Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme

Tina Muscarella Gooch

Recommended Citation
Available at: https://digitalrepository.unm.edu/nrj/vol48/iss1/8
TINA MUSCARELLA GOOCH*

Conflict Diamonds or Illicit Diamonds: Should the Difference Matter to the Kimberley Process Certification Scheme?

ABSTRACT

The implementation of the Kimberley Process Certification Scheme (KPCS) was designed to keep "conflict diamonds" out of the legitimate international diamond market. This article analyzes both the flaws and successes of the KPCS. It explores the United States' domestic implementation of the international KPCS through the Clean Diamond Trade Act and calls for a change in the scope of the diamonds that the KPCS regulates in order to eradicate the social threats illegal diamonds pose to the international community.

INTRODUCTION

Diamonds have occupied a cultural status all their own since De Beers launched one of the most successful marketing campaigns of the twentieth century. As a result, it is now customary in many countries to give a diamond ring as a symbol of engagement and marriage. In fact, "Americans alone buy half of the diamond jewelry sold worldwide." 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.

* J.D. candidate at the University of New Mexico School of Law graduating in May 2008; B.A. University of San Diego. The author wishes to thank Em Hall, Professor of Law at the University of New Mexico School of Law, for his assistance with this article. The author also wishes to thank her husband, Chris J. Gooch, for his support and for being her best friend.


2. Price, supra note 1, at 31 ("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.").

Diamonds also show up in popular culture. They have been given the slang term "bling" and are glorified as status symbols in music videos, song lyrics, print ads, and on television shows. Until recent years, however, few consumers have stopped to think about where these "priceless" gems come from or the activities their sales fund.  

"Conflict diamonds, also known as 'blood' diamonds, are rough diamonds used by rebel movements or their allies to finance armed conflict aimed at undermining legitimate governments." This is a very narrow definition that does not capture many kinds of illegal diamond trading within its small scope. "Illicit diamonds, in contrast, include conflict diamonds as well as diamonds stolen or smuggled, undeclared for tax evasion, used for money laundering, and other crimes." In the grand scheme of illicit diamond trading, conflict stones make up only a limited portion, even though all forms of illegal diamond smuggling pose national, international, and social threats that should be combated.

The Kimberley Process Certification Scheme (KPCS) was, and continues to be, the United Nations' answer to conflict diamonds. It was enacted at a time when these conflict stones flooded the diamond market.
and helped to fund rebel conflicts throughout Africa. The United States passed the Clean Diamond Trade Act (CDTA) as the national scheme for implementing the KPCS. Unfortunately, in the years since these tools have been in place, many deficiencies have appeared.

On the one hand, some critics believe that the KPCS "is more to sanitize the industry from the market side rather than the supply side." These critics feel that the KPCS allows people to buy diamonds with a clear conscience because they think they are not buying blood diamonds. However, the KPCS does not attempt to deal with the larger issue of the illegal diamond trade. This allows consumers to overlook or remain ignorant of the fact that the diamonds they purchase might still be funding illegal activity outside the narrow definition provided by the KPCS. Further, human rights advocates warn that the vague KPCS certification stamp "merely allows Westerners to ignore what could be a gruesome reality regarding diamond-mining practices." On the other hand, proponents of the KPCS believe that it "is an example of international cooperation at its best." Proponents believe that the "widespread and continued international support confers an important measure of legitimacy upon the KPCS and acknowledges the efforts of KP Participants and Observers." Further, they believe that the KPCS’s "clear distinction between the illegal and legal markets for rough diamonds" of all

11. Id. (February 13 through 16, 2001) was "[t]he first time the term 'Kimberley Process' was officially used" when a "meeting of 38 governments of countries involved in the Kimberley Process took place in Windhoek, Namibia." See also U.N. Ad Hoc Working Group on the Review of the KPCS, The Kimberley Process Certification Scheme: Third Year Review, 5, (Oct. 2006) (stating that the "KPCS is not a legally binding document, as a matter of international law") [hereinafter Ad Hoc Working Group].


14. Id.

15. Jason Blalock & Joelle Jaffe, The Kimberley Process: A Public Relations Stunt or an Effective Protocol to Clean Up the Diamond Trade?, in FRONTLINE WORLD, ADDITIONAL RESOURCES (2006), http://www.pbs.org/frontlineworld/stories/brazil501/brazil501_additional.html (last visited Feb. 22, 2008) (stating that "Amnesty International is now pushing to add a standardized monitoring system to the Kimberley Process and to make its rules legally binding. By trusting nations to manage their valuable natural resources independently, the Kimberley Process may be slowly moving the notoriously corrupt diamond trade toward an undeserved legitimacy.").


17. Id.
kinds has decreased the illicit diamond market and lowered their market price relative to the cost of legitimate diamonds.  

