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International law and governance of natural resources in conflict and post-conflict situations

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8 | Addressing resource-related armed conflicts with informal normative processes

8.1 INTRODUCTORY REMARKS

The preceding chapter discussed the ways in which sanctions regimes imposed by the Security Council address the links between natural resources and armed conflict. It demonstrated that several of the resolutions adopted by the Security Council encouraged States to participate in voluntary initiatives aimed at improving resource transparency.

Some of these resolutions established a direct link between the participation of States in voluntary initiatives and the implementation of the sanctions regime. Resolution 2045 (2012) related to Côte d'Ivoire is one example. This resolution explicitly offers the government of Côte d'Ivoire the possibility of modifying or lifting sanctions, provided that the Ivorian authorities "create and implement an action plan to enforce the Kimberley Process rules in Côte d'Ivoire" and that they "closely work with the Kimberley Process Certification Scheme to conduct a review and assessment of Côte d'Ivoire's internal controls system for trade in rough diamonds and a comprehensive geologic study of Côte d'Ivoire's potential diamond resources and production capacity".¹ Another example concerns the sanctions regime imposed to address the armed conflict in the DR Congo, where the Security Council expressed its intention to impose sanctions for the non-compliance by corporate entities to the voluntary due diligence guidelines developed by the UN Group of Experts.²

The Security Council also expressed its support for these voluntary initiatives in a more general fashion. In its Presidential Statement of 25 June 2007 on Natural Resources and Conflict, it emphasised the important contribution of commodity monitoring and certification schemes, such as the Kimberley Process, in preventing and combating trafficking, illicit trade, and illegal exploitation of natural resources.³ It also recognised the role of voluntary initiatives aimed at improving revenue transparency such as EITI in ensuring that natural resources stimulate sustainable development.⁴ Furthermore, the Security Council referred to the role of voluntary initiatives aiming at en-

1 UN Security Council Resolution 2045 (2012), especially paragraph 6 and 21.

2 See UN Security Council Resolution 1952 (2010), especially paragraph 9.

3 UN Security Council Presidential Statement on Natural Resources and Conflict, *UN Doc. S/PRST/2007/22*, 25 June 2007, paragraph 8.

4 *Ibid.*, paragraph 9.

couraging multinational enterprises to adopt responsible business practices, such as the OECD Guidelines for Multinational Enterprises and the UN Global Compact.⁵ Lastly, in its Presidential Statement of 15 April 2013 on Peace and Security in Africa, the Security Council recognised “the importance of commodity monitoring and certification schemes, such as the Kimberley Process, and the role of voluntary initiatives aimed at improving revenue transparency, such as the Extractive Industries Transparency Initiative” as tools for the prevention of conflicts.⁶

The current chapter aims to identify the contribution of these voluntary initiatives to the development of a regulatory framework for the management of natural resources in post-conflict environments. More specifically, the purpose of this chapter is to assess whether and to what extent these voluntary initiatives respond to the call made in the report of the High-level Panel on Threats, Challenges and Change to the United Nations, national authorities, international financial institutions, civil society organizations and the private sector “to develop norms governing the management of natural resources for countries emerging from or at risk of conflict”.⁷

This call did not receive express follow-up in subsequent formal documents. Instead, the 2005 World Summit Outcome Document focused exclusively on the process of peacebuilding and its procedural modalities, most notably the establishment of the UN Peacebuilding Commission as the principal institution to coordinate action in this field. From a substantive perspective, the call therefore remains very relevant. This is illustrated by the fact that the UN Peacebuilding Commission itself has recently started to consider issues relating to the management of natural resources in its work programme, showing the continued need for a regulatory framework as called for by the High-level Panel.

For this purpose, the current chapter first examines the substantive contributions made by voluntary initiatives to the governance of natural resources in countries emerging from armed conflict. To what extent do voluntary initiatives create standards for the management of natural resources in post-conflict situations? More in particular, to what extent do such initiatives effectively incorporate elements of sustainable development in their methods of operation, and how do these elements contribute to shaping the governance of natural resources in countries recovering from armed conflict?

Furthermore, given their increasing popularity, this chapter addresses the question whether these informal instruments provide a credible alternative to legally binding instruments. Even though these instruments do not impose

5 *Ibid.*, paragraph 10.

6 UN Security Council Presidential Statement on Peace and Security in Africa, *UN Doc. S/PRST/2013/4*, 15 April 2013, paragraph 18.

7 Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, United Nations: New York (2004), para. 92.

legally binding obligations on participants, these participants have committed themselves to strive for the achievement of particular objectives. The question is therefore whether these voluntary instruments contain effective mechanisms to monitor and enforce the implementation of the instruments by the participants.

The current chapter discusses three initiatives that are representative of the categories of voluntary initiatives mentioned in the Presidential Statement. The Kimberley Process for the Certification of Rough Diamonds is an example of a commodity monitoring and certification initiative. The Extractive Industries Transparency Initiative is an initiative aimed at improving resource transparency. Finally, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas is an example of an initiative aimed at improving responsible business conduct.

These initiatives share some common characteristics that make them particularly useful for the purposes of this chapter. First, all three specifically focus on issues related to natural resource governance. This gives them an added value compared to the broad range of other initiatives that address revenue transparency and corporate responsibility in a more general fashion. They include the UN Anti-Corruption Convention and the UN Global Compact. In addition, all three are multi-stakeholder initiatives, which have been developed by representatives of States, civil society and the business community. Thus these initiatives represent a relatively new category of instruments for setting standards, in the sense that they have not been developed by traditional state-centred standard-setting processes. Furthermore, the effective implementation of the initiatives depends not only on States, but also on companies. Finally, the ambition of all three initiatives is to become universal in their application. Therefore they go further than initiatives specific to a particular country or region, such as the Mineral Certification Scheme of the International Conference on the Great Lakes Region.

The following sections discuss the three above-mentioned initiatives. Section 2 discusses the Kimberley Process, section 3 examines the Extractive Industries Transparency Initiative and section 4 looks at the OECD Due Diligence Guidance. Section 5 discusses the substantive contribution of the three initiatives to the development of a regulatory framework for the management of natural resources in conflict-affected States, with a particular emphasis on the role of these initiatives in promoting sustainable resource governance. Finally, section 6 examines the effectiveness of these instruments.

8.2 THE KIMBERLEY PROCESS FOR THE CERTIFICATION OF ROUGH DIAMONDS

8.2.1 Context

The Kimberley Process Certification Scheme was developed in response to the armed conflicts raging in Angola and Sierra Leone, where diamonds were used to finance the military campaigns of rebel groups opposing the legitimate government.⁸ The Security Council had adopted sanctions targeting the export of diamonds originating from these States.⁹ However, neither Angola nor Sierra Leone had an effective system in place to track the origin of diamonds mined in these States.¹⁰ Therefore, the sanctions could easily be busted by armed groups smuggling the diamonds into neighbouring countries, from where they were re-exported and sold on the international market.¹¹

The origin of the Kimberley Process for the Certification of Rough Diamonds is therefore linked to UN sanctions. It was set up in order to find an effective international solution to the problem of diamond smuggling in contravention of UN sanctions. The aim of the process was quite innovative: to design a universal certification scheme for rough diamonds that would be applied by all States producing and purchasing diamonds. The scheme was to be based on national certification schemes, supplemented with international minimum standards. Because of its universal membership, the scheme would stop so-called “blood diamonds” entering the international diamond market by closing the trade routes for armed groups.

Another innovative feature of the process concerns the diversity of its membership. The Kimberley Process was initiated not only by governments but also by the diamond industry and non-governmental organizations. The involvement of all the interested actors, and especially of the diamond industry, was considered crucial for the success of the scheme. For example, in relation to Angola the report of the Panel of Experts concluded that lax controls

⁸ For more details on these conflicts, see Chapter 5 of this study.

⁹ See UN Security Council Resolutions 1173 (1998) and 1295 (2000) concerning the armed conflict in Angola; Resolution 1306 (2000) concerning the armed conflict in Sierra Leone; and Resolution 1343 (2001) concerning Liberia’s involvement in the smuggling of diamonds from Sierra Leone. For a more detailed discussion of these resolutions, see Chapter 5 of this study. It should be noted that the first meeting leading to the Kimberley Certification Scheme took place before the Security Council adopted diamond embargoes for Sierra Leone and Liberia.

¹⁰ See for example the following reports for an account of the difficulties experienced by the government of Angola in setting up a certification mechanism that would effectively control the trade in Angolan diamonds. Final Report of the Panel of Experts, *UN Doc. S/2000/203*, paras. 94-98; and the 2000 Interim Report of the Monitoring Mechanism, *UN Doc. S/2000/1026*, p. 12.

¹¹ For more information, see the report of the Panel of Experts on Angola (the Fowler report), *UN Doc. S/2000/203*, paras. 75-114; and the report of the Panel of Experts on Sierra Leone, *UN Doc. S/2000/1195*, paras. 65-166.

in diamond-selling centres were one of the factors that made it easy for UNITA to gain access to the international diamond market.¹²

The Kimberley Process Certification Scheme was launched in November 2002, only two and a half years after the first meeting in Kimberley, South Africa. The Scheme was adopted with a ministerial declaration at a conference held in Interlaken.¹³ The process is based on voluntary commitments undertaken by participants, *i.e.*, countries producing and trading diamonds. These commitments include the adoption of appropriate national legislation and reporting requirements concerning the volume of their trade in rough diamonds. The implementation of the commitments is monitored by the participating non-governmental organizations.¹⁴ The Kimberley Process is paralleled by a system of self-regulation for the diamond industry under the auspices of the World Diamond Council.¹⁵

8.2.2 Scope and objectives of the scheme

The Kimberley Process is premised on the idea that “urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states”.¹⁶ The Kimberley Process Certification Scheme was designed “to exclude conflict diamonds from the legitimate trade”.¹⁷ As its objectives show, it is a very practical initiative with the primary aim of protecting the legitimate diamond trade.

In order to gain a proper understanding of the scope of the Kimberley Process, it is essential to take a closer look at its definition of “conflict diamonds”. This may help to understand what the scheme covers and, more importantly, what it does not. The Kimberley Process defines conflict diamonds as:

12 Final Report of the Panel of Experts, *UN Doc. S/2000/203*, paras. 87-93.

13 Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds.

14 For more details, see J.E. Wetzel, ‘Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in ‘Conflict Diamonds’’, in N. Quéniévet & S. Shah-Davis (eds.), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague: T.M.C. Asser Press (2010), pp. 170-171.

15 The World Diamond Council has been established in 2000 with the purpose of “represent[ing] the diamond industry in the development and implementation of regulatory and voluntary systems to control the trade in diamonds embargoed by the United Nations or covered by the Kimberley Process Certification Scheme”. See <http://www.worlddiamondcouncil.com/> for more details (consulted on 27 June 2012).

16 Kimberley Process Certification Scheme, fourth paragraph of the preamble.

17 Kimberley Process Certification Scheme, ninth paragraph of the preamble.

“rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future”.¹⁸

The first element that reveals the scope of the Kimberley Process is the reference to “rough diamonds”, defined as “diamonds that are unworked or simply sawn, cleaved or bruted”.¹⁹ In other words, as soon as diamonds have undergone any form of modification from their natural state, they are no longer covered by the Kimberley Process Certification Scheme. Of course, this considerably narrows the scope of the scheme. In addition, it provides loopholes for bypassing it. In fact, in 2007 the participating NGO Global Witness reported a significant number of suspicious shipments of polished diamonds from countries with no diamond industry.²⁰ One possible explanation for this is that these shipments were deliberately misclassified.

Secondly, the Kimberley Process covers only diamonds that are used by rebel movements or their allies. Thus the definition covers rebel movements and all those who provide support to these movements, either by trading with them or by other means, including foreign governments, such as the Taylor administration which supported the Revolutionary United Front (RUF) in Sierra Leone, as well as companies.²¹ Therefore the definition is broader than an earlier one proposed by the General Assembly in its Resolution 55/56, which focused exclusively on the role of rebel movements themselves.²²

However, diamonds mined by national authorities are excluded from the definition, even when this is associated with gross human rights violations. This turns out to be a very problematic limitation, threatening the very survival of the Kimberley Process. The 2011 Plenary decision to allow Zimbabwe to resume export of its diamonds,²³ after an earlier decision of the Plenary in 2009 to temporarily block the export of diamonds from Zimbabwe, was a cause

18 Kimberley Process Certification Scheme, Section I.

19 Kimberley Process Certification Scheme, Section I.

20 Global Witness, ‘Loopholes in the Kimberley Process’, October 2007.

21 See also J.E. Wetzel, ‘Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in ‘Conflict Diamonds’’, in N. Quéniévet & S. Shah-Davis (ed.), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague: T.M.C. Asser Press (2010), pp. 173-174.

