



Acting Chairman Michael S. Piowar
U.S. Securities and Exchange Commission

March 16, 2017

RE: Comments in response to Acting Chairman Piowar's January 31, 2017 statement on the Commission's Conflict Minerals Rule

Thank you for the call for comments, which is a good opportunity for stakeholders to take inventory of what Dodd-Frank Section 1502 – and the SEC rule by extension – has or has not accomplished in the way of the legislative intent. Stakeholders, and especially companies complying with Dodd-Frank Section 1502, rightfully ask the question whether the intended effects of the law are in fact being achieved.

Beforehand, allow me state that the SEC should be commended for its careful reading of the statutory law, for publishing the proposed rule, welcoming public comments, carefully weighing the input, publishing a 356 page Final Release, and clarifying and correcting – through FAQs and statements – its position ever since. Along every step of the way, the Commission prudently carried out its mandate, while respectful and responsive to the array of conflict mineral stakeholders. Under your leadership the SEC is once again undertaking such an exercise in governance responsibility.

In the course of studying this law and its impact primarily from an academic perspective, I wish to share with you a few empirical observations that might be worth bearing in mind when considering adjustments to the rule. Given the differing positions on the issue, without the evidence, we all might agree, conversations between stakeholders are effectively hamstrung.

1. The issue of conflict minerals is in fact material to "a reasonable investor"

For reporting year 2015, **456 issuers discussed "conflict minerals" in their 10-Ks** – most in the "Risk Factors" section of their respective submissions. 456 issuers comprises 37.37% – just about one-third – of the 1,220 issuers that duly submitted a conflict mineral disclosure pursuant to Dodd-Frank Section 1502 in reporting year 2015. Which means, one-third of all public companies exposed to the rule felt it prudent to discuss the conflict status of "conflict

minerals” in their products to investors. I must therefore politely suggest that the first point in Jeffrey W. Rubin’s comments¹ to the SEC is erroneous.

Before suspending the law through an Executive Order, or in some manner curtailing the SEC Rule, one might first ask what would happen in a scenario where information was now withheld from a market in which many affected issuers require this information, make B2B purchasing decisions accordingly, or report that the lack of such information would pose a material risk or reputational harm to their business.²

Here one could ask “What came first: the chicken or the egg?” Did Dodd-Frank “create” the materiality of this issue, or was this issue material prior to the law? I would suggest that in this case **materiality is catching up to real supply chain and reputational risk**. While conflict in the DRC has been raging ever since the Rwandan genocide of 1994, with armed groups enjoying near impunity, raw materials have been sourced from the region ever since it was the “Belgian Congo.” Through the growing awareness on the part of consumers in an increasing interconnected and globalizing marketplace, and specifically the linkages between U.S. consumption and conflict abroad, many consumers are not only adopting *ethical consumption*, but also rallying for congressional action in blatant cases. The investor class is also increasingly paying attention, fully aware that brands that do not source ethically risk reputational damage, boycotts, lawsuits by shareholder activists, divestment, supply disruption from political/paramilitary/cultural incidents, and could in the future struggle to attract top human resource talent.

Just to pick out a few statements in response to a possible alteration of the rule, Richline Group, a Berkshire Hathaway company, expressed its support for Section 1502 of Dodd-Frank.³ Tiffany & Co. did the same, stating:

When managed responsibly, mining can be a source of social and economic development. The situation in the Democratic Republic of Congo (DRC) and its adjoining countries represents both the challenge and the promise of mining, and we are committed to contributing to solutions in the region. We aim to achieve this both through our own voluntary initiatives including a Conflict Minerals Policy adopted by the Tiffany & Co. Board of Directors, and by continuing to conduct conflict minerals diligence and to publicly report on sustainability.⁴

¹ Jeffrey W. Rubin, Letter to the SEC, February 2, 2017, <https://www.sec.gov/comments/statement-013117/cll2-1554819-131474.pdf>

² See, e.g., statement by Boston Common Asset Management, Trillium Asset Management, Mercy Investment Services, and US SIF. *Investors Urge the US Securities & Exchange Commission (SEC) and Administration to Continue Robust Implementation of Dodd-Frank (Section 1502) Conflict Minerals Rule*, March 7, 2017, <http://news.bostoncommonasset.com/investors-urge-sec-conflict-minerals-rule/>

³ Richline Statement on Dodd-Frank Conflict Minerals Law, January 09, 2017, <http://www.businesswire.com/news/home/20170109006133/en>

⁴ Tiffany & Co. Statement Supporting Diligence and Transparency in Addressing Conflict Minerals, February 9, 2017, New York, NY, <http://press.tiffany.com/News/NewsItem.aspx?id=302>

2. The DRC itself issued a moratorium on mining after the passage of Dodd-Frank

You observe in your Public Statement *Reconsideration of Conflict Minerals Rule Implementation*, that “The disclosure requirements have caused a de facto boycott of minerals from portions of Africa, with effects far beyond the Congo-adjacent region.” This statement however omits the fact that explicit buy-in and executive action occurred at the highest level of the Congolese government directly in line with the “La Loi Obama.” This *national* directive served as a desperate attempt to address the considerable problems associated with “conflict minerals,” which, apart from the bloodshed, involve mineral smuggling, unregulated and unsafe “artisanal mining,” and the loss of tax revenue that are instead filling the coffers of armed groups.

It may thus not come as a surprise that the DRC President Kabila himself sought to reinforce the logic behind the American legislative intervention. In September 2010, after the passage of Dodd-Frank, **the Congolese President Kabila himself seized the moment issuing a ban on all mining and mineral exports** in North and South Kivu and Maniema provinces – which the government claimed was needed to put minerals traceability programs in place.⁵ This moratorium lasted six months. Thus, to label the rule “misguided” right off the bat would not appreciate the situation’s nuances in terms of context, complexity and consequences.

Your statement also does not take into account the decisive action that was taken from the US industry itself – even prior to Dodd-Frank. The concept of the Conflict Free Smelter Program (CFSP) was agreed upon in December 2009 by the EICC – a large, pre-competitive, U.S.-based electronics and high-tech coalition – and the Global e-Sustainability Initiative (GeSI). The first compliant smelters came online in December of 2010.⁶ Beginning of April 2011 it was then the explicit policy of the EICC that Smelters or Refiners sourcing from the DRC or its adjoining countries would need to demonstrate that those minerals were in conformance with the OECD DDG to be eligible for the CFSP. In other words, the CFSP created a bottleneck and deadline through which SORs would need to pass to supply the U.S. market with verified conflict-free 3TG.

