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## Articles

# The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate

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*“Diamonds are forever, it is often said. But lives are not. We must spare people the ordeal of war, mutilations and death for the sake of conflict diamonds.”<sup>1</sup>*

### INTRODUCTION

At the hands of rebels, dictators, and terrorists, diamonds have crystallized into a source of financing for conflict and civil wars, which have caused the deaths of more than two million people.<sup>2</sup> These “conflict” diamonds have additionally threatened to tarnish the legitimate diamond trade by associating diamonds with hardened brutality. The international community has attempted to curb the trade of conflict diamonds and promote peace and stability in Angola, the Mano River Union states,<sup>3</sup> and the Great Lakes region<sup>4</sup> of Africa.<sup>5</sup> In the last two

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1. *Conflict Diamonds: Sanctions and War*, at <http://www.un.org/peace/Africa/Diamonds.html> (last modified Mar. 21, 2001) (quoting Martin Chungong Ayafor, Chairman of the United Nations Sierra Leone Panel of Experts).

2. See G.A. Res. 55/56, U.N. GAOR, 55th Sess., 79th plen. mtg., U.N. Doc. A/RES/55/56 (2001); see also Clean Diamonds Act, H.R. 981, 107th Cong. § 2(1) (2001).

3. The Mano River Union states include Liberia, Sierra Leone and Guinea. Michael Fleshman, “*Conflict Diamonds*” *Evade U.N. Sanctions: Improvements in Sierra Leone, But Continuing Violations in Angola and Liberia*, AFR. RECOVERY, Dec. 2001, at 15, available at <http://www.UN.org/ecosocdev/geninfo/afrec/vol15no4/154diam.htm>. The Mano River Union was established pursuant to the Mano River Declaration in October 1973 between Liberia’s President William Tolbert and Sierra Leone’s President Siaka Stevens. *Liberia: The Key To Ending Regional Instability*, ICG AFRICA REPORT No. 43, Apr. 24, 2002, at n.1 (Int’l Crisis Group, Free-

years, international bodies have attempted to accomplish this goal by devising a global certification scheme intended to operate as a blocking mechanism for conflict or blood diamonds. Under the auspices of the United Nations (U.N.), the certification scheme has expanded into an unprecedented multilateral effort involving more than thirty-five countries,<sup>6</sup> the diamond industry, non-governmental organizations (NGOs), the World Diamond Council (WDC),<sup>7</sup> and the diamond trading community.<sup>8</sup> Named after the South African city of its origin, the “Kimberley Process” (KP) will augment existing U.N. sanctions targeted at preventing the trade of conflict diamonds.<sup>9</sup> International imple-

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town/Brussels). Guinea subsequently joined in 1977 under Sékou Touré. *Id.* The union’s purpose was “to build an economic and customs alliance and achieve a common market in which goods, services, and people would move freely across the region.” *Id.*

4. The core of the Great Lakes region is comprised of the Democratic Republic of Congo, Uganda, Rwanda, Burundi, and Tanzania. GEORGES NZONGOLA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE’S HISTORY* 215 (2002).

5. *Essential Elements of an International Scheme for Certification for Rough Diamonds with a View to Breaking the Link Between Armed Conflict and the Trade in Rough Diamonds* § VI, para. 21, Kimberley Process Working Doc. 1/2002 (Mar. 20, 2002) [hereinafter KP Working Doc. 1/2002]; see Press Release, U.N. General Assembly, General Assembly Urges Finalization of International Certification Scheme for Rough Diamonds: Success of ‘Kimberley Process’ a Matter of Life and Death For Southern Africa, Says Botswana as Assembly Adopts Text on Conflict Diamonds, U.N. Doc. GA 10011 (Mar. 13, 2002), available at <http://www.UN.org/News/Press/docs/2002/GA10011.doc.htm>; see also Kimberley Process, at <http://www.kimberleyprocess.com> (last visited Oct. 16, 2002).

6. The following countries are KP Participants: Angola, Australia, Belgium, Botswana, Brazil, Burkina Faso, Canada, China, Central African Republic, Cote d’Ivoire, Czech Republic, Democratic Republic of Congo, France, Gabon, Germany, Ghana, Guinea, India, Israel, Italy, Japan, Lesotho, Liberia, Namibia, Portugal, Russia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Swaziland, Switzerland, Sweden, Tanzania, Thailand, United Kingdom, United States of America, Zambia, and Zimbabwe. Amboka Wameyo, *An End to Conflict Diamonds?*, ACTION AID (Feb. 2002), available at <http://www.actionaid.org/resources/pdfs/endconflict.doc>.

7. The World Diamond Council (WDC) was created in July 2000 at a meeting in Antwerp through a joint resolution of the World Federation of Diamond Bourses and the International Diamond Manufacturers Associations. These two organizations represent the world’s principal diamond manufacturing and trading centers. Headquartered in New York, the WDC was created to represent the diamond industry with respect to the development, implementation, and oversight of a tracking system for conflict diamonds. See World Diamond Council, at <http://www.worlddiamondcouncil.com> (last visited Sept. 25, 2002).

8. See Annex to the Letter from the Permanent Representative of South Africa to the U.N. Addressed to the Secretary-General: Provisional Report of the Kimberley Process to the General Assembly, Submitted in Pursuance of Assembly Resolution 55/56 of 1 December 2000, U.N. Doc. A/56/502, App. B, at 7 (2001) [hereinafter U.N. Doc. A/56/502]. See generally Kimberley Process, *supra* note 5.

9. Diamonds from Angola, Sierra Leone, and Liberia are subject to mandatory

mentation of the Kimberley Process is tentatively scheduled for the end of 2002.<sup>10</sup>

The U.N. defines conflict diamonds as those diamonds originating from areas or mines that are controlled by rebel insurgents and factions that use the diamonds to fund military action in opposition to legitimate governments.<sup>11</sup> Diamonds from Angola, Sierra Leone, and the Democratic Republic of the Congo (DRC), in particular, have fuelled rebellion and human rights violations for at least a decade.<sup>12</sup> More recently, a link between these “dirty” diamonds and terrorist financing has increased international commitment to addressing the conundrum of conflict diamonds.<sup>13</sup>

The KP will result in a memorandum of understanding or a political agreement<sup>14</sup> regarding the trade of rough diamonds.<sup>15</sup> The agreement contemplates a system of national laws that function interdependently to track rough diamonds from the mines to the point they are first worked.<sup>16</sup> It will operate as a

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UNSC sanctions, pursuant to UNSC Resolutions 1127 (1997), 1306 (2000), and 1343 (2001), respectively. See Angola (UNITA) Sanctions Regulations, 31 C.F.R. § 590 (2001); *Illicit Diamonds, Conflict and Terrorism: The Role of U.S. Agencies in Fighting the Conflict Diamond Trade: Hearing Before the Senate Comm. on Government Affairs, Subcomm. on Oversight of Government Management*, 107th Cong. (2002) (statement of Alan W. Eastham, Special Negotiator for Conflict Diamonds, Bureau of Economic and Business Affairs) [hereinafter *Government Affairs Hearing*] (stating that the KP will “supplement and enhance the Security Council measures”).

10. Final Communiqué, Kimberly Process Meeting, Ottawa, 18 to 20 March 2002 (Mar. 21, 2002), available at <http://www.kimberleyprocess.com> [hereinafter KP Final Communiqué].

11. Press Release, U.N. General Assembly, General Assembly Urges States to Implement Measures to Weaken Link Between Diamond Trade and Weapons for Rebel Movements, U.N. Doc. GA/9839 (Dec. 1, 2000) (citing <http://www.UN.org/peace/africa/Diamond.html>) [hereinafter U.N. Doc. GA/9839].

12. See Clean Diamond Trade Act, S. 2027 IS, 107th Cong. § 2(1) (2002).

13. Douglas Farah, *Al Qaeda Cash Tied to Diamond Trade; Sale of Gems From Sierra Leone Rebels Raised Millions, Sources Say*, WASH. POST, Nov. 2, 2001, at A1; see *Government Affairs Hearing*, supra note 9 (statement of Alan W. Eastman, Special Negotiator for Conflict Diamonds, Bureau of Economic and Business Affairs).

14. The draft KP agreement does not include the language typically used to evidence an intention to enter into a formal treaty, such as the use of “shall,” “agree,” “obligations,” or “enter into force.” ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 27 (2000). Additionally, its lack of formality, treaty-like final clauses, or a registration requirement is strongly indicative that the KP agreement is a Memorandum of Understanding (MOU) or a political agreement. See generally *id.* at 18, 26-46 (discussing the various distinctions between formal treaties and MOUs).

15. “Rough diamonds are diamonds that are unworked or simply sawn, cleaved or bruted, and fall under the Relevant Harmonized Commodity Description and Coding System [subheadings] 7102.10, 7102.21, and 7102.31.” KP Working Doc. 1/2002, supra note 5, § I.

16. See KP Working Doc. 1/2002, supra note 5, § IV.

system of common minimum international standards for national certification regimes.<sup>17</sup> All rough diamonds traded legitimately will be accompanied by a certificate of origin.<sup>18</sup> These certificates will be akin to a chain-of-custody warranty as the rough diamonds are traded through the “diamond pipeline.”<sup>19</sup> In addition to the certificates, the nearly finalized KP agreement,<sup>20</sup> or “Working Document,” requires nations to implement certain controls and procedures that are not generally required with simple “declarations” regarding origin.<sup>21</sup>

The priority that the international community is placing on controlling illicit diamond networks constitutes a major policy reversal regarding conflict diamonds, which until 1999 were largely ignored.<sup>22</sup> Although the KP is widely endorsed, fashioning a cure for the trade of conflict diamonds poses many complexities. Some reluctant KP “Participants”<sup>23</sup> have viewed the certification scheme as an inadequate remedy.<sup>24</sup> A central issue

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17. U.N. Doc. A/56/502, *supra* note 8, at 2.

18. KP Working Doc. 1/2002, *supra* note 5, § IV.

19. *Id.* The “diamond pipeline” refers to the stages that diamonds go through before they reach retail stores. See *infra* notes 229-35 and accompanying text.

20. See Proposal for a Council Regulation Implementing the Kimberley Process Certification Scheme for the International Trade In Rough Diamonds, COM (02) 455 final at 2 [hereinafter Proposal for a Council Regulation].

21. For example, Articles 501-503 of the North American Free Trade Agreement, Dec. 8-17, 1992, 32 I.L.M. 296 (NAFTA), require certificates of origin for products traded between Canada, the United States and Mexico. Exporters may make a declaration based on their own knowledge that the goods qualify as “originating goods” under NAFTA. *Id.* Alternatively, they may rely on the representations of a producer, if the certificate of origin appears valid on its face. See The North American Free Trade Agreement Implementation Act, ch. 5, (1993), available at 1993 WL 561140 N.A.F.T.A.; see also Steven W. Baker, *NAFTA Verifications: New Concerns for Exporters and Producers*, 10 CURRENTS: INT’L TRADE L.J. 3 (2001) (discussing the requirements of NAFTA producers and exporters in supplying goods to other NAFTA countries in order to comply with NAFTA’s country of origin verification process).

22. Christian Dietrich, *Hard Currency: The Criminalized Diamond Economy of the Democratic Republic of the Congo and its Neighbors*, (Partnership Africa Canada, The Diamonds and Human Security Project, Occasional Paper No. 4), available at <http://www.partnershipafricacanada.org>.

23. The KP “Working Document,” which is the basis for the final KP agreement, defines “Participant” as “a state or regional economic integration organization for whom the certification scheme is effective. Kimberley Process Working Doc. 1/2001, *supra* note 5, § I, at 4. A final definition of “Participant” is expected to be agreed upon at the next plenary meeting schedule in November 2002. Proposal for a Council Regulation, *supra* note 20, para. 9.

24. See Nicholas Shaxon, *Transparency in the International Diamond Trade*, in GLOBAL CORRUPTION REPORT 2001, at 214, 218, available at [www.globalcorruptionreport.org](http://www.globalcorruptionreport.org) (stating that initially industry, confident that its way of doing business in Africa was the status quo and believing that the U.N., not industry, had the obliga-

of debate is whether the KP will constitute a trade barrier inconsistent with the obligations imposed by the World Trade Organization (WTO).<sup>25</sup> The Working Document states that Participants should ensure that shipments of rough diamonds are not "imported from or exported to a non-Participant."<sup>26</sup> This requirement effectively bars all non-participating countries from the rough diamond trade. The United States, in particular, views the prerequisite of universal implementation (the "universality requirement") as problematic because not all WTO Members have agreed to be KP Participants.<sup>27</sup> For this reason, some nations, including the United States,<sup>28</sup> fear that the KP could violate the General Agreement on Tariffs and Trade (GATT).<sup>29</sup>

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tion of enforcing its own sanctions, first scorned NGO activists who brought conflict diamonds to the attention of the media). This is a publication of Transparency International, an anti-corruption NGO, which provides an overview of the state of global corruption. See Transparency Int'l, at <http://www.transparency.org> (last modified Sept. 24, 2002).

25. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS, GAO-02-678, INTERNATIONAL TRADE: CRITICAL ISSUES REMAIN IN DETERRING CONFLICT DIAMOND TRADE 18 (June 2002), available at [www.gao.gov](http://www.gao.gov); see also *General Assembly Urges Finalization of International Certification Scheme for Rough Diamonds*, *supra* note 5.

26. KP Working Doc. 1/2002, *supra* note 5, § III.

27. Of the WTO Members that are key rough diamond-producing and trading countries, the following are not KP Participants: Austria, Barbados, Congo, Cyprus, Denmark, Egypt, Finland, The Gambia, Greece, Guyana, Hong Kong, Hungary, Ireland, Indonesia, Kenya, Kuwait, Madagascar, Malaysia, Malawi, Malta, Mauritius, Morocco, Mozambique, Netherlands, Nigeria, Panama, Peru, Philippines, Poland, Rwanda, Sri Lanka, Tunisia, Turkey, Uganda, Uruguay, United Arab Emirates, and Venezuela. *An End to Conflict Diamonds?*, *supra* note 6. Members of the EU will implement the scheme, even if they have not participated. *Id.* The following countries are not WTO Members or KP Participants but are diamond producing or trading countries: Armenia, Andorra, Bermuda, Belarus, British Virgin Islands, Iran, Lebanon, Monaco, Saudi Arabia, Taiwan, and Ukraine. *Id.*

28. Supporting this concern, Congress' investigative branch, the General Accounting Office (GAO), reported in February 2002 that the KP's universality requirement posed a possible violation of Article XI of GATT. U.S. GEN. ACCOUNTING OFFICE, GAO-2-02-425T, INTERNATIONAL TRADE: SIGNIFICANT CHALLENGES REMAIN IN DETERRING TRADE IN CONFLICT DIAMONDS: TESTIMONY BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, RESTRUCTURING AND THE DISTRICT OF COLUMBIA, COMMITTEE ON GOVERNMENT AFFAIRS, U.S. SENATE 12 n.13 (2002) (statement of Loren Yager, Director, Internal Affairs and Trade), available at [www.gao.gov](http://www.gao.gov); see also Fleschman, *supra* note 3.

29. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], was amended in 1994, and incorporated into the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1 (1994) [hereinafter Final Act], in Annex 1A, which consists of the Multilateral Agreements on Trade in Goods. The Final Act and its annexes form the basis of the "WTO Agreements." Final Act, *supra*.

Article XI of GATT prohibits WTO Members from employing import or export bans or restrictions, “other than duties, taxes or other charges,” against the products of any other Member.<sup>30</sup> The KP’s certification regime could constitute a trade restriction or a complete ban on the trade of rough diamonds with non-participants, in violation of Article XI. It remains unsettled whether the KP would be susceptible to a WTO challenge and many believe this concern weakened the negotiation of a robust and effective international certification regime.<sup>31</sup>

While possibly risking a WTO challenge, many KP Participants and NGOs have stressed that the universality requirement is essential if the certification scheme is to be effective.<sup>32</sup> Given that the KP is intended to close the loopholes left by U.N. sanctions, those supporting a tough stance on universality underscore that allowing non-Participants to trade rough diamonds will seriously impede, if not completely sabotage, the initiative.<sup>33</sup> These supporters believe that the KP would fall within either GATT’s Article XX general exceptions, or the Article XXI security exception.<sup>34</sup>

Part I of this article provides the backdrop behind the blood diamond issue, focusing on the three African countries most affected by wars to control diamond mines: Sierra Leone, Angola, and the DRC. This section describes some of the political turmoil and rebel insurgencies that have created blood diamonds

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30. GATT, *supra* note 29, at art. XI (1).

31. INGRID J. TAMM, DIAMONDS IN PEACE AND WAR: SEVERING THE CONFLICT DIAMOND CONNECTION 2 (World Peace Found., Report No. 30, 2002). Tamm’s work is based in part on a conference held by the World Peace Foundation in October 2001, on the role of diamonds in prolonging conflicts in Africa. *Id.* The conference was held at the John F. Kennedy School of Government, Harvard University. *Id.* at 1.

32. See Press Release, U.N. General Assembly, Statement by Ambassador Si-chan Siv, United States Representative on the United Nations Economic and Social Council, on the Role of Diamonds in Fuelling Conflict (Mar. 13, 2002), available at [http://www.UN.int/usa/02\\_035.htm](http://www.UN.int/usa/02_035.htm) (stating that “only the widest possible participation” will achieve the desired result of a “reduction of conflict and human suffering”).

33. *Conclusions of the Ministerial Meeting Gaborone* para. 4, Kimberley Process II Ministerial Statement (Nov. 29, 2001) (stating that the “widest possible participation in the certification scheme is essential and should be encouraged and facilitated”).

34. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 18 n.24. Sens. Durbin, DeWine, and Gregg, in a letter to President Bush, dated March 2002, stated that pending U.S. legislation to regulate the diamond trade, *infra* Part III, “is in the national security interest of the U.S., [as well as] many other countries, and as such, would fall under the national security exception of the WTO.” Mark Weissenberger, *Senate Has Introduced New Conflict Diamond Legislation*, NAT’L JEWELER, May 1, 2002, at 7, available at 2002 WL 17600654.

and have resulted in severe humanitarian crises. Part II examines both the criminalized and legitimate trade of diamonds. It discusses the U.N. Security Council (UNSC) resolutions aimed at interdicting the trade of conflict diamonds and explains why the traditional U.N. trade measures, sanctions, and embargoes have proven inadequate to prevent the trafficking of conflict diamonds. Within this framework, the development of the KP is examined, as well as the international debate surrounding the scheme's WTO compatibility. The certification scheme itself is then explained. Part III examines U.S. efforts to implement politically acceptable (and yet meaningful) legislation that is also consistent with the KP and U.S. concerns regarding the scheme's consistency with international trade obligations. Part IV analyzes whether the KP is consistent with WTO obligations under GATT Article XI, and whether the blocking measure fits within the general exceptions of GATT Article XX or the security exceptions of Article XXI. Part V analyzes the KP agreement's strengths, weaknesses, and potential for success. This article concludes that the KP's universality requirement does not violate WTO obligations because the KP is not a unilateral protectionist measure, but a multilateral, U.N.-endorsed initiative that is necessary to ensure the safeguard of human life and security. The certification scheme is an important first step towards the elimination of diamonds as a source of conflict.

## I. POLITICAL UPHEAVAL IN AFRICA: CREATING CONFLICT DIAMONDS

"Diamond wars are not a new phenomenon."<sup>35</sup> Centuries ago, when diamonds were found only in India, "powerful kingdoms fought for control of the mines that made them rich."<sup>36</sup> More recently, traders and smugglers of Sierra Leone's diamonds financed both sides of the Lebanese Civil War in the 1970s and 1980s.<sup>37</sup> This "smuggling-for-financing" trend received little attention. Also overlooked, in the early 1990s, was the connection between diamonds and the Angolan conflict, which was led by Jonas Savimbi, a major supplier of rough diamonds.<sup>38</sup> By the time Sierra Leone's diamond-war atrocities en-

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35. Andrew Cockburn, *Diamonds: The Real Story*, NAT'L GEOGRAPHIC, Mar. 2002, at 6, 22.

36. *Id.*

37. *Id.*

38. *Id.* at 23.

tered the international consciousness, rebels had laundered at least \$10 billion in smuggled diamonds over the course of a decade.<sup>39</sup>

It is now widely known that proceeds from the trade of diamonds are used to finance terrorist regimes and to overthrow legitimate governments.<sup>40</sup> Since the investigations into the September 11, 2001 attacks on the United States, the dangers of hidden smuggling networks have become more apparent.<sup>41</sup> They reach into the dark underworld of arms merchants and international organized crime with ties to government officials and even presidents.<sup>42</sup> These corrupt networks corrode the political economies of diamond-producing countries and raise serious ethical issues for the industry, the consumer, and civil society.<sup>43</sup>

The politically stable countries of Australia, Botswana, Canada, Namibia, Russia, and South Africa mine diamonds peacefully and legitimately.<sup>44</sup> Conflict diamonds, on the other hand, originate primarily in Angola, Sierra Leone, and the DRC,<sup>45</sup> three countries that have suffered immeasurably from armed conflict because they are rich with diamonds.<sup>46</sup> In the last decade, over six million people have been driven from their homes in these three countries.<sup>47</sup> While there are promises of peace in Angola and Sierra Leone, the DRC is still besieged in its struggle for peace and economic stability.

#### A. ANGOLA'S STRUGGLE WITH UNITA

The unexpected death of rebel leader Jonas Savimbi in February 2002 finally paved the way for peace in Angola, at least for the time being.<sup>48</sup> Savimbi was considered the primary obsta-

39. 148 CONG. REC. S2014 (daily ed. Mar. 18, 2002) (statement of Sen. DeWine).

