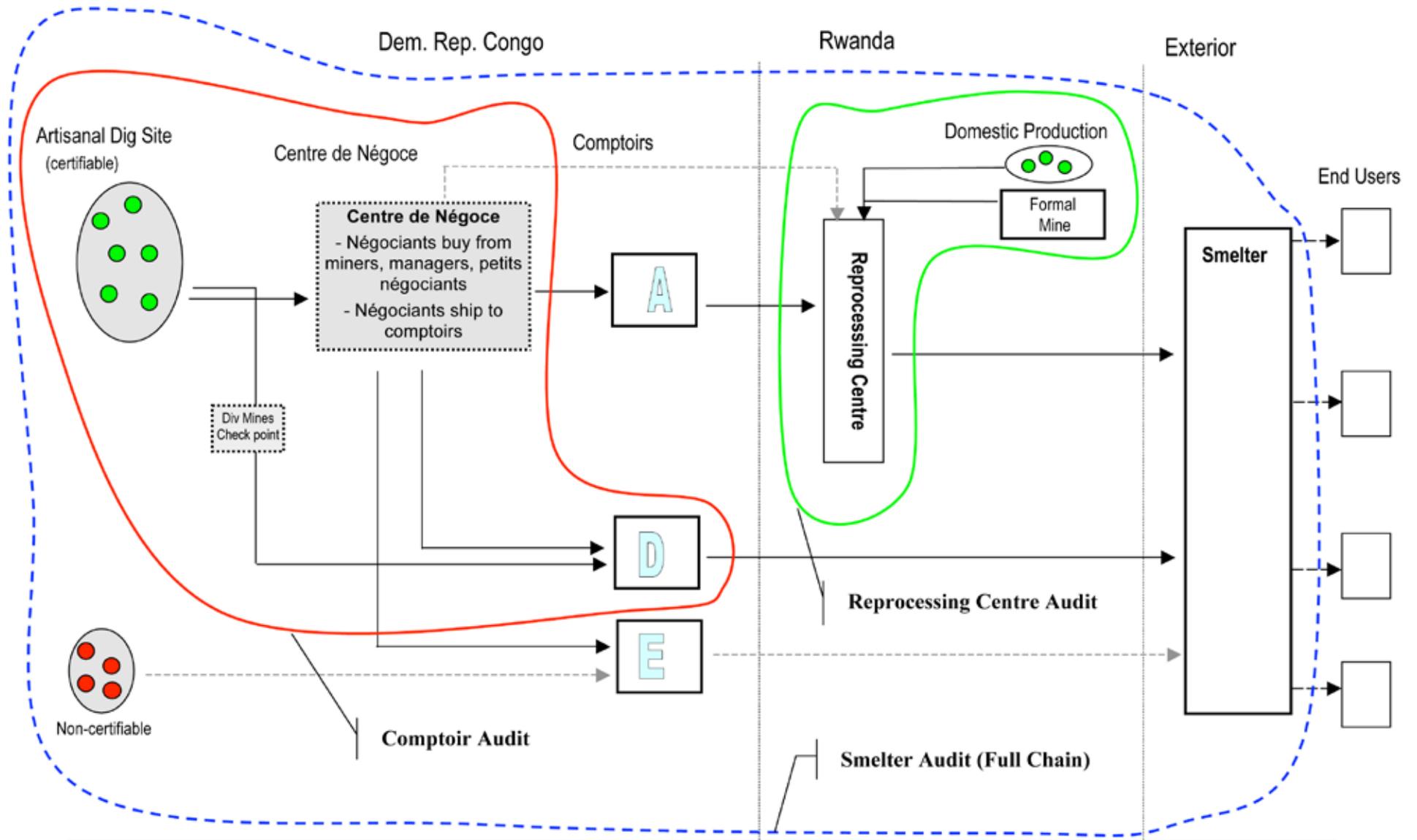
### **Penalties for non-compliance**

An auditing system only functions when there are real and immediate penalties for non-compliance. It should be recalled that the ICLGR Mineral Tracking and Certification Scheme is a dual-key system. Participants need both an ICLGR Regional Certificate (issued with every export) and a passing grade on regular audits to be considered compliant. Those industry actors that are not compliant will suffer real penalties in the marketplace.

The Audit Committee will have the responsibility of determining the rules by which an exporter is declared non-compliant. One possibility is to follow the yellow-card red-card progression used in soccer. The first time an industry player fails an audit, it is given a warning and declared yellow carded. If the industry player fails the subsequent audit (or any further audits that calendar year, or within a 12-month period) it is red-carded; that is, the industry player is declared non-compliant.