Many of the brutal, diamond-funded conflicts have ended, and the international community has taken steps to try to gain control of the rough diamond trade. Nonetheless, the United Nations reports that illicit trading of rough diamonds still exists and that it could potentially finance civil conflicts, as well as criminal and terrorist activities. As one of the largest consumers of diamonds in the world, if the United States does not make the KP work, then the rest of the world will have little incentive to support the process. Currently, the United States, along with all Kimberley Process participant countries, is at a crossroads. What happens next will determine if the process will succeed or fail.

However, there are feasible solutions that KPCS participants can work towards achieving. If the KP is made binding and it is better implemented both internationally and domestically, it can work. In the latest Plenary, participants set out four main issues to make the KPCS stronger. Unfortunately, it is not enough in today’s world to stop only blood diamonds since there is proof that diamonds are also used to launder money to fund terrorism. The current definitions of conflict diamonds in both the KPCS and the CDTA are inadequate to curb this illicit diamond trade. There is a real opportunity to stop such trade by changing how the United States and the rest of the world combat it. If the definition in the KPCS is simply tweaked to treat illicit stones no differently than conflict stones, the KPCS and the CDTA remain viable. With such changes the KPCS may still have enough bite to prevent its entire scheme from becoming obsolete and in the process rid the diamond trade of illicit (and thus encompassing conflict) gems. This would make a diamond’s “road from carbon to Cartier” less bumpy.

---

18. Id. at 21.
20. The Kimberley Process normally meets once a year in a Plenary reserved for participating countries, industry leaders, and civil society members. These plenary meetings provide the opportunity to meet face-to-face to discuss and assess the implementation of the certification scheme. See Kimberley Process, Plenary and Intersessional Meetings, http://www.kimberleyprocess.com/documents/plenary_intersessional_meeting_en.html (last visited Feb. 22, 2008).
22. Id. at 9.
BACKGROUND

The Kimberley Process Certification Scheme (KPCS)

In the 1990s, numerous rough diamonds became known as conflict diamonds23 because they were used to fund conflicts24 and humanitarian crises in African nations such as Sierra Leone, Angola, and Liberia.25 In response to these problems, the international community worked together to take steps to control the rough diamond trade in order to cut off funding for these brutal conflicts. The KPCS came out of this effort.

"In the Interlaken Declaration of November 5, 2002, representatives of the United States and 47 other countries announced the launch" of the KPCS.26 The KPCS, however, is voluntary. Participating countries are "expected to prohibit the importation of rough diamonds from, and the exportation of rough diamonds to, non-Participants and to require that the KPCS control all "shipments of rough diamonds."27 "Participants" are states and/or regional economic integration organizations, such as the European Union, that have met the minimum requirements for the KPCS and are eligible to trade in rough diamonds under the auspices of the Kimberley Process.28

The KPCS came into effect on January 1, 2003. It requires each participating country to track the diamonds it is exporting back to the place where the diamonds were mined or to the point of import.29 Each participating country must meet standards for these internal controls.30 Participants "are responsible for ensuring that the integrity of the

23. Id. at 6.
25. GAO REPORT, supra note 19, at 1.
27. Id.
28. FAQs, supra note 7 ("Applicants" are states that "have expressed their commitment to the [KPCS] but have yet to meet the minimum requirements of the KPCS." "Observers refer to Industry and Civil Society groups that play an active role in monitoring the effectiveness of the certification scheme....." Currently, there are three observers: the World Diamond Council, Global Witness, and Partnership Africa Canada.).
30. Id.
certification scheme is upheld and that the Kimberley Process works toward preventing conflict diamonds from entering the legitimate trade of rough diamonds.”  

If a participant is deemed not to comply with the KPCS, “the KPCS can expel or suspend a participant.” Currently, 70 countries, “including the European Community, voluntarily participate in the KPCS and account for 99.8 percent of the global production of rough diamonds.”

There are seven key provisions of the KPCS. First, participants must “enact or amend appropriate...laws to implement and enforce the certification scheme and maintain dissuasive and proportional penalties for violations.” Second, participants must “designate importing and exporting authorities.” Third, participants must “establish control systems to eliminate conflict diamonds from the rough diamond trade.” Fourth, the KPCS requires that participants ensure that a KP “certificate accompanies each import and export shipment of rough diamonds.” Fifth, participants must “acknowledge the receipt of rough diamond import parcels to the foreign export authority.” Sixth, participants must make sure the diamonds are shipped in tamper-resistant containers. Finally, participants must “collect and maintain rough diamond data on production, imports, and exports” and exchange the data with the KPCS.

The KPCS normally meets once a year in Plenary session. These meetings provide participants, industry leaders, and civil society members...
a chance to meet to discuss and assess the implementation of the certification scheme. These meetings are closed to the public. However, an annual Communiqué is published and made public once each meeting is completed.