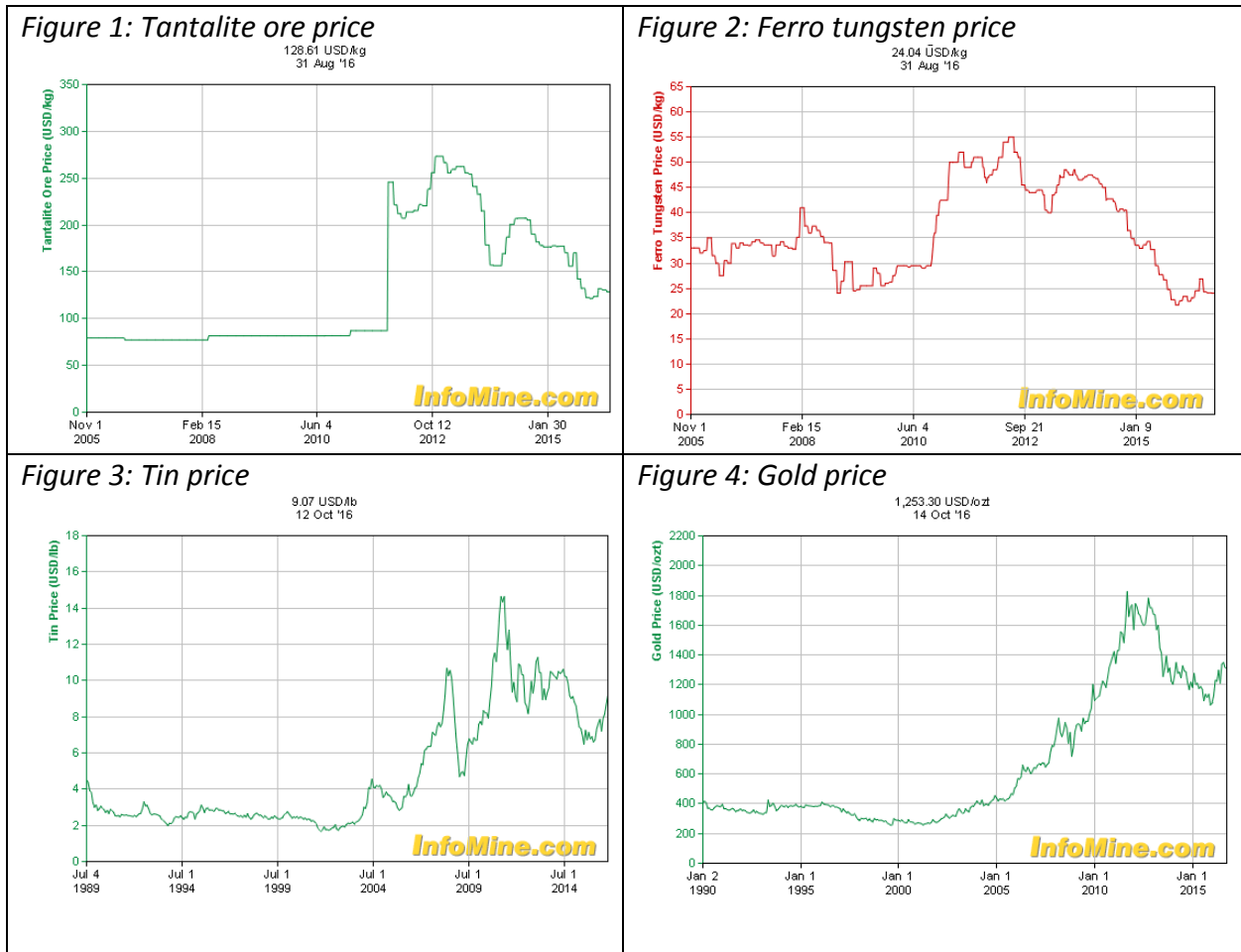
Together, these factors did act as a *de facto* embargo with economic consequences. Interestingly, in the case of tantalum, the production halt is even visible in the world market price (see *Figure 1*). As the DRC (and Rwanda by extension) made up upward of 40% of the world’s tantalite production,⁷ one observes that the **tantalite market price doubled after the**

⁵ BBC, DR Congo bans mining in eastern provinces, 11 September 2010, <http://www.bbc.com/news/world-africa-11269360>

⁶ The first such SOR was F&X – a Chinese tantalum smelter that participated in the *Solutions for Hope* project in the DRC.

⁷ Many observers consider tantalite sold as “Rwandan tantalite” as smuggled ore given that Rwanda’s does not have significant domestic tantalite deposits. With regard to DRC-Rwanda cross-border smuggling, see, e.g., Dranginis, H., *Point of Origin – Status Report on the Impact of Dodd-Frank 1502 in Congo*, Enough Project, February 2016, pages 12 and 13).

September 2010 mining suspension.⁸ Fluctuations in tin, gold and tungsten prices, however, may not be attributed solely to the law and moratorium, as the DRC does not contribute a dominant share of those markets relative to other producers.



Source: [Infomine](http://www.infomine.com), Commodity and Metal Prices

3. Other governments and multilateral organizations have also passed legislation or issued rules on conflict minerals

Starting in December 2009 the OECD – comprised of 35 member countries – developed, with multi-stakeholder input, Due Diligence Guidance (“OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas”⁹), which was

⁸ Another contributing factor may be that the former Talison (now GAM) mine shut down around the same time and may have had an impact on the price of tantalite.

⁹ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, <http://www.oecd.org/corporate/mne/mining.htm>

formally referenced as “the only nationally or internationally recognized due diligence framework” in the SEC Rule.¹⁰ The 5-step framework is structured as follows:

STEP 1: Establish strong company management systems;

STEP 2: Identify and assess risks in the supply chain;

STEP 3: Design and implement strategy to respond to identified risks;

STEP 4: Carry out independent third-party audits of supplier’s due diligence practices;

STEP 5: Report on supply chain due diligence.

Many issuers filing a Form SD and Conflict Mineral Report (CMR) with the SEC followed this OECD Due Diligence Guidance, a requirement stipulated in the SEC Rule. But even beyond the US compliance aspect, the rule inspired other countries to follow suit with their own similar initiatives.

China: Even China subsequently jumped on board with its own due diligence guidance – the *China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters* (CCCMC)’s Guidelines for Social Responsibility in Outbound Mining Investments¹¹ – presumably due to pressure on the part of U.S.-based OEMs.