22 The General Assembly defined rough diamonds as “diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments. UN General Assembly Resolution 55/56 (2000), second paragraph of the preamble.

23 Final Communiqué from the Kimberley Process Plenary Meeting, 3 November 2011, available through <http://www.worlddiamondscouncil.org>, resources section (consulted on 14 June 2012), para. 19.

of great concern. The reasons for blocking Zimbabwe's diamond exports in 2009 were reports of human rights abuses committed by the Zimbabwean army at particular mining sites, as well as reports of smuggling in contravention of the scheme.²⁴ The 2011 Plenary decision provoked a great deal of anger, notably among the NGOs involved in the Process. Some of them even walked out of the process.²⁵

The last element of the definition is very interesting, as it indirectly touches on the question of the legitimacy of the armed conflict itself. According to the definition, conflict diamonds are diamonds that are used to finance conflicts aimed at undermining *legitimate* governments. The reference to 'legitimate' with respect to governments seems to imply that the definition excludes diamonds that are used by rebel movements to overthrow governments that are not – or are no longer – recognised by the international community. In this respect reference can be made to Chapter 2 of this book, which discussed the position of governments under international law. The reference to legitimate governments in the Kimberley definition of conflict diamonds lends support to the conclusion reached there, in the sense that armed groups that aim to overthrow an illegitimate government are considered to have a right to exploit the State's natural resources.

Furthermore, the definition indicates that it is up to the Security Council to determine whether rough diamonds used by armed groups constitute 'conflict diamonds'. The definition explicitly refers to existing and future Security Council resolutions: "as described in relevant United Nations Security Council resolutions". This reference could be interpreted to mean that the Security Council must determine in advance whether diamonds used by armed groups in particular situations are "conflict diamonds". This implies that the Kimberley scheme only covers diamonds that have explicitly been labelled "conflict diamonds" by the Security Council.

Therefore the definition of conflict diamonds in the context of the Kimberley Process is very specific and very limited. This is understandable, as the original objective of the Kimberley Process was to stop diamonds from financing horrific conflicts such as those in Angola and Sierra Leone, where diamonds were mined by rebel groups like UNITA and the RUF.

However, the Kimberley Process scheme entered into force ten years ago and it is time to rethink its objectives. Is it an initiative that aims at re-establishing sovereignty over natural resources by helping governments to regain control over the State's natural resources? Or is the objective of the process rather human rights-oriented, *i.e.*, is its objective to exclude from the market

24 See the Final report of the Kimberley Process Certification Scheme Review Mission to Zimbabwe from 30 June to 4 July 2009, available through <http://graphics8.nytimes.com/packages/pdf/world/ZimFinaldraft020909.pdf> (consulted on 9 December 2012).

25 See in this regard *e.g.* the Press release of Global Witness, one of the founding NGOs, on <http://www.globalwitness.org> (consulted on 14 June 2012).

all diamonds that are associated with violence and human rights abuses in general? In the latter case, the term 'conflict diamonds' urgently needs to be redefined.

The United States, which chaired the Kimberley Process in 2012,²⁶ was certainly in favour of increasing the scope of the definition. It proposed a new definition of conflict diamonds which would include all diamonds associated with violence and human rights abuses, whether committed by rebel movements or States, in or outside the context of an armed conflict.²⁷ The advocates of this broader definition not only include civil society groups and State members to the Kimberley Process, but also companies in the diamond industry. The reason for the diamond industry to engage in the Kimberley Process in the first place was the damage to the industry's reputation after reports involving 'blood diamonds' in the late 1990s. Examples like Zimbabwe pose a similar problem for the industry. However, there are also a number of opponents to a new definition, especially – and not surprisingly – in States that produce diamonds. In the light of the controversy surrounding a new definition, the 2012 Plenary meeting, held in December 2012 in Washington, delayed the adoption of a new definition until at least 2013. At the time of publication of this book, no further action has been taken.

8.2.3 Participants and institutional structure

The Kimberley Process has 54 participants, representing 80 States.²⁸ Although it is not an international organization, State participants are referred to as "members". Producing members account for 99.8 % of the worldwide production in rough diamonds, and the process includes all the major diamond trading countries. Other participants in the process include the World Diamond

26 The Chair of the Kimberley Process rotates on an annual basis. The current Chair is South Africa, while China (the current Vice-Chair) will become the Chair in 2014.

27 In this respect see the Chair Vision Statement of 7 August 2012, available through <http://www.kimberleyprocess.com> (consulted on 12 August 2012). See also the commentary to the Chair Vision Statement, which sets out in more detail a proposition to change the definition for conflict diamonds so as to apply to "diamond-related conflicts that meet generally agreed-upon standards of armed conflicts, such as a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. This would also apply to circumstances of systematic violence, such as protracted and violent internal disturbances and tensions, grave acts of violence or acts of a similar nature over an extended period. Such a definition would not apply to individual or isolated cases. Neither would this apply to violence that is unrelated to diamonds". See Chair Vision Statement FAQs, p. 4 (consulted on 12 August 2012).

28 See <http://www.kimberleyprocess.com> (last consulted on 5 December 2012). The European Union and its member States count for one single participant. In December 2012, Panama, Kazakhstan and Cambodia are admitted as new participants following the admission in August of Cameroon.

Council, representing the diamond industry, and civil society. Global Witness and Partnership Africa-Canada are among the founding NGOs.

The institutional structure of the Kimberley Process is very basic. Its operation largely depends on the contribution of the participants and observers to the Scheme. The Kimberley Process does not have a permanent secretariat at its disposal, although there are plans to establish a so-called administrative support mechanism (ASM).²⁹ Furthermore, the principal organ of the Kimberley Process is the Plenary, which meets once a year and consists of all the Kimberley Process participants and observers, i.e., the participating States, as well as the diamond industry and civil society. Decisions regarding the functioning of the system are adopted by this organ on the basis of consensus.³⁰ It may also set up *ad hoc* working groups and subsidiary bodies to refine particular aspects of the system, i.e., to prepare guidelines on internal controls, or to look into specific situations.³¹

The Kimberley Process is supervised by a Chair, a function that rotates amongst the participants on a yearly basis. In addition to directing the working groups and administering the Process, the Chair's functions include the resolution of disputes between participants regarding the implementation of the scheme.³² This dispute resolution mechanism could constitute an important tool to ensure compliance by members, if used effectively. It is triggered by a form of "whistle blowing". Participants can inform the Chair of concerns regarding compliance with the scheme by other participants. The Chair will then try to find a solution to the problem with a form of mediation. So far, the dispute settlement mechanism has been used once, leading to the suspension of a participant from the process.³³

29 See the 2010 Administrative Decision on the Establishment of an Ad Hoc Committee for Exploring the Modalities of Enhancing the Efficiency of the Kimberley Process With a View to Provide Administrative Support for its Activities and the 2011 amendment to this decision, available through <http://www.kimberleyprocess.com>, documents section (consulted on 14 June 2012). In December 2012, the Plenary agreed to accept the offer of the World Diamond Council to supply administrative support to the body for one year, starting January 1, 2013.

30 2003 Rules of Procedure of Meetings of the Plenary, and its Ad Hoc Working Groups and Subsidiary Bodies [hereafter: Rules of Procedure], available through <http://www.kimberleyprocess.com> (consulted on 14 June 2012), Rule 42.

31 Rules of Procedure, Rule 1 and 19.

32 Kimberley Process Certification Scheme, Section VI.

33 In this respect, see The Kimberley Process Certification Scheme: Third Year Review, p. 6, available through <http://www.kimberleyprocess.com>, documents section (last consulted on 27 August 2012).

8.2.4 Operation of the scheme

The Kimberley Process Certification Scheme functions on the basis of export and import permits for shipments of rough diamonds. Each shipment of rough diamonds must be accompanied by a duly validated Certificate.³⁴ This Certificate must meet a number of minimum requirements, including a statement that the rough diamonds in the shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme. Furthermore, it must be tamper and forgery-proof, it must identify the issuing authority as well as the exporter and importer, state the carat weight, the number of parcels and the value of the shipment, and it must include a validation of the Certificate by the Exporting Authority.³⁵ In addition, a confirmation of receipt must be sent to the relevant Exporting Authority, with reference to the Certificate number, the number of parcels, the carat weight and the details of the importer and exporter.³⁶

In order to meet these requirements, participants must establish a system of internal controls designed to eliminate conflict diamonds from shipments of rough diamonds imported into or exported from their territory.³⁷ In this respect, participants must meet a number of minimum requirements. They must designate Importing and Exporting Authorities, ensure that rough diamonds are imported and exported in tamper-proof containers, adopt appropriate legislation to implement and enforce the Certification Scheme, and collect, maintain and exchange official production, import and export data with other participants.³⁸ Finally, participants should cooperate with each other with the exchange of information and best practices.³⁹ Over the course of time, these requirements have been further refined with administrative decisions and declarations adopted in the plenary sessions.⁴⁰

In addition to these minimum requirements, the Kimberley Process Certification Scheme provides a number of recommendations for the establishment of a system of internal controls. These include recommendations relating to

34 Kimberley Process Certification Scheme, Section III (a).

35 Kimberley Process Certification Scheme, Annex I A.

36 Kimberley Process Certification Scheme, Section III (b).

37 Kimberley Process Certification Scheme, Section IV (a).

38 Kimberley Process Certification Scheme, Section IV (b)-(f).

39 Kimberley Process Certification Scheme, Section V.

40 See, *e.g.*, the 2005 Moscow Declaration which sets out a number of recommendations concerning internal controls over alluvial diamond mining. Similarly, the 2007 Brussels Declaration contains recommendations on internal controls for participants with rough diamonds trading and manufacturing which directly affect companies. See also the 2009 Administrative Decision on Implementation and Enforcement which builds on Section V of the Kimberley Process Certification Scheme concerning cooperation and transparency, *inter alia*, to counter fraudulent certificates and suspect shipments. For all these documents, see the documents section of <http://www.kimberleyprocess.com> (consulted on 13 June 2012).

the transparency of payments for rough diamonds, the licensing of mines and miners, as well as the registration and licensing of diamond buyers, sellers, exporters, agents and courier companies.⁴¹

The proper functioning of the Kimberley Process is therefore largely dependent on national implementation. Decisions on the operation of the internal controls are left to the national States participating in the scheme. The prosecution of infringements of the scheme is also a domestic issue. The Kimberley Process Third Year Review Report of November 2006 mentions a number of seizures of diamond parcels, as well as the instigation of criminal proceedings by countries, but the report fails to give a real insight into the proper functioning of the Process. The significant number of reported seizures by trading countries such as the European Union, Australia and Canada is a hopeful sign, but does not provide much information on the overall success of the scheme.

Although the scheme relies on national implementation, the Kimberley Process has introduced a system of international monitoring. This system is based primarily on a peer review system and works largely on a voluntary basis. States have to consent to the use of a review mission.⁴² Despite the voluntary nature of the monitoring system, the majority of Kimberley members have accepted review missions. In some cases, these have had a considerable impact. In the case of Zimbabwe, for example, a review mission in 2009 provided essential information, resulting in a temporary blocking of Zimbabwean diamonds and the adoption of a working plan by the Zimbabwean government to address the findings of the review team.

Despite the emphasis on national implementation and the voluntary nature of the commitments, States do have to satisfy a number of requirements in order to be eligible to participate in the Kimberley Process. Participation in the process is dependent on the implementation of the minimum requirements set out above. If States do not meet these minimum requirements, they can be suspended from the Process.⁴³

In practice there have been some cases of suspension or self-suspension under the Process. In 2004, the Republic of the Congo was suspended because it could not provide sufficient details on its diamond production. It was suspected of being a transit country for smuggling diamonds from the Democratic Republic of the Congo and Angola. The suspension was lifted in 2007,

41 Kimberley Process Certification Scheme, Annex II.

42 See the 2003 Administrative Decision on the Implementation of Peer Review in the KPCS, available through <http://www.kimberleyprocess.com>, documents section (consulted on 14 June 2012). The peer review system has been revised several times, the last revision dates from 2007, through Administrative Decision 16.

