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**The 2017 EU Conflict Minerals
Regulation: An Effective
European Instrument to
Globally Promote Good Raw
Materials Governance?**

Rechtswissenschaftliche
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A. Introduction: Of “Natural Resource Curses” Resulting from “Conflict Minerals” – and Enhanced Transparency as a Possible Cure

It would probably amount only to a minor exaggeration to consider the continuous supply of mineral raw materials as the central lifeblood of the technological and computerized societies of our time. Metals and other minerals are of essential importance for the industrial production of countless manufactured goods, most certainly including products in the realm of modern environmental, entertainment and information technology such as wind power plants, laptops, digital cameras, video game consoles and smartphones. At least equally well-known, these indispensable raw materials are usually far from evenly distributed around the globe but rather often concentrated in certain geographic areas. Consequently, most manufacturing countries, including the European Union (EU) member states, are heavily dependent on the import of the respective minerals. Since many of the natural-resource-exporting states happen to be developing countries, this demand situation would at first sight most naturally be regarded as offering a considerable potential for their economic and social development.

Nevertheless, and quite to the contrary, it is sadly well-known that the “natural resource wealth” of many of these exporting countries has from the perspective of societal and economic development as a whole frequently rather turned out to be a kind of “natural resource curse” for the political communities in question. The often obvious focusing on the production, extracting and exportation of certain minerals or other raw materials results in practice not infrequently in neglecting to establish an own raw materials processing industry, and visibly contributes to the creation or perpetuation of authoritarian regimes, widespread corruption, severe damages to the natural environment as well as last, but surely and unfortunately not least, serious and often systematic violations of fundamental human rights and labour standards, to mention only a few quite negative effects.¹ In light of these findings and in order to remedy – or at least to mitigate – these undesirable consequences, the transnational regulatory regimes dealing with commodity markets have undergone notable modifications in recent decades. Many of the new transboundary steering mechanisms, established on the basis of “hard law” as well as – more frequently – of “soft law”, now aim more broadly at promoting changes in the general societal, economic and political conditions of the resource producing and exporting countries.²

In order to effectively achieve these broader purposes, the respective normative regimes are often relying on more indirect steering approaches such as for example incentive-based mechanisms and cooperative implementation structures. Quite prominently among these regulatory techniques is also the stipulation of disclosure and reporting requirements aimed at enhancing transparency. In this connection, transparency serves a dual purpose – first and directly, allowing the public, including stakeholders and consumers, to access information for example on the (due diligence) activities of respective economic actors, but, second and more indirectly, thereby in particular also inducing and influencing a behaviour change of these

1 Generally on the phenomenon of the so-called “natural resource curse” see for example WTO, World Trade Report 2010: Trade in Natural Resources, 2010, 91 *et seq.*; DeKoninck, Indiana Journal of Global Legal Studies 22 (2015), 121 (134 *et seq.*), each with numerous further references.

2 See also already Schorkopf, Archiv des Völkerrechts 46 (2008), 233 (252 *et seq.*); Nowrot, Bilaterale Rohstoffpartnerschaften: Betrachtungen zu einem neuen Steuerungsinstrument aus der Perspektive des Europa- und Völkerrechts, 21 *et seq.*

actors in the interest of protecting and promoting human rights and other community interests.³ An illustrative example is the Extractive Industries Transparency Initiative (EITI), a coalition of governments, companies, NGOs, investors and international governmental organizations launched in 2002 at the initiative of the former UK Prime Minister *Tony Blair*. The central purpose of this transnational good governance regime is promoting improved governance structures and activities in resource-rich countries through the full disclosure and verification of company and investor payments as well as government revenues from the extractive industries sectors of oil, gas and mining.⁴ In a broader sense, EITI thereby serves as a clear indication that the international community as a whole more recently approaches the economic and societal challenges connected with the international trade in raw materials in a more holistic manner.

The same underlying considerations also strongly influence the regulatory approaches towards the political and societal implications arising from the phenomenon of so-called “conflict raw materials” in general and “conflict minerals” in particular. Disputes over natural resources are seldom the primary reason for the outbreak of civil wars and the accompanying formation of armed rebel groups. However, it is generally recognised that resource-rich countries, in particular those that rely heavily on the export of primary commodities, face an overall higher risk of prolonged and even increasingly intensified non-international armed conflicts precisely due to the fact that the production of, and international trade in, raw materials such as diamonds and other gemstones, gold, timber, rare minerals, oil or illegal narcotics often presents itself as one of the primary sources of funding for insurgents and other organised armed groups. In order to illustrate and substantiate the proposition that natural resources have thus a clear potential to “fuel” ongoing civil wars, one only needs to refer to the respective conditions prevailing in the armed conflicts in Angola, Colombia, Myanmar, Sierra Leone, Peru, Cambodia, Iraq, Libya and – last but unfortunately surely not least – in the Democratic Republic of Congo.⁵ Especially in the last two decades a number of international steering mechanisms have been created with the aim to suppress or at least limit this funding of parties to internal armed conflicts by means of transboundary trade in natural resources and to prevent in particular also the accompanying human rights violations in the interest of good global governance. The probably still most well-known example is the Kimberley Process Certification Scheme, a joint initiative of governments, NGOs as well as representatives from the diamond industry formally launched in 2003. This regime portrays itself as an attempt to curb the transboundary trade in so-called “rough” or “blood” diamonds that are used by armed insurgent groups to finance the continuation of civil wars, in particular in Africa.⁶

3 See generally thereto more recently for example *Chilton/Sarfary*, *Stanford Journal of International Law* 53 (2017), 1 (20 *et seq.*).

4 For a more in-depth assessment of this transnational steering regime see, e.g., *Brouder*, in: Tietje/Brouder (eds.), *Handbook of Transnational Economic Governance Regimes*, 849 *et seq.*, with further references. For an overview and evaluation of other related normative instruments see for example *Al Faruque*, *Journal of Energy & Natural Resources Law* 24 (2006), 66 (72 *et seq.*).

5 See thereto as well as generally on the correlation between natural resources and civil wars *Ross*, *International Organization* 58 (2004), 35 *et seq.*; *Smillie*, *Vanderbilt Journal of Transnational Law* 46 (2013), 1003 *et seq.*; *Voland/Daly*, *Journal of World Trade* 52 (2018), 37; as well as specifically with regard to the violent conflict in the Democratic Republic of Congo more recently also Final Report of the Group of Experts on the Democratic Republic of the Congo of 26 November 2014, UN Doc. S/2015/19 of 12 January 2015, paras. 73 *et seq.*, 156 *et seq.*

6 Generally on the Kimberley Process Certification Scheme see, e.g., *Brouder*, in: Tietje/Brouder (eds.), *Handbook of Transnational Economic Governance Regimes*, 969 *et seq.*; *Meessen*, in: Bungenberg/Hobe (eds.), *Permanent Sovereignty over Natural Resources*, 173 *et seq.*; *Vidal*, in: Berman *et al.* (eds.), *Informal International Lawmaking: Case Studies*, 505 *et seq.* On the role of the EU in this regime see, e.g., Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, OJ EC L 358/28 of 31 December 2002; and *Fernández Arribas*, *The European Union and the Kimberley Process*, 7 *et seq.*

The fact that the respective steering instruments, in the interest of effectiveness most certainly rightly, first and foremost also include and directly or at least indirectly address the activities of non-state business enterprises as the primary actors in the international trade in (conflict) raw materials and thereby emphasise the importance of transparency is specifically in the context of the ongoing conflict in the Eastern Democratic Republic of Congo, *inter alia*, also illustrated by the respective UN Security Council resolutions. In resolution 1952 (2010), for example, the members of this primary organ of the UN call upon “all States to take appropriate steps to raise awareness of the due diligence guidelines referred to above, and to urge importers, processing industries and consumers of Congolese mineral products to exercise due diligence by applying the aforementioned guidelines, or equivalent guidelines, containing the following steps [...]: strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings”.⁷ In addition, and already with a view to the main focus of this contribution, reference can be made in the present context to the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted by the OECD Council at Ministerial level on 25 May 2011 and subsequently amended on 17 July 2012 as well as on 25 September 2015. The central purpose of this soft law steering instrument is “to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices”⁸ and, in this regard, it foresees in particular also the implementation of measures aimed at enhancing transparency.

