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## REVIEW OF iTSCi INCIDENTS NOTED IN APPLE INC'S CONFLICT MINERAL REPORT

31<sup>st</sup> March 2016

### SUMMARY

The recent Conflict Minerals Report (CMR) from Apple Inc<sup>1</sup> for the reporting period of 2015 described how the company performed due diligence, including a review of more than 700 incident report summaries provided by iTSCi. Since this is the first occasion that a downstream product manufacturer has reviewed information with iTSCi for purposes of a CMR it is useful to provide additional context and comment.

In the CMR, three incidents were noted as still being actively investigated. These relate to acts of individuals linked to police, the army or other authorities in the DRC; none related to non-state armed groups. The amount of mineral that could be linked to these incidents was around 0.1% of that tracked by iTSCi from mines in four countries during the year, with the potential financial benefit to the individuals estimated to be up to US\$425. This appeared to be for personal gain rather than for the benefit of the state services to which the individuals were connected, and the authorities followed up and resolved the issues within a short time.

The review of incidents for preparation of a CMR highlighted various challenges such as;

- Definitions of 'armed group' are not always simple to interpret in practical situations, and understandings under OECD guidance and Dodd Frank are not always aligned,
- The actions of rogue individuals acting in a criminal manner for personal gain are not equivalent to organised 'armed groups' funding conflict yet could be interpreted as such under Dodd Frank,
- Legal payments of state services for provision of security, while recognised in OECD guidance, could lead to apparent link to conflict under Dodd Frank,
- Out of step timing of mine production, smelting, use in components and final product, makes direct linkage between incidents and final product, and therefore determination of 'conflict-free' product impossible at a practical level,
- The level of evidence available in-region, while sufficient to encourage mitigation, does not always provide exact times or dates that can be definitively linked to specific mineral for purposes of determination.

iTSCi is pleased to co-operate with member companies making use of incident reports for their own due diligence and will continue to learn lessons from such discussions to further improve our activities to achieve positive and lasting change in the central African 3T mineral sector. iTSCi also encourages the international community to address some of the challenges highlighted in these examples in order to reach an improved common and practical understanding of the best approach to manage 'conflict minerals'.

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<sup>1</sup> See [http://images.apple.com/supplier-responsibility/pdf/Conflict\\_Minerals\\_Report\\_2016.pdf](http://images.apple.com/supplier-responsibility/pdf/Conflict_Minerals_Report_2016.pdf)

## REVIEW OF iTSCi INCIDENTS NOTED IN APPLE INC'S CONFLICT MINERAL REPORT: 31<sup>st</sup> March 2016

### 1. INTRODUCTION

A fundamental component of the iTSCi Programme is the provision of a widespread and competent on the ground assessment team to report on potential risks in the 3T mineral sector and encourage their resolution through stakeholder engagement. This incident reporting process complements other aspects of iTSCi such as provision of traceability, third party auditing and due diligence training, and through recommendations made in every case, brings about improvement actions and/or sanctions that drive positive and lasting change<sup>2</sup>.

Over the five years of iTSCi's implementation member companies in the upstream supply chain between mine and smelter have made use of 1,000's of incident reports to assist their own decisions on purchasing, and now Apple Inc is the first company in the downstream portion of the supply chain to engage in a review of the information made transparently available by iTSCi on identified risks relating to OECD due diligence guidance, follow up with iTSCi, and include comment in their Conflict Mineral Report. Lessons learnt during this review process have highlighted challenges in interpreting the often complex situations that occur on a day to day basis, as well as previously discussed incompatibility between the concept of progressive improvement through mitigation described in the OECD guidance, and 'conflict-free' determination originally enshrined in the Dodd Frank Act.