43 Guidelines for the Participation Committee in Recommending Interim Measures as regards Serious Non-compliance with KPCS Minimum Requirements, adopted on 5 November 2008, available through <http://www.kimberleyprocess.com> (consulted on 13 May 2012).

after the Republic of the Congo had demonstrated that it had introduced reforms in its diamond sector.⁴⁴

Furthermore, Venezuela and Côte d'Ivoire are examples of participants that opted for self-suspension. Côte d'Ivoire opted for suspension as soon as the requirements were introduced in 2003. Today, the country is still not allowed to trade in rough diamonds, but this is largely due to the UN Security Council sanctions imposed in 2005 against diamonds originating from the country. The Kimberley Process and the UN Panel of Experts on Côte d'Ivoire are closely cooperating to reinstate Côte d'Ivoire as an active member of the Kimberley Process. Venezuela announced in 2008 that it would suspend its export of rough diamonds until it had taken the necessary reforms to control its diamond sector. However, Venezuela has not yet rejoined the Kimberley Process.

Since the launch of the Kimberley Process, the number of 'conflict diamonds' traded on the international market has dropped significantly. It is estimated that conflict diamonds represent about one per cent of the international trade in diamonds today, compared to estimates of up to 15% in the 1990s.⁴⁵ Nevertheless, it is difficult to measure the precise contribution the Kimberley Process has made to this success. Some of the conflicts that were financed with diamonds, in particular the conflicts in Angola and Sierra Leone which triggered the development of the Kimberley Process in the first place, had already come to an end by the time the Kimberley Process entered into force in early 2003. As a result, the total number of 'conflict diamonds' traded on the international market obviously declined as well.

Thus it is difficult to measure the impact of the Kimberley Process on the elimination of the trade in conflict diamonds. One important function of the Kimberley Process is related to conflict prevention. The improved governance of diamonds, with the introduction of internal controls, the licensing of mines and increased transparency in export data and payments, can fulfil an important role in preventing rebel groups from gaining access to diamond mines. Furthermore, a functioning system of internal controls can be a disincentive for rebel groups to consider diamonds as a source of funding or financial gain. The certificate requirements, as well as the almost universal membership to the scheme, make it more difficult for rebel groups to find buyers for conflict diamonds.⁴⁶

In the case of Sierra Leone, the Kimberley Process has certainly played an important role in capacity building, making the diamond sector in that

44 See J.A. Grant, 'The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), p. 165.

45 See <http://www.kimberleyprocess.com>, 'About' section (last consulted on 6 December 2012).

46 See J.A. Grant, 'The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), p. 175.

country more resilient to future attempts by rebel groups to gain control over the sector. Moreover, the proportion of diamonds exported through government channels in that country has increased significantly due to implementation of the Kimberley Process.⁴⁷

8.2.5 International recognition of the Kimberley Process

From the beginning, the Kimberley Process received the support of the principal UN organs. In its resolution 55/56, adopted in December 2000, the UN General Assembly enthusiastically welcomed the Kimberley Process initiative and encouraged the development of an international certification scheme.⁴⁸ Moreover, the General Assembly issued a number of recommendations on the design of such a scheme.⁴⁹ These included recommendations to base it primarily on national certification schemes to ensure the widest possible participation. They emphasised the need for appropriate arrangements to help to ensure compliance and the need for transparency. Since then, the General Assembly has issued several resolutions endorsing the process and the resulting certification scheme.⁵⁰

From the start of the process, the Security Council also emphasised the importance of States working together with the diamond industry to devise effective arrangements to ensure that members of the diamond industry worldwide abide by the diamond sanctions imposed by it.⁵¹ In this respect the Council welcomed the initiatives that led to the Kimberley Process Certification Scheme.⁵² In addition, soon after the official launch of the certification scheme in 2002, the Security Council expressed its strong support for the scheme and urged all member States to actively participate in it.⁵³ Moreover, as discussed in the preceding chapter, the Security Council embraced the mechanism in several of its subsequent sanctions regimes as the primary way of implementing the sanctions. This gave significant added authority to the Kimberley Process.

In addition, the Kimberley Process has received support from organizations outside the UN. Most notably the recognition by the WTO through its waiver

47 *Ibid.*, pp. 166-173.

48 UN General Assembly Resolution 55/56 of 1 December 2000 (date of publication 29 January 2001) on the role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts, paragraph 10 of the preamble and especially paragraph 5.

49 *Idem*, para. 3.

50 See, *inter alia*, UN General Assembly Resolution 56/263 of 13 March 2002; Resolution 57/302 of 15 April 2003; Resolution 58/290 of 14 April 2004 and subsequent resolutions. The most recent resolution is Resolution 66/252 of 25 January 2012.

51 UN Security Council Resolution 1295 (2000), especially paragraph 19.

52 *Ibid.*, especially paragraphs 17-18.

53 UN Security Council Resolution 1459 (2003), especially paragraphs 1-3.

procedure. This waiver grants WTO members participating in the Kimberley Process the right to adopt measures to regulate the trade in rough diamonds that deviates from the trading rules of the WTO.⁵⁴ In this way, the WTO expresses its support for the Kimberley Process. It should be noted that it is exceptional for the WTO to express support for an initiative that addresses ethical concerns. In most cases where States have invoked ethical concerns as a reason to deviate from the WTO rules, the WTO has adhered to its non-discrimination policy.⁵⁵

8.2.6 Appraisal of the initiative

The Kimberley Process is a voluntary initiative which does not impose legally binding obligations on participating States. However, as stated before, States wishing to participate in the initiative must meet the minimum requirements of the Process. If they do not meet these requirements, they either cannot join or risk suspension from the Process. This is one of the major strengths of the Process, as the participants, including almost all the diamond-producing States, as well as all States hosting major diamond markets, such as Belgium, South Africa and Israel, are barred from trading with non-participants.⁵⁶ Therefore expulsion from the process implies exclusion from the international diamond market.

54 Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of the WTO General Council of 15 May 2003, *Doc. WT/L/518* (27 May 2003). The waiver was extended in 2006 by General Council Decision of 15 Dec. 2006, *Doc. WT/L/676* (19 December 2006) and again in 2012 by General Council Decision of 11 December 2012, *Doc. G/C/W/675/Rev.2*. The waiver expires on 31 December 2018.

55 See P. van den Bossche, N.J. Schrijver and G. Faber, *Unilateral Measures Addressing Non-Trade Concerns, A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods*, The Hague: OBT / the Ministry of Foreign Affairs of the Netherlands (2007).

56 This is the characteristic of the scheme that has inspired most debates concerning the compatibility of the scheme with WTO trade law and especially with the principle of non-discrimination. Although in practice this problem is solved through a waiver by the WTO, many authors question the necessity of such a waiver. The main argument of these authors is that the Kimberley Process can be exempted under one of the general exceptions to the principle of non-discrimination under the General Agreement on Tariffs and Trade (GATT). For more details on this discussion, see, e.g., J. Pauwelyn 'WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for "Conflict Diamonds"', *Michigan Journal of International Law*, Vol. 24 (2002-2003), pp. 1177-1207; K.N. Schefer, 'Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process', in T. Cottier, J. Pauwelyn and E. Bürgi, *Human Rights and International Trade*, Oxford: Oxford University Press, pp. 391-450; J.E. Wetzel, 'Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in "Conflict Diamonds"', in N. Quéniévet & S. Shah-Davis (ed.), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague: T.M.C. Asser Press (2010), pp. 171-173.

The implementation of the Kimberley Process and its standards is achieved through the adoption of national legislation and procedures. Thus, while the Kimberley Process itself does not impose legally binding obligations on its participants, standards set by the Kimberley Process acquire legal force through implementation in national legislation. Participants expressly commit themselves to implementing Kimberley's minimum requirements regarding internal controls in their national legislation.

Moreover, the international recognition of the scheme, especially the strong support from the Security Council, adds considerable weight to the credibility and effectiveness of the initiative. In its sanctions regimes in relation to Angola, Sierra Leone and Liberia, the Security Council expressly provided for exemptions from the sanctions for rough diamonds traded with an effective certificate of origin regime, and expressed a preference for the Kimberley Process Certification Scheme. In its sanctions regime in relation to Côte d'Ivoire, the Security Council even made the lifting of sanctions conditional on Côte d'Ivoire's participation in the Kimberley Process.

However, from an institutional point of view, the Kimberley Process also has some significant weaknesses. The most important concerns the monitoring mechanism of the scheme. The Kimberley Process relies principally on national monitoring. There is no independent international body responsible for monitoring the implementation of the Kimberley Process requirements by the participants. International monitoring is conducted on the basis of a peer review system and largely on a voluntary basis. This system diminishes the credibility of the Kimberley Process and increases the possibilities for rebel groups to find loopholes to bypass the scheme.

Another weakness of the system is related to the decision-making process. As indicated above, decisions are taken in the Plenary, which is composed of the participants in the Process. This means that the participants have to decide on each other's performance. Decisions are taken on the basis of consensus, which means that States can effectively block controversial decisions. This makes enforcing the requirements much more difficult. The Group of Experts on Côte d'Ivoire mentioned this problem when it concluded that "the Kimberley Process fails to take action when its participants do not, or cannot, adhere to its principles. This problem is not restricted to the region, but applies to Kimberley Process participants more generally".⁵⁷

Thus, on the whole, the Kimberley Process could be seen as an example of a voluntary agreement with compulsory elements, albeit not from a purely legal perspective. In countries that are committed to implementing the scheme, the results have been impressive. Sierra Leone serves as an example in this respect. The country has seen its official diamond exports growing considerably, while a recurrence of the armed conflict has so far been prevented.

57 Midterm Report of the Group of Experts on Côte d'Ivoire pursuant to paragraph 12 of Security Council Resolution 1893 (2009) of 18 March 2010, *UN Doc. S/2010/179*, para. 77.

However, in countries that do not have such a direct interest in implementing the scheme, the results have not always been so positive. Countries like Venezuela and Côte d'Ivoire, which are notorious for large-scale diamond smuggling and circumvention of the Kimberley Process requirements, illustrate the weaknesses of a non-legally binding regulatory regime like the Kimberley Process.

From a legal point of view, the significance of the Kimberley Process could be further improved with reforms in its institutional structure. The monitoring mechanism would benefit from greater impartiality with the introduction of independent audits. The functioning of the enforcement mechanism could be improved with the introduction of a more refined set of sanctions. The only formal sanction that exists at the moment is suspension from the scheme. This is such a robust measure that it is hardly ever applied.

The introduction of more moderate sanctions would give the participants more options to deal with issues of non-compliance, and in practice, such options already exist. The diamond exports of a country can, for example, be blocked without this resulting in the official suspension of the participant. This was the case in Zimbabwe in 2009. The system would benefit from formalising and refining these options.

In spite of its weaknesses, the Kimberley Process has proved to be an invaluable tool in eliminating conflict diamonds. It has provided a universal template for the certification of rough diamonds which can be applied in all countries trading in them. Therefore one important contribution of the Kimberley Process is that it has increased transparency in the diamond industry. Another important contribution of the Kimberley Process is that it has provided a platform for dialogue for States, companies and civil society to draw up plans for the elimination of the trade in conflict diamonds.

It is precisely this latter function that determines the future relevance of the Kimberley Process. In order to continue to be relevant, the participants should carefully reconsider the objectives of the Process. Currently, its principal function is related to conflict resolution, in the sense that it provides a tool to stop armed groups from financing their armed struggle with the trade in rough diamonds. Its function as a tool for conflict prevention is limited to discouraging armed groups from turning to diamonds to finance their armed struggle. Arguably, the participants should continue to develop the role of the Kimberley Process in the prevention of conflicts by adopting a broader definition of conflict diamonds, as proposed by the United States. This definition should include rough diamonds that are associated with violence and human rights abuses, whether they are committed by rebel movements or governments, in or outside the context of an armed conflict. Obviously, this policy change has major implications, not only for the Kimberley Process itself but also for its relationship with other institutions, most notably with the Security Council. The Kimberley Process would become more independent from the Security Council as a result of this change, since it would allow

Kimberley to address situations that do not directly pose a threat to international peace and security. Nonetheless, in order to improve its credibility as a tool to break the link between diamonds and armed violence, it is imperative for Kimberley to embark upon that route.