Against this background and in light of the importance of the respective steering instruments for the protection of human rights in the realm of the extractive industries, the present contribution is aimed at taking a closer look at another quite recent regulatory approach in the field of good raw materials governance intended to promote responsible business practices in the context of so-called “conflict minerals”, namely the EU Regulation 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas of 17 May 2017 (EU Conflict Minerals Regulation).⁹ For this purpose, the following assessment is divided into four main parts. The first section addresses the legal basis as well as in particular the EU primary law background of the newly adopted regulation (B.). The following second part outlines and evaluates the comparatively long and complex legislative history of this steering instrument (C.). Subsequently, the third part is intended to provide some thoughts on the regulatory structure and primary steering mechanisms stipulated in the 2017 EU Conflict Minerals Regulation (D.). Based on the findings made in this section, in the fourth and final part of this contribution an attempt will be made to specifically assess the importance of the concept of transparency in the present context (E.).

7 UN Security Council Resolution 1952 (2010), UN Doc. S/RES/1952 (2010) of 29 November 2010, para. 8, with reference to the Final Report of the Group of Experts on the Democratic Republic of the Congo of 26 October 2010, UN Doc. S/2010/596 of 29 November 2010, paras. 356 *et seq.* See also subsequently for example UN Security Council Resolution 2198 (2015), UN Doc. S/RES/2198 (2015) of 29 January 2015, paras. 20 *et seq.*

8 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Third Edition, 2016, p. 3, available on the internet under: <<http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>> (last accessed 22 October 2018).

9 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ EU L 130/1 of 19 May 2017. Generally on EU regulations in the sense of Article 288 (2) TFEU see, e.g., *Schütze*, European Union Law, 89 *et seq.*; *Bradley*, in: Barnard/Peers (eds.), European Union Law, 97 (99 *et seq.*).

B. Translating Foreign Policy Objectives into Practice: EU Constitutional Underpinnings of the 2017 Conflict Minerals Regulation

At first sight and viewed from a more formal perspective, the EU Conflict Minerals Regulation presents itself as a rather “ordinary” supranational steering instrument under EU secondary law in the realm of the autonomous common commercial policy on the basis of Article 207 of the Treaty on the Functioning of the European Union (TFEU).¹⁰ Although such a perception is undoubtedly not mistaken, it seems appropriate in particular in the context of human rights in the extractive industries to also briefly draw attention to the underlying foreign policy objectives enshrined in EU primary law. The implementation of these provisions stipulating objectives to be achieved by the design of EU external relations can very well be regarded as the overarching purpose pursued by this recently adopted regulation in the sense of Article 288 (2) TFEU.¹¹

Contrary to the traditional understanding of foreign policy as an almost exclusive prerogative of the executive branch largely unconstrained by substantive constitutional requirements,¹² the stipulation of legally binding foreign policy objectives is today no longer an unusual phenomenon in national constitutional law. Quite to the contrary, an increasing number of states, among them EU member states as well as several third countries, provide at the top level of their domestic hierarchy of norms a range of objectives pertaining to their external action.¹³ In particular also with regard to the realm of international economic relations, this trend is obviously supported and further strengthened by the substantive constitutionalisation of the EU external action on the basis of the foreign policy objectives stipulated in Article 21 of the Treaty on European Union (TEU).¹⁴ The scope of application of this provision also includes the common commercial policy and thus encompasses what has already been qualified as the “external economic constitution of the Union”.¹⁵ Stipulating a common set of overarching principles and objectives governing all EU external action, and thus first and foremost also including the in practical and doctrinal terms still most important area of EU external relations, the common commercial policy,¹⁶ on the basis of Article 21 (3) TEU as well as the Articles 205

10 The Treaty on the Functioning of the European Union is for example reprinted in: *Foster*, Blackstone’s EU Treaties & Legislation 2018-2019, 21 *et seq.* Specifically on the EU legal basis and competence for the adoption of the EU Conflict Minerals Regulation see also for example *Elsholz*, Die EU-Verordnung zu Konfliktmineralien, 7. Generally on the distinction between the autonomous and the contractual trade policy in the field of the common commercial policy see, e.g., *Khan*, in: Geiger/Khan/Kotzur (eds.), European Union Treaties, Article 207 TFEU, paras. 17 *et seq.*; *Lenaerts/Van Nuffel*, European Union Law, 963 *et seq.*

11 On this perception see also for example already *van der Velde*, The End of Conflict Minerals on the EU Market?, 2017.

12 See thereto, e.g., *Krajewski*, in: Bungenberg/Herrmann (eds.), Common Commercial Policy after Lisbon, 67 (68 *et seq.*); *Tietje/Nowrot*, in: Morlok/Schliesky/Wiefelspütz (eds.), Parlamentsrecht, 1469 *et seq.*; *Larik*, Foreign Policy Objectives in European Constitutional Law, 55 *et seq.*, each with further references.

13 *Larik*, Foreign Policy Objectives in European Constitutional Law, 88 *et seq.*; see in particular *id.*, 88 (“This chapter shows that foreign policy objectives abound in contemporary constitutional law. They are not the exception, but rather the rule, both within and outside the EU.”).

14 The Treaty on European Union is for example reprinted in: *Foster*, Blackstone’s EU Treaties & Legislation 2018-2019, 1 *et seq.* Generally on the idea of a constitutionalisation of the EU foreign (trade) policy on the basis of constitutional-like foreign policy objectives see also for example *von Arnould*, in: von Arnould (ed.), Europäische Außenbeziehungen, 41 (54); *Krajewski*, Europarecht 51 (2016), 235 (248); *Larik*, Foreign Policy Objectives in European Constitutional Law, 125 *et seq.*

15 *Vedder*, in: Bungenberg/Herrmann (eds.), Common Commercial Policy after Lisbon, 115 (143 *et seq.*).

16 See also already, e.g., *Krajewski*, Common Market Law Review 42 (2005), 91 (92) (“the common commercial policy was and still is the most important constitutional battleground for European external relations”).

and 207 (1) 2nd sentence TFEU, has been and continues to be frequently and rightly regarded – at least from the perspective of foreign trade and investment policy – as one of the principal innovations brought by the Treaty of Lisbon.¹⁷ Among the foreign policy objectives being of relevance in the present context are the protection of human rights under Article 21 (1) and (2) (b) TEU, the prevention of conflicts under Article 21 (2) (c) TEU, the sustainable social and economic development of developing countries under Article 21 (2) (d) TEU as well as the sustainable management of global natural resources in accordance with Article 21 (2) (f) TEU.