### 2. CONTEXT OF INCIDENTS

Apple Inc.'s Conflict Minerals Report (CMR) is for the reporting period January 1, 2015 to December 31, 2015. As noted in the CMR, the company reviewed more than 700 incident report summaries provided by iTSCi. Further detail of the three incidents noted as being actively investigated by Apple is provided in section 6 of this document. Note that regular iTSCi incident report summaries contain information on the original concern, as well as various updates that can contain many twists and turns and complications; for the purpose of enhanced clarity, this document summarises the best available information at the current time.

During 2015, the iTSCi Programme traced and monitored the trade of a large volume of mineral from four countries to international markets. This totalled at least 1,151,141 transactions, and more than 12,400,000 kg of mineral tracked from mines. The weight of mineral impacted by the three relevant incidents may amount to a maximum of 17,429 kg which represents around **0.1%** of the total mine production of the year by weight. The extent of likely funding to the individuals involved in these incidents amounts to a maximum of **US\$425**. For comparison one bottle of beer in the DRC costs around US\$5.

There is no evidence to suggest any of the financial gain obtained by the individuals in the three described incidents went to an organised state armed group of which the individual was a member, nor to fund conflict, nor support human rights abuses. Indeed, the authorities or relevant hierarchy sanctioned the individuals as is the desired outcome of mitigation, and aligned with progressive improvement expected under the OECD guidance. There was also no involvement of non-state armed groups.

### 3. AVAILABILITY OF INCIDENT INFORMATION

iTSCi provides incident reports to member companies, governments and stakeholders once concerns have been initially verified, and updates these on a monthly basis to allow any member company to follow progress of mitigation actions and make any relevant decisions. Membership is the mechanism by which companies across the supply chain share in the cost of creating the information required for their due diligence and as an

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<sup>2</sup> A booklet providing an overview of iTSCi process can be found here <https://www.itri.co.uk/information/itsci/itsci-graphics/itsci-booklet>

Associate member of iTSCi, Apple Inc has access to these regularly updated incident reports. Incident reports have also always been made freely available to those who have not contributed to generating the information, but only at a later date<sup>3</sup>.

#### 4. INTERPRETATION CHALLENGES HIGHLIGHTED DURING THE REVIEW

##### 4.1 What is an armed group?

Definition of armed groups in Dodd Frank relates to those listed in US annual country reports on human rights<sup>4</sup> and therefore changes from year to year. However, the relevant country reports covering 2015 are not yet available, and use of 2014 reports for comparison with up-to-date incidents which occurred in 2015, and are reported in a 2015 CMR, is not ideal and does not help to reflect progress on the ground.

The US country reports on human rights mention one-off instances of risk in general terms, sometimes with no specific location given, and using generic terms such as 'state security forces'. This attaches an unjustified non-specific stigma of 'conflict' to entire security forces which then suffer unnecessarily from negative perceptions. In comparison, iTSCi incidents report precisely on locations and actors creating risks, as well as how mitigation of those risks is achieved. Unfortunately, Dodd Frank does not appear to allow for use of more recent and precise information on local situations to determine links to conflict despite this being available. This can generate misleading reports from evaluations.

The OECD guidance does not precisely define public security forces, and defines non-state armed groups through reference to UN resolutions<sup>5</sup>. Technically, resolutions currently only relate to renewal of MONUSCO or sanction committee mandates and not, for example, Group of Expert reports. It is entirely possible that armed groups/security forces according to Dodd Frank and OCED guidance will not be in agreement even though the SEC Rule also refers to OECD guidance for due diligence; this creates incompatibility affecting decision making.

In some cases, civilian or unarmed services, while separate institutions, may be under the authority of an armed state security force. There is no guidance on whether the definition of armed groups in Dodd Frank encompasses subsidiary unarmed services or not which adds further challenges to interpretation.

Some state services have a mandate to provide security in exchange for payment. For example in the DRC, the mines police, as part of the national police, may be contracted for certain fees. If the mines police are named in the US country reports and are working under contract receiving fees for their normal activity, this could be interpreted as benefiting armed groups under Dodd Frank. The OECD guidance more realistically recognises that state forces have a role in providing security which creates further potential incompatibility.