40. *Id.*

41. See Karen DeYoung & Douglas Farah, *Infighting Slows Hunt for Hidden Al Qaeda Assets: Funds Put in Untraceable Commodities*, WASH. POST, June 18, 2002, at A1 (explaining that investigators in the U.S. led effort to trace terrorists' assets are developing a "growing understanding" that these assets are "not in banks but in untraceable commodities" such as gold, diamonds, and tanzanite, and that the shifting of assets from banks to precious gems and gold went largely unnoticed before September 11th).

42. Nicholas Shaxon, *supra* note 24, at 215.

43. *Id.*

44. TAMM, *supra* note 31, at 5.

45. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 4.

46. See U.N. Doc. GA/9839, *supra* note 11.

47. See Clean Diamond Trade Act, H.R. 2722 PCS, 107th Cong. §2 (2001).

48. See generally Michael Dynes, *Hope For Peace in Angola After Savimbi*

cle to peace, personifying the “corrupting influence of ambition, mineral wealth, and the grinding brutality of war.”<sup>49</sup> With the death of its guerrilla leader, the National Union for the Total Independence of Angola (UNITA) signed a peace pact with the Government of Angola on April 4, 2002 and brought an end to twenty-seven years of strife.<sup>50</sup> The peace pact came after more than ten years of U.N. efforts to restore peace to the region.<sup>51</sup> Approximately one million Angolans died in the war and over four million people, forty percent of the country’s population, have been displaced.<sup>52</sup>

In 1975, after fourteen years of war with Portugal, three nationalist movements split control of the oil and diamond-rich country.<sup>53</sup> The Popular Movement for the Liberation of Angola (MPLA), the National Front for the Liberation of Angola (FNLA), and UNITA each had their share of control.<sup>54</sup> The MPLA, which stood for “democratic socialism,” successfully seized power in 1975 and was backed by the Soviet Union.<sup>55</sup> Although the FNLA retreated, apartheid South Africa and the United States backed UNITA, sustaining its bid for power.<sup>56</sup>

As a pawn of the Cold War between 1975 and 1989, the country, including control of its natural resources, was divided between the MPLA and UNITA.<sup>57</sup> MPLA forces profited from Angola’s oil reserves, while UNITA controlled most of the diamond mines.<sup>58</sup> When the Cold War ended, outside funding from the United States, South Africa, the Soviet Union, and Cuba dissipated, making Angola’s natural resources essential to fi-

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*Death Report*, TIMES (LONDON), Feb. 23, 2002, at 1. Savimbi was killed in a gun battle between the Angola government forces and rebel forces near the city of Luena, Angola. Michael Dynes, *Ceasefire Ends 27-year Civil War in Angola*, TIMES (LONDON), Apr. 5, 2002, at 21.

49. Editorial, *Death of a Warlord*, TIMES (LONDON), Feb. 25, 2002, at 46.

50. *Peace Pact Signed in Angola*, CNN.COM, Apr. 4, 2002, at <http://www.cnn.com/2002/WORLD/africa/04/04/angola.peace/index.html> (last visited Oct. 30, 2002). See generally Press Release, U.N., Secretary-General’s Special Adviser Briefs Security Council on Angola: Says Recent Agreement Creates Brighter Prospects for Lasting Peace, U.N. SCOR, 57th Sess., 4517th mtg., U.N. Doc SC/7372 (Apr. 23, 2002), available at <http://www.UN.org/News/Press/docs/2002/SC7372.doc.htm>.

51. *Peace Pact Signed in Angola*, supra note 50.

52. See *id.*

53. TAMM, supra note 31, at 8.

54. *Id.*

55. *Id.*

56. *Id.*; see also Dynes, supra note 48.

57. TAMM, supra note 31, at 8.

58. *Id.*

nance the MPLA-UNITA conflict.<sup>59</sup>

After years of conflict, the MPLA and UNITA agreed to a cease-fire in 1991, which resulted in a multiparty constitution.<sup>60</sup> In 1992, the U.N. monitored free elections.<sup>61</sup> When Savimbi lost the election to MPLA leader, Eduardo dos Santos, the war reignited.<sup>62</sup> Without external funding, Savimbi supplied his army with "bombs and bullets by selling diamonds mined in areas he controlled."<sup>63</sup>

The UNSC responded in September 1993 by imposing a mandatory embargo on the sale or supply of weapons or petroleum products to UNITA forces.<sup>64</sup> It also established a sanctions committee to monitor and report on the implementation of the mandatory measures.<sup>65</sup> When the Lusaka Protocol was executed in late 1994, UNITA refused to comply with the peace accord.<sup>66</sup> Three years later, it was still evident that tensions persisted and extensive military preparations continued unabated.<sup>67</sup> The UNSC responded again with increased pressure on senior UNITA leaders and their immediate families with mandatory resolutions prohibiting their access to transportation or transit through Members' territories.<sup>68</sup>

As tensions further intensified, the UNSC declared that the situation in Angola constituted a threat to international peace and security in the region.<sup>69</sup> In 1998, through UNSC Resolution

59. *Id.*; see also Dynes, *supra* note 48.

60. *Timeline: Angola - A Chronology of Key Events*, BBC NEWS, Aug. 3, 2002, at <http://news.bbc.co.uk/2/hi/world/africa/country-profiles/1839740.stm> (last visited Sept. 25, 2002).

61. *Id.*

62. *Final Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA*, U.N. SCOR, 55th Sess., para. 3, U.N. Doc. S/2000/203 (2000), available at <http://www.un.org/Docs/scres> [hereinafter U.N. Doc. S/2000/203]. This report is known as the "Fowler Report," after Ambassador Fowler of Canada. See *id.*; see also Tony Dawe, *Hopes Are High For End of Civil War*, TIMES (LONDON), Mar. 12, 2002, at 23.

63. Dawe, *supra* note 62, at 23.

64. See S.C. Res. 864, U.N. SCOR, 46th Sess., 3277th mtg., paras. 19-23, U.N. Doc. S/RES/864 (1993).

65. *Id.*

66. See *Lusaka Protocol*, U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/1994/1441 (1994); see also *Progress Report of the Secretary-General on the United Nations Observer Mission in Angola (MONUA)*, U.N. Observer Mission in Angola, U.N. Doc. S/1997/640 (1997) [hereinafter U.N. Doc. S/1997/640].

67. U.N. Doc. S/1997/640, *supra* note 66, at 3.

68. S.C. Res. 1127, U.N. SCOR, 3814th mtg., para. 4, U.N. Doc. S/RES/1127 (1997).

69. S.C. Res. 1173, U.N. SCOR, 53d Sess., 3891st mtg., para. 10, U.N. Doc. S/RES/1173 (1998).

1173, diamonds were officially recognized as fuelling the Angolan conflict.<sup>70</sup> The resolution placed a mandatory embargo on all UNITA-mined diamonds by prohibiting the direct or indirect import from Angola of all diamonds not controlled through the Government of Angola's certificate of origin regime.<sup>71</sup> Although this embargo reduced Savimbi's takings, the reduction was marginal because smuggling diamonds is attractive and relatively easy due to their high value and small size.<sup>72</sup>

With evidence that sanctions alone were insufficient, the U.N. welcomed steps taken by the Government of Belgium in its implementation of the UNITA diamond embargo.<sup>73</sup> Recognizing that further effort was necessary to control the trade of conflict diamonds, the U.N. additionally welcomed the proposal to devise a system to control the trade of diamonds from their origin to the bourses, or trading centers.<sup>74</sup>

Since the U.N.'s endorsement of a trade-blocking measure for conflict diamonds, significant progress has taken place in Angola.<sup>75</sup> Until April 2002, UNITA fought the legitimate government of Angola almost continually since the country gained independence from Portugal in 1975.<sup>76</sup> Peace finally appears to be within reach.<sup>77</sup> Still, Angola faces a battle for survival. Over 1.4 million people are in need of food aid, while 500,000 people are in critical danger of starvation.<sup>78</sup> Further, the country is now heavily laden with approximately four to five million land mines that cause death or injury to over 700 Angolans a year.<sup>79</sup>

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70. *Id.* para. 12(b).

71. *Id.*

72. Dawe, *supra* note 62; see also GOREUX, CONFLICT DIAMONDS para. 35 (World Bank Africa Region, Working Paper Series No. 13, 2001). For example, in 1999, the value of one kilogram of rough diamonds from Sierra Leone equaled that of 135 kilograms of gold, \$1.15 million, or the total annual salary of 2000 Sierra Leonean civil servants. *Id.*

73. S.C. Res. 1295, U.N. SCOR, 55th Sess., 4129th mtg., para. 17, U.N. Doc. S/RES/1295 (2000).

74. *Id.* para. 18.

75. See *Peace Pact Signed in Angola*, *supra* note 50.

76. *Id.*

77. Kofi Annan Visits Angola and Congratulates Its President On Peace Progress, ASS'D PRESS NEWSWIREs, Aug. 26, 2002, available at WL ALLNEWSPLUS (quoting U.N. Secretary General Kofi Annan).

78. *Food Supply Situation and Crop Prospects in Sub-Saharan Africa*, U.N. Food and Agriculture Organization, FAO/GIEWS: Africa Report No. 2, at 2, Aug. 2002, available at [www.fao.org/WAICENT/faoinfo/economic/giew/English/eaf/eaf0208e11.htm](http://www.fao.org/WAICENT/faoinfo/economic/giew/English/eaf/eaf0208e11.htm) (last visited Aug. 27, 2002).

79. *Kofi Annan Visits Angola And Congratulates Its President On Peace Progress*, *supra* note 77.

The implementation of a global rough diamond certification scheme alone will not solve Angola's woes. The international communities' rigorous commitment to the interdiction of the conflict diamond trade cannot come soon enough, given Angola's fragile political and security situation that for the first time offers a glimmer of lasting peace.

## B. THE RUF AND THE ONSLAUGHT OF SIERRA LEONE

While the war in Angola brought the issue of conflict diamonds to the attention of the U.N. and NGOs, Sierra Leone and its now infamous war atrocities brought conflict diamonds to the forefront of civil society.<sup>80</sup> Control of the richest diamond mines in the world ensnared Sierra Leone in the ravages of civil war and human rights violations for more than a decade.<sup>81</sup> The Revolutionary United Front (RUF) and other rebel groups fought viciously for control of the diamond fields.<sup>82</sup> "The war began as a revolt against corruption, mixed up with a criminal quest for illegally mined diamonds."<sup>83</sup> The war ended with over 75,000 people dead.<sup>84</sup> For over eight years, the RUF conscripted an estimated 12,000 children from their families, forcing them to fight as rebels.<sup>85</sup> The RUF is internationally known for its vicious abductions, rapes, and murders; however, the RUF is most known for horrifically hacking-off the limbs of victims with machetes.<sup>86</sup> Seeking to demonstrate that people without hands could not vote against the RUF, over 20,000 people were mutilated.<sup>87</sup> The gruesome tactics of the RUF strategically instigated the mass exodus of the populace away from diamond-rich areas.<sup>88</sup> By the end of the war, eighty percent of the country's na-

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80. Cockburn, *supra* note 35, at 28.

81. See generally Paul Richards, *War and Peace in Sierra Leone*, 25 SUM FLETCHER FORUM OF WORLD AFFAIRS 41 (2001) (analyzing the corruption and political instability in Sierra Leone from 1991 through 2000).

82. 148 CONG. REC. S2011 (daily ed. Mar. 18, 2001) (statement of Sen. DeWine).

83. *Sierra Leone's Flames of Peace*, BBC NEWS, at [http://news.bbc.co.uk/hi/English/world/Africa/newsid\\_1767000/1767600.stm](http://news.bbc.co.uk/hi/English/world/Africa/newsid_1767000/1767600.stm) (last visited Mar. 13, 2002).

84. Ian Smillie, et al., *The Heart of the Matter: Sierra Leone, Diamonds & Human Security*, Partnership Africa Canada, available at <http://www.sierra-leone.org/heartmatter.html>.

85. 148 CONG. REC. S2014 (daily ed. Mar. 18, 2001) (statement of Sen. DeWine).

86. *Id.*

87. GREG CAMPBELL, BLOOD DIAMONDS 213 (2002).

88. *Id.* at 72.

tionals were refugees.<sup>89</sup>

The war began in March 1991 when the RUF, led by former army corporal Foday Sankoh, launched a campaign to overthrow then-President Joseph Momoh.<sup>90</sup> Sankoh's RUF soldiers claimed to be fighting for justice and against the corruption of the middleclass.<sup>91</sup> The people initially believed these claims and viewed the RUF as a heroic army that would fight for a multi-party government and equitable wealth distribution.<sup>92</sup> Unfortunately, however, control of the diamond mines was at the heart of the conflict.<sup>93</sup> The RUF took over the diamond-rich areas, capturing the mines allegedly to hold as ransom in exchange for a more democratic system, while killing and mutilating the local villagers.<sup>94</sup> Composed primarily of disenfranchised, uneducated youths, the RUF was quickly revealed as a band of murderous thugs.<sup>95</sup>

Sierra Leone's army initially fought to defend the government with support from the Ceasefire Monitoring Group (ECOMOG), the military arm of the Economic Community of West African States (ECOWAS).<sup>96</sup> In 1992, however, the Sierra Leonean army, led by Captain Valentine Strasser, ousted President Momoh and overthrew the government.<sup>97</sup> The RUF continued its attacks.<sup>98</sup>

Finally in 1995, the U.N. intervened and appointed a Special Envoy to negotiate a peace settlement.<sup>99</sup> In January 1996, Captain Strasser was ousted in a coup led by his own defense minister, Brigadier General Julius Maada Bio.<sup>100</sup> A month later,

89. *Id.* at 31.

90. See *Blood Diamonds* (BBC Two television broadcast, Oct. 21, 2001), available at <http://news.bbc.co.uk/1/hi/audiovideo/programmes/correspondent/1604165.stm> (last visited Oct. 22, 2002).

91. *Bringing Justice to Sierra Leone*, BBC NEWS, Jan. 17, 2002, at [http://news.bbc.co.uk/1/hi/English/world/Africa/newsid\\_1765000/1765611.stm](http://news.bbc.co.uk/1/hi/English/world/Africa/newsid_1765000/1765611.stm) (last visited Mar. 13, 2002).

92. CAMPBELL, *supra* note 87, at 71.

93. *Bringing Justice to Sierra Leone*, *supra* note 91.

94. CAMPBELL, *supra* note 87, at 71.

95. *Id.*

96. *Id.* at ix.

97. Richards, *supra* note 81, at 42.

98. *Member States' Requests for Electoral Assistance to the United Nations System*, at <http://www.un.org/Depts/dpa/ead/websit13.htm> (last visited Oct. 22, 2002).

99. See generally *Sierra Leone - UNAMSIL Background*, at <http://www.un.org/Depots/dpko/unamisil/UnamisilB.htm> (last visited Oct. 22, 2002).

100. *Timeline: Sierra Leone - A Chronology of Key Events*, BBC NEWS, at [http://news.bbc.co.uk/1/hi/English/world/Africa/newsid\\_1065000/1065898.stm](http://news.bbc.co.uk/1/hi/English/world/Africa/newsid_1065000/1065898.stm) (last visited May 20, 2002).

parliamentary and presidential elections were held with the assistance of the U.N..<sup>101</sup> Although the RUF recognized the winner, Dr. Alhaji Ahmed Tejan Kabbah, the conflict continued.<sup>102</sup> The Special Envoy, Mr. Berhanu Dinka of Ethiopia, working with the Organization of African Unity (OAU) and ECOWAS, was able to bring about a peace settlement in 1996, known as the Abidjan Accord.<sup>103</sup> One year later, however, the army and the RUF joined forces to become a ruling "junta" and overthrew the peace accord in a coup d'état, forcing President Kabbah into exile in Guinea.<sup>104</sup>

In late 1997, the UNSC imposed sanctions against Sierra Leone, including an embargo on weapons and petroleum,<sup>105</sup> although logistical support and rifles were provided to President Kabbah's allies. With assistance from ECOMOG to drive out the RUF, President Kabbah was able to return to Freetown, but his foothold on peace was brief.<sup>106</sup> The RUF again seized parts of Freetown and the city was once more immersed in war.<sup>107</sup>

A cease-fire in May 1999 led to another peace agreement signed by the RUF, the Sierra Leone government, and the U.N. in July (the Lomé Agreement).<sup>108</sup> After six weeks of negotiations in Lomé, the capital of Togo, Western negotiators seeking a speedy resolution to the insurgency promised the rebels government positions and immunity from prosecution for war crimes.<sup>109</sup> Some criticized the agreement as too favorable to the RUF and "[m]eanwhile peace deal or not, the diamond channels were wide open."<sup>110</sup>

Although U.N. troops were installed to enforce the peace accord, the agreement failed.<sup>111</sup> In an effort to protect Freetown, maintain security, and train Sierra Leone's army, U.N. peacekeepers were increased to approximately 13,000 and were aug-

101. *Id.*

102. *See Sierra Leone - UNAMSIL Background, supra* note 99.

103. *Id.*

104. CAMPBELL, *supra* note 87, at 80-82.

105. S.C. Res. 1132, U.N. SCOR, 52d Sess., 3822nd mtg., para. 5, U.N. Doc. S/RES/1132 (1997).

106. *See* CAMPBELL, *supra* note 87, at 84-86.

107. *See id.* at 86-89.

108. *See* CAMPBELL, *supra* note 87, at 90; *see also Sierra Leone - UNAMSIL Background, supra* note 99.

109. CAMPBELL, *supra* note 87, at 90-91.

110. *Id.* at 91.

111. *See id.* at 91-95 (describing the failure of the UNAMSIL peacekeeping efforts).

mented by another 750 from the United Kingdom's military.<sup>112</sup> In May 2000, approximately six months after the Lomé Agreement was established, ECOMOG troops were attacked and the RUF took more than 500 U.N. troops as hostages.<sup>113</sup> British forces worked to release and rescue the hostages between May and September 2000.<sup>114</sup>

As a result of rebel piracy, Sierra Leone's official diamond exports nearly vanished.<sup>115</sup> The 9,000 carats officially exported in 1999 reveal the shocking extent of the plunder when compared to the two million carats exported annually in the 1960s.<sup>116</sup> In its struggle to break the link between armed conflict and diamonds, the U.N. established tough sanctions against Liberia, based upon "unequivocal and overwhelming" evidence that the Government of Liberia was supporting the RUF at all levels, as well as other rebel groups in the region.<sup>117</sup> Like the UNSC's 1998 resolution placing an embargo on UNITA diamonds from Angola, UNSC Resolution 1343 in March 2001, banned the importation of all rough diamonds exported from Liberia, whether or not originating from Liberia.<sup>118</sup> The resolution further established an arms and petroleum embargo and prohibited Member States from providing travel access to senior Government of Liberia officials and their families.<sup>119</sup>

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112. See CIA, THE WORLD FACTBOOK: SIERRA LEONE, at <http://www.odci.gov/cia/publications/factbook/geos/sl.html> (last visited Sept. 25, 2002).

113. CAMPBELL, *supra* note 87, at 93.

114. Press Release, U.N. Security Council, Security Council Expresses Full Support For Rescue of U.N. Peacekeepers in Kailahun, Sierra Leone, U.N. SCOR, 55th Sess., 4173rd mtg., U.N. Doc. S/PRST/2000/24 (2002).

115. CAMPBELL, *supra* note 87, at 23.

116. *Id.*

117. S.C. Res. 1343, U.N. SCOR, 56th Sess., 4287th mtg., para. B2, U.N. Doc. S/RES/1343 (2001).

118. *Id.* para. 6.

119. *Id.* para. 7(a). The UNSC has additionally linked Liberia's President Charles Taylor to the illegal-timber trade. Although Taylor has profited tremendously from the conflict diamond trade, the greater part of his wealth has been gained through control of Liberia's timber industry. See Carla Hoyos, *Liberian timber in U.N. Spotlight*, FIN. TIMES, Jan. 27, 2001, available at <http://forests.org/archive/Africa/litiunsp.htm>. President Taylor gave the Indonesian-owned company, Oriental Timber Corporation (OTC), a 1.44 million hectare concession and a monopoly over Liberia's transportation. *Id.* This maneuver has enabled OTC to import weapons into Liberia and transport them to Sierra Leone on logging roads. See Press Release, Global Witness, Global Witness Calls on U.N. Security Council to Embargo Liberian 'Logs of War' (Jan. 17, 2001), available at [http://www.oneworld.org/globalwitness/press/pr\\_20010117liberia.html](http://www.oneworld.org/globalwitness/press/pr_20010117liberia.html). Moreover, the OTC has been linked to illegal logging and to smuggling arms to RUF rebels in Sierra Leone. See Press Release, Greenpeace, Greenpeace Exposes Scandal of Afri-

While insecurity has continued, U.N. troops are finally able to patrol peacefully certain areas in Sierra Leone previously controlled by rebels.<sup>120</sup> Throughout 2001, rebels gradually disarmed.<sup>121</sup> In January 2002, the U.N. announced the completion of the disarmament of over 45,000 rebel soldiers.<sup>122</sup> The U.N. established war crimes tribunals in Freeport to try Foday Sankoh, who has been held by the U.N. since 2000, along with dozens of other rebel fighters.<sup>123</sup>

Although the country has been left in ruins with crude graves and roadsides littered with bones,<sup>124</sup> there is hope that the country will continue to stabilize. President Kabbah was re-elected in May 2002 by a seventy percent vote in general elections conducted with U.N. assistance, in what was the country's first peaceful election since the country gained independence over forty years ago.<sup>125</sup>

### C. THE DRC & AFRICA'S WORLD WAR

While Angola and Sierra Leone have made tremendous strides toward lasting peace, the DRC has been embattled in a complex conflict involving seven African nations, which is considered to be Africa's First World War.<sup>126</sup> This protracted battle, waged over natural resources ranging from diamonds to timber, killed an estimated 2.5 million people in the last four years alone.<sup>127</sup>

The DRC's natural resources may be the most opulent on

can Rainforest Destruction and Demands Governments to Act Now (Nov. 14, 2001), available at <http://forests.org/archive/Africa/grexscan.htm>.