The Audit Committee will have the responsibility of determining the rules by which further sanctions are applied to non-compliant participants, as required by circumstances.

Figure 4: Scope of Audits



#### **4.2.4 Independent Mineral Chain Auditor and Whistle Blowing Mechanism**

##### **Purpose**

The Independent Mineral Chain Auditor is the fourth and final key element in the ICGLR Mineral Tracking and Certification System. The Auditor's function is to analyse the data streaming into the ICGLR, and look for anomalies and problems, and then initiate further investigation as required.

The Auditor is empowered to conduct these investigations, to issue reports, and to suggest both sanctions and solutions. If an Auditor's report shows significant non-compliance on the part of an industry participant, the Auditor has the authority to declare that participant non-compliant.

To preserve independence and freedom of action, the Mineral Chain Auditor does not report to the Audit Committees, but directly to the head of the ICGLR.

##### **Function**

The Auditor is intended to investigate situations that will likely arise, and that will not be covered by the existing set of controls. A pair of examples may be the best way to illustrate the Mineral Chain Auditor's role.

##### **Phantom Gold Production**

With the establishment of an ICGLR tracking system for DRC gold, those exporting gold from the DRC will be required to pay taxes, and to show tracking documents back to the mine site. Some gold exporters will comply. Others will seek out less expensive alternatives, the most simple of which is to continue to export DRC gold to Uganda, while claiming it originates somewhere else.

Initially, these exporters may try to choose South Sudan as the nominal origin point for their gold. Theoretically, as Sudan is part of the ICGLR, this gold would be subject to the same tracking requirements as DRC. However, it is likely that Sudan will lag behind the DRC in implementing tracking mechanisms, and for some period – possibly years – DRC gold could be laundered through Sudan. Eventually, tracking mechanisms and 3rd party audits in Sudan might well catch this problem. However, an independent auditor empowered by the ICGLR would uncover this kind of gap much sooner.

Extending this idea, it is entirely possible that once the Sudan loophole was closed, dishonest gold dealers might try to claim a non-ICGLR country as the ostensible source of the DRC gold they wish to export via Uganda. Neither tracking mechanisms nor audits would then be sufficient to catch and close this loophole. However, an investigation by the ICGLR Auditor would be able to disclose what was happening, and so bring pressure on exporters to bring the practise to a halt.

Continuing with gold, a situation might arise where gold dealers ceased to declare their gold altogether, and exported straight to Dubai without obtaining requisite export permits. This kind of irregularity would not be uncovered via tracking mechanisms or database analysis or even regular audits. However, a Mineral Chain Auditor could travel to Dubai, liaise with officials there, and through investigation and analysis of customs declarations in that country uncover this kind of contraband traffic.

##### **Neighbour Country Traffic**

The laundering of ICGLR minerals by neighbouring countries not in the ICGLR could easily become an issue with a variety of minerals, from gold to coltan to tin to wolframite. Minerals mined in areas that are not and

cannot meet the necessary requirements could be shipped out to a neighbouring country with porous borders and good transport facilities – i.e. South Africa, among several others. This outside country would then claim the minerals as domestic production, and sell them into the world market with no need for certificate. Neither mineral tracking nor database balances nor 3rd party audits would uncover this loophole.

However, gaps in production data might well lead to an investigation by the Mineral Chain Auditor, who could uncover and close such a loophole.

## Summary

The Mineral Chain Auditor should thus be seen as the reserve, the last key line of defence, with the ability to react to unforeseen situations and close loopholes that were not seen or envisioned at the time of the system's creation. The Mineral Chain Auditor is thus a crucial part of the system, because while it is impossible to anticipate what these new scams and dodges and loopholes will look like, it can be said with 100% certainty that they will be created, and they will thus have to be closed.