E.U.: The E.U., meanwhile, passed its own conflict mineral regulation, which will require all but the smallest EU importers of tin, tungsten, tantalum, gold and their ores to perform “due diligence” on their suppliers, and big manufacturers will also have to disclose how they plan to monitor their sources to comply with the regulations.¹²

California: Introduced by California Senator Ellen Corbett and signed by Governor Jerry Brown, the 2011 California law amends the Public Contract Code to make state procurement conditional upon compliance with Section 13(p) of the Securities Exchange Act of 1934.¹³

Massachusetts: Signed by Governor Charlie Baker in 2016 a new law, S.2463, requires Massachusetts to review its purchasing policies related to mineral resources from Congo.¹⁴ The

¹⁰ Page 56281, *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

<https://www.gpo.gov/fdsys/pkg/FR-2012-09-12/pdf/2012-21153.pdf>

¹¹ China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters (CCCMC), Guidelines for Social Responsibility in Outbound Mining Investments, December 2, 2015,

https://www.globalwitness.org/documents/18138/201512_Chinese_Due_Diligence_Guidelines_for_Responsible_Mineral_Supply_Chains_-_En_K83fxzt.pdf

¹² Conflict minerals: MEPs secure mandatory due diligence for importers, January 09, 2017,

<http://www.europarl.europa.eu/news/en/news-room/20161122IPR52536/conflict-minerals-meps-secure-mandatory-due-diligence-for-importers>

¹³ “(a) A scrutinized company is ineligible to, and shall not, bid on or submit a proposal for a contract with a state agency for goods or services related to products or services that are the reason the company must comply with Section 13(p) of the Securities Exchange Act of 1934.”

See: California Legislature, SB-861 Public contracts: contract eligibility: conflict minerals in the Democratic Republic of the Congo, October 09, 2011,

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB861

¹⁴ Shira Schoenberg, Gov. Charlie Baker signs bill mandating review of potential 'conflict minerals' from Congo January 09, 2017, http://www.masslive.com/politics/index.ssf/2017/01/gov_charlie_baker_signs_congo.html

law required the state to issue a report by Feb. 1, 2017 that examines ways to ensure that electronics and communications companies from which the state purchases do not directly or indirectly finance armed conflict or result in labor or human rights violations.

4. Affected issuers have by-and-large complied with the SEC Rule

Dodd-Frank Section 1502 was a *call to due diligence action* on the part of 3TG-based industries – a call which has largely been heeded on the part of 1,220 issuers in reporting year 2015. This cohort comprised a combined revenue of US\$ 9.7 trillion, active in hundreds of sectors of the American economy.¹⁵ As our RY 2014 and RY 2015 evaluations showed, **compliance with the SEC Rule was generally robust.** Our RY2015 conflict mineral disclosure benchmarking evaluation found that the Form SD-only filers averaged a 7-point SEC Rule compliance score of **95%** (see *Figure 5*).

Figure 5: SEC compliance results of Form SD-only filers

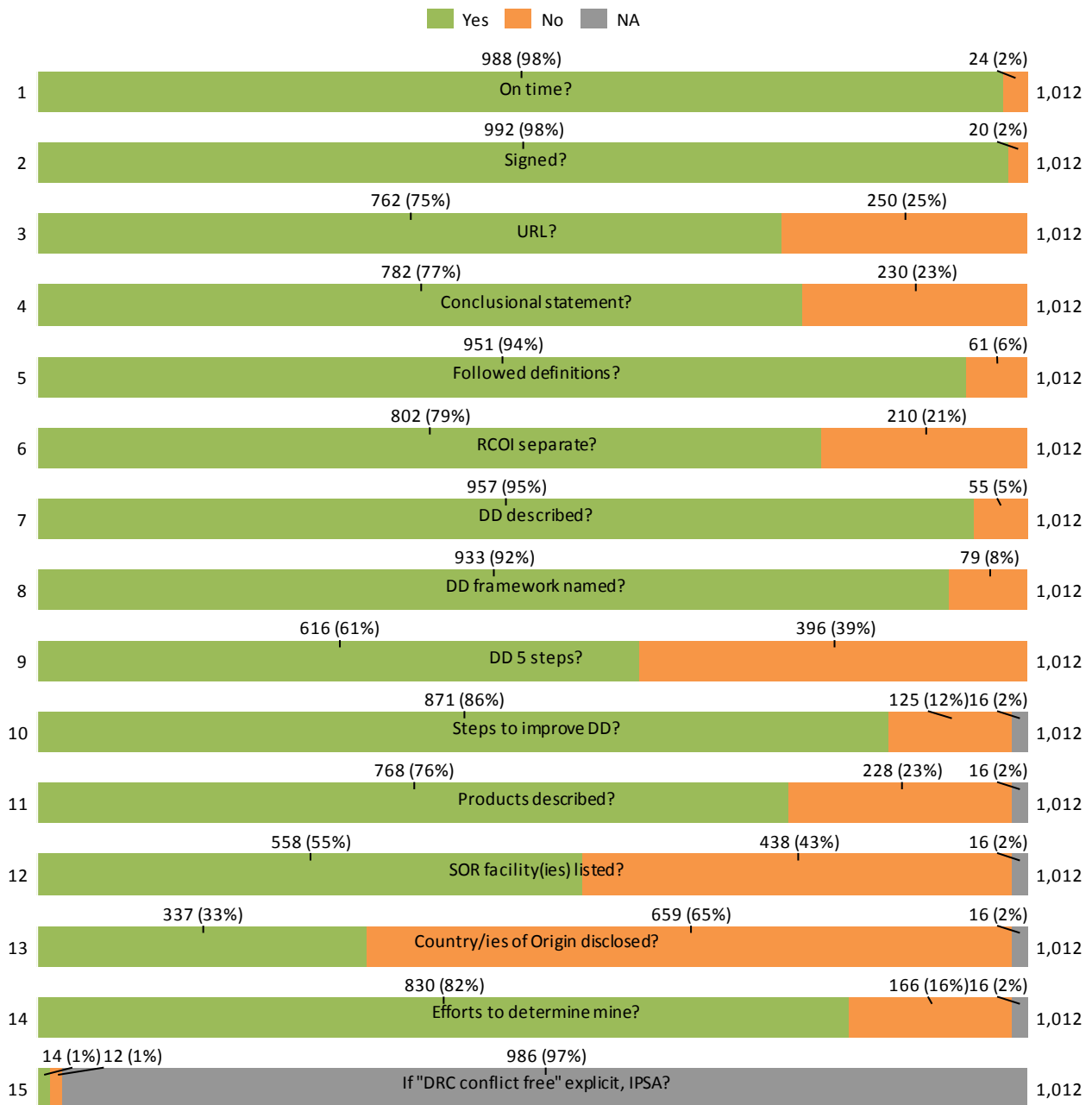


The conflict mineral report (CMR) filers averaged a 15-point compliance score of **79%** for reporting year 2015, a generally **high degree of compliance given the intricacies and difficulty** of the task at hand (see *Figure 6*).¹⁶