8.3 EXTRACTIVE INDUSTRY TRANSPARENCY INITIATIVE

8.3.1 Context

The Extractive Industry Transparency Initiative (EITI) results from an NGO-driven campaign, introduced in 1999 with the aim of increasing transparency in the natural resources sectors of poor States which are rich in resources, by publishing company payments and government revenues. This “Publish What You Pay” campaign inspired the British government to initiate EITI, based on a multi-stakeholder initiative involving governments, the extractive industry and non-governmental organizations.⁵⁸ EITI was introduced during the 2002 Johannesburg Summit on Sustainable Development and a pilot phase was launched a year later. In the following years, both the institutional structure and the implementation process were developed in more detail. A Secretariat and a Board were established, and EITI principles, criteria and a validation guide were adopted. EITI has been fully operational since 2009.⁵⁹ Moreover, the EITI Standard is updated on a regular basis in order to increase the effectiveness of the initiative. The most recent version of the Standard was adopted in May 2013.

8.3.2 Scope and objectives of the initiative

The objective of EITI is to strengthen governance in resource-rich States by increasing transparency and accountability in the extractive industries. In the first place this involves the oil, gas and mining sectors, but it may also include other natural resources industries. Liberia, for example, has included the forestry and rubber industries in its EITI programme.⁶⁰

The initiative is based on twelve principles which clearly demonstrate a broader commitment to sustainable development.⁶¹ This is especially clear from the first principle, which formulates the premises on which the initiative

58 For more information on the ‘Publish What You Pay Campaign’, consult <http://www.publishwhatyoupay.org> (consulted on 18 June 2012).

59 For more details, see the Extractive Industries Transparency Initiative, *The EITI Standard*, EITI International Secretariat (May 2013), available through <http://eiti.org> (consulted on 20 June 2013).

60 See <http://eiti.org/Liberia> (consulted on 10 August 2012).

61 These principles can be found in the EITI Standard, p. 9.

is built. This is the belief that “the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction” and that the improper management of natural resource wealth “can create negative economic and social impacts”.

The principles reaffirm the sovereignty of States over their natural resources, while emphasising the responsibility of governments to manage natural resources for the benefit of the country’s population and in the interests of national development. In this respect, the principles reflect the idea of stewardship for revenue streams and public expenditure.⁶² In addition, the principles articulate the relationship between the accountability of governments for the management of natural resources and for sustainable development.⁶³

EITI’s main tool to increase transparency and accountability for the management of natural resources revenues is the regular publication of reports, including full government disclosure of all extractive industry revenues on the one hand, and of all material payments to governments by extractive companies on the other. These publications must be made available to a wide audience in a publicly accessible, comprehensive and comprehensible manner. Other tools to increase transparency and accountability include external audits and the active engagement of civil society.⁶⁴

Although EITI is not an instrument that is designed specifically to stop natural resources from fuelling armed conflict, the mechanism can be extremely useful in restoring effective government control and improving governance over natural resources in situations of (immediate) post-conflict reconstruction. In this way, EITI can help to prevent resource revenues from provoking a relapse into armed conflict. In fact, its broader ambit does not preclude it from being one of the principal tools to break the link between natural resources and armed conflict. Many countries where major resource-related conflicts have taken place in the last twenty years have joined the Initiative.⁶⁵ In addition, a concept note prepared by the United Kingdom for the Security Council’s thematic open debate of 19 June 2013 on natural resources and conflict prevention refers to EITI as one out of four risk mitigating initiatives, together with the Kimberley Process, the OECD Due Diligence Guidance and the Ruggie

62 See Principle 2: “We affirm that management of natural resource wealth for the benefit of a country’s citizens is in the domain of sovereign governments to be exercised in the interests of their national development” and Principle 8: “We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure”.

63 See Principle 4, which states that “a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development”.

64 See the seven EITI Requirements as set out in the EITI Standard 2013, p. 10.

65 EITI compliant countries include Liberia, while candidate countries include the DR Congo, Sierra Leone, Iraq and Côte d’Ivoire. See <http://eiti.org/countries> for up-to-date information. (consulted on 18 June 2012).

Framework for responsible business practices.⁶⁶ During the Open Debate, several delegations confirmed this position.⁶⁷ Lastly, EITI is among the principal tools of the International Conference on the Great Lakes Region to curb illegal exploitation of natural resources, as set out in the 2010 Lusaka Declaration.

8.3.3 Participants and institutional structure

EITI has 39 implementing countries, 23 of which are recognised as EITI-compliant countries while 16 have the status of candidate countries.⁶⁸ Compliant countries meet all the requirements of the EITI standard, while candidate countries implement the EITI standard but do not yet meet all the requirements. Liberia, Nigeria, Iraq and Côte d'Ivoire are examples of compliant countries, while Afghanistan is a candidate country. In addition to implementing countries, EITI recognises stakeholders. These are "supporting" countries, including the Netherlands and the United States, but also non-governmental organizations, companies and international organizations. Relevant examples of non-governmental organizations include Global Witness, the Open Society Institute, Publish What You Pay and Transparency International. Participating companies include De Beers, BP, Shell and Tata Steel. Finally, international organizations involved in EITI include the African and European Union, the OECD, the IMF and the World Bank Group.

EITI's institutional structure is well developed. EITI is governed by an association, which is registered as a non-profit organization under Norwegian law. Its governance structure is codified in Articles of Association.⁶⁹ The EITI Association comprises three permanent institutional bodies. First, the EITI's Members' Meeting, consisting of personal representatives of States, companies and civil society organizations.⁷⁰ This is EITI's governing body.⁷¹ The second body is the EITI Board, which is the executive body of the Association. The

66 See Annex to the letter dated 6 June 2013 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General on 'Conflict prevention and natural resources: how can the effective and transparent management of natural resources in conflict-affected States contribute to international peace and security?', *UN Doc. S/2013/334*, 6 June 2013, paragraph 6.

67 See e.g. the United States, which emphasised that "[m]ultiple stakeholder partnerships among Governments, the private sector and civil society, such as the Extractive Industries Transparency Initiative (EITI), are making significant progress in addressing the link between extracted resources and conflict".

68 See <http://eiti.org/countries> (last consulted: 20 June 2013).

69 See the EITI Standard 2013, pp. 43-52, adopted on 16 February 2009.

70 Articles of Association, Articles 4, 8 and 9. As regards States' representatives, these are mostly civil servants or independent experts. There is no formal State representation in the Members' Meeting.

71 *Ibid.*, Article 8.

EITI Board consists of an independent Chair, eight State members, six members from industry and five members from civil society.⁷² The members of the Board are elected by the Members' Meeting.⁷³ The third institutional body is the EITI Secretariat, which supports the EITI Board in running the organization.⁷⁴ The Secretariat is funded on a voluntary basis by supporting governments and participating companies.⁷⁵

The well-developed institutional structure of the EITI Association, with organs that can act independently from the Association's members, is one of the principal strengths of the initiative, since it effectively allows EITI to perform its oversight function. It makes EITI less susceptible to inside pressure from member countries.

8.3.4 Operation

States wishing to join EITI have to meet four registration requirements. These include a public announcement of the State's intention to implement EITI and the creation of a multi-stakeholder group at the national level consisting of representatives from the private sector, civil society and relevant government ministries, to prepare and supervise the implementation of the EITI programme.⁷⁶ When States have satisfied these requirements, they can apply to the EITI Board for admission as a candidate country. In order to ensure the participation of all the relevant actors in the implementation process, the application cannot take place without the full support of the multi-stakeholder group.

After admission as a candidate country, States have to meet yet another set of minimum requirements before being accepted as a full member or "compliant country".⁷⁷ Amongst other things, all the relevant actors must be included in the process of implementation, and all relevant companies and government entities must submit reports which are based on accounts audited to international standards.

Furthermore, governments and companies, including state-owned companies, must comprehensively disclose all material payments and revenues. These are published in an EITI report, drawn up by an independent organization. The report must be "comprehensible, actively promoted, publicly accessible, and contribute to public debate".⁷⁸ One important innovation in the 2013 Standard, compared to the 2011 EITI rules, is that the reports must include

⁷² *Ibid.*, Articles 4 and 10.

⁷³ *Ibid.*, Articles 9 and 10.

⁷⁴ *Ibid.*, Articles 4 and 16.

⁷⁵ *Ibid.*, Article 18.

⁷⁶ EITI Standard 2013, p. 11.

⁷⁷ *Ibid.*, p. 10.

⁷⁸ *Ibid.*, pp. 32-33, Requirement 6.

contextual information about the extractive industry in the EITI participant's State.⁷⁹ This information must include details about the legal framework and fiscal regime, production data of the extractive industries, government involvement in extractive companies, and the allocation of licences to extractive companies. The inclusion of this requirement in the EITI 2013 Standard is an important step in raising public awareness, as contextual information about the sector enables citizens to see the individual data from a broader perspective. The last requirement of interest is that EITI implementation must be on a "stable, sustainable footing".⁸⁰ However, the Standard does not elaborate on this requirement.

Candidate countries must submit their first EITI report within 18 months after their admission. After that, countries must report annually. However, in order to be accepted as an EITI-compliant country, candidate countries must take one final step. Within two and a half years after admission as a candidate, countries must submit a validation report to the EITI Board for approval. This is an external review that assesses a country's compliance with the EITI Principles and Criteria.⁸¹ Again, the process comprises a number of checks and balances: the validator is selected by the EITI Secretariat from a list of accredited organizations pre-approved by the EITI Board, and the national multi-stakeholder group must give its consent to the proposed validator.

The validation process has to be repeated every three years once a country has been accepted as a compliant country. The validation requirements, together with the annual reporting procedure, ensure that States continue to comply with the requirements after their recognition as compliant countries. If the EITI Board considers at any given moment that a country has stopped complying, it can take several measures, ranging from temporary suspension from the process to the delisting of a State. At the moment there are several countries that have been suspended from the process, including the DR Congo, the Central African Republic and Sierra Leone.⁸²

The effectiveness of EITI was subject to a review in 2011, undertaken by an independent bureau.⁸³ However, the review report was based on a very limited case study of three countries, viz. Nigeria, Gabon and Mongolia. Moreover, the report showed mixed results. In all three countries, reforms

⁷⁹ *Ibid.*, pp. 21-25, Requirement 3.

⁸⁰ *Ibid.*, p. 33.

⁸¹ For more details on the validation process, see the Validation Guide, included in the EITI Standard 2013, pp. 35-39.

⁸² Status as of 20 June 2013. The DR Congo is suspended for not reaching compliance in its second validation; the CAR for not being able to implement EITI as a result of the *coup d'état* in March; and Sierra Leone for not satisfying all the reporting requirements in its 2010 Report.

⁸³ Scanteam, Evaluation of the Extractive Industries Transparency Initiative, May 2011, available through <http://eiti.org/files/2011-EITI-evaluation-report.pdf> (consulted on 7 December 2012).

had been undertaken for the purpose of implementing the EITI Standard. However, there were important differences between the countries, for example, notably with regard to the inclusiveness of the process and the institutional structure put in place to ensure the proper implementation of the process. Moreover, the report showed that the EITI process had hardly had any impact on society, in the sense of creating more accountability in government administration or promoting development. Other case studies on the Nigerian and Liberian EITI programmes have reached similar conclusions.⁸⁴

Joining EITI is regarded as an important step in creating a platform for dialogue and for building trust in government institutions, but it does not directly contribute to creating more accountability in government administration. The 2013 review of the EITI requirements is specifically intended to address these deficiencies, notably with the introduction of the requirement to publish contextual information on the extractive sector and by requiring more detailed information regarding individual payments by companies to governments.

In conclusion, EITI's most important functions so far have been to provide a framework for changes in the administration of natural resources revenues, to create a level playing field for companies in the extractive industries, and to create a platform for dialogue. However, when it comes to bringing about changes in government administration in general, and especially in fostering accountability and sustainable development, it has not yet generated any tangible results. As a tool for conflict prevention and resolution, EITI's role is therefore limited to improving the basic structure for resource governance, while it is not sufficiently equipped to eliminate grievances over resource distribution and to promote sustainable peace.

8.3.5 International recognition of the initiative

Although the launch of EITI had been announced in 2002, it was not until 2009 that it became fully operational. Since then, it has steadily been gaining support. Early support for EITI was voiced by the leaders of the G8, who referred to the importance of the initiative for increasing transparency in the extractive industries in all their declarations since 2007. In their most recent declaration, adopted at the 2013 summit held in Northern Ireland, the G8 expressly encouraged countries to join EITI.⁸⁵

84 See P.D. Ocheje, 'The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa', *Journal of Sustainable Development in Africa*, Vol. 8 (2006), No. 3 on Nigeria; and E. Rich & N. Warner, 'Addressing the Roots of Liberia's Conflict Through the Extractive Industries Transparency Initiative', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), pp. 201-209 on Liberia.