In the 2006 KPCS Plenary session, the KPCS Participants agreed that the following four issues would receive priority attention in 2007: “funding and resource requirements; improving statistical data gathering and analysis; effective and credible government oversight of industry; and the treatment of illegal shipments.” The KPCS Participants also agreed on “stronger internal control standards for participants who produce, trade, cut, and polish diamonds.” This was thought to offer stronger “guidance on implementing effective controls from mine to export and include stronger government oversight of the diamond industry, including spot checks of industry compliance.”

The Clean Diamond Trade Act

The KPCS is important to the United States because it ensures the protection of the legitimate trade in rough diamonds. “Although the United States is not a producer of rough diamonds, it is a significant global trader of both rough and polished diamonds and the world’s largest consumer market for diamond jewelry.” Thus, the United States has a stake in making sure that the KPCS remains viable so that the legitimate diamond trade can continue to prosper without trading in conflict stones.

According to the KPCS, each participant is responsible for implementing the scheme inside its own borders and making sure the country continues to comply. On April 25, 2003, President George W. Bush signed the Clean Diamond Trade Act (CDTA) in order to implement the

41. Id.
42. Id. (Meetings were held in Johannesburg, South Africa in April 2003; Sun City, South Africa in October 2003; Gatineau, Canada in October 2004; Moscow, Russia in November 2005; Gaborone, Botswana in November 2006; and Brussels, Belgium in November 2007.).
44. Id. ¶ 3.
45. Id.
46. See GAO REPORT, supra note 19, at 7 n.7.
47. Id. at 2. “In 2003, the United States was the seventh largest exporter of rough diamonds among non-mining KPCS participants...and the fifth largest exporter of polished diamonds.” Id.
KPCS. Then, on July 29, 2003, the President signed Executive Order 13312, "Implementing the Clean Diamond Trade Act." The Act requires that, except to the extent that the President can modify the regulations, all shipments of rough diamonds imported to the United States from a KPCS Participant or exported from the United States to a KPCS Participant must be accompanied by a Kimberley Process Certificate and sealed in a tamper-resistant container.

The United States must designate importing and exporting authorities and establish an interagency KP Implementation Coordinating Committee to oversee U.S. implementation efforts. The U.S. government also has the responsibility for overseeing any entity involved in the issuance of the KP certificates. It has the ability to impose civil and criminal penalties to enforce the CDTA. Finally, the CDTA requires that the United States support the collection and exchange of U.S. import and export data of rough diamonds.

The CDTA provides criminal penalties for any person or corporation that violates any order or regulation issued under the Act. The CDTA authorizes criminal penalties up to $50,000 per count for corporations and individuals and/or ten years' imprisonment for individuals. Civil penalties of up to $10,000 per violation may be imposed on anyone who violates, or attempts to violate, any order or regulation issued under

---

48. Clean Diamond Trade Act, Pub. L. No. 108-19, 117 Stat. 631 (2003). "The act directs the President to prohibit imports and exports of rough diamonds that are not controlled through the KPCS. The act defines the term 'controlled by the Kimberley Process Scheme to include any system that substantially meets standards, practices, and procedures of KPCS.'"


50. 19 U.S.C. § 3903(b) (2005) (allowing the President, in certain limited circumstances, to waive the prohibitions in the CDTA with respect to a particular country for periods of not more than one year).

51. U.S. DEPT. OF TREASURY, supra note 26 ("The Kimberley Process certificates must bear the following: the title 'Kimberley Process Certificate'; the statement, 'The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds'; country of origin for shipment of parcels of unmixed origin; unique numbering with the Alpha 2 country code, according to ISO 3166-1; date of issuance; date of expiry; name of issuing authority; identification of exporter and importer; carat weight/mass; value; number of parcels in shipment; Harmonized Commodity Description and Coding System; and validation by the exporting authority.'").

52. 19 U.S.C. § 3905(a)(1)-(2) (2005); GAO REPORT, supra note 19, at 9.

53. GAO REPORT, supra note 19, at 10.

54. This is currently the U.S. Kimberley Process Authority (USKPA). See id.


57. Id. § 3909(b).

58. Id. § 3907(a)-(c).

59. Id. § 3907(a)(2).
the CDTA. In addition, both civil and criminal United States customs laws apply to rough diamonds imported in violation of the CDTA.

"Moreover, 18 U.S.C. 3571 provides that organizations or individuals convicted of violating a criminal statute," such as the criminal provisions in the CDTA, "may be fined the greater of the amount specified in the statute, or twice the pecuniary gain or loss from the violation, or $500,000 for felonies and that individuals may be fined $250,000 for felonies." Finally, 18 U.S.C. 1001 provides for five years' imprisonment and a $10,000 criminal fine for knowingly making false statements or falsifying or concealing material facts with respect to any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."