##### 4.2 Do actions of individuals benefit or represent armed 'groups'?

In almost all incidents reported by iTSCi that relate to public security forces the activities of concern are carried out by individuals acting of their own volition, rather than acting under instruction of, or as a group. Those individuals may be for example, drunk, or acting in a criminal manner, for example carrying out theft, and appear to invariably be acting for personal gain. The actions of the individuals within the security services are

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<sup>3</sup> Incident report summaries are publicly available here; <https://www.itri.co.uk/information/itsci/itsci-incident-summaries> with those from an earlier date available in annexes of governance assessments available here; <https://www.itri.co.uk/information/itsci/itsci-governance-assessments>

<sup>4</sup> Item 1.01(d)(2) of Form SD - The term **armed group** means an armed group that is identified as a perpetrator of serious human rights abuses in annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country.

<sup>5</sup> To identify non-state armed groups, companies should refer to relevant UN Security Council resolutions.

not supported by, and typically penalised by, their hierarchy or other procedural measures which is therefore aligned with the concept of mitigation in the OECD guidance.

OECD Annex II explains that companies should 'commit to refraining from any action which contributes to the financing of conflict'. There is no suggestion or evidence that the gain which appears to be obtained by rogue individuals interfering in the supply chain funds conflict.

In this context, it is illogical to consider rogue individuals acting in a criminal manner for personal gain as organised 'armed groups' funding conflict yet the generalised definition of armed groups in Dodd Frank could be interpreted to make that necessary.

#### *4.3 Is linkage of conflict to a consumer product possible?*

Minerals are mixed, processed and re-graded multiple times through the upstream supply chain until inputted into a smelter and iTSCI is able to track this through the supply chain from the mine. However, smelters use continuous rather than batch processes and it is technically impossible to directly link metal output to mineral inputs. Therefore individual lots of metal sold for product manufacture cannot be linked to specific incidents at mines.

Tracking batches of metal through component manufacture and recycling circuits into final products is also impossibly complex. There is a significant time delay of six months or more between mining of minerals and smelting into metal even in the best market circumstances. Different factors such as stockpiling due to price and demand factors can extend this time, and, similar market factors in post-smelting commodity trading and for example, electronic component storage, would make comparison of incidents occurring in mines in 2015, with smelting in the same time period of 2015, and consumer product manufactured in 2015, entirely out of step and inaccurate, even if feasible.

The focus of OECD recommended due diligence is on ensuring processes to mitigate risks are in place and this is achieved through processes applied by iTSCI and the involvement of stakeholders. Previous discussions in the OECD forum have concluded that mitigation should be focused on actors, and minerals themselves should not be tainted within the supply chain. Ensuring companies have due diligence processes in place, assisted by joint industry programmes such as iTSCI and CFSP is a workable and practical approach, while conversely, the objective of Dodd Frank to link incidents of conflict financing to product manufacturing to declare products as 'conflict-free' is unlikely to be possible or useful.

#### *4.4 What is sufficient evidence to conclude link to conflict?*

The operating environment of central Africa is not highly formalised and documentation and records are not always available. Many incidents arise from verbal reports that frequently differ depending on the point of view of the individual involved in the discussion, and do not give precise times or locations. The understanding of incidents also develops over time and as a result, the issues being discussed can be very difficult to follow for those outside the local area, and even locally a definitive agreement on what occurred may not be reached. Nevertheless detailed understanding such as may be required in a legal case is not a pre-requisite for encouraging effective mitigation actions.

The processes applied through iTSCI are demonstrated to achieve actions by stakeholders that resolve and prevent re-occurrence of issues of concern in a relatively short time and prior to completion of investigations. This achieves results while avoiding an enforced embargo by companies who must act in a more formalised

manner. The level of evidence available may not be sufficient for a company to break a legally binding purchase contract but is sufficient to perform mitigation.