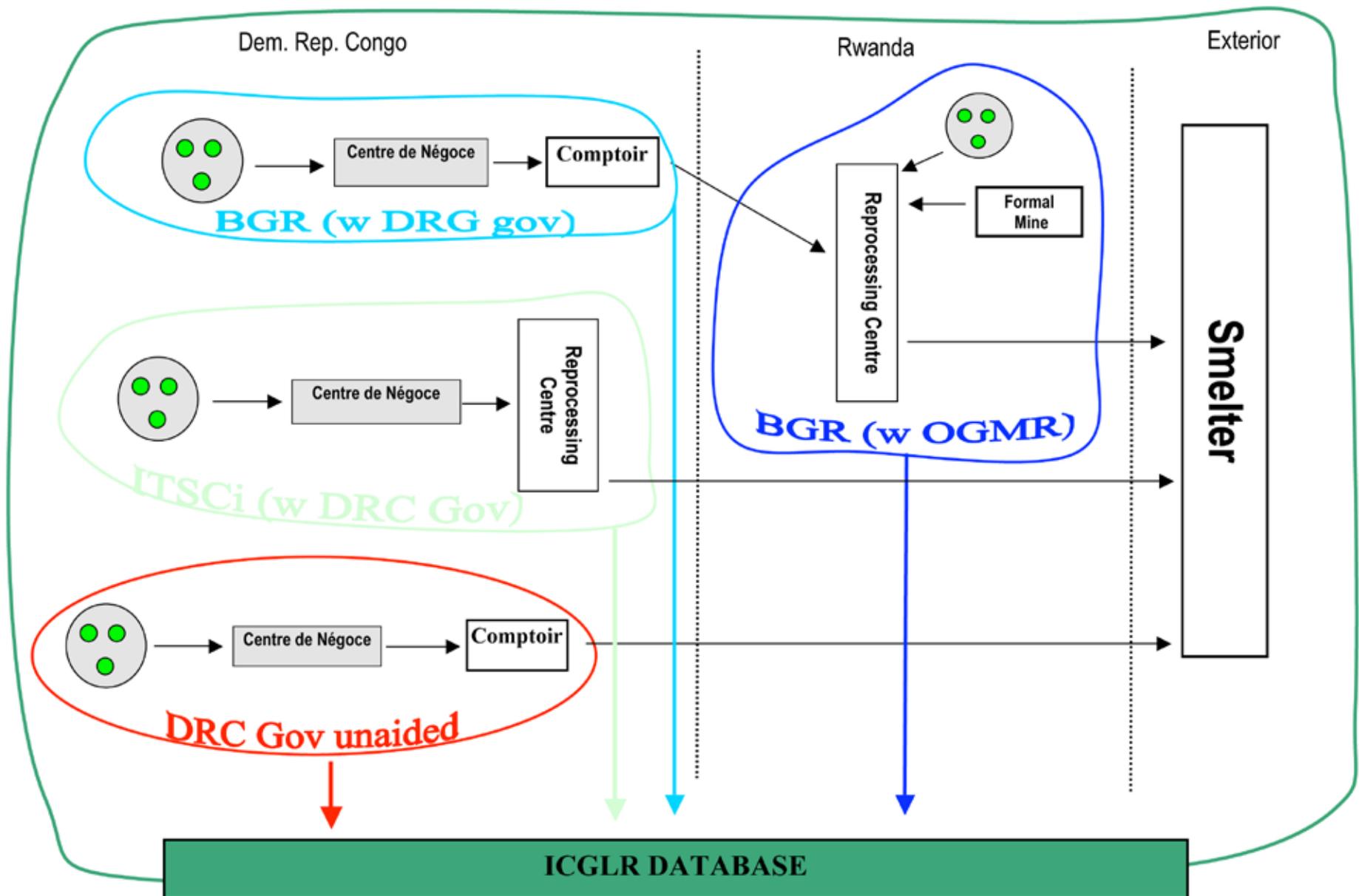
### 4.2.5 Scope of Various Initiatives

This paper has introduced the origins, principles and mechanism for a mineral tracking and certification system based at the ICGLR. In addition, the paper has briefly described other initiatives currently being developed. The profusion of proposals and possibly solutions has undoubtedly led to some confusion as the compatibility, interaction and overlap of these various schemes.

The diagrams in this section are designed to help clarify these issues. Figure 5 shows graphically the scope of the several schemes, as well as how the data they produce can be fed into the ICGLR scheme.

Tables 1 through 3 provide side by side comparisons of key components of the various schemes, including their scope, technology, transparency, auditing mechanisms, and penalties for non-compliance.