¹⁵ For reporting year 2015, filers with 262 different SIC codes submitted a Form SD to the SEC. See: Bayer, C (2016). *Dodd-Frank Section 1502 – RY2015 Filing Evaluation*. Development International. Nov 15, 2016. http://media.wix.com/ugd/f0f801_5914a425c06e4517a2441fc08998e517.pdf

¹⁶ Ibid.

Figure 6: SEC compliance results of Form SD & CMR filers



5. Significant compliance with the letter and the spirit of the law and rule has resulted, *inter alia*, in unprecedented pre-competitive industry collective action

The all-hands-on-deck call to the private sector has been heeded. The affected industries – notably led by the Electronic Industry Citizenship Coalition (EICC) and the Global e-Sustainability Initiative (GeSI) – created the Conflict-free Smelter Initiative in 2010 and quite literally went from 0 to 100 in a matter of 5 years – an impressive feat that deserves public recognition. This

industry-led initiative would turn a 100% opaque, don't-ask-don't-tell supply chain into a market where the mineral bottleneck – the smelters and refiners – are publically known and audited.

Tantalum leads the pack, with **100% of worldwide tantalum smelters in the industry verified conflict free** (status as at February 27, 2017). The tin and tungsten smelters are almost tied at second place, while gold refiners however lag behind.¹⁷

	Tantalum	Tin	Tungsten	Gold
Eligible SORs	45	89	45	146
CFSP active SORs	1	9	0	12
CFSP compliant SORs	44	69	40	93
SORs not participating in CFSP	0	11	5	41
% of SORs either CFSP active or compliant out of total SORs	100%	88%	89%	72%

Source: [CFSI](#), as of February 27, 2017

Associated audit programs are also jumping on board. For example, Country of Origin (COO) reporting became mandatory for gold refiners in 2017 under the LBMA's Responsible Gold Guidance (RGG), which aims "to combat systematic or widespread abuses of human rights, to avoid contributing to conflict, to comply with high standards of anti-money laundering and combating terrorist financing practice." The LBMA thus seeks to ensure all its gold stocks are conflict-free due to compliance with an assurance process.

The takeaway is that **due diligence and country-of-origin disclosure – and with it traceability and chain-of-custody solutions – are increasingly being scaled up to meet the new norms.** And for the first time in history, market actors have bona fide white- and blacklists of SORs with which to make procurement decisions.

Companies thus initiated and then rallied, on a pre-competitive basis, towards systems that would enable them to first obtain the data and then apply the necessary assurance in order to be in a position to publicly report findings and positive outcomes. For hundreds of U.S.

¹⁷ There is also a physical explanation for the differences observed in the supply chain assurance performance. Micheal George explains: "Processing of the 3T mineral concentrates requires substantial infrastructure and capital and generally is done at relatively few specialized facilities that are not located at the mine site; primary and secondary processors typically are at separate locations. Gold, however, can easily be processed into semi-refined products at or near the mine site and has a high unit value in any form, which allows it to be readily exported through undocumented channels, making it more difficult to track to the mine or region of origin. To put this in perspective, 30 kilograms (66 pounds) of 83 percent pure gold (20 carat) would form a cube measuring 12 centimeters per side (about the size of a small tissue box) and, at a price of \$1,200 per ounce would be worth nearly \$1 million. By contrast, the equivalent value of tungsten concentrates would weigh about 45 metric tons (t) (100,000 pounds)."

See: Conflict minerals from the Democratic Republic of the Congo—Gold supply chain, Fact Sheet 2015-3075, <https://pubs.er.usgs.gov/publication/fs20153075>

companies, **anti-conflict due diligence** is here to stay. For example, some companies such as Intel are differentiating their products as deliberately “conflict-free” in the marketplace.¹⁸ Apple's 2015 CMR states that it achieved 100% SOR-audited 3TG supply chains.

That said, the **assurance systems put in place still have work to do to effectively match risk and audit scrutiny**. Indeed, the first *public* case of inadvertent whitewashing occurred with a LBMA/CFSI-audited gold refiner who actually sourced illegal gold from Latin America.¹⁹

6. Compliance and collective action however do not automatically translate into peace and security in the DRC

The law's primary instrument is issuer due diligence to mitigate the funding of armed groups in the eastern Congo. A careful reading of the original law shows that Congress was first and foremost concerned that through blind, no-questions-asked procurement of 3TG-based products, publicly traded U.S.-listed companies would be implicating themselves in the horrific, human suffering in the Eastern Congo (*"It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual-and gender-based violence, and contributing to an emergency humanitarian situation therein"...*). The law goes on to stipulate that U.S.-listed issuers would describe *"measures taken by the person to exercise due diligence on the source and chain of custody of such minerals."*

Two points were well understood at the time:

1. the connection between Congolese mining and the consumption of 3TG products (which was long documented by the U.N. Group of Experts, the Enough Project, Global Witness, etc.); and
2. the importance of Congolese-sourced tantalite in the world market (with a market share of at least 40%).²⁰

Before the law was passed, companies were accused of aiding and abetting to varying degrees – or, at the very least, ultimately profiting from – the illicit extraction and trade of minerals linked to bloodshed, abuse, sexual violence and labor exploitation in the DRC. None of these scenarios were acceptable to the U.S. government or U.S. consumers. The status quo of armed groups taking advantage of miners at the root of 3TG supply chains, wreaking havoc on defenseless communities in the meantime, with 3TG-based industries benefiting but not

¹⁸ Intel, In Pursuit of Conflict Free Minerals, <http://www.intel.com/content/www/us/en/corporate-responsibility/conflict-free-minerals.html>

¹⁹ Bloomberg, How to Become an International Gold Smuggler, March 9, 2017, <https://www.bloomberg.com/news/features/2017-03-09/how-to-become-an-international-gold-smuggler>