## **5. CONTINUING IMPROVEMENTS IN 2016**

The processes of iTSCi are frequently changed and improved in response to lessons learnt during implementation of this complex programme in order to ensure that we continue to be successful in bringing about significant change and assisting the supply chain in an appropriate manner.

A number of changes were made to iTSCi incident reporting procedures during 2015 as a result of various requests and suggestions, for example, to reduce the number of incidents that remain open for a longer time, to highlight lack of action from specific stakeholders that may have limited success of mitigation, and to review the categorisation process for the seriousness of any incident. Other improvements will continue in 2016. While further investment in enhanced information systems would also be desirable, this can only be considered if sufficient resources are available. In the current challenging market conditions for commodities highlighted in an open letter in December 2015<sup>6</sup>, such investment is unlikely to be possible at this time.

The main reference and basis of design of iTSCi is the OECD guidance since continued engagement and progressive improvement is the practical and effective approach. A number of compatibility challenges between OECD and Dodd Frank have previously been raised and discussed without conclusion and these challenges were continually faced during review of incidents for the CMR. It is hoped that examples in this document may promote better understanding and allow for further informed discussion. Pressure towards expectations that are incompatible, too high, difficult or expensive to meet will lead back to embargo.

The upstream sector has requested agreement through the OECD multi-stakeholder forum on how to manage seized minerals, as well as minerals found to be subject to risk after sold down the supply chain. These unresolved issues continue to limit the possibilities for mitigation, since there is no way to responsibly dispose of such minerals, and therefore incidents involving questionable minerals are impossible to close causing significant frustration among all actors.

It is also hoped that, once clarification of some of the challenges described in this document has been achieved, it will be possible to promote greater understanding of the needs of the supply chain through our work with stakeholders in-region.

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<sup>6</sup> See <https://www.itri.co.uk/itsci/news/itsci-calls-for-funding-in-open-letter-to-downstream-business-and-donors>

## 6. SUMMARY OF THREE INCIDENTS STILL UNDER INVESTIGATION

Incident 1: Request for payment by rogue police and local authority. Status closed.

For a period of up to three weeks, some miners taking one route home from a mine were asked for payment by two territorial policemen (PNC) and one person from the customary authority to avoid confiscation of their tools. Once discovered and reported to the local stakeholder committee the practice immediately stopped. The rogue policemen were not acting with support of managers, were reprimanded, and suspended from regular duties for a probationary period, as was the local mayor. Payments requested were around US\$0.5 a time but did not relate to bags of minerals directly since those were not carried by miners. Many miners could also avoid the request by using a different route home from the mine. The maximum potential benefit shared between the individuals of the police and authority has been estimated as a maximum of **US\$370**.

### *Solution achieved*

The OECD Guidance Annex II, paragraph 5 considers illegal taxation by public and private security forces as a risk and recommends through paragraph 10 suspension of engagement with the supply chain after six months if an agreed mitigation plan is not effective. Action, agreed by local stakeholders, was successful in resolving the situation and preventing continuation of the practice within eight calendar days of discovery of the risk. The rogue individuals were disciplined by their superiors. There is no involvement of non-state armed groups.

### *Classification of incidents*

Taxation by individuals of state services not acting as a group was previously categorised by iTSCi at a lower level (2) than attacks or activity organised by non-state armed groups (1). However, since revision of the iTSCi incident definition in autumn of 2015 both would now be categorised as the highest level. This incident remained open for a time in order to allow for on-going monitoring of the situation.

Incident 2: Theft and partial return of bags involving mining police. Status closed.

A small number of bags of mineral were stolen from a company warehouse while being guarded by private security guards and the mining police (PMH). It was suspected that the guards were complicit in the theft and ultimately they were able to lead investigators to the recovery of five bags. Another two bags remain unrecovered. The recovered mineral was returned to the company together with three unrelated bags of mineral like waste which was all noted in an official return record by the authorities. The guards were detained and transferred to a military justice court pending trial should the company press charges. There is **no evidence that the police benefited** from the incident although there is a risk of potential benefit associated to the two unrecovered bags if the individuals were indeed complicit in the original theft.