Figure 5: How Schemes Fit Together



**Table 1: Scope, Start Dates, Technology of several mineral tracking or certification schemes dealing with African minerals**

Scheme	Scope	Technology	Implementation Dates	Minerals	Transparency	Mine Site Certification
<b>BGR (DRC)</b>	In DRC, from dig site to border (export)	Unknow	In progress now Fully Functional End of 2011	Cassiterite Coltan Wolframite Gold	Data collected by DRC government agencies. DRC transmits data to ICGLR	Developing criteria for mine site certification
<b>ITRI-Phase 2 (in country tracking)</b>	In DRC, from dig site to border (export)	Tags, bags, data collection via agents in the field	6-month Pilot begins May, 2010 in Sud Kivu, Nord Kivu. Evaluation at end of 6-month Pilot	Cassiterite	Data collected by DRC government agencies. DRC transmits data to ICGLR (to be confirmed by ITRI/DRC)	Will rely on BGR/DRC certification
<b>ITRI-Phase 1</b>	From comptoirs to smelters	Establishment of documentation and licensing standards	Complete	Cassiterite	Mineral flow data kept by comptoirs/traders. Audits required to verify mineral flows. Audits to be kept confidential (summary to be made public)	Will rely on BGR/DRC certification
<b>ICGLR</b>	From dig site in producer country to reprocessing countries to smelter	Papers forms; to be upgraded with laptops	Pilot tracking DRC beginning July 2010	Cassiterite Coltan Wolframite Gold	Full transparency. Data on mineral flows stored on public database. Audits made public	Third-party audits to confirm BGR certification
<b>EICC/GeSi</b>	Smelter verification	To be determined	Still being developed	Wolframite	To be determined	Not included
<b>OECD due diligence</b>	From comptoir to smelter	To be determined	Still being developed	Cassiterite Coltan Wolframite Gold	To be determined	Not included

**Table 2: Audit mechanisms of several mineral tracking or certification schemes dealing with African minerals**

Scheme	Auditing Mechanism	Audits TORs (Terms of Reference)	Audits Commissioned	Audit Publication	Audits paid for by	Audit Management by	Audit Frequency	Start Dates
<b>BGR (DRC)</b>	For mine site certification	Not yet available	BGR/DRC Government	No	Government	Government	Not yet determined	2011
<b>ITRI-Phase 2 (in country tracking)</b>	Included	Not yet available	Industry	Audit summary published	To be determined	Industry	Once per year	To be determined
<b>ITRI-Phase 1 (regional tracking)</b>	Not yet available	Not yet available	Industry	Audit summary published	To be determined	Industry	Not yet determined	To be determined
<b>ICGLR</b>	Third-party audits at regular intervals	Not yet available	Committee of Industry/ Governments/ Civil Society	Full audit made public	Industry fees, directed through ICGLR	Industry/ Governments/ Civil Society	3 times per year (proposed)	To be determined
<b>EICC/GeSi</b>	Smelter audits	Not yet available	Industry	To be determined	To be determined	Industry	To be determined	To be determined
<b>OECD due diligence</b>	Third-party audits	Not yet available	Industry	To be determined	To be determined	Industry	To be determined	To be determined

**Table 3: Audit mechanisms of several mineral tracking or certification schemes dealing with African minerals**

Scheme	Penalties for non-compliance
ICGLR	Mine site de-certification renders export impossible
ITRI-Phase 2 (in country tracking)	Industry determined; not yet clear
ITRI-Phase 1 (regional tracking)	Industry determined: not yet clear

## 5. Discussion and Recommendations

### 5.1. Discussion

As noted above, the principle elements of the tracking and certification system described in this report were adopted by the ICGLR Steering Committee in April, 2010, as the basis of the ICGLR's Regional Initiative on Natural Resources (RINR). This in turn was approved by a conference of the ICGLR mining ministers in Nairobi in September, 2010, and formally adopted by the ICGLR heads of state, as noted in the Lusaka Declaration of December 15, 2010. The ICGLR has called for the system to be inaugurated by November, 2011.

The ICGLR's rapid adoption of the system principles demonstrates the broad consensus in the region among all actors – industry, civil society and government – on the need for a tracking and certification system for minerals from the African Great Lakes region. It also demonstrates the agility of the ICGLR, as a regional government body, to reflect the will of the governments and peoples of the region, and translate that will into action.

That noted, a great deal of work remains if the November, 2011 deadline is to be met. The following recommendations serve as a guide to the actions that can be taken by diverse actors, within the region and elsewhere, to facilitate the development and rapid implementation of the ICGLR Mineral Tracking and Certification System