85 G8, 2013 Lough Erne G8 Leaders' Communiqué, 18 June 2013, paras. 34-39.

Furthermore, several international organizations participate directly in the initiative, including the African and European Unions, the IMF, the World Bank and the OECD. It is relevant to note that the World Bank administers EITI's so-called Multi-Donor Trust Fund, which provides technical and financial assistance to implementing States.⁸⁶ In addition, the OECD has integrated EITI in its own policy tools, such as its Due Diligence Guidance, examined in the following section.⁸⁷ The International Conference on the Great Lakes Region also endorsed EITI in its Lusaka Declaration of 15 December 2010 as one of the six tools developed to curb the illegal exploitation of natural resources.⁸⁸

EITI has encouraged the implementation of disclosure requirements for the extractive industries in the national legislations of several States, including those where major extractive companies are located. The United States, for example, has included a section in its Dodd-Frank Wall Street Reform and Consumer Protection Act which requires oil, gas and mining companies listed on Wall Street to include in their annual report information relating to any payment made by the company or any of its subsidiaries to a government for the purpose of the commercial development of oil, natural gas, or minerals.⁸⁹ This legislation affects all companies listed on the American stock market, including foreign companies such as BP and Shell.

Similarly, the European Union is currently amending the 2004 Transparency Directive and the 1978 and 1983 Accounting Directives in order to introduce mandatory disclosure requirements in EU legislation. Under the new Directives, both extractive and timber companies must publicly disclose their tax and revenue payments to governments worldwide.⁹⁰ The EU legislation goes

86 See the Memorandum of Understanding between the MDTF and the EITI International Secretariat of 20 March 2008, available through <http://eiti.org> (consulted on 18 June 2012).

87 OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2011), p. 24.

88 Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region, Lusaka, 15 December 2010, especially paragraph 2.

89 Dodd-Frank Wall Street Reform and Consumer Protection Act, *H. R. 4173*, 21 July 2010, Section 1504.

90 Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, 25 October 2011, *COM (2011) 684 final*, Article 6; Proposal for a Directive of the European Parliament and of the Council on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, 25 October 2011, *COM (2011) 684 final*, Article 4.9. Recently, the Legal Affairs Committee of the European Parliament has proposed an amendment to the Directives that would require oil, gas, mining and forestry companies not only to disclose their payments to governments country by country, but also on a project-to-project basis. Furthermore, it has set a relatively low threshold by requiring disclosure of all payments of €80,000 and over. See *The Guardian*, 'EU legislators aim for tougher law on oil, gas and mining payments', 19 September 2012, available through <http://www.guardian.co.uk/global-development/2012/sep/19/eu-tougher-transparency-law-extractive> (last consulted on 19 December 2012).

beyond section 1504 of the Dodd-Frank Act in two respects. First, unlike the Dodd-Frank Act, the EU legislation applies to timber companies as well. In addition, unlike the Dodd-Frank Act, which applies only to companies listed on the stock market, the EU proposals apply both to companies listed on the European stock markets and to large unlisted companies.⁹¹

Furthermore, the UN's principal organs have expressed their support for EITI. In a resolution on strengthening transparency in industries, the UN General Assembly emphasised that permanent sovereignty over natural resources must be exercised in the interests of national development and the well-being of the people of the State concerned.⁹² It is in this context that the General Assembly encouraged the international community "to strengthen, as appropriate, upon request, the capacity of States endowed with natural resources, especially those emerging from conflict situations" and that it noted "the efforts of countries that are participating in all relevant voluntary initiatives to improve transparency and accountability in industries, including in the Extractive Industries Transparency Initiative in the extractive sector".⁹³

Similarly, the Security Council has expressed its support for EITI, both in a general fashion and in the specific case of Liberia.⁹⁴ In its Presidential Statement of 25 June 2007, the Security Council recognised the role of voluntary initiatives aimed at improving revenue transparency, such as EITI, in ensuring that natural resources become an engine for sustainable development.⁹⁵ In addition, in Resolution 1854 (2008) concerning Liberia the Security Council expressed its support for Liberia's decision to take part in EITI and encouraged "Liberia's continued progress in implementing their EITI work plan to improve revenue transparency".⁹⁶

Nevertheless, it should be noted that the Security Council has never made use of the initiative to support its sanctions regimes, as it did with the Kimberley Process. This is remarkable, as there have been several cases where the Security Council had the occasion to do so. The first example concerns the conflict in Côte d'Ivoire, where revenues from natural resources were used

91 Large companies are those that exceed two of the following three criteria: annual turnover of €40 million; total assets €20 million and employees 250. An important consequence of bringing large unlisted companies under the directive is that state owned companies also fall under the directives.

92 UN General Assembly Resolution 62/274 of 11 September 2008, paragraph 4 of the preamble.

93 UN General Assembly Resolution 62/274 of 11 September 2008, especially paragraph 3 and 4.

94 See the Statement by the President of the Security Council of 25 June 2007, *UN Doc. S/PRST/2007/22*, p. 2; and UN Security Council Resolution 1854 (2008), paragraph 5 of the preamble.

95 UN Security Council Presidential Statement on Natural Resources and Conflict, *UN Doc. S/PRST/2007/22*, 25 June 2007, paragraph 9.

96 UN Security Council Resolution 1854 (2008), paragraph 5 of the preamble.

by both sides to the conflict in order to acquire arms in contravention of the embargo.⁹⁷

The second example concerns the situation in the DR Congo. In its Resolution 2053 (2012), the Security Council encouraged the Congolese Government “to further increase transparency in the administration of contracts for mining rights and the collection and accounting for taxes”.⁹⁸ These recommendations were made in connection with broader efforts to stop the trade in conflict resources from the DR Congo and to restore governance over the natural resources sectors. However, the Security Council did not refer to EITI as a tool to help the Congolese government to increase the transparency of its administration. Therefore the support for EITI expressed by the Security Council is not unequivocal.

The hesitancy of the Security Council to embrace an initiative like EITI can be linked to the diverging views of members of the UN Security Council with regard to the role of the UN Security Council in preventing armed conflicts. EITI is primarily an initiative aimed at improving the public management of natural resources, and in this way helps to eliminate some of the root causes of armed conflict. An open debate held in the Security Council on the topic of “Conflict prevention and natural resources” on 19 June 2013 revealed that many countries support a stronger role for the Security Council in addressing the root causes of armed conflict. France, for example, emphasised the responsibility of the Security Council “to encourage initiatives that ensure proper, lasting and responsible management” of natural resources. In France’s view, the Security Council “must support measures that can establish the basis for lasting peace”.⁹⁹ France explicitly referred to EITI as one of those measures, which, according to it, “has as a goal to ensure that [natural] resources serve development and not fuel ongoing conflicts”.¹⁰⁰

At the same time, Russia opposed strengthening the role of the UN Security Council. In Russia’s view, the Security Council can adopt sanctions “only in the case of specific violators whose actions fuel hotspots of instability. Such measures should be introduced on the basis of the Charter of the United

97 See, e.g., the Midterm report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 8 April 2009, *UN Doc. S/2009/188*, paras. 61-72; Final report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 9 October 2009, *UN Doc. S/2009/521*, paras. 171-210; Final report of the Group of Experts submitted in accordance with paragraph 12 of Security Council Resolution 1893 (2009) of 27 April 2011, *UN Doc. S/2011/271*, paras. 118-219. The indications of the Group of Experts were confirmed after the conflict had ended. See Final Report of the Group of Experts on Côte d’Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, paras. 92-100.

98 UN Security Council Resolution 2053 (2012), especially paragraph 25.

99 United Nations Security Council, Open debate on conflict prevention and natural resources, *UN Doc. S/PV.6982*, p. 13.

100 *Ibid.*

Nations, be targeted in nature and take account of the negative humanitarian consequences thereof for the population as a whole". Russia also emphasised the danger of "attempts to introduce automaticity in the sanctions mechanisms or to introduce, through the Security Council and not in line with its mandate, quasi-sanction instruments by broadening the practice of the certification of raw materials",¹⁰¹

It is this difference of opinion of the permanent members of the UN Security Council with respect to the role of the Security Council in addressing the root causes of armed conflict which to a large extent explains the Council's position with respect to EITI. During the open debate, many delegations emphasised the significance of EITI in preventing armed conflicts involving natural resources. However, the debate also reveals that opinions diverge as to the role of the Security Council in promoting EITI as part of its sanctions mechanisms. This is unfortunate, because instruments like EITI can and do make a valuable contribution to preventing the outbreak of armed conflicts.

8.3.6 Appraisal of the initiative

EITI is an initiative based on voluntary participation and States decide for themselves whether they are willing to participate. However, as soon as a State has decided to implement EITI, it has to satisfy a large number of compulsory requirements, both before joining and after admission. These requirements may not be legally binding, but compliance is essential for participation in the initiative. Furthermore, States that do not – or no longer – satisfy the criteria can lose their membership. One of the major strengths of the initiative lies in its system for the verification of compliance with the EITI requirements. Compliance is verified with an independent third party audit and the process is supervised by the EITI Board.

However, the initiative also has some weaknesses, for example, it relies exclusively on national reporting. EITI therefore relies completely on the national multi-stakeholder groups to provide reliable information concerning both government revenues and company payments. Even the validation process cannot guarantee that the information that is provided is wholly accurate. This weakness could be partly remedied by requiring governments and companies to report directly to EITI.

Furthermore, EITI has so far not been able to improve accountability in government administration. However, the evaluation reports predate the 2013 adaptation of the EITI requirements. Previous EITI Standards did not include any requirements regarding the distribution of revenues from the extractive sectors. The focus of the initiative was one-sided, in the sense that it dealt only with resources revenues and not with issues relating to the expenditure of

¹⁰¹ *Ibid.*, p. 16.

revenues from the extractive sector. This meant that EITI could be instrumental only in showing where the money came from, but not what it was spent on. The 2013 EITI Standard on the other hand, does include requirements related to the distribution of revenues from the extractive industries. Requirement 3.7 in particular determines that the EITI Report “should indicate which extractive industry revenues, whether cash or in-kind, are recorded in the national budget. Where revenues are not recorded in the national budget, the allocation of these revenues must be explained...”. Although framed as a recommendation rather than as a mandatory requirement, the inclusion of a reporting requirement for revenue expenditure is encouraging. Broadening the scope of EITI to mandatory public expenditure reporting does not seem to be a viable option, as this would mean that States would have to accept a third party audit on their expenditure. This could be a bridge too far for many countries participating in the initiative.

In conclusion, EITI is the only global initiative that specifically addresses problems related to public administration in the extractive industry. This makes it an important tool for the prevention and resolution of armed conflicts which have grievances over natural resources among their root causes. EITI has successfully highlighted the importance of transparent and accountable public administration in a sector that is of great economic importance to many developing countries, including developing countries emerging from armed conflict. The subsequent adoption of national and regional legislation to address these issues attests to EITI’s success in this respect.

At the same time, the adoption of the US Dodd-Frank Act and the revision of the European Transparency Directives, each with its own standards and modes of operation, also present a risk of the duplication of efforts. Therefore, there is a clear need to develop a single global reporting standard for the extractive industries, which was also recognised by the G8 at its 2013 Summit. In their final declaration, the leaders of the G8 committed themselves to “raise global standards for extractives transparency and make progress towards common global reporting standards, both for countries with significant domestic extractive industries and the home countries of large multinational extractives corporations”.¹⁰² EITI should play an important role in the implementation of these commitments. As the initiative brings together all the relevant actors and has a well-developed institutional structure, it constitutes a convenient forum for the synchronisation of further international action, both in relation to improving the governance of natural resources in general and, specifically, as part of post-conflict reconstruction efforts. Its primary role in improving resource transparency in conflict-affected States has been expressly acknowledged in specific instruments. Amongst these are the Lusaka Declaration of the International Conference on the Great Lakes Region, referred to

102 G8, 2013 Lough Erne G8 Leaders’ Communiqué, 18 June 2013, para. 36.

above, and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, examined below.

8.4 OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS

8.4.1 Context

The OECD Due Diligence Guidance is a voluntary code of conduct for companies in the minerals sector that either import from or operate in conflict-affected or otherwise politically unstable regions. The Guidance refers to “high-risk areas”, which are characterised by the presence of widespread violence or other risks of harm to people.¹⁰³ They include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence.¹⁰⁴

In other words, the OECD Due Diligence Guidance applies both to companies operating in States where there is ongoing armed conflict and to companies operating in fragile States. Thus the Guidance is not only a tool to address the responsibility of companies for fuelling conflicts but also to address their responsibility in other situations where gross human rights violations occur.