### *Solution achieved*

The OECD Guidance Annex II, paragraph 6 emphasises the role of public and private security forces in maintaining the rule of law and protecting security and human rights. The actions of the individuals involved deviated from this role and they were disciplined by authorities within a short time of the incident occurring. The OECD Guidance through paragraph 10 recommends suspension of engagement with the supply chain after six months if an agreed mitigation plan has not been effective, however, resolution had been achieved within a much shorter timescale. There is no involvement of non-state armed groups, and, no benefit to the rogue individuals of the state armed group for the minerals recovered and entering the supply chain.

### *Classification of incidents*

This incident was categorised as theft and disregard for iTSCi procedures at level 2 since PMH is a stakeholder in the governance of the mining sector with the mandate to provide security in the mineral sector, and a

stakeholder in the iTSCi programme. Higher categorisation was not necessary since there was no evidence of financial benefit to the rogue individuals found during investigation.

Incident 3: Payments requested for evening mineral transport by off-duty individuals of FARDC working as unarmed DSF. Status closed.

Discussion at a local stakeholder meeting identified some taxation of negotiants and the population in two different locations. There was much confusion between the verbal reports given, as well as the precise actors involved, making this incident difficult to evaluate conclusively. Taxation was originally thought to be by individuals in the army (FARDC), however, in the first case this was later found to be bandits in disguise as FARDC and not related to minerals.

In the second case, two border agents (DSF) were requesting payment to authorise negotiants loading minerals for transport after 6pm. DSF agents are civilians who are not armed, however, these agents in question also separately appeared to work in FARDC. It also remains unclear under which authority DSF are managed, potentially the intelligence agency (ANR) or the FARDC, or otherwise by a different body. The DSF may have been accompanied by FARDC during night patrols creating more confusion on roles. There were also significant discrepancies between reports of dates and times of taxation by different parties which makes proof of linkage to exact bags of mineral challenging to obtain. With information available to date it may be estimated that around 140 bags out of potential 2,300 bags transported over the period may be related to some illegal taxation. Negotiants were reportedly requested to pay around US\$5 a time (rather than in relation to number of bags), and may have paid in total around **US\$40-55** to the two DSF agents. The authorities changed the regulations on late transport and the issue was resolved and has not recurred. The commander of the FARDC met with relevant groups to emphasise that there should be no interference in the supply chain. The two involved DSF agents acknowledged the facts and committed to complying with expected practice. The FARDC general responsible for the area provided a statement to confirm the agents were acting individually without any authorisation from the FARDC, and to confirm that the FARDC did not benefit from the actions of those individuals.

#### *Solution achieved*

The OECD Guidance Annex II, paragraph 6 emphasises the role of public and private security forces in maintaining the rule of law and protecting security and human rights. Assuming that the individuals involved were acting in some way related to their roles in FARDC (although off-duty) they were not acting according to this expectation. The OECD Guidance through paragraph 10 recommends suspension of engagement with the supply chain after six months if an agreed mitigation plan has not been effective, however, resolution, including changed regulations and action by the FARDC, was completed within around 6 weeks of the first report of the risk. The incident remained open for a time in order to allow for on-going monitoring of the situation.

#### *Classification of incidents*

Note that this incident was considered by iTSCi as relating to payments to a civilian unarmed agency and therefore categorised as level 2 risk. An alternative interpretation of the incident focusing on the membership of the individuals in FARDC, although they were not acting in that capacity while off-duty, would also have been categorised as taxation by individuals of state services not acting as a group (level 2) in a similar manner as incident 1. In the revised iTSCi incident definitions one interpretation would now remain level 2, while another may be classified as level 1 although such decisions can be subjective.