### 5.2 Recommendations

#### **The International Conference on the Great Lakes Region (ICGLR) should:**

1. Begin work forthwith on implementing the RINR mineral tracking and certification system. As concrete steps, the ICGLR should:
  - a. Hire an overall project coordinator to manage and supervise implementation of the system
  - b. Hire a database coordinator to manage and supervise the installation and development of the ICGLR database for regional mineral flows
  - c. Begin integrating data from existing mineral tracking systems in member countries into the ICGLR mineral tracking database
  - d. Begin developing terms of reference (TORs) for the system of independent third-party audits
2. Work to raise awareness of and support for the ICGLR mineral tracking system, both within the region and internationally. Within the region, this effort should include diplomatic outreach at the highest levels (heads of state, ministers) to ensure that the leadership in Member States remains aware of the importance of the tracking system, and engaged with the process of its development. The ICGLR Secretariat should further deepen its engagement with civil society in Member States, and in particular civil society with expertise on natural resource issues. These partnerships will help raise awareness and support for the ICGLR's mineral tracking and certification scheme, and will mark the start of the collaboration that will be necessary in order to manage the auditing portion of the system. Outside the region, the ICGLR Secretariat should undertake to educate governments and stakeholders outside the region about the ICGLR, its mission, and the details of the mineral tracking and certification system.
3. Begin examining how to integrate existing pilot tracking schemes, such as the ones managed by BGR and ITSCi, into the overall framework of the ICGLR mineral tracking and certification scheme.

**Governments of Producing, Processing and Transit Countries in the Region should:**

1. Develop tracking systems capable of effectively tracking mineral shipments originating in mines within their territories, and material imported from neighbouring member states. The nature of the effort will depend on the country. The DRC should evaluate the ITSCi pilot projects underway in North and South Kivu, compare the results with the DRC's own tracking systems, and then work to extend the better of the two systems to remaining mineral chains in the Kivus and other provinces. Rwanda must begin adapting its current procedures into a system capable of reliable tracking its domestic production, both artisanal and industrial. Burundi and Uganda must begin designing and then implementing tracking systems capable of reliably tracking domestic gold production back to its province and mine of origin.

**The United Nations MONUSCO force should:**

1. Establish the full complement of Centres de Négoce/Trading Centres as soon as possible. The Centres de Négoce are crucial to DRC plans for mineral chain monitoring.

**Comptoirs and Re-processors in the Region should:**

1. In collaboration with their regional industry associations (i.e. FEC in the North, South Kivu) establish standardized internal systems for tracking their own purchase, processing and export of minerals. The systems should be computerized, to facilitate integration with the ICGLR regional database
2. Work with the appropriate government authority to develop robust tracking systems to trace minerals upstream of their operations (i.e. from the mine site)
3. Refuse to purchase material from buyers who have not followed the government established procedures required to track that material back to its mine of origin. That is, if material comes to a comptoir without the requisite documentation, the comptoir should turn that material away.
4. Organize themselves into associations with the capacity to take part in the management of the auditing system, through participation in the ICGLR Audit Committee.
5. Prepare to submit their records and operations to third-party audits

**Civil Society in the region should:**

1. Engage with the ICGLR to identify where civil society's presence and participation in the tracking and certification system will be either useful or essential.
2. Prepare to help manage the ICGLR system through participation in the Audit Committee.

**Smelters sourcing or contemplating sourcing from the region should:**

1. Refuse to purchase material from buyers who have not followed the ICGLR established procedures required to track that material back to its mine of origin.
2. Develop due diligence standards and procedures (including third-party audits) that will allow them to verifiably track material entering their smelters back to source.

**End-users of metals sourced in the region should:**

1. Notify smelters that they will refuse to purchase material that cannot be tracked from a non-conflict source.
2. Demand that smelters develop due diligence standards and procedures (including third-party audits) that will allow them to verifiably track material entering their smelters back to source. Continue to work with smelters on the development of these standards.

**International Civil Society should:**

1. Continue applying market pressure to electronics manufacturers, in order to maintain the impetus towards mineral tracking
2. Prepare to assist in the management of the ICGLR mineral tracking and certification system through participation in the ICGLR Audit Committee.
3. Engage with local civil society organisations active in addressing the challenges of natural resource management
4. Engage with the ICGLR and regional governments in order to become better informed on the efforts of African political institutions to address the problem of untracked minerals.

**Governments of countries hosting smelters or end-users should:**

1. Require companies doing business within their jurisdictions accept only material that has been tracked and certified via the ICGLR mineral tracking and certification system.

**The International Donor Community should:**

1. Support the ICGLR both financially and logistically in its efforts to put in place the four elements of the ICGLR mineral tracking and certification system.
2. Support the governments of the region both financially and logistically in their efforts to put in place tracking mechanisms for minerals sourced within their borders
3. Support civil society

**ITRI/BGR should:**

1. Continue work on their pilot tracking projects. Once the best technology has been established, it can be extended to all mineral chains throughout the region.
2. Begin consideration of how to integrate their systems into the overall ICGLR framework.