The CDTA uses many U.S. agencies and the private, not-for-profit entity U.S. Kimberley Process Authority (USKPA) to "implement the domestic and international provisions of the CDTA." The departments of State, Treasury, Homeland Security, and Commerce, along with USKPA, implement the domestic provisions of the Act. This includes preparing and sharing the statistics of United States trade of rough diamonds to other KPCS participants and convening regular interagency meetings.

The USKPA was set up and is run by officials from U.S. trade associations and is responsible for facilitating the issuance of the KP certificates for exports of rough diamonds and reporting this to the U.S. government. The U.S. government currently does not have a plan for monitoring the Kimberley Process Authority and this is seen as a major weakness in U.S. diamond law.

The World Diamond Council and Diamond Industry

Even before the Kimberley Process was being formulated, the diamond industry was taking steps of its own to combat conflict diamonds.

60. Id. § 3907(a)(1).
61. Id. § 3907(b).
63. Id.
64. USKPA, overseen by the Department of State, is made up of 17 private entities from the diamond industry that issue KP certificates that must accompany U.S. exports of shipments of rough diamonds. GAO REPORT, supra note 19, at 25.
65. Id. at 3.
67. Id.
68. Id.
In response to growing concerns over human rights violations against innocent victims in diamond producing countries in central and western Africa, the World Federation of Diamond Bourses and the International Diamond Manufacturers Association created the World Diamond Council (WDC) in July of 2000.69

The WDC70 was created to develop, implement, and oversee a “tracking system for the export and import of rough diamonds to prevent the exploitation of diamonds for illicit purposes such as war and inhumane acts.”71 The inaugural meeting of the WDC occurred on September 7, 2000 in Tel Aviv, where the Council agreed to implement a comprehensive plan to “curtail the trade in conflict diamonds while minimizing the impact on the legitimate diamond trade.”72

To complement the KPCS, “the international diamond and jewelry industry initiated a voluntary system of warranties.”73 For every diamond transaction (rough, polished, or in jewelry) the system requires that the seller affirm that the diamonds were bought through legitimate channels and that they are not conflict diamonds.74 This is a more expansive warranty system than a KP certificate since the KPCS only deals with rough diamonds. Though this system is voluntary, the U.S. industry views it as a requirement of all its members and noncompliance can result in expulsion from diamond trade organizations.75

WHAT HAS WORKED AND WHAT HAS NOT

The Clean Diamond Trade Act has not worked as the United States had hoped it would when it was enacted in 2003. While the United States has sought to enhance the reporting and accuracy of its rough diamond trade data, “work remains to be done.”76 There are many weaknesses in the structure and reporting processes of the Act. These problems open the

70. See Ad Hoc Working Group, supra note 11, at 67 (mentioning that the interactive website www.diamondfacts.org was instituted at the WDC’s own expense to provide “information about diamond producing nations, the good diamonds can do for nations, and more”).
71. See Press Release, supra note 69.
73. GAO REPORT, supra note 19, at 7 n.7; see Ad Hoc Working Group, supra note 11, at 68 (encouraging the WDC “to continue its work of educating the trade in the functioning of the KPCS and in the trade’s responsibility to ensure its effective operation”).
74. GAO REPORT, supra note 19, at 7 n.7.
75. Id. at 2.
76. Id. at 4.
legitimate export and import of rough diamonds in the United States to illicit diamonds. They also expose the United States to possible KPCS suspension or expulsion since deficient U.S. trade data has raised concerns with other KP participants. Such an expulsion could cause the whole process to collapse.

"The United States does not periodically or regularly inspect rough diamond imports or exports, a control feature that allows participants to match the contents of the rough diamond parcels and Kimberley Process certificates and deters illicit trade in rough diamonds." Inadequate inspection leads to failure to report as well as inaccurate reporting. Without government oversight, the current U.S. control systems cannot help deter illicit rough diamonds from entering the diamond trade. Thus, the United States must implement a more structured reporting and inspection regime in order to make the CDTA work.

The United States also lacks an effective system for confirming the import of rough diamonds and has no federal agency to track these imports. Currently, for inbound shipments of rough diamonds to the United States, the final consignees must report the receipt of the shipment to the relevant exporting authority within 15 calendar days of the date the shipment arrived at a U.S. port of entry. This delegation of responsibility for confirming rough diamond receipts has not worked. There is no U.S. agency responsible for making sure that these import confirmations have occurred. In fact, the failure to report confirmations was only discovered when other KPCS participants complained about the problem.