120. *Fifteenth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, U.N. SCOR, 57th Sess., para. 2., U.N. Doc. S/2002/987 (2002).

121. *Twelfth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, U.N. SCOR, 56th Sess., para. 15, U.N. Doc. S/2001/1195 (2001).

122. See CAMPBELL, *supra* note 87, at 215.

123. *Id.* at 216.

124. *Id.* at 214.

125. *Sierra Leone After Elections: Politics As Usual?* (Int'l Crisis Group, Free-town/Brussels IGC Africa Report No. 49), July 12, 2002, at 4, available at [www.crisisweb.org/projects/africa/westafrica/reports/A400698\\_15072002.pdf](http://www.crisisweb.org/projects/africa/westafrica/reports/A400698_15072002.pdf); see also *Sierra Leone: Ahmed Tejan Kabbah Re-elected President in U.N. Assisted Vote*, U.N. NEWS SERVICE, at [http://www.un.org/esa/africa/UNNewsOnAfrica/kabah\\_reelected\\_pres\\_sierra\\_leone.htm](http://www.un.org/esa/africa/UNNewsOnAfrica/kabah_reelected_pres_sierra_leone.htm) (last modified May 20, 2002).

126. See *DR Congo War: Who is Involved and Why*, BBC NEWS, at <http://news.bbc.co.uk/2/hi/world/africa/1136470.stm> (last modified Jan. 25, 2001).

127. See 148 CONG. REC. E909 (daily ed. May 24, 2002) (statement of Rep. Tony Hall); see also *Congo Pays the Price for War*, BBC NEWS, at [http://news.bbc.co.uk/1/hi/English/world/Africa/newsid\\_1564000/1564653.stm](http://news.bbc.co.uk/1/hi/English/world/Africa/newsid_1564000/1564653.stm) (last modified Sept. 26, 2001).

earth. The DRC is rich in diamonds, cobalt, copper, timber, and “coltan,” a metallic ore essential to the production of electronics capacitors.<sup>128</sup> In 2001, in stark contrast to the country’s wealth of natural resources, a reported sixteen million people were starving, while two of five children died in infancy.<sup>129</sup>

After sixty years of brutal Belgian colonialism,<sup>130</sup> the Congo became an independent nation in 1960.<sup>131</sup> Five turbulent years

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128. *Congo Pays the Price for War*, *supra* note 127. “Coltan” is short for Columbite-tantalite, a metallic ore, which when refined becomes metallic tantalum. Eighty percent of the world’s coltan deposits are located in eastern DRC. Little known to the average U.S. citizen, coltan is the primary ingredient in the capacitors used in electronic equipment such as cell phones, DVDs, and computers. See British Columbia Institute of Technology, BCIT Chemistry Resource Center, at <http://nobel.scas.bcit.ca/resource/ptable/ta.htm> (last visited Sept. 14, 2002). Coltan is essential to the manufacture of night vision goggles, camera lenses, fiber optics, CB radios, smoke detectors, nuclear reactors, and airbags. *Id.* It is also used in surgical equipment for bone repair, internal stitching to connect torn nerves, and woven gauze to bind abdominal muscles. *Id.* Coltan is so vital to the electronics industry that in December 2000, it was the cause of a Christmas shopping “crisis,” when PlayStation 2 platforms were scarce due to the short supply of coltan. Kark Vick, *Vital Ore Funds Congo’s War*, WASH. POST, Mar. 19, 2001, at A1; see also Dena Montague and Frida Berrigan, *The Business of War in the Democratic Republic of Congo*, DOLLARS & SENSE MAG., July/Aug. 2001, available at [http://www.thirdworldtraveler.com/Africa/Business\\_War\\_Congo.html](http://www.thirdworldtraveler.com/Africa/Business_War_Congo.html). The proceeds from the sale of coltan are fueling the forces of neighboring Rwanda, Uganda, and Burundi. It is estimated that the Rwandan army made at least \$250 million over a period of eighteen months through the sale of coltan, even though no coltan is mined in Rwanda. Imtiyaz Delawala, *What is Coltan - The Link Between Your Cell Phone and Congo*, ABCNEWS.COM, at [http://abcnews.go.com/sections/nightline/DailyNews/coltan\\_explain.html](http://abcnews.go.com/sections/nightline/DailyNews/coltan_explain.html) (last modified Jan. 31, 2002).

Representative Cynthia McKinney (D-GA-4) introduced House Bill 2954 in September 2001, a bill intended “to prohibit the importation into the United States of colombo tantalite from certain countries involved in the conflict in the Democratic Republic of the Congo, and for other purposes.” H.R. 2954, 107th Cong. (2001). The bill was referred to the House Subcommittee on Trade, and no further action was taken. *Bill Summary & Status for the 107th Congress, H.R. 2954*, at <http://Thomas.loc.gov/bss/d107query.html> (last visited Oct. 28, 2002).

129. *Congo In Dire Trouble, Say Agencies*, BBC NEWS, at [http://news.bbc.co.uk/hi/English/world/Africa/newsid\\_1477000/1477003.stm](http://news.bbc.co.uk/hi/English/world/Africa/newsid_1477000/1477003.stm) (last modified Aug. 7, 2001).

130. As many as ten million Congolese people died between 1891 and 1911 as a result of murder, starvation, exhaustion, and disease. During this time, King Leopold required, by law, the supply of labor, rubber from the vast rubber tree forests, and ivory to Belgian agents. NZONGOLA-NTALAJA, *supra* note 4, at 22. “The spoils of plunder constituted huge capital flows into Belgium.” *Id.* at 24. King Leopold obtained the riches of the Congo using slave labor and by committing murder, mutilation, rape, and torture. *Id.* at 23.

131. See *Timeline: Democratic Republic of Congo*, BBC NEWS, at [http://news.bbc.co.uk/hi/English/world/Africa/newsid\\_1072000/1072684.stm](http://news.bbc.co.uk/hi/English/world/Africa/newsid_1072000/1072684.stm) (last visited Mar. 15, 2002); *Country Profile: Democratic Republic of Congo*, BBC NEWS, at [http://news.bbc.co.uk/2/hi/world/Africa/country\\_profiles/1076399.stm](http://news.bbc.co.uk/2/hi/world/Africa/country_profiles/1076399.stm) (last modified

later,<sup>132</sup> Joseph Mobutu became President after a coup d'état.<sup>133</sup> He ran the country as a military dictatorship and renamed the country "Zaire" in 1971.<sup>134</sup> Failed foreign investments, cancelled development programs, and riots by unpaid soldiers characterized his thirty-year reign.<sup>135</sup> His presidency finally ended over a period between 1996 and 1997, after a ruthless conflict between rebels and Mobutu's government soldiers.<sup>136</sup>

The U.N. issued a five-point peace plan in February 1997, which called for: (1) the immediate cessation of hostilities; (2) the withdrawal of all external forces; (3) the reaffirmation of the sovereignty and territorial integrity of Zaire and other states in the Great Lakes region; (4) the protection of all refugees and displaced persons; and (5) the rapid and peaceful settlement of the conflict through dialogue, the electoral process, and an international conference on peace in the region.<sup>137</sup> In spite of the peace plan, the rebels captured eastern Zaire, and then the capital city, Kinshasa.<sup>138</sup> Kabila declared himself President two months later and renamed "Zaire" the "Democratic Republic of the Congo."<sup>139</sup>

Instability continued under the new president.<sup>140</sup> A new rebellion turned into a civil war between rival factions of Rwan-

June 29, 2002) (providing a summary of the DRC's history, politics and economic background).

132. A mutiny of armed forces began in 1960 and ended five years later with a military coup that involved the assassination of the country's Prime Minister, Patrice Lumumba. NZONGOLA-NTALAJA, *supra* note 4, at 95-96.

133. Justin Pearce, *DR Congo's Troubled History*, BBC NEWS, at <http://news.bbc.co.uk/2/hi/world/Africa/1120825.stm> (last modified Jan. 16, 2001).

134. NZONGOLA-NTALAJA, *supra* note 4, at 141.

135. *See id.* at 149 ("From 1975 until its demise in 1997, the Mobutu regime presided over an economic crisis that reduced a once proud people to abject poverty and a daily quest for sheer survival."). During Mobutu's reign, he received strong external support from the United States, France, and Belgium, as well as support from regional allies such as apartheid South Africa, Israel, Egypt, Saudi Arabia, and Morocco. *Id.* at 160. This support was arguably predicated upon three premises: (1) that a multi-ethnic Congo needed a "strongman" to maintain stability, prevent chaos and subvert communism; (2) the moral commitment, within the context of the Cold War, to support allies, in spite of their treatment of their own citizens; and (3) the need to promote Western interests in Central and Southern Africa. *Id.* at 160-61.

136. *Id.* at 276; *see also Timeline: Democratic Republic of Congo*, *supra* note 131.

137. S.C. Res. 1097, U.N. SCOR, 52d Sess., 3741st mtg., para. 1, U.N. Doc. S/RES/1097 (1997).

138. NZONGOLA-NTALAJA, *supra* note 4, at 276.

139. *See id.*

140. *Id.* at 237 ("A regime of pillage was established, with Ugandans and Rwandans dividing up among themselves the gold, diamonds, timber, coffee, and tea. . .Entire factories. . .machinery and tools have also been plundered.")

dan and Ugandan-backed soldiers in 1998.<sup>141</sup> As Angola, Namibia, and Zimbabwe supported Kabila, the entire country became a battleground.<sup>142</sup> The U.N. called for an immediate cease-fire in April 1999.<sup>143</sup> The DRC, Zambia, Angola, Namibia, Rwanda, Uganda, and Zimbabwe finally signed the Ceasefire Agreement in Lusaka in July 1999, agreeing to cease hostilities and withdraw rebel forces in the DRC.<sup>144</sup>

Shortly thereafter, the Congolese rebel groups, the Movement for the Liberation of the Congo (MLC) and the Congolese Rally for Democracy (RCD), agreed to adhere to the cease-fire.<sup>145</sup> Over the next year, the U.N. expanded its mission in the DRC to 5,500 military personnel to monitor compliance with the cease-fire, remove mines from the area, and provide humanitarian assistance.<sup>146</sup> Despite the cease-fire and the U.N. mission's efforts, peace was illusive. In December 2000, the U.N. Security Council expressed their "serious concern" over the humanitarian crisis resulting from the conflict and again called for the immediate withdrawal of all Rwandan and Ugandan forces.<sup>147</sup>

In early 2001, Joseph Kabila was inaugurated as president only days after his father's assassination.<sup>148</sup> President Joseph Kabila continues to face substantial opposition among numerous factions, making the solution to the DRC's intractable conflict

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141. *Sierra Leone: Ahmed Tejan Kabbah Re-elected President in U.N. Assisted Vote*, *supra* note 125. *But see* NZONGOLA-NTALAJA, *supra* note 4, at 227-28 (explaining the politics behind the plot to oust Kabila and arguing that the conflict was not actually a "civil war," but a clever ploy by Rwanda and Uganda, as well as Burundi, to benefit from the disintegration of the Congolese state by toppling Kabila and installing a new puppet figurehead).

142. *See* NZONGOLA-NTALAJA, *supra* note 4, at 238.

143. S.C. Res. 1234, U.N. SCOR, 54th Sess., 3993d mtg., at 2, U.N. Doc. S/RES/1234 (1999).

144. *Id.*

145. *See* NZONGOLA-NTALAJA, *supra* note 4, at 241 (explaining that the Congolese rebels had been fighting the war on two fronts, "with a double strategy of resistance against external aggression and new forms of dictatorship by the Kabila regime."). *See generally* U.N. Organization Mission in Democratic Republic of Congo (MONUC), at [www.monuc.org/eng/onmonuc/background/EN\\_background.asp](http://www.monuc.org/eng/onmonuc/background/EN_background.asp) (last visited Sept. 20, 2002).

146. S.C. Res. 1291, U.N. SCOR, 55th Sess., 4104th mtg., at 3, U.N. Doc. S/RES/1291 (2000).

147. S.C. Res. 1332, U.N. SCOR, 55th Sess., 4247th mtg., para. 10, at 2, U.N. Doc. S/RES/1332, (2000); *see also* U.N. Security Council "Concerned" By Resumption of Fighting in DR Congo, AGENCE FRANCE-PRESSE, Dec. 23, 2000, available at 2000 WL 24785686.

148. *Sierra Leone: Ahmed Tejan Kabbah Re-elected President in U.N. Assisted Vote*, *supra* note 125.

difficult to unravel.<sup>149</sup> The Angola, Uganda, and Zimbabwe contingents are partially withdrawn.<sup>150</sup> As of May 2002, the U.N. had verified that only Namibia had withdrawn all of its combat troops from the DRC.<sup>151</sup>

The U.N. and South Africa brokered a peace agreement between the DRC and Rwanda in July 2002.<sup>152</sup> The DRC promised to disarm and arrest thousands of Hutu rebels, while Rwanda agreed to withdraw tens of thousands of Rwandan troops.<sup>153</sup> Justifiably, the agreement has been met with a wary hope for peace.<sup>154</sup> Less than three weeks after the agreement was signed, the U.N. dispatched humanitarian aid to the eastern part of the DRC, where approximately one hundred people were killed as a result of ethnic conflict in the town of Bunia.<sup>155</sup>

A U.N. Panel of Experts issued a report on the illegal exploitation of the DRC's natural resources in April 2001,<sup>156</sup> which recommended, among other things, sanctions against countries involved in illegal activities in the DRC and the "improvement of international mechanisms and regulations governing some natural resources."<sup>157</sup> The panel also recommended an immediate, temporary embargo on the import or export of coltan, timber, gold, and diamonds from or to Burundi, Rwanda, and Uganda and sanctions against any country breaking this embargo.<sup>158</sup> The U.N. has not approved any resolutions to date implementing the recommendations of the Panel of Experts.<sup>159</sup>

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149. 148 CONG. REC. E909, (daily ed. May 24, 2002) (statement of Rep. Hall) (stating that the DRC's war is complex because it has involved several nations and several rebel groups which have been fighting for political control to avail themselves of at least nine different valuable natural resources).

150. *Report of the Security Council Mission to the Great Lakes Regions, 27 April-7 May 2002*, U.N. SCOR, 56th Sess., 3406th mtg. at 3, U.N. Doc. S/2002/537 (2002).

151. *Id.*

152. See African "World War Peace Signing," CNN.COM, at <http://www.cnn.com/2002/world/africa/07/30/congo.deal/index.html> (last modified July 30, 2002).

153. See *Congo and Rwanda Sign Peace Deal*, BBC NEWS, at <http://news.bbc.co.uk/2/low/Africa/2160522.stm> (last modified July 30, 2002).

154. See African "World War Peace Signing," *supra* note 152.

155. *U.N. Dispatches Relief Flight to Scene of Recent Fighting in DR of Congo*, U.N. NEWS SERVICE, at <http://www0.un.org/apps/news/printnews.asp?nid=4489> (last modified Aug. 16, 2002).

156. See *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/357 (2001) [hereinafter U.N. Doc. S/2001/357].

157. *Id.* at 3.

158. *Id.* at 42.

159. See 148 CONG. REC. E908 (daily ed. May 24, 2002) (statement of Rep. Tony Hall). Congressman Tony Hall introduced a resolution in the House of Representatives, H.R. 410, 107th Cong., 2d Sess. (2002), on May 23, 2002, calling for President

In October 2002, the panel reported that, although the seven-nation war has diminished in intensity, “the overlapping microconflicts that it provoked continue.”<sup>160</sup> Criminal groups linked to the armies of Uganda, Rwanda, Zimbabwe, and the Government of the DRC have established a self-financing war economy and continue to benefit from microconflicts over minerals and other resources.<sup>161</sup> They will not voluntarily disband, even as foreign troops withdraw.<sup>162</sup> The panel further recommended that all Member States that trade rough diamonds join the KP, and noted that without universal participation, the KP would be a less effective instrument.<sup>163</sup>

#### D. ENDING CONFLICT THROUGH ECONOMIC POLICY REFORMS

Angola, Sierra Leone, and the DRC ought to be some of the wealthiest nations in the world.<sup>164</sup> Their natural resources are tremendous,<sup>165</sup> and yet they are failed states,<sup>166</sup> suffering from an

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Bush “to press for a United Nations embargo on Congolese diamonds.” 148 CONG. REC. E908. Congressmen Hall stated that because the KP has limited the definition of conflict diamonds to those diamonds that are embargoed by the U.N., without a U.N. embargo against Congolese diamonds, these diamonds are not technically conflict diamonds as defined by the KP. *Id.* Congressman Hall further stated that President Bush’s trade and diplomatic representatives had assured that if Congress would use the KP’s definition of conflict diamonds, the Administration would promise to press the UNSC to extend its embargo to other conflict zones, including the DRC. 148 CONG. REC. E910 (May 24, 2002) (statement of Rep. Tony Hall).

160. *See Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/1146 (2002), para. 12 [hereinafter U.N. Doc. S/2002/1146].

161. *Id.*

162. *Id.*

163. *See id.*

164. 148 CONG. REC. E908 (statement of Rep. Tony Hall).

165. WORLD BANK, CAN AFRICA CLAIM THE 21<sup>ST</sup> CENTURY? 213 (2000), available at [www.worldbank.org/publications](http://www.worldbank.org/publications). For example, Sierra Leone is rich not only in gem-quality diamonds, but also in oil, rubies, gold, rutile, and bauxite. CAMPBELL, *supra* note 87, at xxii. Sierra Leone “should be the Saudi Arabia of Africa, but it’s not.” *Id.*

166. “Failed” or “failing” states are those “which are torn by violent conflict to an extent that people’s every day life is affected” where “the government is either unable to cope with inter-group conflict or, most likely, it is part of this conflict.” Lothar Brock, *Enforcement and Intervention vis à vis Failing States: Pro and Contra*, Conference, *Failed States III: Globalization and the Failed State*, Apr. 7-10, 2000, Florence, Italy, available at [http://www.ippu.purdue.edu/failed\\_states/2000/papers/brock.html](http://www.ippu.purdue.edu/failed_states/2000/papers/brock.html). This conference was sponsored by a grant from the Strategic Outreach Program of the U.S. Army War College and the Office of International Programs at Purdue University. *Id.* “[S]tate failure . . . manifests itself in an inability of the government to exert control.” *Id.* Failed states in the 21st Century are character-

obstinate state of humanitarian crises. Their economies are not diversified.<sup>167</sup> Instead, primary commodity exports are their biggest industries.<sup>168</sup> The people are impoverished and economic growth is insufferably slow.<sup>169</sup>

The Director of the Development Research Group for the World Bank, Paul Collier, has posited that three key economic conditions are closely linked to the type of civil rebellion seen in

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ized by blurred lines “between government repression and organized crime,” which are “carried out with the help of political, social and economic networks which may span the world.” *Id.* Though Sierra Leone is in the process of rebuilding, ten years of civil war left nearly half the country’s inhabitants homeless, with a collapse of the country’s productive agriculture and mining sectors, and its most basic social services for water, health, and education. Press Release, World Bank, Sierra Leone Disarmament Program and Donor Conference (June 5, 2001), available at [http://www.worldbank.org/afr/sl\\_pr\\_factsheet.pdf](http://www.worldbank.org/afr/sl_pr_factsheet.pdf). Without basic social services, Angola’s thirteen million people have an average life expectancy of forty-five years. Declan Walsh, *Billions of Dollars Simply Vanish; Angolan Government Accused of ‘State Robbery,’* THE HAMILTON SPECTATOR, Aug. 24, 2002, at D8, available at 2002 WL 24455728. Unemployment is eighty percent and thirty percent of children die before the age of five. *Id.* The country ranked at the very bottom of the U.N.’s Human Development Index for 2000, with infant, child, and maternal mortality rates the highest in the world and among the lowest in life expectancy. *Id.* Conflict has left the DRC with failing public utilities and a collapsed infrastructure; roads, waterways, and railroads are almost unusable. Press Release, World Bank, Donors Meet New DR Congo Government to Organize Emergency Aid (July 3, 2001), available at <http://www.worldbank.org/afr/news/pr.pdf>.

167. Nearly seventy-five percent of the DRC’s economy is composed of either agriculture (in particular, cash crops such as tea, coffee, palm oil, and rubber) or mining. See U.S. STATE DEPT., BACKGROUND NOTES: DEMOCRATIC REPUBLIC OF CONGO, at <http://www.state.gov/r/pa/ei/bgn/2823.htm> (last visited Oct. 15, 2002). In 1997, for example, more than fifty percent of the DRC’s total annual exports were diamonds. See *id.* Copper, coffee, cobalt, and crude oil account for the remaining exports. CIA, THE WORLD FACTBOOK, DEMOCRATIC REPUBLIC OF CONGO, at [www.odci.gov/cia/publications/factbook/geos/sl.html](http://www.odci.gov/cia/publications/factbook/geos/sl.html) (last visited Oct. 6, 2002). Crude oil constitutes ninety percent of Angola’s exports. CIA, THE WORLD FACTBOOK, ANGOLA, at <http://www.odci.gov/cia/publications/factbook/geos/sl.html> (last visited Oct. 6, 2002). While Sierra Leone’s exports consist of diamonds, rutile, cocoa, coffee and fish. CIA, WORLD FACTBOOK: SIERRA LEONE, *supra* note 112. In a country where sixty-eight percent of the people live below the poverty line, nearly two-thirds of Sierra Leone’s labor force engages in subsistence agriculture. *Id.*

168. Eighty-five percent of Angola’s population survives primarily from subsistence agriculture. CIA, THE WORLD FACTBOOK, ANGOLA, *supra* note 112. The 4.9 percent economic growth rate is overshadowed by a 325 percent inflation rate. *Id.* Similarly, the DRC’s fifteen percent growth rate in 2000 pales in comparison to its 540 percent inflation rate. CIA, THE WORLD FACTBOOK, DEMOCRATIC REPUBLIC OF THE CONGO, *supra* note 167. A certain degree of economic progress can be seen in Sierra Leone. It had a 4.2 percent estimated growth rate in 2000, while its inflation rate was estimated at about fifteen percent. CIA, THE WORLD FACTBOOK, SIERRA LEONE, *supra* note 112.