Thereby, it hardly needs to be recalled that in practice the incorporation of non-economic concerns like the promotion of democracy, the protection of human rights, issues of supra- and international security as well as the protection of the environment into the law-making processes of the Union's contractual as well as autonomous foreign commercial policy has been already prior to the entry into force of the Reform Treaty in December 2009 certainly not without precedents.¹⁸ Nevertheless, it is equally well-known that among legal scholars the now – for the first time in the process of European integration – explicitly made and EU primary law based self-commitment¹⁹ of this supranational organisation to pursue the principles and objectives enshrined in Article 21 (1) and (2) TEU also within the context of implementing the common commercial policy was and still is not only met with approval. This stipulated list of external policy goals has occasionally been perceived as for example “lengthy and wide-ranging”,²⁰ as a mere “wish list for a better world” or even as “redolent of motherhood and apple pie”.²¹ Furthermore, it is in particular the alleged dangers of, first, an increasing “politication” of the EU trade and investment policy as well as, second and closely related, of a notable (and thus undesirable) “downgrading” of the specific trade policy objectives aimed at a gradual trade and investment liberalisation as enshrined in Article 206 TFEU that have at times given cause to serious concern and criticism.²²

Since this is not the appropriate place for a detailed engagement with that debate and the individual arguments brought forward in this connection, I will confine myself to two more general remarks intended to at least relativize the respective reservations and objections voiced in the legal literature. On the one hand we should not forget that just as transboundary economic relations never develop – and as a consequence should never be considered – in isolation from, and thus uninfluenced by, the respective political relationship between the states concerned,²³ foreign trade policy measures and regulations have not infrequently been, and continue to be, used also as governmental means to promote and protect non-economic interests and objectives.²⁴

17 On this perception see for example also *Cottier/Trinberg*, in: von der Groeben/Schwarze/Hatje (eds.), *Europäisches Unionsrecht, Kommentar*, Vol. 4, Article 207 AEUV, para. 7.

18 See thereto, e.g., *Vedder*, in: Bungenberg/Herrmann (eds.), *Common Commercial Policy after Lisbon*, 115 (127 *et seq.*); *Weiß*, in: von Arnould (ed.), *Europäische Außenbeziehungen*, 515 (527).

19 *Vedder*, in: Bungenberg/Herrmann (eds.), *Common Commercial Policy after Lisbon*, 115 (137), with further references.

20 *Cremona*, *Common Market Law Review* 41 (2003), 553 (568) (“the lengthy and wide-ranging list of external policy objectives [...] is unlikely to bring about a greater policy focus”).

21 See the references provided by *Larik*, *Foreign Policy Objectives in European Constitutional Law*, 168.

22 See thereto for example also *Tietje*, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 19 *et seq.*; *Hahn*, in: Calliess/Ruffert (eds.), *EUV/AEUV, Kommentar, Artikel 207 AEUV*, paras. 5 *et seq.*; *Bungenberg*, *European Yearbook of International Economic Law* 1 (2010), 123 (128); *Terhechte*, in: Schwarze (ed.), *EU-Kommentar, Artikel 205 AEUV*, para. 7.

23 *Meng*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 57 (1997), 269 (271 *et seq.*); *Boor/Nowrot*, *Die Friedens-Warte* 89 (2014), 211 (241).

24 See also, e.g., *Krajewski*, in: Biondi/Eeckhout/Ripley (eds.), *EU Law after Lisbon*, 292 (297); *Boysen*, in: von Arnould (ed.), *Europäische Außenbeziehungen*, 447 (468 *et seq.*); *Nettesheim/Duvigneau*, in: Streinz (ed.), *EUV/AEUV, Kommentar, Artikel 207 AEUV*, paras. 37 *et seq.*

On the other hand it seems worth recalling the quite broad consensus in the scholarly literature – confirmed by the case law of EU courts²⁵ – on the for a number of reasons rightly assumed existence of a wide margin of appreciation enjoyed by EU institutions with regard to the practical means and feasibility of the implementation as well as the prioritisation of the principles and objectives stipulated in Article 21 (1) and (2) TEU.²⁶ Despite this last-mentioned observation, however, the legally binding character of this provision – as well as of Article 205 and Article 207 (1) 2nd sentence TFEU – as normative guidelines for the EU common commercial policy is in principle clearly beyond reasonable doubt.²⁷ The same applies to their judiciability and thus to the possibility of judicial review by EU courts, since Article 275 TFEU limiting the jurisdiction of the Court of Justice of the EU does only cover the provisions relating to the common foreign and security policy. Consequently, the scope of application of this provision cannot be extended to the supranational policies dealing with the Union’s external actions as regulated in Part Five of the TFEU, prominently among them the common commercial policy.²⁸

- 25 See for example General Court, *Front Polisario/Council*, Case T-512/12, Judgment of 10 December 2015, paras. 164 *et seq.* This judgment was on appeal subsequently – albeit for reasons unrelated to the present issue – set aside by European Court of Justice, *Council/Front Polisario*, Case C-104/16 P, Judgment of 21 December 2016. See in the present context also the Opinion of Advocate General *Melchior Wathelet* of 13 September 2016 in Case C-104/16 P, *Council/Front Polisario*, paras. 220 *et seq.*
- 26 See also, e.g., *Dimopoulos*, *European Foreign Affairs Review* 15 (2010), 153 (165); *Herrmann/Müller-Ibold*, *Europäische Zeitschrift für Wirtschaftsrecht* 27 (2016), 646 (647); *Hahn*, in: *Calliess/Ruffert* (eds.), *EUV/AEUV, Kommentar, Artikel 207 AEUV*, para. 4; *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, 792 (802); *Krajewski*, *Europarecht* 51 (2016), 235 (243).
- 27 See also for example *Heintschel von Heinegg*, in: *Pechstein/Nowak/Häde* (eds.), *Frankfurter Kommentar zu EUV, GRC, und AEUV, Vol. I, Artikel 21 EUV*, para. 11; *Larik*, *Foreign Policy Objectives in European Constitutional Law*, 154 *et seq.*; *Dimopoulos*, *European Foreign Affairs Review* 15 (2010), 153 (165); *Krajewski*, *Europarecht* 51 (2016), 235 (242); *Nettesheim/Duvigneau*, in: *Streinz* (ed.), *EUV/AEUV, Kommentar, Artikel 207 AEUV*, para. 24; *Cremer*, in: *Calliess/Ruffert* (eds.), *EUV/AEUV, Kommentar, Artikel 205 AEUV*, para. 2.
- 28 Thereto among others also for example *Bungenberg*, in: *Pechstein/Nowak/Häde* (eds.), *Frankfurter Kommentar zu EUV, GRC, und AEUV, Vol. III, Artikel 205 AEUV*, para. 10; *Terhechte*, in: *Schwarze* (ed.), *EU-Kommentar, Artikel 205 AEUV*, para. 8; *Lachmayer*, in: *von der Groeben/Schwarze/Hatje* (eds.), *Europäisches Unionsrecht, Kommentar, Vol. 4, Article 205 AEUV*, para. 11; *Nettesheim/Duvigneau*, in: *Streinz* (ed.), *EUV/AEUV, Kommentar, Artikel 207 AEUV*, para. 24; *Krajewski*, *Europarecht* 51 (2016), 235 (242).

C. It's a Long Way to ...: On the Legislative History of the Regulation

The main external regulatory impulse and initial general role model for the newly adopted 2017 EU Conflict Minerals Regulation came from the other side of the Atlantic Ocean in the form of section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that became effective on 21 July 2010 following its approval by the United States Congress²⁹ and is currently subject to legal as well as political challenges.³⁰ Section 1502 (b) Dodd-Frank Act stipulates that all companies required to file periodic reports with the United States Securities and Exchange Commission (SEC), among them in particular publicly traded companies including foreign issuers with securities registered in the United States,³¹ have to make annual disclosures to the SEC regarding the origins of covered conflict minerals as well as the respective measures and precautions taken by the corporation to exercise due diligence on the source and chain of custody of such minerals. In addition, respective enterprises are also obliged to make this reported information available to the public on their internet website (section 1502 (b) (1) E Dodd-Frank Act).³² The personal scope of application of the reporting requirements thus covers all corporations – to which the other stipulations of section 1502 Dodd-Frank Act apply – involved in the entire supply chain for conflict minerals in all industrial sectors (e.g. automotive, electronics, packaging, aerospace, construction, lighting, industrial machinery and tooling as well as jewellery). It therefore potentially includes the so-called “upstream” activities of miners, traders and smelters/refiners as well as the “downstream” activities of traders, component producers, manufacturers and end-users.³³

Almost immediately after the adoption of the Dodd-Frank Act in the summer of 2010, the European Parliament in a resolution of 7 October 2010 not only welcomed this legislative act but also asked the Commission and the Council “to examine a legislative initiative along these lines”.³⁴

29 Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 – July 21, 2010, 124 Stat. 1375 (2010), available for example on the internet under: <<https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf>> (last accessed 22 October 2018). The steering influence exercised by this legislation on the current EU initiative is for example illustrated by European Commission, Commission Staff Working Document – Impact Assessment, SWD(2014) 53 final of 5 March 2014, p. 8, 13 and *passim*; European Commission, Assessment of Due Dilligence Compliance Cost, Benefit and Related Effects on Selected Operators in Relation to the Responsible Sourcing of Selected Minerals, Final Report by *Katie Böhme, Paulina Bugajski-Hochriegl and Maria Dos Santos*, September 2013, p. 9.