In response to these complaints about missing information, the U.S. government sent letters to about 150 U.S. importers reminding them of the reporting requirement and warning that administrative subpoenas would be issued to those importers who failed to report. The government warned that if any importer continues to fail to confirm import receipt, civil

77. Id.
78. See id. at 14.
79. Id.; see Ad Hoc Working Group, supra note 11, at 22 (The reporting of seizures and cases of infringement or violations of the KPCS is not mandatory, although it is recommended.).
80. See GAO REPORT, supra note 19, at 2.
81. Id. at 14 (In 2004 and 2005, the United States did not confirm most import shipments originating from four key U.S. trading partners [Canada, Belgium, Israel, and the United Kingdom], and the United States "does not know the extent to which it has not confirmed imports from other countries.").
83. GAO REPORT, supra note 19, at 22.
84. Id.
85. Id. at 22–23.
penalties might result. These superficial threats are inadequate to get the much-needed data for the KPCS to function properly. The United States needs to have a government agency in charge of this reporting function if the KPCS is going to work. As of 2006, no steps had been taken to make essential change.

Most disturbing, however, is that, more than three years after the CDTA's implementation, the United States has not created a plan to oversee the activities of the USKPA and its licensees, the body responsible for issuing KP certificates. The pivotal job of issuing KP certificates, the backbone of the KPCS, is left to the industry that has the biggest stake in keeping the diamonds flowing freely, and the industry has little or no supervision in issuing certificates. This means that there is no governmental body making sure that the USKPA activities conform to KPCS standards at the present time.

The USKPA also does not have a plan to supervise and review the licensees that issue KP certificates in the United States. Based on research by the GAO, the USKPA cannot be sure that its licensees are meeting their requirements to prevent illicit exports of rough diamonds from the United States. More problematic for the USKPA are the reported problems with the KP certificates it has issued. Such quality issues "raise the possibility that the certificates have been tampered with and, thus, do not meet KPCS requirements." In order for the CDTA to improve, in late 2006, the GAO recommended that, at a minimum, the following should occur: (1) "the processes for importing and exporting rough diamonds, including conducting physical inspections periodically or regularly and confirming rough diamond receipts with foreign exporting authorities" should be streamlined to make it more effective and (2) "the oversight of the activities of the USKPA and its licensees" needed to be improved.

86. Id. at 23.
87. Id. at 5. Notably, the State Department is currently developing and testing a plan to allow periodic and systematic oversight of the USKPA. Id.
88. Id. at 39. In fact, the USKPA had only visited five of its 17 licensees in 2006. Id.
89. Id. at 28 (stating that the USKPA has no plan to conduct monitoring visits, no protocol for selecting who would be visited, or any documentation, other than an annual report, regarding reviews).
90. Id. In 2005, one country reported that 26 KP certificates had been sent with corrections (i.e., whited-out to amend errors). Also, five certificates had incorrect dates and ten had typographical errors. Id.
91. Id.
92. Id. at 6. Two other recommendations were also made: (1) the accuracy of the U.S. rough diamond trade data needed to improve and (2) U.S. diamond-related assistance needed to be developed through a regional approach. Id.
CONFLICT DIAMONDS

PROSECUTION UNDER THE CDTA

On February 4, 2007, Maliki Mohamad Diane, a naturalized U.S. citizen born in Sierra Leone, and Kouate Saoud, of Guinea, were arrested in the United States and charged with violating the CDTA. U.S. Immigration and Customs Enforcement agents seized 11,000 carats of diamonds, estimated to have a value between $250,000 and $2 million. If convicted, they face up to five years in prison. It remains to be seen how they will be dealt with under the CDTA since they are among the first to face such charges.

The WDC stated, "The arrests that took place in Arizona provide great evidence that [the WDC is] making progress and the Kimberley Process is having an impact on stopping the illegal smuggling of diamonds." The WDC went on to state that the "United States has laws in place to prosecute anyone who smuggles a diamond across an international border without proper documentation." This statement is evidence that the WDC believes that all illegal smuggling is the target of both the KPCS and the CDTA. Although as written these schemes are limited only to conflict diamonds, statements such as these give hope that there is room to broaden the scope of both to combat illicit diamond trading.

According to the GAO report, since 2003 the Bureau of Customs and Border Protection (CBP) has seized seven shipments of rough diamonds for violations of the CDTA. "One case involved a rough diamond import without a valid Kimberley Process certificate that was not

94. Id. “The word “carat” originated from the carob tree or Ceratonia siliqua. The tiny seeds of this tree are well known for their uniformity and consistent weight. Diamonds were weighed against these seeds until the system was standardised, and one carat was fixed at 0.2 grams.” Sylvia Pfeifer, Stones of Contention, SUNDAY TELEGRAPH, Jan. 28, 2007, at 8.
95. Wagner, supra note 93.
96. Id.
97. See also United States v. Approximately 1,170 Carats of Rough Diamonds Sieded at John F. Kennedy Int’l Airport on Jan. 13, 2004, No. CV 2005-5816(ARR)(MDG), 2007 WL 2071863, at *1 (E.D.N.Y. 2007) (concerning claimant Mark Kalisch, who was stopped for allegedly attempting to import defendant diamonds into the United States from Brazil without a KP certificate; the case is still pending).
99. Id.
100. GAO REPORT, supra note 19, at 20; see Ad Hoc Working Group, supra note 11, at 22 (noting that the reporting of seizures and cases of infringement or violations of the KPCS is not mandatory, although it is recommended).
packed in a tamper-resistant container."101 Of the six other cases, three were resolved through the administrative process; one of these three resulted in a fine.102 There are three open cases moving through administrative procedures.103