169. See *supra* note 166 for a brief discussion of the impact of poverty in Angola, Sierra Leone, and the DRC.

Africa: (1) dependence on primary commodity exports; (2) low average income of the country, and (3) slow economic growth.<sup>170</sup> Collier suggests that such economies, which are intrinsically dependent on highly lootable primary commodity exports, such as diamonds, provide significant opportunity for “predatory rebellion”<sup>171</sup> or the “looting” of economic resources.<sup>172</sup> He explains that it is still profitable to exploit these resources despite rebel looting because primary commodities are established and long lasting.<sup>173</sup>

He further explains that these lootable commodities must be transported and exported and that rebel forces are guaranteed to confront government authorities at some point en route, which will lead to the natural growth of rebel armies in both size and power.<sup>174</sup> The growth of these armies results from the fact that approximately ten percent of the labor forces in these diamond-rich African countries are artisanal miners and diamond diggers clinging to the hope of striking it rich.<sup>175</sup> With the lack of better employment, most of these diggers remain in poverty at the diamond mines and constitute an easy target for rebel recruitment.<sup>176</sup> Once these diggers are recruited, they either join as fighting rebels or continue to dig for diamonds to finance the war.<sup>177</sup> A World Bank report indicates that natural resource dependence will begin to decline once a civil war ends and a country stabilizes and sustains economic policy reforms for five years. Within ten years of reform implementation, this dependence will be notably reduced.<sup>178</sup> Collier suggests that if it were more difficult for rebels to sell their looted commodities, the

170. PAUL COLLIER, WORLD BANK, ECONOMIC CAUSES OF CIVIL CONFLICT AND THEIR IMPLICATIONS FOR POLICY 9-11 (2000), available at <http://www.worldbank.org/research/conflict/papers/civilconflict.pdf>.

171. Collier explains that the pilfering of accessible local commodities funds rebellion. *Id.* at 9. “Rebel groups need to meet the payroll without producing anything, so they prey on an economic activity that won’t collapse under the weight of their predatory activities.” Press Release, World Bank Group, Greed For Diamonds and Other “Lootable” Commodities Fuels Civil Wars: New Report Challenges Popular Notions About Origins of Civil Conflict, News Release No. 2000/419/S (June 15, 2000) (quoting Collier), at <http://wbln0018.worldbank.org/news/pressrelease.nsf>.

172. COLLIER, *supra* note 170, at 3, 9.

173. *Id.* at 9-10. Primary commodities include such things as diamonds and other mineral resources, old growth forests, and coffee trees. *Id.*

174. *Id.* at 10.

175. GOREUX, *supra* note 72, para. 18.

176. *Id.*

177. *Id.*

178. COLLIER, *supra* note 170, at 16.

value of the goods, i.e. diamonds, would decrease.<sup>179</sup> Predatory rebellion would decline because it would be less lucrative.<sup>180</sup>

With U.N. assistance and the concerted cooperation of the international community, sound policy reforms such as the KP will enable these countries to regain control of their natural wealth, which will foster political stability, economic diversity, and growth. Since the rebel disarmament and restoration of control of the diamond mines to the government of Sierra Leone, the country's gross domestic product increased by 5.4 percent and inflation decreased sharply to three percent.<sup>181</sup> Due to these economic, financial, and security improvements, the International Monetary Fund (IMF) has agreed to make twelve million dollars in low-interest loans available to Sierra Leone.<sup>182</sup>

A global certification scheme is not likely to be a panacea for resolving all of Africa's political and economic difficulties. However, it will likely decrease the value of looted diamonds. This devaluation will enable the legitimate governments of these countries to implement further necessary changes. For example, deep mine shafts and formal mines are easier to oversee than surficial alluvial deposits<sup>183</sup> and they would facilitate the governmental control that is necessary to eliminate rebel looting.<sup>184</sup> Such improved formal mines require a capital investment and technology that these war-torn countries cannot afford.<sup>185</sup> Moreover, without minimal political stability, these countries have little chance of obtaining the necessary tax revenues or investment funds required for such projects. As noted by the WTO's former Director-General, "[c]ertainly no lasting peace has ever been built on the shaky foundations of economic insecurity, inequality and isolation."<sup>186</sup>

179. *Id.*

180. *Id.*

181. *IMF Unblocks Aid for Sierra Leone*, BBC NEWS, at [http://news.bbc.uk/1/hi/English/world/Africa/newsid\\_1870000/1870259.stm](http://news.bbc.uk/1/hi/English/world/Africa/newsid_1870000/1870259.stm) (last modified Mar. 13, 2002).

182. *Id.*

183. Diamonds originate in two geological formations: kimberlite pipes and alluvial deposits. Kimberlite diamonds require deep mining, while alluvial deposits can be found at or near the surface of the ground, including washed out in rivers. See *Diamond Geology*, available at <http://www.debeersgroup.com/exploration/expGeology.asp> (providing an overview of the geology of diamonds, including an explanation of differences between kimberlite and alluvial deposits).

184. *Smuggling is Easy: The Boom in "Conflict Diamonds,"* ECONOMIST, Mar. 16, 2001, at 50.

185. *Id.*

186. Renato Ruggiero, Former Director-General of the WTO, Speech at the

## II. THE CONFLICT DIAMOND TRADE, LEGITIMATE INDUSTRY, AND THE KIMBERLEY PROCESS

### A. TRACING THE WORLD'S MOST CONCENTRATED FORM OF WEALTH

Conflict diamonds originate primarily in Angola, Sierra Leone, and the DRC. However, they are often smuggled through adjacent countries, including Liberia, the Central African Republic, Congo-Brazzaville, Guinea, Cote d'Ivoire, and Gambia.<sup>187</sup> Additionally, the U.N. reported that the individuals involved in the trade of conflict diamonds come from all over the world.<sup>188</sup> Often referred to as the world's most concentrated form of wealth, diamonds can be used as currency to purchase weapons, fund drug deals, launder money, or finance other crimes.<sup>189</sup> Rebels and terrorists alike use diamonds as a means of hoarding wealth, which allows the international movement of resources without resorting to normal banking channels where assets are more easily detected and subject to seizure.<sup>190</sup> Conflict diamonds are attractive to those interested in avoiding banking institutions because diamonds are a convertible form of wealth and are subject to fewer trading restrictions, unlike other commodities or illegal substances.<sup>191</sup>

The blood diamond trade is generally estimated to be worth approximately \$300 million a year, making up between three and fifteen percent of the global diamond industry.<sup>192</sup> This relatively low percentage within the global market skews the real impact of conflict diamonds within the key countries affected by intractable civil strife.<sup>193</sup> Moreover, these estimates represent only the ascertainable percentage of trade in conflict diamonds; the actual percentage may be even greater.<sup>194</sup>

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MENA III Conference, Cairo (Nov. 12, 1996), available at [http://www.wto.org/English/news\\_e/pres96\\_e/pr058\\_e.htm](http://www.wto.org/English/news_e/pres96_e/pr058_e.htm).

187. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 4-5; *Smuggling is Easy*, *supra* note 184.

188. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 4-5.

189. *Id.* at 8.

190. *Id.*; Farah, *supra* note 13.

191. Farah, *supra* note 13.

192. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 6.

193. Paul Harris & Jason Burke, *Mugabe Men's Blood Gems: Businessman Says General and Ministers Make Fat Profits from Smuggled Diamonds*, OBSERVER, Mar. 3, 2002, available at <http://observer.co.uk/international/story/0,6903,660963,00.html>.

194. Smillie, *supra* note 84, § 1.2 (estimating that African rebel groups may

On the floor of the House of Representatives in May 2002, Congressman Tony Hall stated that as much as eighty-five percent of Congolese diamonds are smuggled out of the country, siphoning approximately \$854 million a year from the country's gross domestic product.<sup>195</sup> Many of these diamonds are "illicit" diamonds, as opposed to "conflict" diamonds, smuggled by individual traders and farmers with small-scale enterprises.<sup>196</sup> The actual dollar amount attributed to looters versus rebels, however, is difficult to determine given the informal trading channels in both cases.<sup>197</sup> Either way, forty million dollars in taxes are unpaid annually, leaving the DRC's people without benefit.<sup>198</sup>

Because they change hands multiple times as they are traded from country to country, the true origin of diamonds is obscured. They often enter the stream of commerce through smuggling and other illegal behavior that may conceal their actual origin.<sup>199</sup> Experienced diamond traders can determine the origin of uncut stones, but once rough diamonds are polished, it is virtually impossible to determine their true source.<sup>200</sup> Thereafter, blood gems are irretrievably mixed with legitimate diamonds in the stream of commerce.<sup>201</sup>

Peace and the protection of the legal diamond trade are vital to the social and economic welfare of these diamond-rich but

supply as much as twenty percent of the world's global diamond market).

195. 148 CONG. REC. E908 (daily ed. May 24, 2002) (Statement of Rep. Tony Hall).

196. JANET MACGAFFEY & RÉMY BAZENGUISSA-GANGA, CONGO-PARIS: TRANSNATIONAL TRADERS ON THE MARGINS OF THE LAW 33 (2000).

197. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 7 (stating that the criminal nature of the illicit diamond trade, including conflict diamonds, "precludes determination of the actual extent of the problem").

198. 148 CONG. REC. E908 (statement of Rep. Tony Hall).

199. U.N. Doc. S/2000/203, *supra* note 62; see also *Conflict Diamonds: Hearing Before the Subcommittee on Trade of the Committee on Ways and Means*, 107th Cong. 46 (2001) (statement of Sen. DeWine) [hereinafter *Ways and Means Hearing*].

200. *Smuggling is Easy*, *supra* note 184. Experts can generally identify the source of rough diamonds according to the surficial characteristics, crystal qualities, and other structure-related characteristics. NICHOLAS COOK, CONG. RES. SERV. RPT., DIAMONDS AND CONFLICT: POLICY PROPOSALS AND BACKGROUND 12 (2001). These methods, however, are more of an art than a science. Once a rough diamond is cut and polished, the surface characteristics and trace elements are removed, making a determination of origin more tenuous. *Id.* At present, geo-chemical and automated physical characteristic methods are being researched for identifying diamond origin (and individual diamonds), using geo-chemical testing methods for trace elements and impurities, employing plasma mass spectrometry, and similar technologies. *Id.* at 16 n.36.

201. *Smuggling is Easy*, *supra* note 184.

impoverished and politically fragile African countries.<sup>202</sup> Despite U.N. peacekeeping efforts and improved enforcement regimes, U.N. statistics substantiate that mandatory sanctions against the trade of diamonds from Liberia, Sierra Leone, and Angola have failed to prevent the financing of armed conflict in Africa.<sup>203</sup>

The U.N. monitoring mechanism, which was established to gather information and investigate UNITA<sup>204</sup> sanctions violations in Angola, reported that UNITA was able to exchange diamonds for cash and weapons.<sup>205</sup> Diamonds also enabled UNITA to acquire external support and to stockpile wealth in the form of diamond caches, rather than bank accounts.<sup>206</sup> In 2000, one million dollars in diamonds was smuggled from Angola each day, constituting \$350 to \$420 million annually.<sup>207</sup> This represented approximately half of Angola's total annual production.<sup>208</sup> Although UNITA is credited with smuggling at least twenty-five percent of this total amount, the rest is attributed to smuggling enterprises. These illicit diamonds accounted for about five percent of the worldwide rough diamond sales for 2000.<sup>209</sup>

The diamonds in these countries are scattered over vast territories making it difficult for governments to control the diamond mines.<sup>210</sup> With respect to Angola, the monitoring mechanism reported that, despite U.N. sanctions, not a single parcel of illicit diamonds had been intercepted worldwide.<sup>211</sup> "These diamonds seem to vanish into thin air" after leaving their country of origin.<sup>212</sup> Furthermore, U.N. world importing data suggest

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202. See, e.g., U.N. Doc. A/56/502, *supra* note 8.

203. Fleshman, *supra* note 3, at 15.

204. See *supra* Part I.A., for a discussion of the tensions between UNITA and rival Angolan groups.

205. A Panel of Experts, established pursuant to U.N. Res. 1237 (1999), issued a report on sanctions against UNITA, entitled *Final Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA*, U.N. Doc. S/2000/203, *supra* note 62. As a result of the Panel's findings, the UNSC adopted resolution 1295 of 18 April 2000, U.N. Doc. S/Res/1295 (2000), which requested the Secretary-General to establish a monitoring mechanism to investigate violations of the measure contained in resolutions 864 (1993), 1127 (1997), and 1173 (1998). *Id.*

206. U.N. Doc. S/2000/203, *supra* note 62.

207. *Supplementary Report of the Monitoring Mechanism on Sanctions against UNITA*, U.N. SCOR 56th Sess., U.N. Doc. S/2001/966, para. 141 (2001) [hereinafter U.N. Doc. S/2001/966].

208. *Id.*

209. *Id.*; see also Fleshman, *supra* note 3, at 15.

210. See, e.g., TAMM, *supra* note 31, at 8.

211. *Id.*, *supra* note 31, at 9 (citing U.N. Doc. S/2001/966, *supra* note 207).

212. Fleshman, *supra* note 3, at 15.

that many countries' exports of rough diamonds far exceed their production.<sup>213</sup> For instance, although the United Arab Emirates globally exported \$177 million in rough diamonds in 2000, it neither mines rough diamonds, nor reported importing any rough diamonds from producing countries.<sup>214</sup> Between 1998 and 2000, Liberia exported \$300 million in diamonds, despite having relatively few diamond mines.<sup>215</sup> The same year, Sierra Leone's exports were correspondingly reduced by fifty percent to \$30 million.<sup>216</sup> Similarly, the Central African Republic (CAR) officially exported 400,000 carats in 2000, but Belgium alone imported 900,000 carats from CAR.<sup>217</sup> The CAR minister of mines described the discrepancy as the "annual inevitability" of diamond laundering.<sup>218</sup> Since the imposition of the U.N. diamond embargo, an increasing number of diamonds are smuggled through CAR, where the number of diamond-buying bureaus recently tripled.<sup>219</sup>

In April 2002, the Monitoring Mechanism on Sanctions against UNITA reiterated an earlier determination that importing countries and trading centers are unable "to intervene effectively in the trade to prevent embargoed diamonds [from] reaching markets."<sup>220</sup> It also noted that there were "acute problems of collecting evidence of violations of the sanctions, in view of weak control systems and the lack of a sufficiently adequate paper trail."<sup>221</sup> The Monitoring Mechanism reasoned that "those involved in the illicit trade have continued to profit from war," in part, because evidence of such illicit transactions is difficult to obtain and because "no concrete steps have yet been taken to control the trade in embargoed gems" beyond those measures implemented by the governments of the countries targeted by

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213. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 8-9.

214. *Id.* at 9.

215. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 9.

216. *Diamonds: A Rebel's Best Friend*, BBC NEWS, at [http://news.bbc.uk/hi/english/world/Africa/newsid\\_754000/newsid\\_745000/745194.stm](http://news.bbc.uk/hi/english/world/Africa/newsid_754000/newsid_745000/745194.stm) (last visited Mar. 12, 2002).

217. *Smuggling is Easy*, *supra* note 184.

218. *Id.*

219. *Id.*

220. Letter from the Chairman of the Security Council Committee to the President of the Security Council, Annex Letter from the Chairman of the Monitoring Mechanism on Sanctions against UNITA to the Chairman of the Security Council and the President of the Security Council (Apr. 9, 2002), U.N. Doc. S/2002/486, para. 77 (2002) (referencing U.N. Doc. S/2001/966, *supra* note 207).

221. *Id.*

the embargoes.<sup>222</sup> As noted by a U.N. Panel of Experts, the sale of illicit African diamonds could not occur without willing buyers. The panel concluded that “business has superceded security concerns.”<sup>223</sup>

## B. A BILLION DOLLAR INDUSTRY AT STAKE

Diamonds are the centerpiece of a multi-national, multi-billion dollar industry that has thrived on tradition, elitism, and secrecy for hundreds of years. The legal diamond business operates behind closed doors, on handshakes and trust, in a trading system that involves players from around the world.<sup>224</sup> The industry’s initial reluctance to embrace the KP as a new way of doing business is not surprising. International diamond firms are not accustomed to sharing information freely and the industry has historically avoided close scrutiny.<sup>225</sup> The diamond industry lacks transparency, which is evident from the irreconcilable trade statistics discussed above.<sup>226</sup> Until conflict diamonds surfaced from the seamy under-side of industry, this opaque trading system enabled conflict diamonds to be traded without detection or outside scrutiny.

One of the KP’s primary purposes is to protect the world’s legitimate diamond trade, a \$7 billion business.<sup>227</sup> With diamond mining companies producing an estimated 114 million carats of rough diamonds annually, two million people around the world make their living from the diamond industry.<sup>228</sup> The diamond pipeline begins at the diamond mines on four continents, in about twenty-six countries.<sup>229</sup> De Beers plays a large role in diamond mining, owning about forty percent of the world’s diamond mines and regulating world prices for unpol-

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222. *Id.* paras. 78-79.

223. U.N. Doc. S/2001/357, *supra* note 156.

224. *Government Affairs Hearing*, *supra* note 9; Smillie, *supra* note 84, § 3.1 (describing the international diamond trade as “secretive, iconoclastic, exploitive and . . . ‘still pretty medieval’”); see also GLOBAL WITNESS, A ROUGH TRADE §§ 1-2 (1998), available at <http://www.globalwitness.com>.

225. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 12.

226. *Id.* at 8.

227. See generally World Diamond Council, *supra* note 7.

228. *Id.*

229. GLOBAL WITNESS, CONFLICT DIAMONDS: POSSIBILITIES FOR THE IDENTIFICATION, CERTIFICATION AND CONTROL OF DIAMONDS § 1 (2000), available at <http://www.globalwitness.com>. This report was partially funded by the U.N. Department of the United Kingdom’s Foreign and Commonwealth Office. See *id.*

ished stones with a large “buffer” or excess stock.<sup>230</sup> A De Beers Group company, the Central Selling Organization, manages this buffer stock by purchasing approximately seventy percent of the world’s rough diamond output.<sup>231</sup> After the rough diamonds are purchased, they are sent to London for sorting into approximately 5,000 categories by size and quality.<sup>232</sup> Next, the diamonds are distributed to diamond cutting centers and to dealers in Antwerp, where approximately eighty-five percent of the rough diamond trade occurs.<sup>233</sup> Other major trading centers include London, Lucerne, New York, Tel Aviv, Johannesburg, Bombay, and Dubai.<sup>234</sup> The same rough diamond may be traded several times at major trading centers before being sold to a manufacturer.<sup>235</sup>

Diamonds are then processed in one of approximately thirty countries.<sup>236</sup> Cutting and polishing diamonds occurs primarily in South Africa, Botswana, Russia, China, Sri Lanka, Thailand, Vietnam, and Mauritius, while major manufacturing (jewelry-making) centers are located in Israel, Belgium, India, and New York.<sup>237</sup> Mining, processing, distributing, and retailing enable the annual sale of 67 million pieces of diamond jewelry worldwide.<sup>238</sup> By the year 2005, world production is expected to increase to over 120 million carats, worth in excess of \$9 billion.<sup>239</sup>

Diamonds have been valued for centuries and are one of the world’s most concentrated forms of wealth.<sup>240</sup> The growth and

230. GOREUX, *supra* note 72, para. 5. By late 1998, De Beers had amassed a stockpile of diamonds nearly equivalent to a full year of world production. *Id.* para. 10. De Beers has, however, reduced this buffer stock from \$5 billion to less than \$3 billion in 2000, in an attempt to change its image from “cartel manager” to “supplier of choice.” *Id.*

231. *Id.* para. 5.

232. World Diamond Council, *supra* note 7; see also GOREUX, *supra* note 72, para. 5.

233. GOREUX, *supra* note 72, para. 5. See Smillie, *supra* note 84, § 3.3, for a discussion of the historical reasons for Belgium’s preeminent role in the diamond industry, and an analysis of Belgium’s diamond trade.

234. See GOREUX, *supra* note 72, para. 5.

235. *Id.* at 2 n.1.

236. World Diamond Council, *supra* note 7.

237. *Id.*

238. *Id.*

239. *Id.*

240. For over a thousand years, diamonds were extremely rare, found only in India for most of that period. One of the earliest known references to diamonds is found in a Sanskrit manuscript, entitled “The Lesson of Profit,” dating from 320-296 BC. During this period, rough diamonds were believed to confer supernatural powers or protection upon the bearer. See *Diamonds through the Ages*, NAT’L PUB. RADIO, at <http://www.americanradioworks.org/features/diamonds/timeline.html> (last

success of the industry, and the mass consumption of diamonds as the most legitimate and acceptable symbol of marital engagement, is largely a result of the most successful marketing campaign of the Twentieth Century.<sup>241</sup> The De Beers company created the image of the diamond solitaire as a symbol of love in the 1930s to recover dwindling sales after the Great Depression.<sup>242</sup> By 1950, within three years after instituting its “Diamonds are Forever” advertising slogan, an estimated eighty percent of engagements in the United States were consecrated with diamond rings.<sup>243</sup> Men and women from the United States, Europe, and Japan (and increasingly China) now buy into the concept that a diamond engagement ring is the “traditional” engagement token.<sup>244</sup> De Beers can be credited with single-handedly creating this notion in less than a century.<sup>245</sup>

De Beers sells about eighty percent of the world’s annual diamond production and has monopolized the diamond industry for most of the past century.<sup>246</sup> Spending \$60.4 million in advertising in 1997, the De Beers media budget generally ranks in the top ten of all U.S. advertisers.<sup>247</sup> De Beers continues to advertise aggressively. As a result of the De Beers “Diamonds are Forever” campaign, the perception of diamonds as a symbol of love and wealth is well entrenched in the psyche of people from around the world, particularly in the United States.<sup>248</sup> A product built on a successful marketing strategy, however, could fall from grace at the hands of a negative publicity campaign emphasizing the association of diamonds with mutilated and murdered women and children.<sup>249</sup>

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visited Sept. 25, 2002).