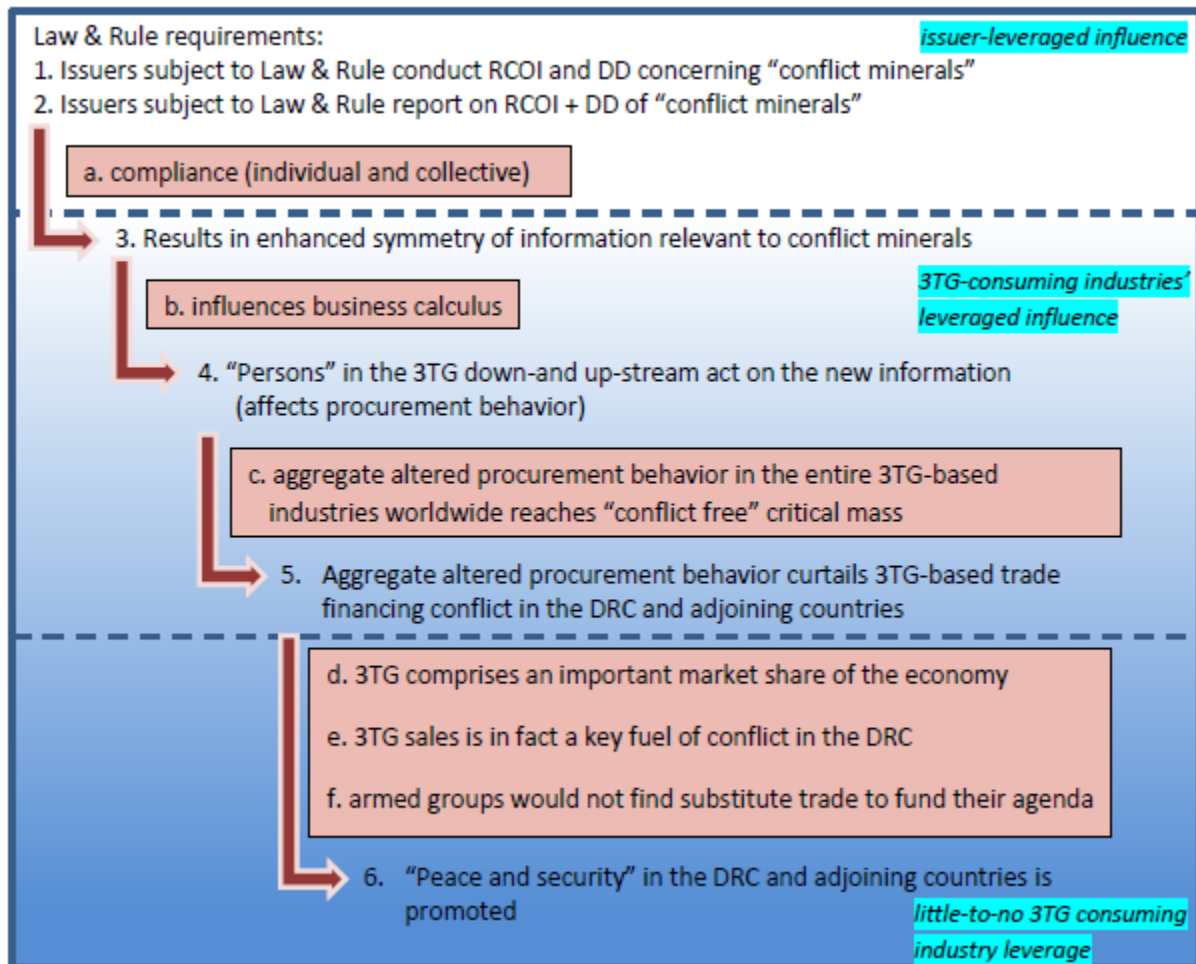
²⁰ While officially the DRC production of tantalum was 17%, when controlling for the smuggling out of the DRC and into Rwanda, the figure of DRC-originating Tantalite exceeds 40%. See, e.g. the December 2015 USGS report: *Shift in Global Tantalum Mine Production, 2000–2014*, <https://pubs.usgs.gov/fs/2015/3079/fs20153079.pdf>

significantly contributing to a resolution, was the situation in which U.S. Congress intervened in 2010.

Had the law featured a logical framework of its cause-and-effect hypotheses, it might have looked akin to *Figure 7*. The steps in Arabic numbers are intended conditions and/or produced results, whereas the alphabetized elements in the pink boxes represent assumptions or outcomes that are pre-conditions to arrive at the next “logical” step.

Compliance is however just the first step in the multi-variable “equation.” Compliance would have translated into enhanced symmetry of information in 3TG markets as the law and rule required issuers to infuse this relevant information into the market (condition 3). The 4th outcome is then only possible if the market has sufficient symmetry of information between the supply chain tiers.

Figure 7: Hypothetical Dodd-Frank Section 1502 logical framework



The law and rule potentiates – but does not ensure – ethical procurement. As an indicator for the next condition “b. influences business calculus” and element “4. ‘Persons’ in the 3TG down-and up-stream act on the new information (affects procurement behavior),” we note, based on

data highlighted in our report, that almost half of issuers (47%) specified that they *recommended* or *required* all their suppliers to source 3TG through SORs that were verified DRC conflict free. One may therefore expect that 3TG markets, from the downstream all the way to the DRC, to have been impacted. Which brings us to the next point: whether or not a critical mass of “conflict free” procurement behavior has been achieved, and whether there are leakages in and out of the legitimate supply chains.

7. Identifying and containing the bad apples

Jean-Jacques Rousseau’s stag hunt theory describes a conflict between survival and social cooperation. A hunter can get a hare for himself, but a hare is worth less than a stag. Hunters must have the cooperation of their hunting partners in order to succeed in surrounding and trapping the stag. Stag theory – I would suggest – also applies to conflict minerals, in that cooperating companies are going after the stag, while those hunters instead pursuing rabbits are the smugglers and companies who deliberately trade or process blood-minerals. To date, especially with gold, too many hunters are still chasing rabbits.