30 See thereto, e.g., *Taylor*, *Lewis & Clark Law Review* 21 (2017), 427 *et seq.*

31 For a more detailed description of the personal scope of application of this provision see, e.g., *Nelson*, *Utah Law Review* 2014, 219 (227 *et seq.*).

32 For a more detailed analysis of section 1502 Dodd-Frank Act and its regulatory content see already *Nanda*, *ILSA Journal of International & Comparative Law* 20 (2014), 285 (288 *et seq.*); *Nelson*, *Utah Law Review* 2014, 219 *et seq.*; *Harline*, *Northwestern Journal of International Law & Business* 35 (2015), 439 (441 *et seq.*); *Factor*, *Ohio State Entrepreneurial Business Law Journal* 9 (2014), 89 (93 *et seq.*), each with further references.

33 For a vivid description of the supply chain for conflict minerals see for example European Commission/High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council: Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas – Towards an Integrated EU Approach, JOIN(2014) 8 final of 5 March 2014, p. 6.

34 Resolution of the European Parliament of 7 October 2010 on failures in protection of human rights and justice in the Democratic Republic of Congo, P7_TA(2010)0350, para. 14.

This request for a suitable legislative proposal by the Commission, supported by numerous representatives of civil society, was subsequently reiterated on a number of occasions.³⁵ Nevertheless, it was only on 5 March 2014 that the Commission finally presented its proposal for an EU regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas.³⁶ This legislative proposal's material scope of application was virtually identical to section 1502 Dodd-Frank Act, covering with tin, tantalum, tungsten and the respective ores as well as gold in accordance with its Article 1 and Article 2 lit. a and b basically the same conflict minerals. For the rest, however, many of the regulatory approaches foreseen in the 2014 Commission's draft regulation differed considerably from its previously adopted US pendant. Three aspects seem to be particularly worth at least briefly drawing attention to in this regard.³⁷

First, the territorial scope of application of the proposed EU regulation was not confined to the Democratic Republic of Congo and nine adjoining countries but intended to extend to respective minerals from all "conflict affected and high-risk areas" in the world. This regulatory approach aiming not at any specific region of the world but establishing potentially a global geographical applicability should first and foremost also be seen as an attempt to avoid one of the major regulatory challenges arising in connection with section 1502 Dodd-Frank Act. This applies in particular to the – indeed at least partially materialized – possibility that companies might altogether avoid conflict minerals from the targeted region thereby creating a kind of *de facto* embargo with often disastrous socio-economic consequences in particular for artisanal miners and their families.³⁸

Second, and in contrast to the broad territorial coverage stipulated in the proposal, the personal scope of application was envisioned to be quite narrow in comparison to section 1502 Dodd-Frank Act. The draft regulation was not intended to apply to all companies in the whole supply chain but only to "importers" of respective conflict minerals. These actors were defined – pursuant to Article 2 lit. g of the proposal – as "any natural or legal person declaring minerals or metals within the scope of this Regulation for release for free circulation within the meaning of Article 79 of Council Regulation (EEC) No 2913/1992". The Commission estimated in 2014 that, while there were some 880.000 companies in the EU trading or processing tin, tantalum,

- 35 See for example European Parliament resolution of 5 July 2011 on increasing the impact of EU development policy, P7_TA(2011)0320, para. 60 ("Calls on the Commission to make a legislative proposal with a similar objective to the new US 'Conflict Minerals Law', namely to combat the illegal exploitation of minerals in developing countries, in particular in Africa, which fuels civil war and conflicts, and to ensure traceability of imported minerals in the EU market;"); European Parliament resolution of 26 February 2014 on promoting development through responsible business practices, including the role of extractive industries in developing countries, P7_TA(2014)0163, paras. 45 *et seq.*
- 36 European Commission, Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, COM(2014) 111 final of 5 March 2014.
- 37 For a more in-depth evaluation of the 2014 Commission's draft regulation see also already for example *Brackett/Levin/Melin*, *Global Trade and Customs Journal* 10 (2015), 73 (80 *et seq.*); *Výboldina*, *Global Trade and Customs Journal* 10 (2015), 338 (341 *et seq.*); *Nowrot*, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union*, 214 (240 *et seq.*).
- 38 See thereto, e.g., Commission/High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council: Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas – Towards an Integrated EU Approach, JOIN(2014) 8 final of 5 March 2014, p. 7; European Commission, Commission Staff Working Document – Executive Summary of the Impact Assessment, SWD(2014) 52 final of 5 March 2014, p. 3; Conflict Minerals – An Evaluation of the Dodd-Frank Act and other Resource-Related Measures, Öko-Institut e.V., August 2013, p. 27; Centre for Research on Multinational Corporations (SOMO), Conflict Due Dilligence by European Companies, SOMO Paper, October 2013, p. 3; *Veale*, *Cardozo Journal of International & Comparative Law* 21 (2013), 503 (533 *et seq.*); *Brackett/Levin/Melin*, *Global Trade and Customs Journal* 10 (2015), 73 (74 *et seq.*); for a more optimistic perception see, however, also *Schwartz*, *Harvard Business Law Review* 6 (2016), 129 (171 *et seq.*).

tungsten or gold, only “about 300 EU traders and around 20 smelters/refiners importing ores and metals derived from the four minerals and more than 100 EU component manufacturers importing derived metals” existed at that time.³⁹

Third, and at least equally noteworthy, the 2014 Commission’s proposal differed from its US pendant in particular also insofar as it did not stipulate mandatory disclosure obligations for respective EU companies. Rather, its Article 3 only foresaw for the quite limited number of covered enterprises – and exclusively for them⁴⁰ – the option of a voluntary self-certification as “responsible importer”. As proscribed by Article 3 of the 2014 proposal, interested companies were for that purpose envisioned to declare to a member state competent authority that they adhere to the supply chain due diligence obligations as set out in the Articles 4 to 6 that were closely modelled after and in part even explicitly referring to the above mentioned OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Finally, it were only these “responsible investors” that were subjected to respective disclosure obligations in accordance with Article 7 of the draft regulation.⁴¹

Since an EU regulation on conflict minerals as part of the Union’s autonomous common commercial policy is subject to the ordinary legislative procedure with the European Parliament and the Council acting as co-legislators, the 2014 Commission’s proposal was submitted to these two EU institutions in accordance with Articles 207 (2), 294 (2) TFEU.⁴² Bearing in mind that many members of the European Parliament originally envisioned and also explicitly asked for a regulation creating legally binding due diligence obligations for a large number of companies involved in the trading or processing of respective raw materials,⁴³ it is hardly surprising that not only for example numerous civil society groups but also the representatives of this EU institution were in their majority considerably less than entirely pleased with the draft presented by the Commission. On 20 May 2015, the European Parliament during the first reading of the proposal under Article 294 (3) TFEU favourably considered and approved a significant number of in part quite fundamental amendments. Among them was the regulatory approach of imposing on all EU importers of covered conflict minerals legally binding supply chain due diligence obligations (amendment 154: new version of Article 1 (2) of the EU regulation).