Most recently, in May and June 2007, U.S. Customs and Border Protection officers in Anchorage, Alaska "seized six shipments of smuggled or possibly 'conflict' diamonds worth $350,000."104 Also, in April 2007, CBP officers in Ohio seized 957 diamonds that were imported in violation of the CDTA.105 The small diamonds were being shipped from Spain to Indiana in an express mail box and were stored in a plastic baggie.106 In both cases, the stones were not in tamper-resistant packaging and lacked a KP certificate, both requirements of the KPCS.107 No arrests were made.108 Interestingly, the CBP called the stones "blood diamonds" and "conflict" stones since they were in violation of the CDTA, even though CBP had no way to prove they came from a conflict zone.

Thus, it appears that even within U.S. government offices there is confusion about the difference between illicit and conflict stones. This may be evidence that the purported difference should not matter in today's international community or that, in fact, it no longer does matter. It also may be evidence, however, that even the governmental offices charged with enforcing the KPCS are ignorant about what the KPCS is trying to actually accomplish.

While these examples all point to the CDTA working as planned, none to date have actually utilized the CDTA penalties and statutory regimes to prosecute anyone. One may ask why, but the answer seems to be clear from the numerous issues of enforcement and implementation that the GAO has noted in the CDTA. With rampant internal problems in the process,109 prosecutors will have a hard time overcoming the burden of proof in any case. Until these issues are fixed, it is unlikely that any prosecution under the CDTA will occur.

101. GAO REPORT, supra note 19, at 20.
102. Id.
103. Id.
105. Press Release, supra note 38.
106. Id.
107. See id.; Press Release, supra note 104.
108. See Press Release, supra note 38; Press Release, supra note 104.
109. How can one prove a KP certificate is a fraud when the USKPA cannot issue the legitimate certificates correctly? How can one prove the stones are actually conflict gems when the definition is narrowly construed to leave out illegal diamonds?
The Kimberley Process has helped to bring "huge volumes of illicit diamonds to the surface." 110 It is estimated that during the 1990s, as much as 20 [percent] of the world's diamonds are in some way illicit. 111 While some KP participants say that the "system was designed only to halt conflict diamonds and not the wider problem of illicit diamonds," 112 it is hard to imagine the world would turn the other cheek knowing the gems are used as currency to fuel other illegal acts.

In the United States, little difference is mentioned between illicit and conflict stones even though the narrower definition of conflict diamonds was used to draft the CDTA. This needs to change in order to allow both the CDTA and the KPCS to catch more illegal diamond trading in their nets.

THE RETAIL DIAMOND SECTOR

Most consumers only deal with the end retailer when they purchase diamonds. However, the CDTA does not reach this key sector of the diamond trade because the Act only applies to rough, rather than cut and polished, stones. 113 A recent 2007 survey by Amnesty International USA 114 and Global Witness 115 shows that the $33 billion per year American jewelry retail industry fails to take adequate measures to help consumers avoid conflict diamonds. 116 This survey of the 37 jewelry retailers listed by National Jeweler magazine as $100 Million Supersellers was conducted between December 2006 and February 2007. 117 While many findings were

110. Partnership Africa Canada, supra note 29.
111. Id. They were used for money laundering and tax evasion and to buy drugs, weapons, and other clandestine goods. Id.
112. Id.
113. See Ad Hoc Working Group, supra note 11, at 54-55 (noting that "[w]hen the KPCS was initiated...no thought was given to the possibility that conflict diamonds might be concealed within a producer country by moving them straight from the mine to polishing, thus avoiding all formal KPCS internal control requirements").
114. Amnesty International is a Nobel Peace Prize-winning grassroots activist organization that undertakes research and action focused on preventing and ending human rights abuses, including violations of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination. Amnesty International, Who Are We, http://www.amnesty.org/en/who-we-are (last visited Feb. 22, 2007); see Press Release, supra note 3.
117. Id.
disappointing, the survey did note a few "industry leaders such as Helzberg Diamond Shops, Sterling (Signet), and Tiffany & Co. have taken stronger measures" than most "to combat conflict diamonds, including third party auditing." Overall, the survey urges the government to more effectively oversee all sectors of the diamond industry to ensure widespread compliance with the KPCS and other laws affecting the diamond industry including the CDTA and anti-money laundering provisions. The United States can monitor markets for guns, food, and tobacco. Thus, it is hard to imagine that the retail diamond market is beyond governmental supervision. Oversight needs to occur in the retail sector if the world is serious about ridding illicit diamonds generally, and blood diamonds specifically, from the marketplace.