Enter Japanese Professor Takayuki Mizuno. Using a supercomputer Oakleaf-FX10, the professor crunched the S&P Capital IQ’s data on nearly 425,000 companies in 217 countries, as well as their suppliers and customers, and found that 4,954 businesses are the “conflict mineral hunters” – the companies that together could largely decimate the trade in such minerals.²¹

Too many companies that feed non-U.S. 3TG-consuming markets are not affected by Dodd-Frank, and thus do not need to cooperate in industry initiatives. To date Dubai retains the title of world’s pawn broker – readily categorizing African gold as “recycled gold.”²² Rwanda to date functions as state-sponsored 3TG smuggling hub, which ever since the second Congo war directly and indirectly robs or buys 3TG, eviscerating the minerals’ chain of custody in the process.

The DRC’s soil contains at least 740 tons of gold, worth about \$30 billion in current gold prices.²³ Overall, prospectors estimate that the DRC has an estimated \$24 trillion in mineral deposits.²⁴ **Further stag hunt-type cooperation is required between governments and corporations through concerted and tech-savvy supply chain engagement – not only to make sure blood minerals are not sold on the U.S. market, but that the considerable efforts result in impacts ultimately felt in the DRC.**

²¹ Takayuki Mizuno et al, Structure of global buyer-supplier networks and its implications for conflict minerals regulations, December 2016, <http://link.springer.com/article/10.1140/epjds/s13688-016-0063-7>

²² See, e.g. the publications [All that Glitters is Not Gold: Dubai, Congo and the Illicit Trade of Conflict Minerals](#) and [Contraband Gold in the Great Lakes Region](#), both published by Partnership Africa Canada

²³ Mark Harris, The Physicist Who Sees Crime Networks, Oct 13, 2016, <https://backchannel.com/the-physicist-who-sees-crime-networks-fb6478536e8f#bj9rrdpoc>

²⁴ United Nations, DR Congo: UN advises prudent use of abundant resources to spur development, 10 October 2011, <http://www.un.org/apps/news/story.asp?NewsID=39986#.WMmQN28rLIV>

8. Impact on the ground

You mention in your Public Statement “Reconsideration of Conflict Minerals Rule Implementation” that “It is also unclear that the rule has in fact resulted in any reduction in the power and control of armed gangs or eased the human suffering of many innocent men, women, and children in the Congo and surrounding areas” and you speak of the “tide of unintended consequences washing over the Democratic Republic of the Congo and surrounding areas.”

Economies are products of endogenous vs. exogenous factors. The majority of the provisions contained in Dodd-Frank were promulgated in response to the Great Recession of 2007/2008. Now, to what extent is change in the DRC – for better or for worse – attributable to this law? Before attempting to answer the attribution question, let us first consider the main endogenous and exogenous forces acting upon the country and its economy before discussing any potential impact.

Exogenous factors:

- *Negative:* The "Great Recession" reverberations were felt worldwide, and global production – including the mining sectors – generally took a hit for some years after 2007.
- *Mixed:* Continued demand and procurement of both black market and legitimate 3TG over the past decade.

Endogenous factors:

- *Negative:* The DRC’s economy lacks modern infrastructure and robust industrialization, mechanized modes of mining are not at scale, and it is heavily dependent on the importation of finished and high-tech products, with the informal (black) markets the modus operandi. These factors further discourage FDI.
- *Positive:* The DRC, which many observers have called a failed state, would be largely ungoverned without the heavy security investment through what is the most expensive peacekeeping mission in UN history.²⁵ This effort, as well as considerable foreign aid to subsidize its development budget, is barely meeting the country’s most basic needs.

The context for any potential impact is roughly sketched in light of the above factors. It does indeed appear to be the case that due to the negative and mixed factors detailed above, in combination with Dodd-Frank Section 1502-related actions (i.e. the Congo-stipulated moratorium and the CFSI response) there was an initial impact felt in the ASM sector with real repercussions for those “artisanal miners.” While not taking into account the complex forces behind the observed phenomena the Parker & Vadheim paper [Resource Cursed or Policy Cursed? U.S. Regulation of Conflict Minerals and Violence in the Congo](#) does note an uptick in

²⁵ With currently 22,016 total uniformed personnel deployed in the DRC, MONUSCO has cost over \$10 billion since 1999. See: MONUSCO, <https://monusco.unmissions.org/en/facts-and-figures>

the mention of violence in public records, presumably – the authors argue – due to the 2010-2012 disruption of “*the stationary-bandit equilibrium*” in eastern Congo. Reliable statistics being hard to come by in the DRC, the paper features data drawn from local media reports (“*The ACLED data are based on media reports and there is almost certainly measurement error in reported conflicts.*” -- page 17 of the journal article). Yet this is precisely the type of data that GAO will not rely on in their own reports.²⁶ Another weakness is that this retrospective study ends in 2012, and a lot has happened since; notably the 3TG-consuming industries revving their due diligence engines.

In addition, with Dodd-Frank-inspired corporate action, and the private sector playing a large role either in rewarding responsible producers and traders or alternatively punishing irresponsible producers and traders, one should realistically expect new winners and losers to emerge in the supply chains of these companies.

You mention in your Public Statement “Reconsideration of Conflict Minerals Rule Implementation,” that you recently visited the region. The conditions you observed are no doubt real, the people with whom you talked have real stories. But how representative were your observations, and did you talk to detractors as well as proponents? Entities opposed to Section 1502 have for example interviewed black market *comptoirs* that were since put out of business or complain of the lack of liquidity in “their sector.” Furthermore, reports have pointed to the price differential of legitimate and illegitimate 3TG even in the Congolese market. Winners and losers should be expected in the wake of any legislation. An important question here is whether the legitimate, legal producers have grown or been displaced.

To answer this question, **the most telling data that exist are (1) the number of green mine sites, (2) volumes of verified conflict-free 3TG produced by the region, (3) number of SORs that have been verified conflict free, and (4) the price difference between conflict-free verified and non-verified 3TG, all considering change over time.**

To 1, 2 and 3:

One of the few comprehensive, macro-level studies was conducted by the Belgian research group IPIS which collected data on 2026 artisanal mining sites in eastern DRC over the last couple of years.²⁷ They found that overall, 80% of the artisanal miners work on a gold site. The 3T minerals sectors employ an estimated 16% of the miners. Although IPIS observed an armed presence in more than half of the mines, it found that 79% of tin, tantalum, and tungsten

²⁶ (“*Third, case file data are not based on a random sample, and the results of analyzing these data are not generalizable.*” -- see page 45 of the GAO report [SEC CONFLICT MINERALS RULE Companies Face Continuing Challenges in Determining Whether Their Conflict Minerals Benefit Armed Groups](#)).