39 European Commission/High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council: Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas – Towards an Integrated EU Approach, JOIN(2014) 8 final of 5 March 2014, p. 6.

40 See thereto already my critical evaluation in *Nowrot*, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union*, 214 (243).

41 For a more detailed evaluation, also on the envisioned incentives for as well as control mechanisms in case of participation in this self-certification process, see for example *Brackett/Levin/Melin*, *Global Trade and Customs Journal* 10 (2015), 73 (80 *et seq.*); *Nowrot*, in: Bungenberg/Herrmann (eds.), *Die gemeinsame Handelspolitik der Europäischen Union*, 214 (243 *et seq.*); *Schuele*, *Wisconsin International Law Journal* 33 (2015), 755 (772 *et seq.*).

42 Generally on the Union’s ordinary legislative procedure see, e.g., *Schütze*, *European Union Law*, 247 *et seq.*; *Bradley*, in: *Barnard/Peers* (eds.), *European Union Law*, 97 (120 *et seq.*).

43 See for example European Parliament resolution of 26 February 2014 on promoting development through responsible business practices, including the role of extractive industries in developing countries, P7_TA(2014)0163, para. 46 (a) (“create a legally binding obligation for all upstream companies operating in the EU that use and trade natural resources sourced from conflict-affected and high-risk areas and all downstream companies that act as the first placer on the European market to undertake supply chain due diligence to identify and mitigate the risk of conflict financing and human rights abuse”).

Furthermore, and inspired by section 1502 Dodd-Frank Act, all other “downstream” companies would have been asked to take “all reasonable steps to identify and address any risks arising in their supply chains for [covered] minerals and metals” and, in this connection, would have been legally required to “provide information on the due diligence practices they employ for responsible sourcing” (amendment 155: new Article 1 (2) lit. d of the regulation).⁴⁴ In light of these substantial “modifications”, which in fact amounted to fundamentally changing the proposed regulation’s underlying regulatory approach from “voluntary” to “mandatory”, the European Parliament ultimately decided on the same day by a vote of 343 to 331, with nine abstentions, to postpone the final vote on the draft legislative resolution in accordance with Article 61 (2) of the Rules of Procedure of the European Parliament (RoP EP) and thus not to close the first reading position under Article 294 (3) TFEU.⁴⁵ Officially, the matter was thus under Article 61 (2) RoP EP deemed to be referred back to the committee responsible, in the present case the EP Committee for International Trade (INTA Committee).

Less officially, but surely no less important, this course of action was intended to open the way for informal tripartite meetings between representatives of the Parliament, the Council and the Commission (“trilogues”) aimed at seeking a political understanding on the regulatory approach and content of an EU regulation on conflict minerals.⁴⁶ After the Council clarified its own position on the draft legislation, the trilogue process commenced in early 2016. On 16 June 2016 the three institutions announced that they had reached an agreement with regard to the broad framework and regulatory design of a future conflict minerals regulation.⁴⁷ Following a consensus on the technical details of the legislative instrument on 22 November 2016,⁴⁸ the EU Conflict Minerals Regulation was adopted by the European Parliament and the Council on 16 March 2017 as well as 3 April 2017 respectively and, in accordance with its Article 20 (1), ultimately entered into force in June 2017.

44 There to as well as with regard to all other amendments see Amendments adopted by the European Parliament on 20 May 2015 on the proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, P8_TA(2015)0204.

45 On the respective voting at the initiative of the Chair of the INTA Committee, *Bernd Lange*, see PV 20/05/2015 - 10.7.

46 On the approach of institutional trilogues in the EU legislative procedures see European Parliament/Council/Commission, Joint Declaration on Practical Arrangements for the Codecision Procedure, OJ EU C 145/5 of 30 June 2007; as well as, e.g., *Schütze*, *European Union Law*, 252 *et seq.*; *Chalmers*, in: Arnulf/Chalmers (eds.), *The Oxford Handbook of European Union Law*, 303 (322 *et seq.*), with further references.

47 See European Parliament, Conflict Minerals: MEPs Secure Mandatory Due Diligence for Importers, Press Release of 16 June 2016, available on the internet under: <http://www.europarl.europa.eu/pdfs/news/expert/infopress/20160615IPR32320/20160615IPR32320_en.pdf>; European Council/Council of the EU, EU Political Deal to Curb Trade in Conflict Minerals, Press Release 342/16 of 16 June 2016, available on the internet under: <<http://www.consilium.europa.eu/de/press/press-releases/2016/06/16-conflict-minerals/>>; European Commission, EU Political Deal to Curb Trade in Conflict Minerals, Press Release of 16 June 2016, available on the internet under: <http://europa.eu/rapid/press-release_IP-16-2231_en.htm> (all last accessed 22 October 2018).

48 See European Commission, EU Reaches Landmark Agreement on Conflict Minerals Regulation, Press Release of 22 November 2016, available on the internet under: <http://europa.eu/rapid/press-release_IP-16-3931_en.htm> (last accessed 22 October 2018).

D. Between “Dodd-Frank Act plus” and “Dodd-Frank Act minus”: Some Thoughts on the Regulatory Features of the Final Normative Outcome

With one quite notable exception, the 2017 EU Conflict Minerals Regulation is in principle very much in line with the 2014 Commission’s draft. This finding is likely to be at first sight at least to a number of observers and readers probably somewhat surprising, in particular considering the rather fundamental opposition voiced by the Parliament with regard to this proposal. Nevertheless, this outcome can ultimately be to a certain extent explained on the basis of the quite strong institutional and procedural orientation towards compromise solutions as being an inherent characteristic of the ordinary legislative procedure involving the Parliament and the Council. When attempting to systemize the regulatory content and to identify the main steering features of this recently adopted instrument, it seems useful to draw attention to five issues that are particularly worth highlighting in this regard.

I. Material Scope of Application: “Dodd-Frank Act reloaded”

First, despite earlier intentions expressed by the Parliament to extend the material scope of application of the regulation to literally “all natural resources, without exception”,⁴⁹ Article 1 (1) and (2) as well as Article 2 (a) and (b) in connection with Annex I of the Conflict Minerals Regulation all stipulate that the regime only covers minerals and metals containing or consisting of tin, tantalum, tungsten, their ores and gold as already foreseen in the 2014 Commission’s proposal and in line with section 1502 Dodd-Frank Act. Following the adoption of this steering instrument, it’s quite narrow substantive focus on a very limited number of minerals has most certainly given rise to – renewed – criticism.⁵⁰ Nevertheless, it seems not entirely unreasonable to start this regulatory experiment on the basis of a rather small number of raw materials that appear to be – according to the European Commission – the “most mined in areas affected by conflict or in mines that rely on forced labour”.⁵¹ Such an approach surely does not foreclose the possibility of subsequently – based on a re-evaluation of the regulation as foreseen in its Article 17 (2) – enlarging the substantive scope of application by including also other “notorious” conflict raw materials like jade and cobalt in the future.

49 European Parliament resolution of 26 February 2014 on promoting development through responsible business practices, including the role of extractive industries in developing countries, P7_TA(2014)0163, para. 46 (c).

50 See thereto, e.g., *van der Velde*, The End of Conflict Minerals on the EU Market?, 2017; *Heße/Klimke*, Europäische Zeitschrift für Wirtschaftsrecht 28 (2017), 446 (450).

51 See the information provided by the Commission under: <<http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/>> (last accessed 22 October 2018).