The Guidance elaborates on earlier OECD initiatives in the context of the OECD Declaration on International Investment and Multilateral Enterprises. These initiatives include in particular the OECD Guidelines for Multinational Enterprises and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.¹⁰⁵ The 2011 revision of the OECD Guidelines for Multinational Enterprises includes general due diligence requirements for all companies adhering to the OECD Guidelines.¹⁰⁶ The OECD Due Diligence Guidance develops these requirements specifically for some of the minerals that have contributed most to contemporary armed conflicts. These are tin, tantalum, tungsten and gold (3TG).

The OECD Due Diligence Guidance was developed to address the responsibility of corporations in respect of the trade in conflict minerals, in particular

103 See the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 13.

104 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 13.

105 For a discussion of the OECD Guidelines for Multinational Enterprises, see, e.g., J.L. Černič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights*, Groningen: Europa Law Publishing (2010), p. 184-207. For a discussion of the 2011 update of the guidelines, from the same author, ‘The 2011 Update of the OECD Guidelines for Multinational Enterprises’, *ASIL Insight*, Vol. 16 (4), February 2012.

106 *Ibid* for a discussion of these requirements.

from the DR Congo. In 2009, the Security Council mandated the Group of Experts on the DR Congo to draw up guidelines for the exercise of due diligence by the importers, processing industries and consumers of mineral products from the DR Congo, taking advantage of work carried out in other forums.¹⁰⁷ In order to implement this resolution, the Group of Experts turned to the OECD, member States of the International Conference on the Great Lakes Region, industry and civil society. This collaboration resulted in two instruments: the OECD Due Diligence Guidance as a general tool for companies in the minerals sector operating in conflict-affected or high-risk regions, as well as a more specific set of guidelines to address the problem of conflict minerals originating from the DR Congo, which was presented to the Security Council by the Group of Experts.

The OECD Council endorsed the Guidance with a recommendation.¹⁰⁸ It recommended that members and non-members adherent to the Declaration on Investment and Multilateral Enterprises “actively promote the observance of the Guidance by companies”, that they “take measures to actively support the integration into corporate management systems” of the framework, and that they “ensure the widest possible dissemination of the Guidance and its active use by other stakeholders including professional associations, financial institutions, and civil society organizations”.¹⁰⁹ Furthermore, the OECD Council instructed the Investment Committee and the Development Assistance Committee to monitor the implementation of the recommendation.¹¹⁰

8.4.2 Scope and objectives of the initiative

The aim of the Guidance is to ensure that companies procuring minerals from conflict-affected and high-risk areas “respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development”.¹¹¹ The Guidance provides a framework for these companies to help them assess the risk of their activities contributing to armed conflict or human rights abuses. Companies are to observe “due diligence”, defined as “an on-going, proactive and reactive process through which companies can

107 UN Security Council Resolution 1896 (2009), especially paragraph 7. The UN Security Council thus implicitly referred to the work undertaken by the OECD, in particular the 2006 Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones; and by the International Conference on the Great Lakes Region, in particular to its 2006 Protocol Against the Illegal Exploitation of Natural Resources and related initiatives.

108 See the Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), *Doc. C(2012)93*.

109 *Ibid.*, especially paragraphs 1-3.

110 *Ibid.*, especially paragraph 5.

111 *Ibid.*, especially paragraph 1.

ensure that they respect human rights and do not contribute to conflict”.¹¹² The due diligence framework applies to companies throughout the mineral supply chain, from the phase of the extraction of the minerals to their incorporation in the final consumers’ product.¹¹³ The Guidance currently covers tin, tantalum and tungsten, including their ores or mineral derivatives, as well as gold sources.¹¹⁴

The framework for due diligence aims to provide practical guidance to companies to help them to assess the risks of their activities contributing to armed conflict or human rights violations and to find adequate responses to eliminate these risks. This raises important questions regarding the nature of the risks the OECD Guidance aims to address. In this regard, the OECD Guidance incorporates a Model Supply Chain Policy which sets out principles and standards for responsible mineral sourcing.¹¹⁵ Companies adhering to the OECD Guidance must ensure that their own supply chain policy is consistent with the standards set out in this model. A discussion of the principles and standards set out in the Model Supply Chain Policy helps to gain a proper understanding of the OECD’s definition of responsible mineral sourcing.

First of all, the Model Supply Chain Policy determines that companies “sourcing from, or operating in conflict-affected and high-risk areas are not to tolerate nor by any means profit from, contribute to, assist with or facilitate the commission by any party” of serious abuses associated with the extraction, transport or trade in minerals. The first paragraph of the Model Supply Chain Policy identifies the following serious abuses: any forms of torture, cruel, inhuman or degrading treatment, any forms of forced or compulsory labour, the worst forms of child labour, other gross human rights violations and abuses such as widespread sexual violence, and war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide.

In other words, the Model Supply Chain Policy requires companies engaged in the minerals sector in fragile States to ensure that neither they nor their business partners are in any way involved in the violation of fundamental human rights or the commission of international crimes. Thus the Model Supply Chain Policy sets a very high standard. It is also interesting to note that the Guidance does not require companies to respect relevant conventions,

112 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 13.

113 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 14.

114 Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), *Doc. C(2012)93*.

115 Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), Annex II.

although it specifically refers to particular conventions and also uses legal terminology. It explicitly refers to the ILO Convention on the Worst Forms of Child Labour and uses the ILO's definition of forced and compulsory labour.¹¹⁶ In addition, it uses such legal terms as 'war crimes' or 'other serious violations of international humanitarian law', 'crimes against humanity' and 'genocide'.

The second form of irresponsible mineral sourcing that the OECD Guidance seeks to prevent is the provision of support to non-state armed groups or public or private security forces that illegally control mining sites. In this respect, the Model Supply Chain Policy requires companies not to tolerate any direct or indirect support to non-state armed groups or to public or private security forces through the extraction, transport, trade, handling or export of minerals. Direct or indirect support is defined broadly to include not only the procurement of minerals themselves, but also any indirect payments to such groups (e.g., by paying them illegal taxes) or providing them with logistical assistance or equipment.

In other words, the OECD Guidance seeks to prevent the involvement of companies in the trade in conflict minerals. It is interesting to note that the Guidance not only targets non-state armed groups, but also other actors such as mercenaries, private security companies and members of the national army involved in illegal mining. In this way, the Guidance aims to cover situations like that in the DR Congo, where criminal bands in the national army are involved in illegal mining.¹¹⁷

Finally, the Model Supply Chain Policy requires companies to refrain from engaging in bribery or fraudulent misrepresentation of the origin of minerals. They must support efforts to eliminate money laundering and they must ensure that all taxes, fees and royalties related to mineral extraction, trade and export are paid to the government and disclosed in accordance with the EITI principles.

In this way, the OECD Guidance seeks to prevent illegal taxation in all its forms by non-state armed groups and criminal bands in conflict-affected and high-risk areas. This was a major issue in several of the conflicts discussed in this book. The conflict in Côte d'Ivoire is a good example. The Group of Experts on Côte d'Ivoire uncovered the existence of parallel taxation systems in that country, operated by the opposition forces.¹¹⁸ A second point of interest is the reliance of the OECD Guidance on EITI as a means to ensure that taxes,

116 ILO Convention No. 182 on the Worst Forms of Child Labour, concluded on 17 June 1999, 2133 *UNTS* 161; ILO Convention No. 29 concerning Forced or Compulsory Labour, concluded on 28 June 1930, 39 *UNTS* 55.

117 Final Report of the Group of Experts on the Democratic Republic of the Congo prepared pursuant to paragraph 6 of Security Council Resolution 1896 (2009), *UN Doc. S/2010/596* of 29 November 2010, p. 76, pp. 47-76.

118 Final Report of the Group of Experts on Côte d'Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, paras. 92-110.

fees and royalties paid to the government are accounted for. This can be seen as a form of direct support for EITI.

It can be concluded from the above that the OECD has opted for a very broad definition of “responsible supply chains of minerals”. The responsibility of mineral companies is not limited to their role in fuelling armed conflicts. The OECD Guidance also seeks to address the broader responsibility of mineral companies and their policies on society in conflict-affected and high-risk areas, in particular with the provisions on serious abuses and bribery.

However, at the same time, the OECD Guidance sets a very high standard with regard to abuses in the minerals sector that are not directly related to the issue of providing support to armed groups. In order for the Guidance to become relevant, these abuses must have a serious nature, in the sense of amounting to complicity in the violation of fundamental human rights and international crimes. Therefore, the relevance of the Guidance is limited to addressing only the most serious irregularities in the extractive sector. It is not an instrument that addresses responsible business conduct in the extractive sector in a broad sense.

8.4.3 Participants and institutional structure

The OECD Due Diligence Guidance is part of a broader framework of instruments adopted by the OECD in relation to the (revised) OECD Declaration on International Investment and Multinational Enterprises. All OECD members, as well as nine non-members (Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru and Romania), have signed this declaration. For the purposes of the present study, it is relevant to note that these countries do not include any African States.

The Guidelines for Multinational Enterprises are annexed to the Declaration on International Investment and Multinational Enterprises.¹¹⁹ They contain recommendations on responsible business conduct for multinational companies. Since 2011, the Guidelines have included detailed recommendations on supply chain due diligence. Under the new Guidelines, companies should “carry out risk-based due diligence [...] to identify, prevent and mitigate actual and potential adverse impacts [...] and account for how these impacts are addressed”.¹²⁰ The impacts referred to in the Guidelines include both adverse

¹¹⁹ *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition.

¹²⁰ *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, Chapter II, para. A 10.

impacts caused by a company's own activities and adverse impacts caused by their business relations.¹²¹

In addition to this general due diligence requirement, companies must also carry out human rights due diligence in relation to their own activities and those of their business partners.¹²² These requirements were inserted in response to the 'Protect, Respect and Remedy Framework for Business and Human Rights', developed by John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.¹²³ This framework formulates human rights standards for companies. Guiding Principle 17, which sets out a human rights due diligence standard, is particularly relevant in this respect.¹²⁴

It is also relevant to note that States adhering to the Guidelines for Multinational Enterprises must set up so-called National Contact Points (NCPs). The role of the NCPs is to increase the effectiveness of the Guidelines, for example, by resolving issues that arise in relation to the implementation of the Guidelines.¹²⁵ These issues can be raised by all the interested parties, inclu-

121 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, Chapter II, paras. A 11-12. The OECD official Commentary to these Guidelines define business relationships as including "relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services. *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, p. 23.

122 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, Chapter IV, paras. 2, 3 and 5.

123 This framework has been developed on the initiative of the UN Human Rights Council (then: Commission) in order to improve corporate responsibility for the protection of human rights. It was subsequently endorsed by the Human Rights Council. Also see the Report on the 'Protect, Respect and Remedy Framework for Business and Human Rights' by John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *UN Doc. A/HRC/8/5*, 7 April 2008. See also the Report on the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, *UN Doc. A/HRC/17/31*, 21 March 2011.

124 Guiding Principle 17 states: "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."

125 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, p. 68, section I(1).

ding worker organizations and non-governmental organizations.¹²⁶ Although the NCPs cannot take binding decisions, the dispute resolution mechanism has proved to be a valuable resource for non-governmental organizations challenging the human rights policies of individual companies.

As the Due Diligence Guidance was a specific result of the general due diligence requirements set out in the Guidelines for Multinational Enterprises, its implementation is subject to the same institutional structure. This means that the dispute resolution mechanism set up under the Guidelines is also able to address alleged violations of the Due Diligence Guidance. This is a promising possibility for challenging the supply chain policies of mineral companies operating in conflict regions. In the 2000 version of the Guidelines, several complaints had already been filed against mineral trading companies operating in the DR Congo.¹²⁷ These complaints were triggered by a report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo on business enterprises considered by the Panel to be in violation of the OECD Guidelines for Multinational Enterprises.¹²⁸

Most of these complaints alleged that the company had failed to observe sufficient due diligence in the supply chain. Despite the rudimentary provision of the 2000 version of the Guidelines on supply chain due diligence, stating merely that “[e]nterprises should encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines”,¹²⁹ some of the cases brought before NCPs have been quite successful.

One of these complaints related to the practices of Afrimex, a British mineral trading company operating in the DR Congo. The complaint brought to the British NCP by Global Witness accused Afrimex of paying taxes to rebel forces in the Democratic Republic of Congo (DRC) and of practising insufficient due diligence in the supply chain, sourcing minerals from mines that use child and forced labour. According to the NCP, Afrimex failed to fulfil the due diligence requirements in two ways. In the first place the NCP concluded that the reliance of Afrimex on statements by its suppliers on the origin of the minerals purchased by Afrimex did not reflect sufficient due diligence.¹³⁰

126 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, p. 72, section C.