²⁷ In an interactive map, updated in 2015, IPIS provides information about the on-site presence of armed groups and the Congolese army (FARDC) as well as indicators of the relative importance of the site. It also shows whether mining sites have been ‘validated’ (licensed to operate) by the Congolese government or if they are covered by supply chain control mechanisms. The companion report “*Analysis of the interactive map of artisanal mining areas in eastern DR Congo*” provides an analysis of the collected data and guidance on how to use the interactive map. This ongoing monitoring and mapping of the mines in former and potential and current conflict zones is imperative. See. IPIS, <http://www.ipisresearch.be/mapping/webmapping/drcongo/v4>

miners surveyed now work in conflict-free mines. In other words, significant progress has been achieved with tin, tantalum, and tungsten, but gold remains a conflict commodity.

These findings are congruent with those reported by in-region initiatives which have on-the-ground teams of surveyors and experts that undertake hundreds of mining site visits per year. The largest is the International Tin Research Institute's iTSCi program, which focuses on tin, tungsten and tantalum mining and trade: "Over six years of continued growth in implementation from 2011 to 2016, more than 90,800,000 kg of mineral concentrate were traded in more than 5.4 million in-region business transactions."²⁸ The Better Sourcing Program provides a tech-savvy mine assessment and supply chain traceability system, and as of 2016 verifies a handful of pilot sites in Rwanda and the DRC.²⁹ Together, there are now over 200 "green" 3T mines in the DRC. **These findings signal significant improvements in the 3T sector and could even indicate that a tipping point has been achieved with respect to those 3 minerals.** However, gold verification remains a formidable challenge.³⁰

To 4:

To date, stakeholders are not measuring the economic impact of Section 1502 on the DRC. In a November 2016 proposal Development International submitted to the Public-Private Alliance for Responsible Minerals Trade (PPARMT), we suggested an empirical method to quantitatively answer the question whether the law – through the aggregate due diligence and purchasing actions of affected issuers and their suppliers – has produced a measurable economic impact in the DRC. The principal indicator selected to answer this question is the **price differential of unverified 3TG relative to conflict-free verified 3TG**. The change in this price differential between these two price points over time, ceteris paribus, is a reflection how effective the combined due diligence and procurement actions on the part of issuers are. As this proposal was not funded, stakeholders will remain in the dark about the economic impact of the collective conflict mineral efforts of stakeholders.

9. The cost of the legislation to U.S. issuers

It is rare for Congress to require companies to map and even influence their often very complex supply chains – an involved and therefore costly undertaking. As you know the Foreign Corrupt Practices Act of 1977 first set in motion requirements for companies to control for "politically exposed" individuals in their dealings with subsidiaries or 3rd parties operating abroad. In response, companies launched FCPA compliance programs (often called Anti-Bribery Anti-Corruption – ABAC programs) to control for this risk. After 9/11, terrorism financing became a national security priority, and with the Patriot Act provisions in which the finance industry

²⁸ ITRI, iTSCi report demonstrates effective risk management outcomes in 3T minerals supply, March 15, 2017. <https://www.itri.co.uk/itsci/news/itsci-report-demonstrates-effective-risk-management-outcomes-in-3t-minerals-supply>

²⁹ Better Sourcing Program. <http://bsp-assurance.com/>

³⁰ To date, only 18 gold sites have been inspected and validated in the DRC. See: Shawn Blore, CAPACITY BUILDING FOR A RESPONSIBLE MINERALS TRADE (CBRMT), Tetra Tech, May 2015, http://www.resolv.org/site-ppa/files/2015/06/CBRMT-Gold-Assessment_REVISED-FINAL-WITH-COPY-EDIT.pdf

verifies the identity of customers, and applying enhanced due diligence to certain types of accounts involving foreign persons.³¹ Dodd-Frank effectively added anti-conflict to a company's existing charge of enhanced due diligence in their business dealings.

It is thus safe to conclude that **U.S. Congress hoists mandatory due diligence and disclosure obligations upon the shoulders of the private sector only in exceptional cases such as gross corruption that undermines fair competition, terrorism, and in the case of Dodd-Frank Section 1502 a series of extremely bloody wars in the Congo that are linked to the genocide in Rwanda.**

I do not believe there is appetite in Congress – nor should there be – to charge entire industries to map every iota of their supply chain – and hoist upon them the public reporting charge. I do not believe that this was considered "slam-dunk" legislation, even for the sponsors behind Section 1502.

“The Dodd-Frank Act is ripe with burdens ultimately borne by the forgotten investors,” you recently stated. Without a doubt the law restricts “capital formation” in the narrow sense due to the direct cost to U.S. issuers. To the best of my knowledge, we conducted the only surveys investigating the actual costs of the law to issuers. The cost and effort to turn rather obscure and highly complex 3TG supply chains into a halfway transparent and manipulate-able structure has been formidable. Based on the extrapolated survey data, the costs of 1,300 issuers to comply with Dodd-Frank Section 1502 in the lead-up to the first filing deadline was US\$ 709.7 million, US\$ 545,962 per issuer on average.³² Even without modeling the cost trajectory on a peak-cost curve, it is safe to assume that the compliance cost well exceeds the one billion Dollar mark for issuers since the lead-up to that first filing date. Yet it should be noted on the cost point that the main cost factor revealed by the survey was internal company time. Some companies had a full time employee managing the data requirements and procurement decisions related to conflict minerals, other companies had made full time equivalent investments to launch their conflict mineral programs.

10. The cost of in-region assurance

You lament in your statement the cost burden to “legitimate mining operators” in-region: “Legitimate mining operators are facing such onerous costs to comply with the rule that they are being put out of business.” Indeed, the question of who bears the cost of verified supply chains is long from settled. Just last year at the OECD conflict mineral conference in Paris an important theme became how to ensure that the central African mining sector remains

³¹ To assist companies in spotting bad apples, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) maintains the *Specially Designated Nationals and Blocked Persons List* (SDN list).

³² The period between July 23, 2013 (when U.S. District Judge Wilkins upheld the SEC rule) and the June 2, 2014 due date of the first Form SD filing deadline, 216 working days.