II. Personal Scope of Application: “Union Importers only”

Second, and again quite contrary to the previous majority opinion of the Parliament⁵² as well as – at least equally noteworthy – to the expectations raised by the political understanding reached in June 2016,⁵³ the EU Conflict Minerals Regulation does not extend its personal scope of application to in principle all corporate actors in the whole supply chain of conflict minerals. Rather, it retains on the basis of its Article 1 (2) the comparatively narrow focus on “Union importers” in accordance with the definition stipulated in Article 2 lit. 1.⁵⁴ Consequently, as already envisioned in the 2014 Commission’s draft, the clear distinction between direct EU importers of the respective raw materials on the one hand and the “downstream” activities of other traders, component producers, manufacturers and sellers on the other hand is maintained as far as the respective obligations enshrined in this steering instrument are concerned.

This regulatory approach of focusing first and foremost on European “upstream” businesses in the form of smelters and refiners placed in the EU⁵⁵ as well as those “downstream” businesses like traders that act as the first placers on the EU market, now estimated by the Commission to comprise of a combined number of 600 to 1.000 EU importers,⁵⁶ seems in principle not implausible. Attention might be drawn in this regard to the well-known fact that – as for example also emphasized in recital 16 of Regulation 2017/821 – this part of the conflict minerals supply chain is of critical importance since in particular smelters and refiners are normally the last stage where it is still technically feasible to identify the origin and chain of custody of minerals and thus to effectively assure due diligence. However, it appears considerably less plausible why other “downstream” EU companies continue to be⁵⁷ entirely excluded from the personal scope of application of the Conflict Mineral Regulation and are thus not, *inter alia*, granted the possibility of a kind of voluntary self-certification as “responsible manufacturers” or “responsible sellers”; an option apparently, if only for a while, also foreseen in the political understanding reached in June 2016.

52 See, e.g., European Parliament resolution of 26 February 2014 on promoting development through responsible business practices, including the role of extractive industries in developing countries, P7_TA(2014)0163, para. 46 (a).

53 On the respective content of the political understanding see European Parliament, Conflict Minerals: MEPs Secure Mandatory Due Diligence for Importers, Press Release of 16 June 2016, available on the internet under: <http://www.europarl.europa.eu/pdfs/news/expert/infopress/20160615IPR32320/20160615IPR32320_en.pdf> (last accessed 22 October 2018); as well as *Nowrot*, European Yearbook of International Economic Law 8 (2017), 381 (398 *et seq.*).

54 Article 2 lit. 1 EU Conflict Minerals Regulations states that Union importer refers to “any natural or legal person declaring minerals or metals for release for free circulation within the meaning of Article 201 of Regulation (EU) No 952/2013 of the European Parliament and of the Council or any natural or legal person on whose behalf such declaration is made, as indicated in data elements 3/15 and 3/16 in accordance with Annex B to Commission Delegated Regulation (EU) 2015/2446”.

55 In accordance with Article 2 lit. j and k of the EU Conflict Minerals Regulation, “upstream” refers to “the mineral supply chain from the extraction sites to the smelters and refiners, inclusive”, whereas “downstream” means “the metal supply chain from the stage following the smelters and refiners to the final product”.

56 See the information provided by the Commission under <http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/> (last accessed 22 October 2018). See also, e.g., European Commission/High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council: Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas – Towards an Integrated EU Approach, JOIN(2014) 8 final of 5 March 2014, p. 6.

57 See also already the respective regulatory approach foreseen in the 2014 Commission’s draft *supra* under C.

III. Territorial Scope of Application: “Only the World is Enough”

Third, Regulation 2017/821 stipulates with regard to the territorial application that this steering instrument retains – in deviation from section 1502 Dodd-Frank Act being applicable only to the Democratic Republic of Congo and nine adjoining countries – the broad territorial coverage as already suggested in the 2014 Commission’s draft. It thus has a potentially global reach by applying to respective minerals and metals from all conflict-affected and high-risk areas around the world. In accordance with the definition provided in Article 2 lit. f of the regulation, this term covers all “areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”.⁵⁸

In order to assist EU importers in their task to employ these rather abstract criteria in practice, and thereby also to facilitate consistency in the identification of conflict-affected and high-risk areas, Article 14 of the Conflict Minerals Regulation provides for two approaches. Article 14 (1) stipulates that the European Commission is entrusted with the task of preparing – in consultation with the European External Action Service and the OECD – a handbook for economic operators containing non-binding guidelines on how to apply the criteria for respective areas as stated in Article 2 lit. f. In addition, and on the basis of these guidelines, Article 14 (2) foresees that this supranational organ also calls upon “external expertise that will provide an indicative, non-exhaustive, regularly updated list of conflict-affected and high-risk areas”.⁵⁹ Already in the interest of legal certainty and practicability, these measures in principle surely deserve applause. Nonetheless, it should not be left entirely unsaid here that the last-mentioned approach again potentially entails the danger – already partially realised in connection with section 1502 Dodd-Frank Act – that such a list, even if only indicative and not necessarily exhaustive, will nevertheless with regard to the covered countries be interpreted and somewhat “misapplied” by the respective EU importers as constituting something like current *de facto* “no-trade areas” for the minerals and metals in question,⁶⁰ with undoubtedly severe consequences for affected artisanal miners and their relatives.

58 On this definition see in principle also OECD Due Dilligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Third Edition, 2016, p. 13, available under: <<http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>> (last accessed 22 October 2018).

59 See in this connection also for example already Directorate-General for External Policies, Briefing – EU Initiative on Responsibly Importing Minerals from Conflict-Affected Regions, December 2014, DG EXPO/B/PolDep/Note/2014_195, p. 6 (“To help ‘responsible importers’ determine whether their sources are in conflict-affected or high-risk areas, the European Commission will establish an expert group.”).

60 See also already *Brackett/Levin/Melin*, *Global Trade and Customs Journal* 10 (2015), 73 (83 *et seq.*); *Nowrot*, in: *Bun- genberg/Herrmann* (eds.), *Die gemeinsame Handelspolitik der Europäischen Union*, 214 (241 *et seq.*); *Heße/Klimke*, *Europäische Zeitschrift für Wirtschaftsrecht* 28 (2017), 446 (449 *et seq.*).

IV. Regulatory Approach: Stipulating Legally Binding Due Diligence Obligations

And this danger of ultimately turning the intended socio-economic effects of an EU conflict minerals regulation quasi “on their head”⁶¹ is in fact quite real, even more so because – and this is the fourth quite notable aspect – the recently adopted Regulation 2017/821 profoundly changes the quality of the normative expectations arising for covered economic actors in line with the demands voiced by the European Parliament. Contrary to the regulatory approach envisioned by the Commission’s 2014 draft, EU importers at the upper segments of the conflict minerals supply chain no longer find themselves merely encouraged to undertake a voluntary self-certification. Rather, they are under Article 3 (1) now in fact legally required to comply with the due diligence obligations stipulated in the EU regulation and are obliged to keep documentation demonstrating this compliance. The respective supply chain due diligence obligations in relation to management systems, risk management, independent third-party audits as well as the disclosure of information are set out in details in the Articles 4 to 7 of this steering instrument and are closely modelled after or nor infrequently even explicitly referring to – and thus in effect partly incorporating⁶² – the non-binding OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, in particular the OECD Model Supply Chain Policy as laid down in its Annex II.

Articles 4 and 5 of the EU regulation provide for what might be regarded as the core set of substantive obligations incumbent upon covered economic actors. Thereby, Article 4 stipulates various organizational, institutional and procedural requirements in relation to the importer’s management system. Among them are the obligation to adopt and publicly communicate a supply chain policy in line with the model included in Annex II of the OECD Due Diligence Guidance and to incorporate these standards into contracts with suppliers (Article 4 lit. a, b and d), the duty to establish an own – or provide for access to an external – grievance mechanism in the sense of Article 2 lit. p (Article 4 lit. e) as well as the need to operate a chain of custody traceability system for minerals and metals that generates and thus provides for quite detailed information on such aspects like the country of origin, the supplier and, if applicable, the smelters and refiners (Article 4 lit. f and g). Within the framework of a management system so designed and maintained and on the basis of the information retrieved in accordance with Article 4, the following Article 5 sets out generally phrased risk management obligations to be fulfilled by covered economic actors. In this regard, Article 5 requires Union importers to respond to identified risks of adverse impacts in their supply chain by making risk mitigation efforts like, *inter alia*, reporting respective findings to senior management, exerting pressure on suppliers, engaging in consultations with the stakeholders concerned, as well as temporarily suspending or permanently terminating the trade relationships in question.