Jewelry buyer's guides warn that jewelers should be able to assure buyers that "a diamond is not from conflict areas based on warranties that follow the diamond to the retailer." However, these warranties must mean something. The International Diamond Manufacturers Association and the World Federation of Diamond Bourses, representing virtually all significant processors and traders, have established a regime of self-regulation whose principal element is a system of warranties that accompany invoices covering the sale of rough diamonds as well as diamond jewelry. A retailer should only buy diamonds and diamond jewelry from dealers and manufacturers who adhere to this "System of Warranties." The

---

118. The main findings of the survey included "[h]alf of the leading American jewelry retailers failed to respond to the requests to provide information about their policies on blood diamonds,...[56 percent] of those who did respond reported having no auditing procedures in place to combat blood diamonds, despite recommendation to do so by the trade association Jewelers for America," and 57 percent "of the top jewelers do not have any public information posted on their websites about their policies on blood diamonds." Id.
119. Id.
120. See id.
123. Id. A "Warranty" states,

For any product fabricated from rough diamonds mined from January 1, 2003 onward, the seller warrants that the diamonds have been purchased from legitimate sources not involved in funding conflict and are in compliance with United Nations Resolutions. The seller hereby guarantees that the diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds.

For any product fabricated from rough diamonds mined prior to January 1, 2003, the seller warrants that conflict diamonds will not be knowingly
warranty is supposed to assure the retailer that the "supplier vouches for the legitimacy of the merchandise and the supplier has, in turn, required the same warranty from their sources of merchandise." 124

Retailers and other diamond companies who only deal with polished diamonds have committed to carrying out the voluntary system of warranties to support the KPCS even though both the CDTA and the KPCS only apply to rough diamonds. 125 However, this voluntary system is full of flaws and has been called more of a public relations exercise than a credible system since there is nothing concrete backing up the policy. 126 One major flaw is the self-regulation that relies on a statement on an invoice that is unverifiable and is not backed "by meaningful policies to prevent the purchase of diamonds from conflict sources." 127 Another major flaw is that members of the retail diamond sector are not required to carry out independent audits of the warranties to make sure they are legitimate. 128 There is no third-party monitoring or verification that companies are adhering to the system. Also, the system of warranties is not fully implemented. While many companies participate, not all do so since it is voluntary. By making it mandatory, the warranty system could move from a "PR exercise" to a credible system to combat conflict diamonds. 129

PUBLIC RELATIONS AND THE DIAMOND INDUSTRY

In 2006, at the Fourth Annual WDC meeting, Jeffrey Fischer, president of the International Diamond Manufacturers Association, suggested that the system of the KP Certificate accompanying international shipments of rough diamonds is operating

reasonably smoothly and according to design so that there is actually very little to report about it....While it is not without flaw, it continues to improve constantly....The importance of

sold and that, to the best of their ability, will undertake reasonable measures to help prevent the sale of conflict diamonds in [the United States].

compliance—and the penalties of non-compliance are—becoming clear over time. This rose-colored view of the KPCS is one the diamond industry promotes in order to keep diamonds a symbol of love, not suffering. Statements like these are not the only tactics used to promote a "clean" image of diamonds. On May 9, 2007, the WDC held its annual meeting with government, non-government, and industry leaders coming together to discuss the issues surrounding "the eradication of the flow of conflict diamonds" around the world. Coincidentally, this meeting came right before the Hollywood release of the movie Blood Diamond. The movie, starring Leonardo DiCaprio, Jennifer Connelly, and Djimon Hounsou, caused great concern in the diamond industry because it portrayed the role of conflict diamonds in Sierra Leone during its bloody civil war. Though the meeting focused on the Kimberley Process as well as the success of the industry’s "education campaign" of 2006 and efforts to work on refining the core message of its campaign for 2007, a great deal of time was spent on how to combat the issues the movie would raise with consumers.

At the meeting, WDC president Eli Izhakoff emphasized the importance of informing the public about the diamond industry’s efforts in order to dispel a "distorted image that sometimes is created by popular media." The meeting participants also sent a letter to Edward Zwick, the producer of Blood Diamond, "requesting that the movie provide accurate and up-to-date information about the conflict diamond trade in Sierra Leone, which is the country in which the movie was set." Finally, to prepare retailers for questions about its gems in the wake of the release of the movie Blood Diamond, the diamond industry put together an informational website called diamondfacts.org, "educating jewelers and touting the industry’s participation" in the KPCS. To cap the public relations

While the WDC prepared for the backlash from the movie, others believed that the movie’s release would not dampen diamond sales but instead would provide the industry with a great marketing opportunity to champion the changes that have taken place in recent years.\footnote{139 See Pfeifer, supra note 94 (emphasizing that the issue of conflict diamonds “overshadows” the benefits that the diamonds bring to countries having them).} It is, therefore, unfortunate, that many of these purported changes have, in effect, changed nothing but the vocabulary of how people talk about conflict diamonds. The diamond industry is promoting the KPCS and the industry’s “warranty” system as sound and workable, when, in fact, both have significant weaknesses that need to be fixed.