See: Bayer, C (2014). Dodd-Frank Section 1502: Post-Filing Survey 2014. Development International.

http://media.wix.com/ugd/f0f801_d65977e4bc784071a440630dcf1949d3.pdf

competitive in light of the costs of bringing online legitimate and verified minerals. Downstream subsidies of audit programs, inter-program audit recognition, and bringing down the assurance cost through Blockchain-enabled trustable instance are all surely part of the solution. In sum, cost sharing and technological innovation are certainly necessary to bring down cost also for the in-country market actors. **The saving grace, however, is that commodity prices emanating from the Great Lakes region of Africa are already “rock bottom” compared to many of the world’s more developed mining regions.** As Sasha Lezhnev points out, even if you “check every box in terms of due diligence,” Congolese minerals are still the cheapest around.³³ Just as it is possible for voluntary product certification to provide basic assurances with regard to production practices, so can assurance cost in 3TG be rendered market viable.

11. U.S. national interests

You state: “Moreover, the withdrawal from the region may undermine U.S. national security interests by creating a vacuum filled by those with less benign interests.” I completely agree: it is indeed within the U.S. national interest to exact continued engagement on the DRC. I however fear that if one made changes to the law that would allow the return to the pre-2010 climate of market indifference to the conflict-status of 3TG, such a condition would only serve to further weaken the Congolese state.

The DRC has many issues. One is its inability to exact an effective taxation system on gold. According to USAID-sponsored research, the government is only able to tax 3% of gold mined in the country, the remaining 97% of the extracted gold leaking to the black market.³⁴ And without the government effectively able to tax the production of one of the most prolific minerals in its soil, the DRC will remain a weak and vulnerable state, e.g. unable to pay its civil servants and project power and services across its 2.3 million square kilometers. If, through its concerted policy, the U.S. does not help the DRC extricate itself out of this vicious circle, it will indefinitely be absolutely necessary to maintain a 20,000 person strong UN peacekeeping mission at a tune of \$1.3 billion a year.

I would suggest that one might best ensure that **U.S. national security interests are upheld through continued engagement, which in holistic terms would include private sector due diligence on minerals that remain integrally linked with stability in the DRC**, given that due diligence serves as a kind of market intelligence in terms of being able to differentiate between white and black sheep.

Moreover, it is within the U.S. national security interests for the U.S. to continue to support the UN peacekeeping mission in the DRC. Indeed, the lack of rule and order in the DRC prevents

³³ Colin Kinniburgh, Beyond “Conflict Minerals”: The Congo’s Resource Curse Lives On, Spring 2014, <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on>

³⁴ Shawn Blore, CAPACITY BUILDING FOR A RESPONSIBLE MINERALS TRADE (CBRMT), Tetra Tech, May 2015, http://www.resolv.org/site-ppa/files/2015/06/CBRMT-Gold-Assessment_REVISED-FINAL-WITH-COPY-EDIT.pdf

responsible market engagement and FDI. The DRC has an estimated \$24 trillion in mineral deposits³⁵ – including minerals considered strategic by the US Defense Logistics Administrations. It is also host to one of the world’s largest tropical forests and carbon sinks. The DRC’s stability, in order to help its people to responsibly extract these minerals needed for the U.S. economy, is thus squarely within the U.S. national interest.

12. Recommendations

Given the above observations, I wish to offer three core recommendations:

- A.** One ought not to cause a situation where an issue with demonstrated materiality is now no longer a matter of public reporting. It would be as far-fetched as proposing to scrap reporting elements contained in the 10-K. The fact of the matter is that minerals of Congolese origin are landing in products purchased by the U.S. consumer, B2B purchasing decisions are being made according to supplier performance, and a growing number of consumers and stakeholders across the board are aware and concerned about this issue. And increasingly, the mainstream market itself is demanding symmetry of information on matters of anti-conflict. It is my sense that many stakeholders, and increasingly consumers, would no longer accept the pre-Dodd-Frank condition of blind mineral procurement from the Great Lakes region of Africa. Many customers today will buy an engagement ring only if the jewelry store clerk can provide assurances that the engagement ring to be sold was not a “blood diamond” or contained “blood gold.” Given how emotional this issue is for many stakeholders it very well may be a case where confrontational, smear and boycott and campaigns are potentially more damaging to shareholder value than even imperfect regulations.
- B.** From a public policy perspective, **one must ask if the legislation is incentivizing due diligence. The answer would have to be “yes.” Secondly, is that due diligence translating into responsible sourcing? The answer would be: “partly.”** It is certainly within the power and influence of the private sector to conduct due diligence on specific, high-priority matters. One might therefore continue to require the private sector to do its part – through due diligence and procurement practices by extension – to prevent it from acting as a destabilizing element in the DRC. Yet, one should also be cautious not to oversell due diligence as a comprehensive solution to all of the DRC’s problems. For example, political solutions are badly needed to allow for a peaceful democratic transition of power in light of the fact that the current Congolese president’s terms have expired under the constitution.
- C.** You stated: “Today, I directed the staff to reconsider whether the 2014 guidance on the conflict minerals rule is still appropriate and whether any additional relief is appropriate.” Considering the cost burden that due diligence and public reporting places on 3TG based companies, and in light of the impressive gains – especially in the 3T markets (tin, tantalum

³⁵ United Nations, DR Congo: UN advises prudent use of abundant resources to spur development, 10 October 2011, <http://www.un.org/apps/news/story.asp?NewsID=39986#.WMmQN28rLIV>

and tungsten) – at both the mine and SOR level to produce and process verified conflict-free minerals, one may consider requesting that the U.S. Department of State develop criteria for the *exclusion* of a mineral from the current conflict mineral list. The evidence however suggests that gold remains a major driver of conflict in the DRC – which no stag hunt to date has contained.

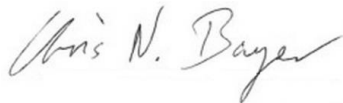
Conclusion

We live in a world where Boeing and SpaceX are competing to send the first men and women to Mars. I commend the political economy of a country that enables such capital formation and technological innovation with which this is even imaginable. The question I'd however ask, is whether such feats are only possible at the expense of other issues, such as peace and stability of other nations from which America obtains raw materials. I would hope we might some day put zero-sum paradigms to rest.

For a country still rebounding from recent wars, where human rights violations are still rampant, and labor exploitation is commonplace, private sector due diligence is a vital component of promoting peace and human rights. In this sense, Section 1502 says: *Through procurement do no harm!* The law and rule recognize this principle and prescribe measured due diligence and public disclosure.

Such that in the 22nd century, reflecting on what he witnessed in the Congo, the observer will not exclaim: "The horror! The horror!"

My highest regards,

A handwritten signature in cursive script that reads "Chris N. Bayer".

Chris N. Bayer, PhD
Principal Investigator
Development International e.V.