61 For a vivid description with regard to the potentially adverse effects of section 1502 Dodd-Frank Act see *Brackett/Levin/Melin*, *Global Trade and Customs Journal* 10 (2015), 73 (76) (“The result could in fact exacerbate the harm the Conflict Minerals Rule is seeking to address by increasing smuggling, weakening governance, and depressing prices for ore. Together, these factors make the violation of human rights even more likely.”); *Abelardo*, *Fordham International Law Journal* 40 (2017), 583 (609-610).

62 On this aspect see also *Partiti/van der Velde*, *Curbing Supply-Chain Human Rights Violations through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Regulation*, 2017.

Supplementing these two provisions, the subsequent Articles 6 and 7 of the Conflict Minerals Regulation stipulate measures obviously first and foremost also intended to foster the observance and implementation of the obligations enshrined in the said Articles 4 and 5. Clearly compliance-oriented in character, Article 6 (1) requires in principle all Union importers – again in conformity with recommendations included in the OECD Due Diligence Guidance⁶³ – to carry out independent third-party audits intended to assess and determine the conformity of applied supply chain due diligence practices with the obligations laid down in the EU regulation in accordance with Article 6 (1) lit. b as well as to make recommendations on how to further improve this practices (lit. c). The respective economic actors are, however, under Article 6 (2) exempted from this procedural obligation if they can provide “substantive evidence [...] demonstrating that all smelters and refiners” in the sense of Article 2 lit. h in their whole supply chain (and thus first and foremost those that are based in third countries) comply with the requirements stipulated in the 2017 Conflict Minerals Regulation. In this connection, a support measure by the European Commission as foreseen in Article 9 of this EU instrument comes into play. This provision entrusts the Commission with the task of drawing up – and of subsequently updating on a regular basis – a list of “global responsible smelters and refiners”. The link between this measure and third-party audit obligations is established by Article 6 (2), stipulating that Union importers of metals are exempted from the duty to carry out third-party audits if they are able to “demonstrate that they are sourcing exclusively from smelters and refiners listed by the Commission pursuant to Article 9”. Aside from this exception under Article 6 (2) that is for a variety of reasons likely to be for quite some time to come of rather limited relevance in practice, the equally noteworthy provision of Article 7, being at least in part also aimed at further strengthening the importance and impact of these third-party audits as generally foreseen in Article 6 (1), includes in its first three paragraphs a number of disclosure obligations of Union importers, namely vis-à-vis the competent authorities of the EU member state at issue, towards the “immediate downstream purchasers” as well as – on an annual basis and including the internet – with regard to the general public.

While in principle all Union importers – irrespective of their size and economic importance – are subjected to these supply chain due diligence obligations as just outlined and as set out in details in the Articles 4 to 7, the 2017 EU Conflict Minerals Regulation also provides for three general exceptions. Among the respective provisions, Article 1 (6) stipulates that recycled metals are, with the exception of a specific disclosure obligation enshrined in Article 7 (4), excluded from the scope of application of the EU regulation. In addition, small volume Union importers are exempted from these obligations. According to Article 1 (3), the Conflict Minerals Regulation does not apply to those importers whose annual import volume of the respective mineral or metal is below the volume threshold stipulated in Annex I. In order to provide for the flexibility, but also effectiveness, of this regulation, Articles 1 (4), (5) and 18 empower the Commission to amend the applicable thresholds every three years, thereby continuously ensuring that – as stated in the second sentence of Article 1 (3) – “the vast majority, but no less than 95 %, of the total volumes imported into the Union of each mineral and metal” is indeed subject to the due diligence obligations set out in the Articles 4 to 7.

63 OECD Due Dilligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Third Edition, 2016, pp. 19, 47 *et seq.*, 106 *et seq.*, available on the internet under: <<http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>> (last accessed 22 October 2018).

Moreover, Article 3 (3) in connection with Article 8 provides for the possibility of governments, industry associations and other groupings to apply to the Commission, subject to certain criteria to be developed and laid down by this supranational organ in a delegated act under Article 8 (2), for recognition of their own due diligence schemes as being equivalent to the requirements set out in the EU Conflict Minerals Regulation. Thereby, these last-mentioned provisions do not exactly stipulate an exception from the observance of the supply chain due diligence requirements of the EU regulation but rather allow for recourse to external equivalent alternatives in order to facilitate the compliance of Union importers with these obligations. Possible candidates for this recognition procedure are currently, among others, the Conflict-Free Smelter Program developed by the Conflict-Free Sourcing Initiative (CFSI)⁶⁴ and the International Tin Supply Chain Initiative (iTSCi) Programme.⁶⁵

V. Enforcement Mechanisms: The Perceived Virtue of (Temporary) Modesty

In particular in light of all of these comparatively impressive normative obligations imposed on Union importers, a fifth and final notable aspect of the regulatory features as manifested in the newly adopted EU Regulation 2017/821 obviously concerns the question how to effectively as well as adequately ensure the enforcement of, and thus compliance by covered economic actors with, the legally binding requirements as first and foremost set out in the Articles 4 to 7. Considering the importance of this issue for the integrity and the overall functioning of the regulatory framework established by this EU regulation, it is hardly surprising that this steering instrument devotes considerable space in the Articles 3 (2), 10 to 13, 16 and 17 (1) to the stipulation of enforcement measures.

In accordance with Article 10, each EU member state designates one or more competent domestic authorities responsible for ensuring the effective implementation of the Conflict Minerals Regulation. Among the compliance measures to be taken recourse to in this regard, Article 11 emphasises the importance of “appropriate ex-post checks”, including on-the-spot inspections at the premises of the Union importers, in order to examine the implementation of supply chain due diligence obligations as well as the documentation and audit duties incumbent upon covered economic actors. Furthermore, in addition to various measures aimed at the exchange of information among member states (Article 13) and the stipulation of their reporting obligations by member states towards the Commission (e.g. Articles 16 (2) and 17 (1)), Article 16 foresees in its first paragraph that each member state shall lay down the rules applicable to cases of infringements by Union importers of their obligations under this EU regulation. More specifically, the competent authorities are under Article 16 (3) also required to issue a notice of remedial action to be taken by the economic actor in question in case of an infringement. Nevertheless, it can be inferred from Article 17 (2) and (3), stating in their relevant parts that the Commission shall assess by 1 January 2023 and every three years thereafter “whether Member State competent authorities should have competence to impose penalties upon Union importers in the event of persistent failure to comply with the obligations set out in this Regulation”, that for the time being the EU member states are not expected – or even entitled – to adopt sanctions in cases of non-compliance; a quite notable, albeit potentially only

64 For additional information see under: <<http://www.conflictreesourcing.org/conflict-free-smelter-program/>> (last accessed 22 October 2018).

65 For respective information on this initiative see <<https://www.itri.co.uk/itsci/frontpage>> (last accessed 22 October 2018).

temporary, limitation on the arsenal of enforcement instruments usually available to governmental actors in order to secure the observance of legal obligations.