241. Jacki Lynden & Michael Montgomery, *DeBeers and the Diamond Mystique*, available at <http://www.americanradioworks.org/features/diamonds/mystique2.html> (last visited Apr. 26, 2002). When diamonds were discovered in Kimberley, South Africa in 1867, they were converted into an industrial product like copper. *Id.* When diamonds hit the western market after the Kimberley discovery, prices dropped from \$500 to \$0.10 per carat. *Id.*

242. GLOBAL WITNESS, *supra* note 224.

243. Lynden & Montgomery, *supra* note 241.

244. Cockburn, *supra* note 35, at 28. In 1967, five percent of Japanese women received diamond engagement rings, whereas by 1981, this figure reportedly rose to sixty percent. GOREUX, *supra* note 72, at 4 n.4.

245. Cockburn, *supra* note 35, at 28.

246. Nicholas Stein, *The De Beers Story: A New Cut on an Old Monopoly*, FORTUNE, Feb. 19, 2001, at 186.

247. Lisa Lockwood, *Fashion’s Deep Pockets*, WOMEN’S WEAR DAILY, May 15, 1998, at 4B.

248. See Lynden & Montgomery, *supra* note 241.

249. See *infra* note 260 and accompanying text.

Negative publicity and horror spurred international cooperation to support the KP. In 1998, the London-based organization Global Witness, thrust the dirty little secret of the diamond industry into public consciousness when it exposed the role of diamonds in the decade-long Angolan conflict.<sup>250</sup> When protesters picketed outside Tiffany Company on Fifth Avenue, the diamond trade community quickly recognized the potential for disaster.<sup>251</sup> The *New York Post* reported in November 1999 that sparkling diamond gifts from swanky Fifth Avenue jewelry stores might be financing cannibal gangs in Sierra Leone.<sup>252</sup> Fearing consumer boycotts, the diamond industry and diamond-producing countries reluctantly embraced the concept of a certification scheme to avoid the kind of negative publicity campaign that all but killed the fur trade.<sup>253</sup> In 2000, despite NGO efforts to increase public awareness of the true price of diamonds from conflict regions, diamond sales soared to the highest on record.<sup>254</sup> Although these concerns have yet to diminish diamond sales, the NGO efforts have been successful in making the industry accountable for the conflict diamond dilemma.<sup>255</sup> De Beers announced it would no longer trade in diamonds from conflict-ridden mines and the industry now fully supports the KP.<sup>256</sup> More than seventy NGOs can be credited with bringing the certification scheme to fruition, largely by capturing the attention and support of the diamond industry.<sup>257</sup> The NGOs have acted largely in partnership with KP Participants, though they have

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250. See GLOBAL WITNESS, *supra* note 224.

251. Editorial, *Diamond Diplomacy*, N.Y. TIMES, Nov. 29, 2001, at A24.

252. Cockburn, *supra* note 35, at 28.

253. Chris McGreal, *Hopes and Fears as Plan to Ban War Gems Begins*, GUARDIAN, Sept. 16, 2000, at 20; see also The World Diamond Council Technical Committee, *A System for International Rough Diamond Export and Import Controls*, at <http://www.worlddiamondcouncil.com/system.shtml> (last visited Sept. 25, 2002) ("The diamond industry. . . seeks to cooperate with the United Nations and governments to ensure that conflict diamonds are excluded from the legitimate diamond trade through implementation of an efficient and workable system of international diamond controls.").

254. Cockburn, *supra* note 35, at 28.

255. See Nicholas Shaxson, *Transparency in the International Diamond Trade*, GLOBAL CORRUPTION REPORT, available at [http://www.globalcorruptionreport.org/download/gi\\_diamond\\_trade.pdf](http://www.globalcorruptionreport.org/download/gi_diamond_trade.pdf) (explaining that, as a result of Global Witness' "A Rough Trade" report on conflict diamonds from Angola, De Beers announced in February 2000 that it would no longer purchase African gems from conflict areas controlled by rebel forces).

256. *Id.*

257. See *Kimberley Process Stalled?*, OTHER FACETS NO. 2, June 2001, at 1-4 (Partnership Africa Canada, Ottawa, Ont., Int'l Peace Serv., Antwerp, Network Movement for Justice & Dev., Freetown).

steadfastly advocated for tough and effective KP standards.<sup>258</sup> Both the international community and the diamond industry are keenly aware of NGO intimations that a campaign to drive consumers away from diamonds could result if KP Participants do not agree to close the loopholes left by ineffective U.N. sanctions with more effective and stricter regulations.<sup>259</sup>

Diamonds seem inalienably wedded to love, marriage, money, and power and diamond sales have yet to be marred by the blood gem trade.<sup>260</sup> Although it may seem incomprehensible that the entrenched concept of diamonds as a symbol of wealth, power, and *the* gift of marital engagement could ever be dismantled in the world psyche, one need only recall the fall from fashion of fur coats in the United States in the latter part of the Twentieth Century.<sup>261</sup> A similar blow to the U.S. diamond mar-

258. NGO's have participated throughout the development of the KP as official "observers," and have been "invited to take part in plenary meetings." KP Working Doc. 1/2002, *supra* note 5, §1, at 4.

259. *Diamond Industry Reacts to Charges that it's Letting Trade in 'Blood Diamonds' Pay for African Wars*, CNN.COM, at <http://www.cnn.com/2000/WORLD/europe/07/17/belgium.diamond.congress/> (last visited Sept. 25, 2002); see also OTHER FACETS NO. 5, Mar. 2002, at 2 (Partnership Africa Canada, Ottawa, Ont., Int'l Peace Info. Serv., Antwerp, Network Movement for Justice and Development, Freetown, South Africa), available at [http://www.partnershipafricacanada.org/pdf/Other\\_Facets5.pdf](http://www.partnershipafricacanada.org/pdf/Other_Facets5.pdf) (referring to the comments of Jeff Fisher, President of the Diamond Manufacturers and Importers Association at a Feb. 3, 2002 jewelry show in Orlando, Florida, who warned that NGOs might lash out in 'sheer frustration' if U.S. diamond legislation continues to falter in the Senate).

260. Although diamonds sales did drop by one percent after the tragedy of September 11, 2001, this represented the first drop in the industry in more than a decade. Peggy Jo Donahue, *2001 Diamond Jewelry Sales Down 1%*, PROF. JEWELER MAG., Mar. 28, 2002, available at <http://professionaljeweler.polygon.net/archives/news/2002/032802story1.html>. This slight decline reflected a three percent decline in the transaction value of the diamonds purchased in a notably weak economy, whereas the number of transactions actually increased by two percent. In comparison, the industry boasted a twelve percent growth rate in 2000. *Id.*

261. Between 1919 to 1921, 107,689,927 "pelts from 125 different species were auctioned in the United States alone." Respect for Animals, at <http://www.respectforanimals.org/facts/endangered.html> (last visited Sept. 25, 2002). Furs were still highly fashionable in the early 1960s, when Jacqueline Kennedy sported a leopard skin coat. *Id.* This set a fashion trend for leopard, cheetah, and jaguar coats, handbags and trousers. *Id.* As a result, 50,000 leopard skins were exported from Eastern Africa in 1964 alone. *Id.* Today, of course, many wild animals are protected as endangered species or they have been rendered extinct. Nonetheless, the fur industry's decline can be directly attributed to increased consumer awareness about animal suffering. Press Release, The Humane Society of the United States, *The HSUS Is Encouraged by Decline in Domestic Mink Industry* (Aug. 29, 2001), available at <http://www.hsus.org/ace/11913>. This is not to suggest that the fur industry has been nullified. *Id.* Although mink pelt production in the United States totaled in excess of 2.5 million in 2001, this represents a steady decline since 1983, when production was over four million. NATIONAL AGRICULTURAL STATISTICS

ket could result in a shock to the world diamond market.

### C. DEVELOPMENT OF THE KIMBERLEY PROCESS

With failing U.N. sanctions and mounting pressure from NGOs, the southern African diamond-producing countries initiated a "self-help" meeting in Kimberley, South Africa in May 2000 to discuss normative standards to deter the trade of conflict diamonds.<sup>262</sup> After several meetings, the certification scheme began to take shape and build momentum.<sup>263</sup> The U.N. endorsed the concept of establishing a global blocking system for conflict diamonds in its December 1, 2000 Resolution 55/56, which was co-sponsored by forty-eight nations and adopted unanimously by 189 nations.<sup>264</sup> The U.N. acted pursuant to Chapter VII of the U.N. Charter to address international peace and security threats caused by the illicit diamond trade and called for Members to develop acceptable minimum standards for rough diamond certification.<sup>265</sup> The "self-help" initiative became known as the "expanded" KP, involving the U.N. and representatives from over thirty-five nations, the WDC, the Southern African Development Community (SADC),<sup>266</sup> the European Union (EU), the World Customs Organization, and various NGOs.<sup>267</sup> A dozen plenary meetings have taken place since

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SERVICE (NASS), U.S. DEPT. OF AGRICULTURE, MINK 2001 (July 2002), available at <http://www.nass.usda.gov/mt/pressrls/livestoc/mink.txt>. At the same time, domestic mink farms, which totaled 1,098 in 1983, have dropped by seventy percent, to about 324 in 2001. *Id.* Moreover, when today's numbers are compared to the 5.7 million pelts that were produced in 1969 (when NASS first began keeping such statistics), the fur industry's decline is significant. Telephone Interview with Tom Krutchen, NASS, Agricultural Statistics Board, (Aug. 19, 2002) (referencing the NASS 1969 mink report). "The continued decline in the industry is. . . a result of increased public awareness about the inhumane treatment of animals inherent in fur farming. Public opposition to fur fashion continues to grow. . ." Press Release, The Human Society of the United States, *supra*.

262. See Proposal for a Council Regulation, *supra* note 20, at 2.

263. See G.A. Res. 55/56, *supra* note 2.

264. *Id.*

265. *Id.* para. 1, 5. Chapter VII of the U.N. Charter, Articles 39-51, pertains to "Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." *Id.*

266. SADC comprises Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, South Africa, Tanzania, Zambia, and Zimbabwe. See Charles Mangwiro, *Mozambique: African Ministers Discuss Peace in Angola, Congo*, REUTERS ENG. NEWS SERVICE, Aug. 22, 2002.

267. See Kimberley Process, *supra* note 5.

2000.<sup>268</sup>

Although international cooperation and industry involvement is impressive, some have likened the KP to “a watchdog without teeth.”<sup>269</sup> Many fear that the system will facilitate the concealment of conflict diamonds within commerce.<sup>270</sup> On February 12, 2001, a coalition of seven NGOs issued a “report card” evaluating the KP initiatives.<sup>271</sup> It included an “A” for good intentions and hard work and an “F” for compliance with the U.N. General Assembly’s call for an “effective, pragmatic and transparent” system.<sup>272</sup> One of the NGOs’ principal concerns has been the international discordance on compliance with WTO obligations.<sup>273</sup>

A meeting in Botswana in November 2001 failed to result in a final agreement, so another “final” meeting was held in Ottawa in March 2002.<sup>274</sup> Just before the Ottawa meeting, the Director of International Affairs and Trade at the General Accounting Office and others expressed concern that the scheme still lacked “important elements”. They suggested that considerable challenges remained before an effective certification scheme could be established.<sup>275</sup>

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268. See Canada’s Human Security website to review nine of the twelve final communiqués from the plenary meetings held between September 2000 and March 2002. Dept. of Foreign Affairs & Int’l Trade, Canada, Canada’s Human Security, at [http://www.humansecurity.gc.ca/conflictprev\\_diamonds-e.asp](http://www.humansecurity.gc.ca/conflictprev_diamonds-e.asp) (last visited Oct. 13, 2002).

269. *International Coalition Issues Kimberley Process Report Card*, DIAMOND.NET (Feb. 13, 2002), at <http://www.diamonds.net> (last visited Feb. 15, 2002).

270. *Id.*

271. *Id.* The following NGOs are included: Amnesty International, Fatal Transactions, Global Witness, Oxfam International, Partnership Africa Canada, Physicians for Human Rights, and World Vision. *Id.*

272. *Id.*

273. *Id.* The NGOs have also been concerned that the KP lacked a system to compile trade statistics on rough diamond production, importing and exporting. *Id.* The NGOs express concern that the KP has a weak independent monitoring of national systems and industry warranties, and advocated for a dispute resolution mechanism and adequate deterrents for countries that fail to meet minimum standards. *Id.*

274. See PARTNERSHIP AFRICA CANADA ET AL., NGO REPORT ON OTTAWA KIMBERLEY PROCESS MEETING, at <http://action.web.ca/home/pac/attach/NGOreport.rtf> (last visited Oct. 13, 2002) (stating that the Ottawa meeting was “unplanned,” in that the November 2001 Botswana meeting “technically finalized agreement on the minimum standards;” however, the Ottawa meeting was necessary “because there were too many loose ends after Botswana, and these required attention before there could be any real agreement”).

275. Danielle Knight, *U.S. Senators Push Law Against ‘Conflict Diamonds’*, INT’L PRESS SERVICE, Feb. 13, 2002, available at 2002 WL 4912862 (quoting Loren

These concerns slowed what was a flurry of support for the KP into a sputtering effort, which was teetering on the brink of collapse. While progress was made in Ottawa, another “final” meeting is scheduled for November 2002 in Switzerland.<sup>276</sup> The U.N. adopted resolution 56/263 in March 2002,<sup>277</sup> which provided a legal underpinning for the KP and further boosted its legitimacy.<sup>278</sup> The resolution welcomed the KP certification scheme and called on all nations to participate.<sup>279</sup> The U.N. is expected to further its endorsement of the KP when the agreement is finalized.<sup>280</sup> South Africa, which chaired the process under the U.N., urged that those countries that can begin issuing KP certificates should do so immediately and all other countries should start full implementation by the end of 2002.<sup>281</sup> KP Participants intended the Switzerland meeting to be a “simultaneous launch” of the certification regime.<sup>282</sup>

#### D. THE CERTIFICATION SCHEME

The KP Participants drafted a political agreement between the participating countries<sup>283</sup> that establishes a rough diamond certification scheme.<sup>284</sup> The Working Document sets forth standards and additional recommendations for Participants to follow in implementing national legislation designed to control the conflict diamond trade.<sup>285</sup> As a signatory to the final KP agreement, Participants are politically bound to act in good faith and im-

Yager, Director of International Affairs and Trade at the General Accounting Office).

276. See Proposal for a Council Regulation, *supra* note 20, at 2.

277. G.A. Res. 56/263, U.N. GAOR, 56th Sess., 96th plen. mtg., U.N. Doc. A/Res/56/263 (2002).

278. See Andre Parker, et al., *End to Trade in 'Conflict Diamonds' Moves Closer*, FIN. TIMES, Nov. 29, 2001, available at <http://www.globalpolicy.org/security/issues/diamond/ft112901.htm>.

279. *Id.*

280. KP Working Doc. 1/2002, *supra* note 5, § VI (6).

281. *Id.*; see also Letter from the Charge d'affaires a.i. of the Permanent Mission of South Africa to the United Nations addressed to the Secretary-General, *Report on the Kimberley Process Submitted to the General Assembly Pursuant to Assembly Resolution 55/56 of 1 December 2000*, U.N. GAOR, 56th Sess., Annex 1, at 4, U.N. Doc. A/56/775 (2002).

282. KP Final Communiqué, *supra* note 10.

283. See Proposal for a Council Regulation, *supra* note 20, paras. 6, 8, at 2 (explaining that the European Commission was authorized to negotiate an agreement on behalf of the European Union and though most of the major objectives were met, “the negotiations will not lead to the formal agreement initially envisaged”); see also *supra* note 16 and accompanying text.

284. See Proposal for a Council Regulation *supra* note 20, at 3, para. 3.

285. KP Working Doc. 1/2002, *supra* note 5, para. 10, at Preamble.

plement the minimum standards contemplated by the regime.<sup>286</sup> Stricter measures are set forth as recommended standards, but are not required for participation.<sup>287</sup> In summary, the certification scheme envisages that Participants will implement laws such that all imports and exports of rough diamonds are accompanied by a valid KP certificate.<sup>288</sup> Both the process for issuing the certificates and the form of the certificates themselves should meet specified minimum standards.<sup>289</sup> Participants will be expected to ensure that rough diamond shipments are imported and exported in tamper resistant containers<sup>290</sup> and are not imported or exported to or from a non-participating country.<sup>291</sup>

Although the global scheme is intended to apply to all "rough diamonds," the Working Document defines conflict diamonds as,

[R]ough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate government, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolution which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in similar UNGA resolutions which may be adopted in the future.<sup>292</sup>

With this definition in mind, the Working Document provides that Participants should "establish a system of controls designed to eliminate the presence of *conflict diamonds* from

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286. Although the KP agreement will not result in a formal treaty, it will still bind Participants as a diplomatic or political obligation. Even though a Memorandum of Understanding (MOU) or political agreement is not generally legally binding under international law, "it does not mean that a state is free, politically or morally, to disregard them." See AUST, *supra* note 14, at 39. Political agreements obligate governments to deal in good faith. *Id.*

287. See generally KP Working Doc. 1/2002, *supra* note 5, at Annex I(B), Annex II-III (setting forth additional recommendations for the implementation of the certification scheme).

288. *Id.* § II (a). "KP Certificate" is defined in the working document as "a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the certification regime." *Id.* § 1.

289. *Id.* § II (b)-(c).

290. *Id.* § IV(c).

291. *Id.* § III (c).

292. KP Working Doc. 1/2002, *supra* note 5, § 1. UNGA Resolution 55/56 called for the international community to develop a certification scheme for rough diamonds. G.A. Res. 55/56, *supra* note 2. "Relevant" UNSC Resolutions are referred to in the Preamble of the Working Document and include UNSC 1173 (1998), 1295 (2000), and 1343 (2001). See *supra* note 9.

shipments of rough diamonds.<sup>293</sup> It would not be commercially viable to determine the origin of each rough diamond shipment based on geo-scientific methods. Moreover, such scientific analyses can only *qualitatively* determine the *likely* origin.<sup>294</sup> It would therefore not be feasible for Participants' "Importing Authorities"<sup>295</sup> to implement certification schemes based on the proven non-conflict origin of each shipment. In order to comply with the obligation posed by the KP to establish a regime that will eliminate conflict diamond imports and exports, Participants must apply their national certification schemes to *all* rough diamonds, regardless of origin.

The certificates of each participating country must, at a minimum, "bear the title 'Kimberley Process Certificate,' the KP logo, and the statement: "[t]he rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process international certification scheme for rough diamonds."<sup>296</sup> The certificate may be printed in any language, as long as an English translation is incorporated into the text.<sup>297</sup> Additionally, the certificates must be tamper-proof and forgery-resistant.<sup>298</sup> They must include the country of origin of the shipment and a unique sequential number with the proper country code identifier.<sup>299</sup> The certificates must also contain general information regarding the shipment itself, including the following: identification of the importer and exporter, date of issuance and expiration, total value and number of parcels in the shipment, carat weight or mass, and quality characteristics of the diamonds.<sup>300</sup> Finally, the certificates must identify the Relevant Harmonized Commodity Description and Coding System

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293. KP Working Doc. 1/2002, *supra* note 5, § IV(a) (emphasis added).

294. Telephone Interview with Jeffrey P. Sgambat, Vice President of Arcadis, (Sept. 10, 2002).

295. "Importing Authority" is defined by the Working Document as the "author-ity(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Certificates." *Id.* § I.

296. KP Working Doc. 1/2002, *supra* note 5, at Annex I(a).

297. *Id.*

298. *Id.* The certificates will likely be made using a cotton-based security paper with chemical additives to avoid tampering, UV activated fibers, micro printing, watermarks, UV ink, and other non-disclosed security features. See Press Release, Kimberly Process, Final Communiqué Brussels Meeting, 25 to 27 April 2001 (Apr. 25, 2001) Annexure A, available at <http://www.kimberlyprocess.org/BulletinDisplay.asp?key=10>.

299. KP Working Doc. 1/2002, *supra* note 5, at Annex I (a). The codes to be Alpha 2 country code identifiers, pursuant to ISO 3166-1. *Id.*

300. *Id.*

subheading,<sup>301</sup> along with an official validation by the Participant's designated competent exporting authority or government issuing agency.<sup>302</sup> Additional details are recommended but not required.<sup>303</sup>

When diamonds are imported into a Participant's territory, the Participant's "Importing Authority" should expeditiously confirm the receipt of a rough diamond shipment with the exporting country's appropriate authorities using the certificate number, the number of parcels, carat weight, and the identifying data of the importer and exporter of record.<sup>304</sup> Additionally, the Working Document recommends that an e-mail be sent from the "Exporting Authority"<sup>305</sup> to the Importing Authority before or upon the arrival of the shipment detailing the information contained on the certificate, including the serial number of the certificate.<sup>306</sup> To this end, it is recommended that an additional portion of the certificate be used for import confirmation with the identity of the importer, the country of destination, the carat, the weight, and the value of the shipment in U.S. dollars.<sup>307</sup> These certificates should be retained and be accessible by customs officials for at least three years.<sup>308</sup> As extra measures, Participants may require that their diamond exports be shipped in transparent security bags with the certificate serial number replicated on the shipping container.<sup>309</sup> In the event that a rough diamond shipment merely transits<sup>310</sup> the territory of a Participant, the certification scheme does not obligate Participants to ensure the shipments are accompanied by a certificate or to maintain any record of the transshipment.<sup>311</sup>

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301. *See id.*

302. *Id.* at Annex I(b).