127 See e.g. *Global Witness vs. Afrimex* (filed on 20 February 2007); *11.11.11 et al vs. Cogecom* (filed on 24 November 2004); *11.11.11 et al vs. Namii Gems* (filed on 24 November 2004); *RAID vs. Das Air* (filed on 28 June 2004); and *NiZA et al. vs. CPH* (filed on 3 July 2003).

128 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2002/1146, Annex III.

129 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2000 Edition, Chapter II, para. II.10.

130 *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD*, Summary of NCP Decision, 28 August 2008, para. 51.

Secondly, Afrimex practised insufficient due diligence in the supply chain, because it “did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety”.¹³¹

The UK National Contact Point applied the Guidelines in a very forward looking way in the Afrimex case, taking into account new developments in corporate responsibility for human rights abuses emanating from the ‘Protect, Respect and Remedy Framework’ developed by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The implementation of this framework in the 2011 version of the Guidelines for Multinational Enterprises will hopefully raise the awareness of both companies and implementing States about the responsibility of companies to carefully assess the risks of their activities contributing to armed conflict or human rights abuses. Furthermore, it is to be expected that when assessing whether companies in the extractive sector have satisfied the due diligence requirements of the 2011 Guidelines, National Contact Points will turn to the Due Diligence Guidance for more specific indications.

8.4.4 Operation

The OECD Due Diligence Guidance was developed to ensure that companies procuring minerals from conflict-affected and high-risk areas “respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development”.¹³² The Guidance attempts to realise these objectives by introducing transparency and accountability in the minerals supply chain. It does so predominantly by using two main tools. The first involves putting in place mechanisms to ensure that upstream companies obtain information from their suppliers about the origin of the minerals purchased by them and that downstream companies provide such information to their business partners. The second concerns requiring independent audits from companies in order to ensure the credibility of the information relied on by upstream companies, as well as the information provided to them by downstream companies.

The OECD Guidance is based on a five-step approach to due diligence. The basic components of the five-step approach are the establishment of strong company management systems, the identification and assessment of supply

131 *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD*, Summary of NCP Decision, 28 August 2008, para. 62.

132 Recommendation of the OECD Council on Due Diligence for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011, para. 17.

chain risks, the design and implementation of strategies to respond to identified risks, the performance of independent third-party audits, and annual reporting on supply chain due diligence.

Therefore the approach focuses on the management of risks associated with business transactions in the mineral and gold sectors. The Guidance provides individual companies with the tools to reduce the risks of their business practices contributing to armed conflict and other forms of violence. In order to ensure the proper implementation of the due diligence policies, the approach has also built in some safeguards. These consist of the independent third-party audits and the disclosure requirements, which permit business partners, as well as the general public, to verify the company's mineral policies.

The OECD has also developed two separate supplements which provide specific guidance to companies on how to implement the five steps in their particular sectors, as referred to above. One supplement focuses on supply chain due diligence for companies trading in tin, tantalum and tungsten, while the other focuses on gold. The two supplements make a distinction between so-called "upstream companies", referring to the supply chain from the mine to smelters/refiners, and "downstream companies", referring to the supply chain from smelters/refiners to retailers.¹³³ Specific recommendations apply to these categories of companies. Neither of the supplements applies to small-scale mining by individuals, informal working groups or communities.

Both supplements require companies to review their sourcing practices in advance in order to determine whether the Guidance applies to them. The supplement on tin, tantalum and tungsten contains a set of "red flags" triggering the due diligence standards and processes contained in the Guidance. Red flags apply to certain locations of mineral origin or transit (minerals originating from or transported via a conflict-affected or high-risk area, minerals that are alleged to originate from a country with very low production levels of the mineral concerned, and minerals that are alleged to originate from a known transit country) and to particular suppliers (suppliers with ties to companies operating in one of the red flag locations, the suppliers or their business partners who are known to have recently sourced minerals from a red flag location). If one of these red flags applies or if a company cannot determine whether this is the case, it should proceed with the implementation of the Guidance.

The supplement on gold does not contain such a red flag system. In order to determine whether they actually or potentially source gold from conflict-affected and high-risk areas, all companies in this sector should immediately start carrying out the first steps of the process. These involve establishing strong management systems and identifying and assessing risks in the supply

133 For these definitions, see the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), Supplement on Tin, Tantalum and Tungsten and Supplement on Gold.

chain.¹³⁴ One important first step in this respect is the adoption of a supply chain policy, consistent with the Model Supply Chain Policy discussed above. The objective of this policy is to set forth common principles and standards against which the company can assess its own policies, as well as the activities and relationships of its suppliers.¹³⁵

8.4.5 International recognition of the initiative

The OECD Due Diligence Guidance has had extensive back-up from the international community. As mentioned above, both the International Conference on the Great Lakes Region and the UN Group of Experts on the Democratic Republic of Congo were involved in drafting the guidelines. This cooperation resulted in the development of mutually supporting initiatives.

First, the International Conference on the Great Lakes Region endorsed the OECD Due Diligence Guidance in its Lusaka Declaration and directed its Secretariat to integrate the processes and standards of the OECD Guidance in the six tools of the Regional Initiative against the Illegal Exploitation of Natural Resources.¹³⁶ Secondly, the Group of Experts on the DR Congo developed a set of due diligence guidelines specifically for minerals originating from the DR Congo, which relies on the OECD Guidance. This was acknowledged by the Group of Experts, which recommended in its final report of 2010 “that relevant individuals and entities refer to the OECD guidance for further details on due diligence requirements”.¹³⁷

The Security Council also expressed support for the OECD Guidance, both directly and indirectly, on several occasions. Most importantly, it did so by endorsing the Group of Experts Guidelines for the DR Congo. More specifically, the Security Council mandated the DR Congo Sanctions Committee to take the exercise of due diligence by a company into account when deciding whether to place it on the sanctions list. In this respect, the Security Council specifically referred to the guidelines developed by the Group of Experts or “equivalent guidelines” as a means of appraising the exercise of due diligence by companies.¹³⁸ The five-step approach to due diligence examined above

134 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), Supplement on Gold.

135 Supplement on Tin, Tantalum and Tungsten, Step 1 (A); Supplement on Gold, Step 1, Section 1 (A).

136 Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region, Lusaka, 15 December 2010, especially paragraphs 12 and 13. These six tools are a Regional Certification Mechanism; harmonisation of national legislation; a regional database on mineral flows; formalisation of the artisanal mining sector; promotion of EITI; and a whistle blowing mechanism.

137 Final Report of the Group of Experts prepared pursuant to paragraph 6 of Security Council Resolution 1896 (2009), *UN Doc. S/2010/596*, para. 319.

138 UN Security Council Resolution 1952 (2010), especially paragraph 8.

is essential to the Security Council in this respect. Thus, at least in relation to the DR Congo, the Security Council expressed strong support for the approach to due diligence set out in the OECD Guidance. In its Resolution 2101 (2013) in relation to the situation in Côte d'Ivoire, the UN Security Council confirmed its support for the OECD Guidance. In this resolution it expressly encouraged the government of Côte d'Ivoire to participate in the OECD-hosted implementation programme with regard to the due diligence guidelines for responsible supply chains of minerals from conflict-affected and high-risk areas.¹³⁹ This reference to the OECD Guidance in relation to Côte d'Ivoire confirms the willingness of the Security Council to promote the implementation of the OECD Guidance in a more general fashion.

Furthermore, the OECD Guidance was put forward as a tool to implement national legislation, such as the obligations imposed by section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁴⁰ Section 1502 of that Act requires companies listed on Wall Street to determine whether their products contain conflict minerals originating in the DR Congo or neighbouring countries, and to report this to the Securities and Exchange Commission (SEC).¹⁴¹ A proposal for a European counterpart to section 1502 of the Dodd-Frank Act is currently under discussion. In October 2010 the European Parliament requested the European Commission and Council to examine a legislative initiative similar to section 1502 of the US Dodd-Frank Act.¹⁴² However, the European Commission has not yet submitted a proposal to this end. In its Communication of 27 January 2012 to the European Parliament, the Council and the European Economic and Social Committee on Trade, Growth and Development, the Commission stated in more general terms its commitment to "explore ways of improving transparency throughout the supply chain, including aspects of due diligence".¹⁴³ However, the Commis-

¹³⁹ UN Security Council Resolution 2101 (2013), especially paragraph 25.

¹⁴⁰ See Joint Letter of the International Conference on the Great Lakes Region, the OECD and the UN Group of Experts on the Democratic Republic of Congo to the U.S. Securities and Exchange Commission, 29 July 2011, available through <http://www.oecd.org> (consulted on 9 July 2012). The transparency requirements regarding the provenance of minerals sourced in the DR Congo, included in section 1502 of the Dodd-Frank Act, must be distinguished from the transparency requirements regarding the payments of oil, gas and mining companies to governments under section 1504 of the Dodd-Frank Act, discussed above. Although these sections complement each other in some ways, they deal with different issues.

¹⁴¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, *H. R. 4173*, adopted on 21 July 2010, Section 1502.

¹⁴² European Parliament Resolution of 7 October 2010 on Failures in Protection of Human Rights and Justice in the Democratic Republic of Congo, *P7_TA(2010)0350*.

¹⁴³ Communication of the Commission to the European Parliament, the Council and the European Economic and Social Committee on Trade, growth and development: Tailoring trade and investment policy for those countries most in need, 27 January 2012, *COM(2012) 22*, p. 15.

sion did not make any concrete proposals, apart from stating its readiness to promote the OECD Due Diligence Guidance.

8.4.6 Appraisal of the initiative

The OECD Guidance is a voluntary initiative that aims to increase corporate responsibility in the minerals sector, operating on the basis of supply chain due diligence. Assigning responsibility throughout the supply chain is one of the ways of contributing to the effectiveness of the OECD Guidance as a framework for industry self-regulation. By requiring companies throughout the supply chain to conduct due diligence, it gives every company a stake in the due diligence process. Companies cannot hide behind each other or deny knowledge of what is happening further down the supply chain. Every company in the supply chain has a responsibility to check whether its business partners comply with the due diligence requirements in order to be able to fulfil its own obligations.

Another major strength of the Guidance is that it does not stand by itself, but that it can be used to give effect to other initiatives on social corporate responsibility. The OECD Due Diligence Guidance primarily provides mineral companies with a sophisticated set of guidelines which can be used to implement the due diligence requirements formulated in the OECD Guidelines for Multinational Enterprises. Companies can also ask the National Contact Points established pursuant to the OECD Guidelines for assistance with regard to the implementation of the Guidance. In addition, the Guidance can be instrumental in helping companies to implement their due diligence obligations pursuant to other initiatives, in particular the due diligence requirements that were imposed in relation to the DR Congo by the UN Security Council sanctions regime and by the United States Dodd Frank Act. The close coordination between these initiatives has resulted in mutually supportive regimes.

Another advantage of the complementary nature of the OECD Guidance is related to its enforcement. Although companies implement the due diligence requirements on a voluntary basis, there are ways of holding companies to account for their failure to exercise due diligence. The principal option for this is to file a complaint with the National Contact Points established pursuant to the OECD Guidelines. Although the decisions of the NCPs are not legally binding, their role in mediating disputes should not be underestimated. In addition, and exclusively in relation to the DR Congo, companies can be placed on a UN Security Council sanctions list for their failure to exercise due diligence and can be subjected to fines under the United States Dodd-Frank Act. It is to be expected that the European Union will adopt similar legislation in the near future.

The Due Diligence Guidance is a promising tool for increasing the responsibility of companies in the minerals sector and for preventing these companies

from contributing to human rights violations and/or armed conflict. The principal contribution of the Guidance is that it provides companies with a comprehensive due diligence model which they can integrate in their company policies. Furthermore, the Guidance sets standards for the protection of human rights and combating corruption. Although these standards are for the most part based on existing legal instruments, including ILO and OECD Conventions, the Guidance is one of the few instruments that is directly addressed to companies.