Aside from this last mentioned and a number of other debatable features as partially also already addressed, however, the normative steering framework established by the 2017 Conflict Minerals Regulation as a whole seems to present itself, if viewed from an overarching perspective, as a rather promising – and thus laudable – regulatory approach to adequately address, and hopefully to constructively contribute to overcome and remove, one of the worst manifestations of the natural resource curse. When assessed from a comparative perspective in light of its initial role model, the mechanism established by section 1502 of the Dodd-Frank Act, the recently adopted EU Regulation 2017/821 can ultimately be positioned somewhere between a kind of “super Dodd-Frank Act” or “Dodd-Frank Act plus” piece of legislation on the one side and a “Dodd-Frank Act minus” instrument on the other side. In order to support, on the one hand, the perception of a “Dodd Frank Act plus” regulatory measure, one only needs to refer for example to the considerably broader territorial scope of application as well as in particular also to the fact that section 1502 Dodd-Frank Act only foresees mandatory annual disclosures but does not stipulate any specific due diligence obligations that covered businesses are legally bound to fulfil. On the other hand, the 2017 Conflict Minerals Regulation, contrary to its US pendant, falls short of applying to economic actors in the whole supply chain of conflict minerals.

Taking into account that the EU regulation has just been adopted and in particular that most of its operational provisions, including the supply chain due diligence obligations set out in its Articles 4 to 7, will only apply from 1 January 2021 onwards in accordance with Article 20 (3), it goes without saying that it is too early to make a definitive finding on the wisdom of introducing these and other regulatory deviations from the section 1502 Dodd-Frank Act role model. Ultimately, as it is not infrequently the case, only time will tell whether the in part quite far-reaching and ambitious normative scheme recently created by EU Regulation 2017/821 is able to successfully establish itself in practice as an effective European “rite” to remove the natural resource curse by adequately coping with the complex and multi-faceted challenges arising in connection with the conflict minerals “dilemma”.

E. (By Way of an) Outlook: Let There be (also) Light and Information – On the More Limited Role of Transparency in the Steering Approaches of the 2017 EU Conflict Minerals Regulation

When finally, against the background of the findings made so far, turning again more specifically to the importance of transparency in transnational steering regimes dealing with extractive industries in general as well as in the regulatory framework of the EU Regulation 2017/821 in particular, it seems appropriate to start with the observation that this normative principle does in the present context not play *the* dominant role that it frequently occupies in other steering regimes aimed at preventing human rights violations in this business sector. In order to illustrate and substantiate this initially probably somewhat surprising remark, attention needs to be drawn to the distinct regulatory approaches that characterise this EU regulation in the broader realm of these steering regimes.

Most hard law instruments, including section 1502 of the Dodd-Frank Act, as well as obviously all soft law regimes addressing the issue of human rights in the extractive industries are with regard to their implementation approaches primarily shaped by the wider concept of law-realisation.⁶⁶ In contrast to the traditional “command and control style of legislation”,⁶⁷ the approach of law-realisation is characterized by more indirect steering mechanisms such as cooperative implementation structures, a recourse to economic steering models that rely on incentives and positive as well as adverse reputational effects and, last but not least, the provision of disclosure and reporting requirements intended to promote transparency,⁶⁸ a regulatory approach that finds its manifestation in the EU legal order for example in the so-called “Corporate Social Responsibility (CSR)” or “Non-Financial Reporting” Directive 2014/95/EU of October 2014.⁶⁹ As already indicated above,⁷⁰ transparency serves in this connection essentially a dual purpose by, first, allowing the public, among them in particular also consumers and other stakeholders, to access information for example on the due diligence activities of the respective business actors, as well as, second, by inducing and thus influencing a change of behaviour on the side of these actors with the aim of protecting and promoting human rights as well as other transnational community interest concerns.⁷¹

66 Generally on the notion of “law-realisation” as being distinct from the considerably narrower concept of “law enforcement” see *Tietje*, Normative Grundstrukturen der Behandlung nichttarifärer Handelshemmnisse in der WTO/GATT-Rechtsordnung, 132 *et seq.*

67 *Zerk*, Multinationals and Corporate Social Responsibility – Limits and Opportunities in International Law, 36.

68 Specifically with regard to section 1502 Dodd-Frank Act see thereto also, e.g., *Ochoa/Keenan*, Goettingen Journal of International Law 3 (2011), 129 (138 *et seq.*).

69 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ EU L 330/1 of 15 November 2014.

70 See already *supra* under A.

71 See thereto, specifically with regard to section 1502 Dodd-Frank Act, for example also *Moncel*, Berkeley Journal of International Law 34 (2016), 216 (225-226) (“The U.S. Congress thus embraced a transparency-based regulatory theory, according to which exposing a problem to the public can foster public action against it. The result may be the same: several technology companies subject to the rule, including Apple, HP, Intel, and SanDisk, have already committed to removing all conflict minerals from their supply chains.”); as well as more generally *Chilton/Sarfary*, Stanford Journal of International Law 53 (2017), 1 (20 *et seq.*).

To the contrary, the 2017 Conflict Minerals Regulation is – primarily on the insistence of the European Parliament, thereby further indicating the important role played by this EU institution in the effective realisation of the EU (non-economic) foreign policy objectives laid down in Article 21 TEU⁷² – first and foremost also stipulating, especially in its Articles 4 and 5, direct and legally binding obligations of conduct for covered economic actors with regard to the exercise of supply chain due diligence. Against this background and bearing in mind the enforcement mechanisms as outlined above,⁷³ this regulatory regime is not to the same extent as other respective steering instruments relying on, and dependent on, disclosure obligations and other means of facilitating transparency for the purposes of ensuring an effective compliance.

This necessary relativisation should nevertheless not give rise to the perception that the principle of transparency is assigned only a minor role in the regulatory framework of EU Regulation 2017/821. Already its Article 1 (1) states quite prominently that providing transparency and certainty as regards the supply practices of Union importers are the central purposes pursued by this steering instrument. In implementation of these legislative goals, the regulation is – on an inter-governmental level – obviously aimed at promoting information exchange, and thus conditions of transparency, between the various competent authorities of the member states (Article 13) as well as between the member states and the Commission (e.g. Article 16 (1) and 17 (1)). Moreover, also with regard to the inter-business level various provisions – among them Article 4 lit. a and Article 7 (2) – are intended to facilitate an increased flow of information between Union importers and their suppliers as well as downstream purchasers.

Finally and presumably most notable in the present context, the fact that various disclosure obligations incumbent upon covered economic actors are also concerned with providing access to information for the wider public, including consumers and other stakeholders, can be regarded as a clear indication that these procedural duties are not merely supplementary means aimed at facilitating the enforcement of substantive due diligence obligations by the competent authorities of the member states, but are actually envisioned as a compliance mechanism in its own right by allowing for public action like the exercise of consumer choices based on the information received.⁷⁴ This applies for example to the disclosure obligations of Union importers stipulated in Article 4 lit. a and Article 7 (3), but also to the publication requirements bestowed upon the Commission, *inter alia*, under Article 9 (5) and Article 10 (2).

In sum, the regulatory features of the 2017 EU Conflict Minerals Regulation transcend the distinction between traditional law enforcement mechanisms and law-realisation approaches by combining “command and control” elements in the form of legally binding supply chain due diligence obligations with more indirect steering tools aimed at improving transparency; a path so far less taken in the realm of international and domestic normative regimes aimed at promoting the observance of human rights in the extractive industries, but in principle undoubtedly promising and thus definitely worth exploring.

72 Generally on the correlation between the considerably increased parliamentarisation of the EU common commercial policy on the basis of the Lisbon Treaty on the one hand and the effective realisation of the EU (non-economic) foreign policy goals see, e.g., *Krajewski*, in: Bungenberg/Herrmann (eds.), *Common Commercial Policy after Lisbon*, 67 (83 *et seq.*); *Bungenberg*, *European Yearbook of International Economic Law* 1 (2010), 123 (129 *et seq.*); *Tietje*, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 21.

73 See *supra* under D. V.

74 See in this regard also for example recital 13 of the Conflict Minerals Regulation: “Public reporting by an economic operator on its supply chain due diligence policies and practices provides the necessary transparency to generate public confidence in the measures economic operators are taking.”

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