303. *Id.*

304. *Id.* § III (b).

305. The Working Document defines "Exporting Authority" as "the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate." KP Working Doc. 1/2002, *supra* note 5, § I.

306. *Id.* at Annex II(19), (21).

307. *Id.* at Annex I(b).

308. *Id.* § III(b).

309. *Id.* at Annex I(c).

310. Under the KP scheme, "transit" means "the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes." *Id.* § I.

311. KP Working Doc. 1/2002, *supra* note 5, § III (d). This provides that the Participant's designated authorities ensure the shipment leaves that territory un-

In addition to the use of KP certificates, participating countries are expected to implement internal controls to ensure that conflict diamonds are not imported or exported from their territories.<sup>312</sup> Respecting the sovereignty of each Participant, these internal controls are set forth in the KP Working Document as a basic framework to provide Participants with broad discretion.<sup>313</sup> This should include at least the following: (1) the designation of an Importing and Exporting Authority; (2) the enactment or amendment of laws or regulations necessary to implement and enforce the certification scheme; and (3) appropriate penalties for transgressions.<sup>314</sup> As additional measures, the Working Document recommends that these internal controls include the appointment of one or more officials to coordinate the implementation of the scheme.<sup>315</sup>

To ensure transparency, Participants should make information regarding a Participant's relevant laws, regulations, rules, procedures, and practices, along with regular updates available to all signatories.<sup>316</sup> Participants are expected to compile and maintain relevant data regarding production, importing and exporting.<sup>317</sup> Further, this information should be made freely available to all Participants.<sup>318</sup> Additionally, the Working Document recommends that a computerized database be maintained with both importing and exporting statistics and that the contents of the KP certificates be utilized to complement or enhance the statistical information.<sup>319</sup>

Participants are further expected to cooperate fully with other Participants, to share information with respect to problems encountered or solutions found, and to assist other Participants in the improvement of the certification schemes within

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opened, without tampering, and otherwise in an identical state as when it entered. *See id.*

312. *Id.* § IV(a).

313. *See id.*, paras. 13, 15, at Preamble (stating, respectively, that "an international certification scheme for rough diamonds will only be credible if all Participants have established internal systems. . . while taking into account that differences in production methods and trading practices as well as differences in institutional controls thereof may require different approaches to meet minimum standards;" and that "state sovereignty should be fully respected and the principles of equality, mutual benefits and consensus should be adhered to").

314. *Id.* § IV.

315. *Id.* at Annex II(1).

316. *Id.* § V(a).

317. KP Working Doc. 1/2002, *supra* note 5, § IV(e).

318. *Id.* §§ IV, V.

319. *Id.* at Annex II(2)-(3).

their territories.<sup>320</sup> Internally, an integrated agency approach is encouraged, with close cooperation between customs agencies and law enforcement.<sup>321</sup>

The scheme encourages diamond-producing countries to ensure that diamond mines are licensed and that mining is restricted to only those licensed mines.<sup>322</sup> It states that mining countries should ensure that licensed mining companies and prospectors maintain adequate security measures.<sup>323</sup> Additionally, the Working Document urges diamond-producing countries to maintain information and analyses of the amount of actual production, as well as the characteristics and qualities of the diamonds produced.<sup>324</sup> As an added measure, diamond-producing countries with rebel groups within their territory are encouraged, but not required, to identify these conflict areas to all other Participants and to update this information regularly.<sup>325</sup>

Annual plenary meetings of Participants, representatives of civil society, the diamond industry, non-participating governments, and international organizations will be held to improve the scheme's effectiveness.<sup>326</sup> The agenda at these meetings will include reviewing the status of each Participant's internal certification scheme, as well as determining whether additional verification measures are necessary.<sup>327</sup> Consensus of the Participants or consultations with the Chair, in the event that consensus is impossible, is necessary for decision-making, including decisions to modify the KP agreement itself.<sup>328</sup> Ad hoc working groups may be established at these plenary meetings to solve specific problems.<sup>329</sup> Additionally, "review missions" may be established for compliance verification "where there are credible indications of significant non-compliance" by a given Participant.<sup>330</sup> Compliance verification reports and the comments from the subject Participant regarding the report will be posted on an official KP website in a strictly confidential re-

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320. *Id.* § IV(E); *see also id.* para. 15, Preamble (stating that "the principles of equality, mutual benefits and consensus should be adhered to").

321. *Id.* at Annex II(9).

322. *Id.*

323. KP Working Doc. 1/2002, *supra* note 5, at Annex II(10).

324. *Id.* at Annex II(8).

325. *Id.*, at Annex II(5).

326. *Id.* § VI (1), (10).

327. *Id.* § VI (11), (13).

328. *Id.* § VI(1), (5), (17).

329. KP Working Doc. 1/2002, *supra* note 5, § VI(4).

330. *Id.* § VI(13)(b).

stricted access section.<sup>331</sup>

In addition to annual reviews, the Working Document provides for a comprehensive review mechanism to analyze the scheme's overall effectiveness, the first to be held "no later than three years after the effective starting date of the certification scheme."<sup>332</sup> These reviews will be scheduled with the annual plenary meeting and will consider the continued threat posed by conflict diamonds and the future of the scheme.<sup>333</sup> The reviews will consider the views of all Participants and NGOs, with great weight given to the perception of the U.N.<sup>334</sup>

The KP sets out a basic framework and relies upon Participants to implement effective legislation. Assuming good faith, the agreement respects the sovereignty of each country to implement the minimum standards as each deems appropriate.<sup>335</sup> The agreement states that Participants should enact legislation with "dissuasive and proportional penalties for transgressions."<sup>336</sup> The commitment of all Participants will be the key to the scheme's success.

### III. THE U.S. EFFORT TO IMPLEMENT CONFLICT DIAMOND LEGISLATION

Given the U.S. position as a global power, unequivocal U.S. leadership in the implementation of the KP is essential.<sup>337</sup> Moreover, the demand for diamonds in the United States is the greatest in the world, with the United States annually importing a great majority of globally-produced diamonds.<sup>338</sup> In fiscal year 2000, over \$800 million in rough diamonds entered the United States from fifty-three countries through several U.S. ports of entry.<sup>339</sup> These imports contribute significantly to the U.S. diamond jewelry market, which was worth an estimated \$26 billion in 2000.<sup>340</sup>

When conflict diamonds became a focus in 1998, the United

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331. *Id.* § VI (15).

332. *Id.* § VI (20).

333. *Id.*

334. *Id.*

335. *See supra* note 313 and accompanying text.

336. KP Working Doc. 1/2002, *supra* note 5, § IV(d).

337. *See supra* note 269 and accompanying text.

338. COOK, *supra* note 200, at 6.

339. U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 11.

340. COOK, *supra* note 200, at 6.

States began to enhance its control of rough diamond imports to honor U.N. mandated sanctions.<sup>341</sup> Pursuant to UNSC Resolution 1127, the United States prohibits the importation of all diamonds from Angola, either directly or indirectly, unless a certificate of origin accompanies the diamonds from the Angolan Government of Unity and National Reconciliation.<sup>342</sup> In January 2001, President Clinton issued an executive order to prohibit the direct or indirect importation of rough diamonds from Sierra Leone, unless accompanied by a certificate of origin issued by the Government of Sierra Leone.<sup>343</sup> President George W. Bush followed suit in May 2001, prohibiting the importation of rough diamonds from Liberia, regardless of whether or not they originated in Liberia.<sup>344</sup>

Despite these sanctions, U.S. diamond imports are largely subject to the same controls as other commodities.<sup>345</sup> Since 1998, U.S. Customs officials have conducted approximately thirty-five random inspections of mixed rough diamond shipments.<sup>346</sup> The inspections revealed only minor documentation discrepancies in five cases.<sup>347</sup> Customs officials attribute this to the fact that it is virtually impossible, based on physical inspection, to determine the original source of rough diamonds.<sup>348</sup> Worldwide discrepancies in the reporting statistics of diamond imports and exports are reflected in U.S. trade statistics.<sup>349</sup> For example, Belgium reportedly exported \$355 million worth of rough diamonds to the United States in 2000.<sup>350</sup> The United States reportedly bought only \$192 million dollars of rough diamonds from Belgium.<sup>351</sup>

The United States is unable to determine the true origin of diamond imports or to block conflict diamonds with its current import control system.<sup>352</sup> Given that rough diamonds are easily imported from countries other than the actual country of origin,

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341. U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 10.

342. 31 C.F.R. § 590 was implemented pursuant to Executive Order 13098.

343. Exec. Order No. 13194, 66 Fed. Reg. 7389 (Jan. 19, 2001).

344. Exec. Order No. 13213, 66 Fed. Reg. 28,829 (May 27, 2001).

345. U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 10.

346. *Id.* at 11. Customs suspended these inspections after September 11, 2001 however, they were resumed in May 2002. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 14.

347. U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 11.

348. *Id.*

349. *Id.* at 8.

350. *Id.*

351. *Id.*

352. *Id.* at 10.

the United States remains susceptible to conflict diamond imports.<sup>353</sup> It follows that, due to the U.S. demand for diamonds, U.S. legislation that ensures that conflict diamonds cannot be imported into the United States would significantly strengthen the effectiveness of a global certification scheme.<sup>354</sup> Strong support of the KP by the United States would provide an incentive to diamond-exporting countries and trade centers to implement acceptable safeguards against conflict diamonds that coincide with the enactment of U.S. legislation.<sup>355</sup>

Passing U.S. conflict diamond legislation is as hard as diamonds themselves. Members in both the 106th and 107th Congresses introduced conflict diamond legislation to implement a certificate of origin for the importation of rough diamonds into the United States in compliance with KP minimum standards, without success.<sup>356</sup> Congressman Tony Hall championed the conflict diamond issue beginning in 1999.<sup>357</sup> He first introduced the Consumer Access to a Responsible Accounting of Trade (CARAT) Act of 2000,<sup>358</sup> which proposed that all gem-quality diamonds valued in excess of \$100, whether rough, polished, or set in jewelry, be accompanied by a certificate of origin.<sup>359</sup> It also required the Secretary of the Treasury to report on the feasibility of marking gem quality stones with origin markings.<sup>360</sup> Unfortunately, the bill did not get past the House Subcommittee on Telecommunications, Trade, and Consumer Protection.<sup>361</sup>

Congressman Hall reinvented and reintroduced the CARAT Act as House Bill 5147 in September 2000.<sup>362</sup> This legislation sought to impose an embargo against Angolan and Sierra Leonean diamonds unless accompanied by certificates of origin from

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353. U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 10.

354. *See* Ways and Means Hearing, *supra* note 199 (prepared statement of Rep. Tony Hall).

355. TAMM, *supra* note 31, at 28.

356. *See* Ways and Means Hearing, *supra* note 199 (prepared statement of Rep. Tony Hall).

357. *See id.*

358. Consumer Access to a Responsible Accounting of Trade Act of 2000, H.R. 3188, 106th Cong. (1999).

359. *Id.* § 3(a)(1).

360. *Id.* § 5.

361. *Bill Summary & Status for the 106th Congress, H.R. 3188*, at <http://Thomas.loc.gov/bss/d106query.html> (last visited Sept. 21, 2002).

362. *See* Peggy Jo Donahue, *WDC Says Congressional Bill Premature*, PROF. JEWELER MAG., Oct. 12, 2000, available at <http://www.professionaljeweler.com/archives/news/2000/101200story.html> (explaining that HR 5147 was introduced as a "follow-up" to CARAT Act).

their respective governments.<sup>363</sup> In addition, the embargo would target known transshipment points of Angolan and Sierra Leonean diamonds, such as Liberia.<sup>364</sup> The bill gave the President discretionary authority to waive the embargo against a given country in response to a national security interest.<sup>365</sup> Finally, the bill required the Secretary of the Treasury to require certificates of origin for diamond imports.<sup>366</sup> Again, this legislation failed to make it out of the House Subcommittee on Trade.<sup>367</sup>

In October 2000, Congressman Hall again tried introducing the Conflict Diamonds Elimination Act.<sup>368</sup> This bill was a compromise between the diamond industry and NGOs.<sup>369</sup> The Act barred diamond imports from any exporting country unless the exporter was either implementing a system of import/export controls or participating in an international agreement that established certain minimum controls.<sup>370</sup> This bill gave the President discretionary authority to grant indefinite biennial waivers to a country in non-compliance if the President determined the country was making significant progress toward one of the above.<sup>371</sup> This bill was referred to the House Subcommittee on Trade, but no further action was taken.<sup>372</sup> Although none of the legislation regarding conflict diamonds passed during the 106th Congress, the bills kept the issue on the political agenda and fostered support for the KP.<sup>373</sup>

During the first session of the 107th Congress, conflict diamond legislation was once again introduced in the House by Representative Amo Houghton.<sup>374</sup> The Clean Diamond Trade

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363. *Bill Summary & Status for the 106th Congress*, H.R. 5147, at <http://Thomas.loc.gov/bss/d106query.html> (last visited Sept. 21, 2001).

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. Conflict Diamonds Elimination Act of 2000, H.R. 5564, 106th Cong. (2000).

369. See Julia M. Duncan, *Conflict Diamond Bill Compromise Proposed*, PROF. JEWELER MAG., NOV. 2, 2000, available at <http://www.professionaljeweler.com/archives/news/2000/110200story.html>.

370. H.R. 5564, § 2(a).

371. *Id.* § 5(c).

372. *Bill Summary & Status for the 106th Congress: H.R. 5564*, at <http://Thomas.loc.gov/bss/d106query.html> (last visited Sept. 21, 2002).

373. Telephone Interview with Deborah DeYoung, Senior Aide to Congressman Tony Hall (April 19, 2002).

374. See *Bill Summary & Status for the 107th Congress, H.R. 2722 IH*, at <http://Thomas.loc.gov/bss/d107query.html> (last visited Sept. 21, 2002).

Act<sup>375</sup> and its companion bill in the Senate<sup>376</sup> were designed to improve earlier legislation, House Bill 918 and Senate Bill 787.<sup>377</sup> The diamond industry opposed House Bill 918, while NGO's opposed Senate Bill 787, which was based on WDC draft legislation.<sup>378</sup> As introduced by Congressman Houghton, House Bill 2722 placed import restrictions on rough diamonds, polished diamonds, and jewelry containing diamonds.<sup>379</sup> It provided automatic triggers for sanctions against countries that failed to implement "KP-type" measures.<sup>380</sup> The President's authority to grant waivers to non-compliant countries was limited to a one-time waiver for a six month period.<sup>381</sup> This bill faced opposition, especially from the Bush Administration, which wanted more discretion in sanctions implementation.<sup>382</sup>

A modified version of House Bill 2722 finally passed in the House of Representatives on November 28, 2001 and went to the Senate calendar.<sup>383</sup> The Act defined "conflict diamonds," as those "rough diamonds, the import of which is fueling conflict and is prohibited by UNSC resolutions."<sup>384</sup> Defining conflict diamonds so narrowly means that blood diamonds from the DRC would be excluded because such importation is not prohibited by any UNSC resolution.<sup>385</sup> The compromise bill revisions were intended to make the legislation more palatable to the Executive Branch.<sup>386</sup> It provided that the President *may* prohibit the import of certain "rough diamonds into the United States from any country that does not take certain measures to stop the trade in conflict diamonds."<sup>387</sup> The President's authority was

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375. Clean Diamond Trade Act, H.R. 2722 IH, 107th Cong. (2001).

376. Clean Diamond Act, S. 1084, 107th Cong. (2001).

377. See Clean Diamonds Act, H.R. 918, 107th Cong. (2001); see also Conflict Diamond Act of 2001, S. 787, 107th Cong. (2001).

378. See TAMM, *supra* note 31, at 29-30. House Bill 918 was co-sponsored by Reps. Hall, Frank Wolfe, and Cynthia McKinney with the support of the U.S. Campaign to Eliminate Conflict Diamonds, representing over seventy human rights organizations. *Id.* The rival bill, S 787, was introduced by Senator Judd Greg (R-NH). *Id.*

379. H.R. 2722 §4(a)(1), (3).

380. *Id.* § 4(a)(1).

381. *Id.* § 6(a).

382. TAMM, *supra* note 31, at 30.

383. Clean Diamond Trade Act, H.R. 2722 PCS, 107th Cong. (2001).

384. *Id.* § 3(1).

385. See 148 CONG. REC. E908 (daily ed. May 24, 2002) (statement of Rep. Tony Hall).

386. Chris Rugaber, *Sanctions: House Passes Legislation To Restrict Trade In Conflict Diamonds After White House Deal*, 18 BNA INT'L TRADE REP. (2001).

387. H.R. 2722 PCS § 4.

qualified in that the prohibition must be (1) “necessary to protect essential security interests” of the United States, or (2) “pursuant to the UNSC Resolutions on conflict diamonds,” and (3) “consistent with both the United States’ foreign policy interests and international obligations.”<sup>388</sup> This language effectively removed the automatic sanctions triggers and made Presidential waivers unnecessary.<sup>389</sup> Furthermore, to appease the industry, the sanctions were not generally applicable to polished gems and jewelry.<sup>390</sup> The President could, in his discretion, prohibit specific entries of polished diamonds and jewelry containing diamonds “if the President ha[d] credible evidence that such diamonds and jewelry were produced with conflict diamonds.”<sup>391</sup>

Concerned that the congressional intent behind House-passed Bill 2722 was severely diluted and compromised, Senator Durbin, with co-sponsors Senators DeWine and Feingold, introduced Senate Bill 2027 on March 18, 2002, also entitled the “Clean Diamond Trade Act.”<sup>392</sup> Senate Bill 2027 included a broad definition of conflict diamonds, which included diamonds from the conflict areas of the DRC as well as diamonds traded by the terrorists named in President Bush’s Executive Order 13224.<sup>393</sup> Whereas the version of House Bill 2722 that was placed on the Senate calendar permitted the President to prohibit certain diamond imports, the Senate version required the President to prohibit the importation of rough diamonds from countries that failed to take effective measures to curb the trade of conflict diamonds if such a prohibition would have been in the foreign policy interests of the United States.<sup>394</sup> Additionally, the bill required the President to prohibit specific imports of polished diamonds and jewelry containing diamonds if the President had credible evidence that they were produced with conflict diamonds.<sup>395</sup> Senate Bill 2027 affirmatively stated that “Articles XX and XXI of GATT 1994 allow WTO Member countries to take

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388. *Id.*

389. *Id.* See generally Rugaber, *supra* note 386.

390. See generally Clean Diamonds Trade Act, H.R. 2722 PCS, 107th Cong. (2001).

391. H.R. 2722 PCS.

392. Clean Diamond Trade Act, S. 2027 IS, 107th Cong. (2002). This is a new and improved version of Senator Durbin’s “Clean Diamonds Act,” Senate Bill 1084, which was introduced in June 2001, but never made it out of the Committee on Finance. *Id.*

393. *Id.* § 3(1).

394. *Id.* § 4(a).

395. *Id.* § 5.

measures to deal with situations such as that presented by the current trade in conflict diamonds without violating their WTO obligations,<sup>396</sup> reflecting the general consensus of the international community.<sup>397</sup>

The 107th Congress will end without passing any conflict diamond legislation for yet another session. While the U.S. struggle for implementing legislation continues, the clock is ticking on the target date for the international implementation of the KP.<sup>398</sup> Given that the United States has come under fire for its trade policies, the failure to implement a conflict diamond certification scheme through legislation or otherwise could be yet another reason for international criticism of U.S. international policies.<sup>399</sup>

#### IV. THE KIMBERLEY PROCESS IS CONSISTENT WITH WTO OBLIGATIONS

The U.S. debate is matched by the struggle for consensus in the international community, especially with respect to whether the KP will be consistent with WTO obligations. The KP is a multilateral effort designed primarily to foster both economic and human security<sup>400</sup> and is not founded in protectionism.<sup>401</sup> Despite the legal underpinning provided by U.N. endorsement, some nations, notably the United States, Canada, and Japan, have expressed concern that the KP may violate WTO obligations.<sup>402</sup> The universality requirement is the primary stumbling block.<sup>403</sup> This is the biggest hurdle to U.S. advocacy for a tough certification scheme.<sup>404</sup> In a Senate hearing in early 2002, Representatives Hall and Frank Wolfe charged that the competing interests of various U.S. government agencies, including the Department of Treasury and United States Trade Representative's office, interfered with U.S. efforts to stem the conflict diamond trade.<sup>405</sup> Representatives Hall and Wolfe stated that the

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396. *Id.* § 2(7).

397. *See infra* notes 412-11 and accompanying text.

398. *See supra* note 281 and accompanying text.

399. *See infra* notes 408-10 and accompanying text.

400. *See KP Working Doc. 1/2002, supra* note 5, paras. 1-3, 8, at Preamble.

401. *See id.*

402. *See supra* note 26 and accompanying text.

403. *See TAMM, supra* note 31, at 31; *supra* note 26 and accompanying text.

404. TAMM, *supra* note 31, at 31.

405. *Government Affairs Hearing, supra* note 9 (statement of Rep. Tony Hall and Rep. Frank Wolfe).