In order to increase corporate responsibility in the minerals sector, some issues need further consideration. The Guidance currently covers tin, tantalum and tungsten, including their ores or mineral derivatives, as well as gold sources.¹⁴⁴ Despite the broad reach of the Guidance, there is one striking omission from the list of minerals. The OECD Guidance does not cover diamonds, a mineral that has financed several contemporary armed conflicts. At first sight, it could be argued that this is obvious, as diamonds are already covered by the Kimberley Process. However, a closer look reveals that there is no clear explanation for this omission. Although the core objective of both initiatives is to exclude conflict minerals from the international market, they use different methods to achieve this objective. The Kimberley Process focuses on government-controlled certification, while the OECD Guidance focuses on the role of companies throughout the supply chain. This makes these initiatives mutually compatible. Moreover, the OECD Guidance could strengthen the Kimberley Process. After all, the Guidance covers every phase of the process, from rough minerals to end products, while the Kimberley Process focuses exclusively on rough diamonds. In addition, the Guidance applies not only to countries where there is an ongoing armed conflict, but also to countries where there is widespread violence. In these ways, the OECD Guidance could fill some of the existing gaps in the Kimberley Process. Therefore it is imperative to increase the scope of the Guidance by adding a supplement on diamonds, as suggested by the Kimberley Process Civil Society Coalition.¹⁴⁵ This suggestion has not yet been followed up.

Furthermore, it is necessary to coordinate initiatives such as the OECD Guidance with other corporate responsibility initiatives. In this respect, special mention can be made to the Voluntary Principles on Security and Human Rights, a multi-stakeholder initiative that formulates due diligence requirements for companies in the extractive sector in relation to their security arrangements. These principles overlap with the requirements formulated under the OECD Guidance in relation to security forces.

144 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013).

145 Kimberley Process Civil Society Coalition, Communiqué, Brussels, 19 November 2011, para. 3, available through <http://www.pacweb.org>

It is therefore clear that the OECD Due Diligence Guidance is an important step in addressing the contribution of companies to resource-related armed conflicts. The years to come will show whether the Guidance can succeed in changing corporate behaviour in the extractive sector in conflict regions. A recent pilot project in the Great Lakes region produced some encouraging results, although it also revealed that the success of the OECD Guidance is largely dependent on external factors, two of which are particularly important. First, the final report revealed that the success of the pilot project was in large part due to the adoption of relevant national legislation, as well as to the formulation of requirements by the industry itself.¹⁴⁶ In addition, the effective implementation of due diligence by companies can only be achieved if the origin of the minerals can be traced. The 2012 Final Report of the Group of Experts on the DR Congo showed that smuggling had increased considerably in the past year.¹⁴⁷ This shows that the implementation of corporate responsibility tools is highly dependent on the efficient functioning of a certification mechanism, as well as on law enforcement efforts in the border regions.

8.5 SUBSTANTIVE CONTRIBUTION OF THE INITIATIVES TO IMPROVING RESOURCE GOVERNANCE

This section aims to assess the substantive contribution of the initiatives to the governance of natural resources in conflict-affected States. In this respect it is important to note that the three initiatives have different objectives and methods, but a common aim, i.e., to increase transparency in the management of natural resources. For this purpose, the initiatives set standards with regard to their management, both for States and for companies. The overall objective of the Kimberley Process is to introduce transparency in the trade in rough diamonds in order to eliminate the trade in conflict diamonds by rebel groups. Relevant standards set by the Kimberley Process include the establishment of internal controls, as well as the collection, maintenance and exchange of data relevant to diamond production, import and export. Additional standards relating to the management of rough diamonds include the licensing of mines and tracking cash purchases of rough diamonds through official banking channels. It is relevant to note that the Kimberley Process does not address companies directly.

¹⁴⁶ See OECD, 'Upstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas', Final Report on one-year pilot implementation of the Supplement on Tin, Tantalum, and Tungsten (2013), p. 9.

¹⁴⁷ Final Report of the Group of Experts on the DRC submitted in accordance with paragraph 4 of Security Council Resolution 2021 (2011), *UN Doc. S/2012/843*, 15 November 2012, paras. 159-242.

EITI's contribution to increasing transparency in the management of natural resources consists of setting standards for the public administration of natural resources, which could be part of broader reforms in post-conflict peace-building strategies. In order to comply with EITI, States must publish the revenues obtained from contracts with the oil, gas and mining industries, while companies in these sectors must publish their payments to the government. In this way, EITI contributes more directly to improving governance over natural resources. In addition, the 2013 review of the EITI Standard introduced requirements aimed at improving transparency, in particular by formulating requirements relating to the publication of relevant information and to public administration. In this way, EITI has moved closer to achieving its basic objective, i.e., to promote sustainable development in resource-rich States.

Finally, the contribution of the OECD Guidance in increasing transparency in the management of natural resources consists of setting standards for companies that extract, handle or procure minerals from countries that suffer from armed conflict or internal tensions in order to ensure that these companies source their minerals in a responsible manner. Responsible mineral sourcing implies, *inter alia*, respect for international human rights standards for the prevention of the most serious violations of human rights, as well as standards for the procurement of minerals and transparency in payments.

However, there is one aspect that is neglected in all three initiatives. None of the initiatives includes any direct sustainability requirements in its scheme. This is strange, as both EITI and the OECD Guidance include a reference to sustainable development as part of their objectives.¹⁴⁸ The absence of requirements ensuring that natural resources are sourced in an environmentally sustainable way is regrettable, as environmental protection is essential for the proper management of natural resources and for the prevention of a relapse into armed conflict. In order to contribute more directly to achieving sustainable development, it is necessary for the initiatives to include some minimal requirements for environmental protection in future revisions of their standard-setting documents. The Kimberley Process could include a commitment adopting the ISO standards for environmental protection of diamond mines. The OECD Guidance could include recommendations on the prevention of serious environmental pollution related to the extraction of minerals.

148 EITI is based on the principle that "the prudent use of natural resources should be an important engine for sustainable economic growth that contributes to sustainable development". See EITI Standard 2013, p. 9. The OECD Guidance formulates as its objective that companies procuring minerals from conflict-affected and high-risk areas "respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development". See the Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), *Doc. C(2012)93*, para. 1.

8.6 EFFECTIVENESS OF THE INITIATIVES

The initiatives discussed in this chapter can be characterised as voluntary agreements between States and other relevant stakeholders, notably civil society and the business community, aimed at creating standards for the governance of particular natural resources, which are to be implemented by States and/or companies respectively. In other words, the initiatives discussed in this chapter create commitments for the actors involved, but on a voluntary basis only.

It is relevant to note that all the basic documents relating to the three initiatives emphasise the voluntary nature of the commitments, either expressly or in their formulation. The Kimberley Process Certification Scheme *recommends* that participants adopt the scheme. Furthermore, it consistently provides that participants *should* ensure that they meet all the requirements. The EITI Rules formulate minimum requirements for States to be EITI compliant. Finally, the OECD Guidance recommends that OECD members ensure the widest possible dissemination of the Guidance. In addition, the Five Step Framework for Due Diligence contains a number of measures that companies *should* take. Therefore it is clear that none of the initiatives was intended to create legally binding obligations for participants.

Considerable differences can also be seen in the nature of the commitments. For the Kimberley Process and EITI, domestic implementation of the commitments is a prerequisite for participation in the initiatives. States that do not implement the commitments are suspended from the initiatives. However, even between the Kimberley Process and EITI, there are differences as regards the monitoring of compliance with the initiatives. While the Kimberley Process relies principally on a peer review system for the monitoring of compliance with the Kimberley requirements, EITI uses an independent third-party monitoring system. The OECD Guidance operates in a different way. It formulates guidelines to assist companies to implement responsible sourcing practices, while respect for the Guidance must be ensured through the OECD National Contact Points.

Finally, the effectiveness of the initiatives hinges on five factors: 1) a dedication by those concerned to implement the commitments; 2) an inclusive system, in which all the relevant actors participate; 3) an effective monitoring system to ensure compliance; 4) effective national legislation to implement the commitments and 5) external recognition of the initiatives. These factors can be illustrated with reference to the OECD Guidance. Even though it is principally a code of conduct, the OECD Guidance does provide companies with a set of guidelines to comply with OECD requirements, as well as with external requirements, such as the US and Congolese legislation, with respect to conflict minerals originating from the DR Congo, as well as the due diligence requirements set by the UN Security Council with respect to minerals sourced from the DR Congo. As a result, companies operating in the DR Congo have started to implement the guidance.

This example reveals that the effectiveness of voluntary initiatives depends to a large extent on their inclusion in broader initiatives to tackle the problems related to resource-related armed conflicts. It is relevant to note in this respect that the OECD Guidance is the only initiative that is embedded in an international organization, while the Kimberley Process and EITI stand alone. Obviously, it is a great advantage for the OECD Guidance to benefit from the institutional structure of the OECD, but that fact alone does not make it necessarily more effective than the Kimberley Process or EITI, since these initiatives rely on other mechanisms to ensure their effectiveness. Lastly, it must be noted that broad participation, not only of producing States, but also of transit and consuming States, is essential to ensure the effectiveness of the initiatives. When these conditions are satisfied, voluntary initiatives can play an important role in addressing the problems associated with resource-related armed conflicts.

8.7 CONCLUDING REMARKS

The principal question that must be answered here is how and to what extent the initiatives discussed in this chapter respond to the recommendation of the High-level Panel on Threats, Challenges and Change to the United Nations “to develop norms governing the management of natural resources for countries emerging from or at risk of conflict”.¹⁴⁹ It should be noted that all three initiatives address aspects relating to the management of natural resources. Although the initiatives do not develop legal norms, they do develop standards for the management of natural resources for countries emerging from or at risk of conflict. Their main contribution is that they introduce elements of transparency, accountability and corporate responsibility in the management of natural resources in States that have experienced armed conflict. In this respect, the voluntary initiatives do respond to the call made by the High-Level Panel.

It should also be noted that the three initiatives discussed in this chapter are representative of particular categories of mechanisms which are essential components of a regulatory framework for resolving armed conflicts involving natural resources. These are certification mechanisms, anti-corruption mechanisms and corporate responsibility mechanisms. One major contribution of the initiatives discussed in this chapter is that they have resulted in best practices for the development of other regulatory initiatives. For example, reference can be made to the scheme for tracking and tracing minerals that is currently being developed under the auspices of the International Conference for the Great Lakes Region. This scheme is modelled on the Kimberley Process, but also

149 Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, United Nations: New York (2004), p. 35, para. 92.

takes into account the failures of the Kimberley Process, including its failure to properly address the issuing of false certificates. Furthermore, this scheme recognises the limited use of certification mechanisms such as Kimberley for the elimination of the root causes of armed conflict relating to the governance of natural resources.¹⁵⁰ Furthermore, the best practices resulting from these mechanisms can assist the UN Peacebuilding Commission in devising new strategies for peacebuilding.

However, the existence of all these initiatives does not eliminate the need to develop general standards for the management of natural resources for countries emerging from or at risk of conflict, as called for by the High Level Panel. The focus of such general standards should be on promoting a participatory and sustainable management of natural resources for the purpose of conflict prevention and resolution.

The first part of this book, dealing with the general legal framework for the management of natural resources, revealed several obligations for States with respect to the management of their natural resources. Amongst the principal obligations for States were, first, an obligation to exploit natural resources for the benefit of the population and, for this purpose, to establish constitutional and political processes which allow for public participation in decision making, and, secondly, an obligation to exploit natural resources in a sustainable way. General standards for the management of natural resources for countries emerging from or at risk of conflict should be based on these two obligations, as they constitute the very foundations of contemporary natural resources law.

It is a fact that these obligations are not adequately reflected in the initiatives examined in this chapter. Nevertheless, important lessons can be learned from these initiatives. A general regulatory framework for the management of natural resources in countries emerging from armed conflict should include standards relating to transparency, accountability and corporate responsibility in the management of natural resources. These standards are important prerequisites for conflict resolution and prevention, as they can be instrumental in eliminating the trade in conflict resources and improve the governance of natural resources.

Lastly, the question arises who should develop such general standards. The High-level Panel called on national authorities, international financial institutions, civil society organizations and the private sector to do this. The most likely option would be to set up an *ad hoc* mechanism for this purpose. Participants would have to include the World Bank, regional organizations (including the OECD and the International Conference on the Great Lakes Region), representatives from the extractives industry and NGO's such as Part-

150 For more information on the design of this scheme, see Partnership Africa Canada, *Taming the Resource Curse: Implementing the ICGLR Certification Mechanism for Conflict-prone Minerals*, March 2011.

nership Africa Canada and Global Witness. Such an effort should be coordinated from within the UN system, preferably by the UN Secretariat, because of its general oversight function and its ability to bring together the key players, including the private sector represented in the UN Global Compact.