Bush Administration's excessive deference to WTO obligations was "disturbing" and that more "muscular action" against conflict diamonds would be well within U.S. rights as a WTO Member.<sup>406</sup>

In KP negotiations, the United States and other countries "often used the rules governing international trade . . . as trump cards to counter certain unpopular proposals."<sup>407</sup> The United States, supported by other Participants, urged KP Participants to ensure that the scheme would not violate WTO obligations before finalizing the understanding.<sup>408</sup> This would involve numerous compromises before the KP could be adopted and would delay the initiative, beyond its second targeted implementation date.<sup>409</sup> At the same time, a KP working group report, issued in advance of the Ottawa meeting, concluded that import and export bans on rough diamonds would not contravene WTO requirements *if* a credible reason and motivation necessitating them existed.<sup>410</sup>

As the debate in Ottawa wore on, the Swiss delegation persuaded all Participants to move forward with the agreement.<sup>411</sup> The Swiss delegation achieved a consensus that the human and national security provisions in the GATT, Articles XX (b) and XXI, respectively, were sufficient to insulate the KP from WTO inconsistency.<sup>412</sup> For most Participants, the Swiss delegation allayed fears of a WTO challenge by pointing out that all the major diamond producing and trading countries, as well as all five Permanent Members of the Security Council, were KP Participants.<sup>413</sup>

The overly cautious position of the United States can be attributed, in part, to the general conception that WTO rules do not allow nations to discriminate between goods on a non-product related basis.<sup>414</sup> Commentators often strictly interpret

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406. *Id.*

407. *Id.*

408. Telephone Interview with Deborah DeYoung, *supra* note 373. The United States has generally supported efforts to curb the conflict diamond trade. *Id.* The United States backed UNSC sanctions targeting conflict diamonds and was a sponsor of the U.N. General Assembly Resolution 55/56, which endorsed the establishment of a global certification scheme. *Id.*

409. PARTNERSHIP AFRICA CANADA, *supra* note 274; *see also* TAMM, *supra* note 31, at 31.

410. OTHER FACETS NO. 5, *supra* note 259, at 2.

411. *Id.*; *see also* PARTNERSHIP AFRICA CANADA, *supra* note 274.

412. PARTNERSHIP AFRICA CANADA, *supra* note 274.

413. *Id.*

414. *See* Steve Charnovitz, *The Law of Environmental "PPMS" In The WTO: De-*

WTO obligations as disallowing trade restrictions directed at the Processes and Production Methods (PPMs) of a product.<sup>415</sup> This general rule is intended to prevent countries from exerting their values and non-product related standards upon other countries.<sup>416</sup> PPMs are often viewed as an imperialistic tool of rich countries used to coerce poor countries into complying with certain values, such as greater environmental protection or higher labor standards.<sup>417</sup>

Unlike other PPM measures, the KP is not a unilateral, self-protectionist measure. It was initiated by developing countries that have sought the cooperation of the international community.<sup>418</sup> With respect to the WTO, developing countries most often express concern that the developed countries will impose trade barriers, such as environmental or labor restraints, that will make it difficult, if not impossible, for the developing countries to meet.<sup>419</sup> The KP turns the tables somewhat. Although the developing diamond-producing countries are supporting the KP largely out of fear that failure to do so would negatively affect the legitimate diamond trade, they are nonetheless supporting the process.<sup>420</sup> Because these nations have much to gain by way of increased security, bolstered governmental control, stability, and increased tax revenues, they have asked the international community for cooperation.<sup>421</sup> Developed countries, such as the United States and Japan, which are not diamond producers, are largely importers of polished, rather than rough diamonds.<sup>422</sup> Nonetheless, they have expressed the most apprehen-

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*bunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 77 (2002) (citing European Commission, Towards Sustainable Trade, Trade Policy Dialogue with Civil Society, Ad-Hoc Meeting on PPMs, 31 May 2001).

415. *Id.* at 76 (arguing that trade restrictions based on processes and production methods can be an appropriate instrument of environmental policy). The term "processes and production methods" initially referred to product standards that focused on production methods as opposed to product characteristics, originating in the 1979 GATT agreement on Technical Barriers to Trade. *Id.* at 64 (citing Agreement on Technical Barriers to Trade, Apr. 15, 1994, Final Act, *supra* note 29, at Annex 1A, art. 2.12 [hereinafter TBT Agreement]).

416. *Id.* at 60.

417. *Id.* at 62-63.

418. See *supra* notes 262-63 and accompanying text.

419. See Steve Charnovitz, *supra* note 414, at 62-63.

420. See e.g., *Diamond Diplomacy*, *supra* note 251.

421. See 148 CONG. REC. E908 (daily ed. May 24, 2002) (statement of Rep. Tony Hall) (discussing the DRC, however, these statements are equally applicable to other African nations struggling with conflict diamonds); see also Proposal for a Council Regulation, *supra* note 20, para. 4, at 2.

422. After the discovery of diamond-bearing kimberlites in Canada's west-

sion about WTO compliance.<sup>423</sup> The KP targets the procedures for diamond mining, exporting, and importing.<sup>424</sup> In order to trade in rough diamonds, the KP requires that certificates accompany diamond shipments according to the proscribed process and procedure<sup>425</sup> and it urges Participants to ensure, among other things, that diamond mines are certified and that prospecting and mining companies maintain effective security standards.<sup>426</sup> The most notable WTO precedent regarding the legality of PPM measures is the WTO Appellate Body's 1998 decision regarding U.S. import prohibitions on shrimp and shrimp products, that were trawled by commercial vessels without the use of a sea turtle excluder device, which were comparable to U.S. standards (the Shrimp-Turtle case).<sup>427</sup> The Appellate Body concluded that the U.S. import prohibitions violated GATT Article XI as a quantitative trade restriction.<sup>428</sup> Arguably, a nation's KP-consistent legislation could be considered akin to the U.S. law, Section 609 of Public Law 101-102, that led to the Shrimp-Turtle decision, and therefore subject to a WTO challenge.<sup>429</sup>

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central Northwest Territories in 1991, Canada has produced as much as fifteen percent of the world's annual output. Ian Smillie, *Fire in the Ice: Benefits, Protection and Regulation in the Canadian Diamond Industry*, at 2 (Partnership Africa Canada, The Diamonds and Human Security Project, Occasional Paper No. 2), available at <http://www.partnershipafricacanada.org>. It is estimated that Canada's newly discovered mines will produce \$500 million dollars annually over the next eighteen years. *Id.*

423. See *supra* note 24 and accompanying text.

424. Smillie, *supra* note 422, at 68.

425. KP Working Doc. 1/2002, *supra* note 5, § IV.

426. *Id.*, paras. 9-10, at Annex II.

427. See WTO Appellate Body Report on U.S. Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, (Oct. 12, 1998), available at <http://www.wto.org> [hereinafter Appellate Body Shrimp-Turtle Report].

428. *Id.* para. 187.

429. Act of Nov. 21, 1989, Pub.L. No. 101-162, Title VI, § 609, 103 Stat. 1037 (codified as 16 U.S.C. § 1537 (2002)), provided in part that:

(b)(1) In general.—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) Certification procedure.—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

This uncertainty regarding the implications of the Shrimp-Turtle case specifically caused some U.S. reluctance in Ottawa.<sup>430</sup>

Corroborating U.S. reticence, the GAO's February 2002 report determined that the KP could violate article XI of GATT, but suggested that the general exceptions under Article XX and the Article XXI security exception might provide allowances for "KP-type" schemes.<sup>431</sup> Before determining whether a trade measure fits within a WTO/GATT exception, however, it is necessary to determine whether the measure is inconsistent with WTO obligations.

#### A. GATT ARTICLE XI

GATT's Article XI prohibits countries from imposing quantitative restrictions or similar measures on the importation of products from other countries.<sup>432</sup> Article XI (1) of GATT provides that,

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any member on the importation of any product of the territory of any other member or on the exportation or sale for export of any product destined for the territory of any other member.<sup>433</sup>

A fundamental principle treaty interpretation is that agreements "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."<sup>434</sup> Article XI applies to prohibitions or restrictions instituted or main-

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

430. Telephone Interview with Deborah DeYoung, *supra* note 373.

431. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 12 n.13.

432. *Id.*

433. GATT 1947 referred to "contracting parties." This was amended in 1994: "The references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "member." GATT, *supra* note 29, at art. XI(1) (emphasis added).

434. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 31(1), 1155 U.N.T.S. 331.

tained by *any member*.<sup>435</sup> The ordinary meaning of the term “any,” means “one indifferently out of any number, indicating a person, thing, event, etc., as not a particular or determinate individual of the given category but whichever one chance may select; this, that or the other; one or another.”<sup>436</sup> Therefore, the applicability of the Article XI is arguably limited to the actions of one or another Member, not to a multilateral initiative endorsed by the U.N. The use of the phrase “any member” in Article XI and throughout the WTO Agreements indicates that the WTO Agreements contemplate that trade measures that violate GATT occur when a certain Member acts unilaterally, or even plurilaterally, but not multilaterally.<sup>437</sup>

#### B. DOES THE KP MEET THE TWO-TIERED ANALYSIS REQUIRED UNDER ARTICLE XX?

Even if the KP were determined to be inconsistent with GATT Article XI, or another provision, the implementing legislation of Participants would qualify as a general exception under Article XX (b) of the GATT. Article XX (b) provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . (b) **necessary to protect human, animal or plant life or health** . . .<sup>438</sup>

The Shrimp-Turtle Appellate Body reiterated the two-tiered method for applying Article XX. First, the measure must be provisionally justified under the applicable Article XX exception—in this case, Article XX (b).<sup>439</sup> Second, the measure must be appraised under the Article XX “chapeau,” or introductory clause.<sup>440</sup> Supporting the applicability of this analysis, the KP Working Group issued a report in advance of the Ottawa plenary meeting concluding that rough diamond trade restrictions would not contravene WTO requirements if a credible reason

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435. GATT, *supra* note 29, at art. XXI.

436. WEBSTER'S NEW INTERNATIONAL DICTIONARY 121 (2d ed. 1939).

437. *See supra* notes 434-34 and accompanying text.

438. GATT, *supra* note 29, at art. XX (b) (emphasis added).

439. Appellate Body Shrimp-Turtle Report, *supra* note 427, para. 113.

440. *Id.* para. 118 (citing Report of the Appellate Body Concerning United States Standards for Reformulated and Conventional Gasoline, Apr. 29, 1996, WT/DS2/AB/R, at 22, available at <http://www.wto.org>).

and motivation existed that required them.<sup>441</sup>

In ascertaining whether the KP is necessary to protect human health under Article XX (b), one only needs to look at the U.N.'s level of effort with respect to its peace-keeping in Africa. The U.N. has expended tremendous effort to bring peace to Africa.<sup>442</sup> In light of these efforts, the U.N.'s endorsement of the KP is de facto testimony to the initiative's necessity. The KP has evolved from the tremendous involvement of the international community, including the five Permanent Members of the UNSC and the diamond-producing countries.<sup>443</sup> Therefore, it is highly unlikely that any WTO Dispute Resolution Body would second-guess the better judgment of these collective sovereign nations as to the necessity of the KP's universality requirement.

The KP, even if justified under Article XX (b) as necessary to protect human health, must still be consistent with the introductory clause of Article XX.<sup>444</sup> This chapeau is an expression of the international principle of good faith.<sup>445</sup> It is a fundamental principle of international law that countries shall "refrain from acts which would defeat the object and purpose of a treaty."<sup>446</sup> The Article XX chapeau recognizes the balance of rights and obligations between Members' rights to invoke Article XX exceptions on one hand and the substantive rights of the other Members on the other.<sup>447</sup> "[T]hat is to say that the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau."<sup>448</sup> While Members may enact certain measures, such as those designed to protect human health, the measures must be consistent with the object and purpose of the multilateral trading system.<sup>449</sup> Those measures may not constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor [be] a disguised restriction on international trade."<sup>450</sup>

The Shrimp-Turtle Appellate Body considered whether the

441. PARTNERSHIP AFRICA CANADA, *supra* note 259, at 2.

442. See generally *supra* notes 35-37, 152-59 and accompanying text (highlighting some of the U.N.'s peacekeeping efforts).

443. See *supra* note 5 and accompanying text.

444. See Appellate Body Shrimp-Turtle Report, *supra* note 427, para. 118.

445. *Id.* para. 158.

446. Vienna Convention on the Law of Treaties, *supra* note 434, art. 18.

447. Appellate Body Shrimp-Turtle Report, *supra* note 427, para. 118.

448. *Id.* para. 157.

449. GATT, *supra* note 29, at art. XX.

450. *Id.*

U.S. law under scrutiny in that case was unjustifiably discriminatory.<sup>451</sup> The Appellate Body determined that U.S. law was conspicuously flawed because of its coercive effects as essentially an economic embargo: WTO Members had to comply with the U.S. standard for shrimp trawling in order to obtain their WTO trading rights.<sup>452</sup> In making this determination, the Appellate Body concluded that the multilateral trading system could not tolerate economic embargoes employed by “one WTO Member” that require others to adhere to the same regulatory program to achieve the policy goals in force within that Member’s territory, without consideration of the different conditions occurring within the territories of those other Members.<sup>453</sup>

The KP could be considered an embargo of sorts against non-Participants because it does propose to treat Participants differently from non-Participants, which would have implications for some WTO Members.<sup>454</sup> This argument is negated, however, by the fact that the KP agreement is open for the signature of all countries.<sup>455</sup> Moreover, the KP trade measures to be implemented by Participants are intended to apply equally to all diamond trading countries “where the same conditions prevail,” as required by GATT Article XX(b).<sup>456</sup> The conditions within the territories of non-Participants will not be the same as within the territories of Participants. Conflict diamonds will be more easily imported into non-participating countries because there will be no certification requirement for their diamond imports. This is a sufficient difference of condition to justify treating the diamonds from Participants differently from the diamonds of non-Participants.

It is possible, however, that a non-Participant could enact KP-like minimum standards but fail to become a signatory to the KP agreement. The Shrimp-Turtle Appellate Body analysed the application of U.S. law in this regard and concluded that shrimp trawled with methods that were fully compliant with the U.S. standard would be excluded from the U.S. market solely because the shrimp have been caught in waters not certified by the United States.<sup>457</sup> The Appellate Body stated that this possible

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451. Appellate Body Shrimp-Turtle Report, *supra* note 427, para. 160.

452. *Id.* para. 161.

453. *Id.* para. 164.

454. *See id.* para. 161.

455. KP Working Document 1/2002, *supra* note 5, § VI(8).

456. GATT, *supra* note 29, at art. XX (b).

457. Appellate Body Shrimp-Turtle Report, *supra* note 427, para. 165.

application of U.S. law was “difficult to reconcile with the declared policy objective of protecting and conserving sea turtles.”<sup>458</sup> The Appellate Body suggested that the U.S. prohibition was more concerned with influencing WTO Members to adopt essentially the same regulatory regime as that applied domestically to U.S. shrimp trawlers, even though many WTO Members may have been differently situated.<sup>459</sup> The Appellate Body articulated its belief that discrimination results when countries in which the same conditions prevail are treated differently, as well as when measures are applied without “any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those countries.”<sup>460</sup>

The Appellate Body did not end its inquiry of the discriminatory application of Section 609 with its analysis of whether the law allowed for a determination of the prevailing conditions in other countries.<sup>461</sup> The Appellate Body emphasized that another aspect bore heavily upon “any determination of justifiable or unjustifiable discrimination.”<sup>462</sup> The Appellate Body considered the failure of the United States to engage the complaining Members and other shrimp-exporting Members in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles before enforcing the import prohibition against the shrimp exports of those Members.”<sup>463</sup> The Shrimp-Turtle Panel Report and the Appellate Body Report noted that the United States did negotiate the Inter-American Convention for the Protection and Conservation of Sea Turtles (the Inter-American Convention), a regional international agreement, which was concluded in 1996 between the United States, Brazil, Costa Rica, Mexico, Nicaragua, and Venezuela.<sup>464</sup> In finding Section 609 discriminatory in its application, the Appellate Body considered that the Inter-American Convention was negotiated *after* the United States began to enforce Section 609 on a worldwide basis and that similar agreements were not sought

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458. *Id.*

459. *Id.*

460. *Id.*

461. *See id.* para. 166.

462. *Id.*

463. *See* Appellate Body Shrimp-Turtle Report, *supra* note 427, para. 166.

464. *See Id.*, para. 169; Panel Report on United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, para. 7.56 (May 15, 1998) [hereinafter Panel Shrimp-Turtle Report].

with other shrimp-exporting countries.<sup>465</sup> “The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.”<sup>466</sup> The Appellate Body suggests that the Inter-American Convention provided convincing evidence that “an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than unilateral and non-consensual procedures in the import prohibition under Section 609.”<sup>467</sup>

The Shrimp-Turtle Appellate Body determined that the failure of the United States to negotiate a consensual international cooperative agreement on shrimp-trawling methods constituted unjustifiable discrimination.<sup>468</sup> The Appellate Body noted that WTO Members have sanctioned international consensus agreements as the most effective multilateral solution for global problems.<sup>469</sup> This strongly evidences that international consensus agreements, especially those open for signature by all countries, are presumptively not discriminatory. The KP is open to all countries on a non-discriminatory basis without any prerequisite entry requirements to further ensure its consistency with WTO obligations.<sup>470</sup> Furthermore, unlike the unilateral action of the United States with respect to protecting sea turtles under Section 609, the KP developed through full and open international discourse.<sup>471</sup> Regardless of whether the KP

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465. Appellate Body Shrimp-Turtle Report, *supra* note 427, paras. 166, 168. The Appellate Body considered the latter particularly important given the migrating nature of sea turtles, stressing that the “very policy objective of the measure, demand[ed] concerted and cooperative efforts on the part of many countries whose waters are traversed in the course of recurrent sea turtle migrations.” *Id.* para. 168.

466. *Id.* para. 172.

467. *Id.* para. 171.

468. *See id.* para. 149.

469. *Id.* para. 168 (citing Report of the Committee on Trade and Environment, WT/CTE/1, para. 171, (Nov. 12, 1996), which was incorporated as Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN/2, 26 November 1996). Although the KP pertains to a human health concern, it is closely analogous to an environmental protection measure in that the analysis with respect to WTO obligations is the same under GATT Article XX (b) for both human health measures and environmental protection measures. *Id.* Additionally, measures directed at protecting environmental and human health would likely share certain commonalities due to the altruistic nature or effect of such measures. *Id.*

470. *Essential Elements of an International Scheme for Certification for Rough Diamonds*, Kimberley Process Working Document 10/2001 § VI(10) [hereinafter KP Working Doc. 10/2001]; *see also* KP Working Doc. 1/2002, *supra* note 5, § VI (8).

471. *See supra* notes 5, 266 and accompanying text.

will be perfected immediately upon implementation, devoid of any safe havens for conflict diamond traders, the initiative is the result of the concerted effort of a substantial number of sovereign nations.<sup>472</sup> WTO Members have notably agreed that the WTO agreements and other multilateral agreements are “representative of efforts of the international community to pursue shared goals and, in the development of a mutually supportive relationship between them, due respect must be afforded to both.”<sup>473</sup> The Shrimp-Turtle Panel observed that, “[t]he negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system.”<sup>474</sup>

The multilateral nature of the KP removes the initiative, or the implementing legislation of Participants, from challenges of arbitrary or discriminatory restrictions on trade, because the KP is open for the signature of all countries.<sup>475</sup> An arbitrary restriction is one that is decisive, but unreasoned, without consideration of principles, circumstances, or significance.<sup>476</sup> The KP is unlikely to constitute an arbitrary restriction because the scheme has been carefully reasoned, debated, and negotiated over a period of two years.<sup>477</sup> During this time, tremendous consideration has been given to the circumstances necessitating the blocking measure and the consequences of failing to implement the measure.<sup>478</sup> Moreover, the WTO Agreement on Technical Barriers to Trade (TBT Agreement) provides that technical regulations “shall be rebuttably presumed not to create an unnecessary obstacle to international trade” when the regulations are adopted for legitimate purposes that further the objectives of GATT and are in accordance with applicable international stan-

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472. See *supra* notes 5, 266 and accompanying text.

473. Appellate Body Shrimp-Turtle Report, *supra* note 427, para. 168 (citing Report of the Committee on Trade and Environment, WT/CTE/1, para. 171 (Nov. 12, 1996)), which was incorporated as Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN/2 (Nov. 26, 1996).

474. Panel Shrimp-Turtle Report, *supra* note 464, para. 7.55.

475. Whereas the WTO Appellate Body noted that few countries were provided the opportunity to negotiate international agreements with the United States regarding the protection of sea turtles and concomitant shrimp-trawling procedures, see *supra* note 465 and accompanying text, participation in the KP is “open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of [the] scheme.” KP Working Doc. 10/2001, *supra* note 470, § VI (8).

476. WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 436, at 138.

477. See *supra* notes 5-10 and accompanying text.

478. See *supra* notes 5, 266 and accompanying text.

dards.<sup>479</sup> Where such technical regulations are required, Members shall apply the relevant international standard if one exists or if its establishment is imminent.<sup>480</sup> At least thirty-five countries and the U.N. have agreed that the KP is required.<sup>481</sup> While progress has been slow, the KP is on the verge of becoming an international standard—its completion is imminent.<sup>482</sup> The KP is not, therefore, contrary to WTO obligations, but is wholly consistent with the WTO model for resolving trans-boundary disputes as set forth in the Shrimp-Turtle case.<sup>483</sup>

### C. DOES THE KP QUALIFY AS A SECURITY EXCEPTION UNDER GATT, ARTICLE XXI

The implementing legislation of KP Participants may constitute technical regulations within the meaning of GATT Article XI. However, such regulations are necessary for international security and do not conflict with GATT/WTO objectives. GATT Article XXI provides WTO Members with a safeguard exception for matters of national security.<sup>484</sup> This exception allows

479. TBT Agreement, *supra* note 415. The TBT Agreement promotes harmonization of international standards. *Id.*

480. *Id.* para. 2.4. The TBT Agreement stipulates that applicable international standards should be followed, unless it would be an ineffective or inappropriate, “for instance because of fundamental climatic or geographical factors or fundamental technological problems.” *Id.*

481. See *supra* note 6 and accompanying text.

482. See KP Working Doc. 1/2002, *supra* note 5, § VI (22) (“[I]t is the intention of the Participants to start the full implementation [of the KP] simultaneously by the end of 2002.”).

483. See *supra* notes 466-65 and accompanying text.

484. GATT, *supra* note 29, Article XXI provides:

Nothing in this Agreement shall be construed

(a) to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of

WTO Members to escape their obligations under the GATT in order to take actions to protect their “essential security interests” and to act pursuant to their obligations under the U.N. Charter “for the maintenance of international peace and security.”<sup>485</sup> Article XXI embodies the concept of sovereignty and respects the right of all nations to protect themselves from external threats.<sup>486</sup> For this reason, Article XXI is written broadly and allows nations greater latitude than the general exceptions under Article XX.<sup>487</sup> The legislative history of GATT reveals that the drafters intentionally separated the security exceptions from Article XX general exceptions, which rendered the qualifying language and two-tiered analysis of Article XX’s chapeau inapplicable to the security exceptions.<sup>488</sup>

Although Article XXI has formally been invoked on only rare occasions, nations have great latitude under this exception and many commentators fear abuse of the provision.<sup>489</sup> Without identifiable standards, the security exception is vulnerable to broad construction that renders it susceptible to abuse.<sup>490</sup> An overly broad interpretation could lead to an unacceptable imbalance between national sovereignty and the multilateral system of global economic governance.<sup>491</sup> Such concerns, however, are not applicable with respect to the KP. The multilateral nature of the KP renders it devoid of unilateral power-based bullying. It fits squarely within the good-faith meaning of Article XXI.<sup>492</sup> The WTO is committed to reducing barriers to legitimate

international peace and security.

485. GATT, *supra* note 29, at art. XXI(c).

486. Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT’L L. 413, 421 (2001) (citing Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 MICH. J. INT’L L. 558, 560 (1991)).

487. *Id.* (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 133 (June 27)).

488. *Id.* at 422 (citing JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 537-38 (1969)); *see also* Hahn, *supra* note 486, at 566-67.

489. Cann, *supra* note 486, at 424.

490. *Id.* at 414.

491. *Id.*

492. Kimberley Process, *Kimberley Process II, Ministerial Statement, Conclusions of the Ministerial Meeting Gaborone* (Nov. 29, 2001), at <http://www.kimberleyprocess.com> (noting the devastating impact on regional stability caused by conflicts fueled by the trade of conflict diamonds and the “obligations placed upon states by the United Nations Charter regarding the maintenance of international peace and security”).

trade and opening markets.<sup>493</sup> The KP is designed to foster lasting peace in Africa, which will facilitate the legitimate trade in diamonds and open African markets.<sup>494</sup>

Prosperity and legitimate trade cannot thrive amidst political unrest and economic instability. Multinational corporations “seek stable markets and prosperous trading partners, both of which are likely in countries at peace.”<sup>495</sup> U.N. peacekeeping is a critical agent that has subdued the violence and transitioned these countries from civil unrest to functioning states.<sup>496</sup> Many countries developed stable economies and growing markets in areas once patrolled by U.N. peacekeepers.<sup>497</sup>

Laws passed by Participants to implement the KP will be insulated from WTO challenge as actions taken pursuant to the U.N. Charter. The U.N. called for Members to develop acceptable minimum standards for rough diamond certification, pursuant to Chapter VII of the U.N. Charter, to address international peace and security threats caused by the illicit diamond trade.<sup>498</sup> The international community agrees that U.N. sanctions left loopholes allowing the conflict diamond trade to continue relatively unfettered. However, closing those loopholes means that non-participating WTO Members would be excluded from the diamond trade.<sup>499</sup>

The U.N. resolution on the conflict diamonds specifically recognizes that the certification scheme would enhance the implementation of relevant Security Council resolutions containing sanctions on the trade in conflict diamonds.<sup>500</sup> Although the KP is more complex than targeted sanctions, it is equally consistent with the purpose of the U.N.<sup>501</sup> It is designed to foster peace and

493. See generally Final Act, *supra* note 29, Preamble.

494. U.N. Doc. A/56/502, *supra* note 8.

495. SANDRINE TESNER, THE UNITED NATIONS AND BUSINESS: A PARTNERSHIP RECOVERED 58-59 (2000) (quoting Richard McCormick, former CEO of U.S. West and President of the International Chamber of Commerce).

496. *Id.*

497. *Id.*

498. G.A. Res. 55/56, U.N. GAOR, 55th Sess., para. 2, U.N. Doc. A/RES/55/56 (2001).

499. See *supra* note 27 for a list of WTO Members that are diamond traders or producers which have not yet agreed to participate in the KP.

500. Press Release, U.N. Gen. Assembly, General Assembly Urges Finalization of International Certification Scheme for Rough diamonds: Success of ‘Kimberley Process’ a Matter of Life and Death For Southern Africa, Says Botswana as Assembly Adopts Text on Conflict Diamonds, U.N. Doc. GA 10011 (Mar. 13, 2002), at <http://www.un.org/News/Press/docs/2002/GA10011.doc.htm>.

501. The U.N. Charter sets forth four purposes of the U.N.: (1) to maintain international peace and security; (2) to develop friendly relations among nations; (3) to

security, to promote economic and social progress, and to support development through multilateral cooperation.<sup>502</sup> Moreover, the U.N. is advantaged in negotiating collective values within the framework of multilateralism.<sup>503</sup> The U.N. is built on the principle of equality for all nations; this principle ideally situates the U.N. to negotiate universally applicable principles for all states.<sup>504</sup> The U.N. established norms to “promote values central to global commerce.”<sup>505</sup> With a key role to maintain international peace and security, the U.N. provides an alternative venue for the enforcement of such values as human rights and environmental responsibility.<sup>506</sup> The U.N.’s resolutions alone, endorsing and encouraging Members to abide by KP minimum standards, provide an adequate legal underpinning for Members to justify their implementing legislation.

## V. POTENTIAL FOR KP EFFECTIVENESS: IS ALL OR NOTHING POLITICS NECESSARY?

### A. THE KP AS AN INTERNATIONAL SECURITY MEASURE

Diamonds have been more of a curse than a blessing for Angola, Sierra Leone, the DRC, and their neighbors.<sup>507</sup> “Unlike copper, cobalt, and oil that must be mined on an industrial scale, requiring substantial investment and stability at the site, alluvial diamonds can be mined in war zones with little or no technology.”<sup>508</sup> The ease with which diamonds can be mined enabled a shadow economy to develop within the context of economic collapse, corrupt government, and military strife.<sup>509</sup> Finding a solution that will effectively end the conflict diamond trade is as correspondingly difficult as resolving the very economic collapse, corruption, and strife that enabled this brutal trade to

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cooperate in solving international problems and in promoting respect for human rights, and (4) to be a center for harmonizing the actions of nations. U.N. CHARTER art. 1, paras. 1-4. The Kimberly Process is consistent with the purpose of the U.N. The process is designed to foster peace and security and as a multilateral effort.

502. Press Release, *General Assembly Urges Finalization*, *supra* note 500.

503. TESNER, *supra* note 495, at 56.

504. *Id.*

505. *Id.* at 55.

506. *Id.* at 53.

507. Dietrich, *supra* note 22, at 2.

508. *Id.*

509. *Id.*

burgeon.

The security efforts within diamond-producing countries will be crucial to the success of the KP. Keeping diamond areas out of the hands of rebels will be a significant step toward economic growth in these countries.<sup>510</sup> An adequate and stable economy will lead to less corruption in government and greater political stability.<sup>511</sup> If the legitimate governments of the countries can establish and maintain adequate control of the mines, they will reap the full benefit of the natural wealth within their territories through tax revenues. Most importantly, these revenues will foster the development of infrastructures needed to support a stable economy and the human services necessary to support the populace.<sup>512</sup> Security controls at the diamond mines will also increase security and stability in the region thereby fostering an increase in external finance investment within these countries.<sup>513</sup>

Without adequate security measures at the mines, illicit rough diamonds will continue to find a market. Once polished, conflict diamonds will continue to enter legitimate commerce undetected.<sup>514</sup> Some have suggested that enabling bad governments to obtain greater power over the diamond trade will simply deprive innocent artisanal miners of their only means of making a living for their families.<sup>515</sup> "The alternative, however—a free for all in which illicit diamonds flow with impunity across borders, evading tax and funding violence—is not a viable option."<sup>516</sup>

The burden of bringing about a successful global certification scheme cannot be placed on the producing countries alone.<sup>517</sup> As these countries struggle with severe humanitarian crises and fledgling peace processes,<sup>518</sup> the international community must maintain its commitment to the scheme by providing significant aid and technical assistance.<sup>519</sup> Skeptics of the KP argue that the measure's success hinges on the integrity and commitment of the major diamond trading centers, such as Bel-

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510. See *supra* part I.D.

511. See *supra* notes 40-47 and accompanying text.

512. See *supra* note 166 and accompanying text.

513. See *supra* notes 181-82, 186 and accompanying text.

514. See COOK, *supra* note 200, at 12.

515. Dietrich, *supra* note 22, at 13.

516. *Id.*

517. See *supra* notes 158, 185, 190-91 and accompanying text.

518. See *supra* notes 76-79, 120-24 and accompanying text.

519. See *supra* notes 74-77, 120-23, 143, 145-47, 151-59 and accompanying text.

gium and Israel, which may place the KP in a precarious position.<sup>520</sup> The system will be largely reliant on the authorities in these countries to scrutinize carefully all imported diamonds to ensure that illegal gems are not slipped into the stream of commerce.<sup>521</sup> Given that eighty percent of the world's diamond are bought and sold in Antwerp, questions arise about the effectiveness of current Belgian diamond regulations.<sup>522</sup> Critics claim that Belgian regulations are not consistently enforced and customs agents screen flights from Africa with a "casual eye."<sup>523</sup> Insiders have observed that Antwerp importers can simply claim that a newly arrived shipment is from a given country, even when no flights or other shipments have arrived from that country.<sup>524</sup> Although EU members agree that the KP will be implemented uniformly among them, each nation will be responsible for administering the regulations and punishments for violations.<sup>525</sup> The necessity of integrity and commitment to the comprehensive implementation of the scheme is equally applicable to all Participants.

The most accurate indices of the integrity of the certification scheme will be the statistics measuring the annual diamond production, the importing figures, and exporting figures of each Participant.<sup>526</sup> The illegitimate diamond trade is evident in Guinea's official export statistics.<sup>527</sup> Between 1995 and 1999, Guinea officially exported to Belgium 1.45 million carats, valued

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520. McGreal, *supra* note 253.

521. *Id.*

522. Elizabeth Bryant, *Antwerp and Dirty Diamond Rumors*, UNITED PRESS INT'L, Mar. 7, 2002.

523. *Id.*

524. *Id.* (quoting Christian Deitrich, an African diamond analyst at Antwerp's International Peace Information Service).

525. Proposal for a Council Regulation, *supra* note 20, at art. 26. On August 8, 2002, the European Commission, adopted a proposal for a new EU regulation that would exceed KP requirements. *Id.* The proposed regulation states that "for purposes of the certification scheme, the Community will be considered as one entity with no internal borders." *Id.*; see also Associated Press Newswires, *EU Head Office Proposes Europe-wide Plan To Stop Flow of Conflict Diamonds Into Europe*, Aug. 8, 2002. Existing EU regulations do not require re-export certifications for diamonds transported between EU members. TAMM, *supra* note 31, at 28.

526. See KP Working Document 10/2001, *supra* note 470, Annex III (stating that "[R]eliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of the certification scheme, and particularly for identifying any irregularities or anomalies which could indicate that conflict diamonds are entering the legitimate trade.").

527. Lansana Gberie, *Destabilizing Guinea: Diamonds, Charles Taylor and the Potential for Wider Catastrophe*, PARTNERSHIP AFRICA CANADA (2001), at 8, available at <http://www.partnershipafricacanada.org>.

at \$133.5 million, although Belgium officially imported 2.9 million carats valued at \$461.3 million.<sup>528</sup> If diamond producing and trading countries maintain adequate information about their diamonds' characteristics and the quantity produced, these statistics should provide a certain degree of transparency as to the effectiveness of national legislation and the KP overall.<sup>529</sup>

The KP transshipment policy, which will allow the transshipment of rough diamonds without inspection or verification of data with exporting authorities, is perhaps even more threatening to the success of the measure.<sup>530</sup> This may lead to questionable procedures and encourage countries to turn a blind eye to illicit shipments traversing their borders. The international community should not assume that rebels and terrorists would not have access to those shipments during transport.<sup>531</sup> Such access might enable conflict diamond traders to conduct their illegal transactions within the territory of a KP Participant without detection at the borders.

For example, if shipments of conflict diamonds exported from an African country to the United States by way of Canada are not examined by the Canadian government upon entry into Canada, the shipment could be sold while transiting the country. The proceeds of the conflict diamonds could be laundered and the diamonds could be re-exported as Canadian diamonds and safely imported into the United States. The certification scheme would be nullified. With respect to the EU, this transshipment loophole poses an even greater threat to KP effectiveness. With the bulk of the world's rough diamonds initially imported into Belgium, a stringent chain-of-custody warranty for shipments transiting EU countries is essential.<sup>532</sup> Moreover, the KP's transshipment policy could pose a great dilemma for countries choosing to stringently inspect diamond shipments entering their borders, regardless of whether the shipment is only transiting the country. Such a full-bore policy could lead to political and trade strife or a WTO challenge, if an exporting country felt targeted by the policy.<sup>533</sup> This strengthens the argument that a strong and unified policy should be implemented globally.

The KP is intended to operate as a system of national

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528. *Id.*

529. *See supra* notes 200-23, 317-19, 324 and accompanying text.

530. *See supra* notes 310-11 and accompanying text.

531. *See supra* notes 211-19 and accompanying text.

532. *See supra* note 233 and accompanying text.

533. *See supra* Part IV.

laws.<sup>534</sup> The KP can work only to the extent that each country vigorously enforces the ban on the conflict diamond trade at its own borders.<sup>535</sup> If loopholes are not carefully scrutinized and rectified, the certification scheme could provide a false sense of security for both the governments and citizens (i.e. consumers) of Participants, while giving those with vested interests in the diamond industry an adequate public relations scheme.<sup>536</sup>

#### B. THE KP AS AN "INTERNATIONAL CONSENSUS AGREEMENT"

The KP is not a treaty, but a political agreement.<sup>537</sup> As such, it provides only a framework regarding what Participants "should" do to implement a national scheme with "recommendations" for enhanced controls.<sup>538</sup> This, in many ways, is the fundamental flaw of the agreement. Without the binding force of international law, the failings of Participants are not *legally* enforceable.<sup>539</sup> The GAO recommended in June 2002 that the U.S. Department of State work with Participants to revise the certification scheme by including "a reasonable control environment, risk assessment, internal controls, information sharing and monitoring."<sup>540</sup> Without a legally binding treaty, complete with a monitoring and enforcement mechanism, the KP may be no more binding than a nod and a handshake. While the GAO's assessment of the scheme's flaws are astute, developing an agreement with over thirty-five sovereign nations is no easy feat.<sup>541</sup>

In comments regarding the GAO's report, the State Department noted that the GAO had not sufficiently considered the political commitments the Participants achieved through the KP.<sup>542</sup> The statement alternatively argued that it was "more appropriate to focus on the Kimberley Process scheme as a dynamic effort to reconcile competing priorities rather than assess the scheme against a set of accountability measures."<sup>543</sup> Although the State Department concurred with the GAO as to the inadequacies of the scheme's accountability measures, it did not

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534. See *supra* note 285 and accompanying text.

535. See *supra* notes 288-91 and accompanying text.

536. See *supra* notes 249-59, 269-73 and accompanying text.

537. See *supra* note 283 and accompanying text.

538. See *supra* notes 286-87 and accompanying text.

539. See *supra* note 14 and accompanying text.

540. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 22.

541. See *supra* Part II.C.

542. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 23.

543. *Id.*

believe that such "additional controls could be realistically negotiated prior to the scheme's launch."<sup>544</sup>

Weaknesses in the Working Document are evident. As the Swiss delegation emphasized, an initial global understanding for the control of rough diamonds is essential.<sup>545</sup> Closing loopholes and resolving other difficulties can be corrected in time as they are revealed. Certainly, international agreements are not without flaws.<sup>546</sup> The Working Document provides for annual reviews and a comprehensive review mechanism.<sup>547</sup> These reviews should present an adequate opportunity for KP Participants to air grievances and correct deficiencies. The horrors of conflict diamonds are more inclined to be minimized through the speedy use of the certification scheme, especially given the annual reviews that will facilitate the continual improvement of the scheme and address weaknesses as they may appear.<sup>548</sup>

Unlike Nineteenth Century treaties, which were judged based on a snapshot in time, the KP and other modern treaties

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544. *Id.* The Department of the Treasury also disagreed with the GAO recommendation, but for different reasons. *Id.* at 24. "Treasury believes that such steps [if taken by the State Department] would be unlikely to increase enforcement and would substantially increase costs and divert enforcement resources." *Id.* The GAO noted, however, that Treasury did not provide an explanation as to why strengthened controls would fail to increase effectiveness or how such improvements in accountability would increase and divert enforcement resources. *Id.* at 24.

545. See OTHER FACETS No. 2, *supra* note 257, at 2.

546. For example, the UNESCO Convention 1970, 823 U.N.T.S. 231, 10 I.L.M. 289, which seeks to protect artworks during peacetime by curbing the illicit trade of cultural property, has been "widely viewed as weak, cumbersome and an unenforceable jumble of rhetoric." Michael J. Kelly, *Conflicting Trends In The Flourishing International Trade of Art and Antiquities: Restitutio In Integrum And Possessio Animo Ferundi/Lucrandi*, 14 DICKINSON J. OF INT'L L. 31, 44 (1995) (citing Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does the Unidroit Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469, 478 (1994)). The Single Convention, opened for signature March 30, 1961, 520 U.N.T.S. 204 (entered into force 13 December 1964) provides strict provisions for international drug trafficking, but states' obligations to enforce drug use provisions are discretionary, providing only that signatories must "take some form of action" to deter the use, reflecting "differing national attitudes." Ian Malkin, *Establishing Supervised Injecting Facilities: A Responsible Way to Help Minimize Harm*, 25 MELBOURNE UNIV. L. REV. 680, 716 n.207 (Dec. 2001). This convention and the 1972 and 1988 Protocols to this convention do not articulate how treatment and rehabilitation should be accomplished, nor do they indicate the measures that should be taken to effectively achieve such objectives. *Id.* at 715-16.

547. KP Working Doc. 10/2001, *supra* note 470, § VI(20).

548. See Proposal for a Council Regulation, *supra* note 20, para. 5, at 2 (stating that "[s]uch a certification scheme will make a major contribution to bringing an end to these [African] conflicts"). EU members have agreed that the KP will be implemented uniformly among them. *Id.*

and political agreements should be viewed as initiating ongoing processes.<sup>549</sup> Arguably, the KP fits within the developing “managerial form of treaty-making,” which is characterized by the implementation of a framework for the future, not just when the treaty is initially concluded.<sup>550</sup> Agreements that establish a framework for the future, such as the KP, are essentially “living” treaties or agreements.<sup>551</sup> “[W]hether or not they resort to harder forms of enforcement such as binding dispute settlement,” they often deepen over time creating a legislative enterprise capable of continuous improvement responsive to the parties’ needs and advancements.<sup>552</sup>

The KP represents a new way to address a problem. It was prompted by NGOs and initiated by African countries, where conflict diamonds are most hindrersome to life and prosperity. Southern African Development Community,<sup>553</sup> together with the unsolicited assistance of various NGOs, managed to build a consensus in the diamond industry,<sup>554</sup> the international community, and among the U.N. members that a global certification scheme for rough diamonds is necessary to protect human life and to maintain international peace and security.<sup>555</sup> Although the KP agreement may be written as a political agreement, without an enforcement mechanism, it still represents a positive initiative that stands to contribute to the urgently needed peace and security of the war-torn countries of Angola, Sierra Leone, and the DRC, as well as their neighbors.<sup>556</sup> Further, the rest of civil society will profit from the interdiction of the conflict diamond trade that has fueled both civil wars and terrorism and possibly from the development of an expanded and diversified market in Africa.<sup>557</sup>

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549. Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT’L & COMP. L. REV. 213, 221-22 (2002).

550. “The twelve protocols of the European system of Human Rights, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the Uruguay Round are all products of managerial regimes and are characteristic of how they function.” *Id.* at 222.

551. *Id.* at 221.

552. *Id.*

553. *See supra* notes 266-68 and accompanying text.

554. *See supra* notes 256-58 and accompanying text.

555. *See supra* notes 264-68 and accompanying text.

556. *See supra* Part I.A-C.

557. *See supra* Part I.D.

## CONCLUSION

The KP certification scheme is a multilateral trade-blocking initiative that is also a U.N.-based trade measure. It evidences the central role that non-trade organizations, especially the U.N., can play in resolving international issues that have a bearing on trade. As the WTO develops and its role is further refined, it may become evident that the WTO is not the proper venue for regulatory enforcement schemes, nor the proper hub for all trade-related harmonization efforts.<sup>558</sup> It would be a mistake to use the WTO as a straightjacket to prevent the international community from taking action to resolve legitimate global issues such as security threats, humanitarian crises, or environmental concerns.

Although the certification system is not a fail-safe guarantee against the trade of conflict diamonds, it is a first step toward preventing the mass looting of African natural resources to finance underworld objectives. Unmonitored transshipment procedures and the scheme's reliance on the effectiveness of the national laws of each Participant may create loopholes that undermine the scheme's overall effectiveness. Nonetheless, the KP serves as an excellent prototype to demonstrate the viability of international consensus agreements as feasible alternatives to address international issues bearing on trade. The requirement of universal implementation does not render the KP inconsistent with the WTO Agreements, as the scheme is open for all to participate. If implemented effectively, international consensus agreements sponsored by organizations other than the WTO may prove an effective solution for minimizing the looting of other primary commodity exports known to finance war and terrorism. As the 107th Congress reaches an end without conflict diamond trade legislation, the ball is beginning to drop for the targeted December 2002 global implementation date for the KP.

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558. Bernard Hoekman, *Strengthening the Global Trade Architecture for Development*, §2.2, at 14, at <http://www.worldbankgroup.org> (last modified Nov. 16, 2001).