**THE UNITED STATES IS NOT THE ONLY KPCS PARTICIPANT STRUGGLING WITH IMPLEMENTATION**

The KPCS achieved many of its initial objectives when it was first implemented. It was able to significantly reduce the ease with which conflict diamonds entered the legitimate diamond market, and it seemed to work reasonably well. However, by mid-2006, the KPCS was showing signs of strain.\footnote{140 See Partnership Africa Canada, supra note 29.} When “confronted with overt examples of obvious and serious non-compliance in Brazil, Guyana, Ghana, and elsewhere,” the KPCS seemed to become “paralyzed.”\footnote{141 Id.} Though the United States has trouble managing the KPCS through the CDTA, other countries have exhibited much greater flaws in their domestic and international systems. While many participants have issues with the KPCS, this article will focus only on the deficiencies illustrated by Côte d’Ivoire, Brazil, and Venezuela, since they are currently the most egregious.

**Côte d’Ivoire (Ivory Coast)**

the report stated that between "$9 and $23 million worth of stones were entering the [diamond] market through Ghana and Mali." If proven true, shipments would "undermine the fundamental aim of the...Kimberley Process, which was established to ensure that all rough diamonds traded internationally are conflict-free." In an open letter to Kimberley Process Chair Kago Moshashane, many NGOs expressed concern about the trade in conflict diamonds that originate in the Côte d'Ivoire and are being smuggled to Ghana and subsequently sold under the guise of being legitimate stones. They warned that if the KPCS did not take action to close the loopholes the situation revealed, the KPCS was "in danger of becoming irrelevant." In order to combat the situation, they urged the KP to "demand stronger and more comprehensive government controls across the diamond pipeline to ensure that conflict diamonds could not enter the legitimate diamond trade."

The government agency in Ghana that supervises the trade in diamonds and gold, Precious Minerals Company Limited, called the U.N. report "inaccurate." However, the Final Communiqué from the Kimberley Process Plenary in Botswana, issued in November 2006, concluded that there were credible indications that Ghana was not in compliance with its Kimberley Process obligations.

Soon thereafter, "Ghana agree[d] to hold shipments until an independent KP-approved evaluator was able to certify that any diamonds offered for sale were Ghanaian and not Ivorian." Ghana also has agreed to tighten its internal controls, to register all diggers and dealers, and to allow a KP review team to review whether the country has done enough. Ghana's continued membership in the Kimberley Process remains dependant on the outcome of these changes.
Brazil

"Brazil, with its rich supply of shallow alluvial diamonds, became a part of the KPCS on August 1, 2003."\(^{154}\) However, Brazil's internal implementation of the KPCS was not "designed for real oversight, but simply to provide token compliance with Brazil's responsibilities under" the KPCS.\(^{155}\) This compliance was proven ineffective on August 19, 2004 when the National Department of Mineral Production (DNPM) issued Kimberley Certificate 64 for diamonds exported by Primieira Gema, a company owned by Hassan Ahmad.\(^{156}\) This certificate was clearly fraudulent because the claims listed as the source of the diamonds in the KP certificate showed no sign of ever having been mined for anything.\(^{157}\) When the Brazilian government was informed of the fraud, the head of the DNPM stated that since the diamonds had left the country, there was nothing Brazil could do.\(^{158}\) The DNPM also made no plans to change its processing procedure "even in light of this fraudulent export."\(^{159}\)

In response to the Certificate 64 report issued by Partnership Africa Canada (PAC),\(^{160}\) the Brazilian Ministry of Mines issued a rebuttal report in November 2005 at the KP Annual Plenary Meeting in Moscow.\(^{161}\) The DNPM presented photos with its report that purported to show mining activity in the areas covered by Certificate 64.\(^{162}\) "The only problem was that the photographs were of an area that had nothing to do with Certificate 64."\(^{163}\) On February 10, 2006, Luiz Eduardo Machado de Castro, the author of the rebuttal report, was arrested in connection with Operation Carbon, an operation targeting illegal exports of diamonds.\(^{164}\)

\(^{154}\) See Blalock & Jaffe, supra note 15.


\(^{156}\) Id. at 4. Ahmad is a diamond exporter arrested in Brazil on February 17, 2006 who, along with Paulo Traven, was believed to be running a large-scale operation for the illegal export of diamonds using dummy corporations, phony front men, and illegal money traders. Id. at 5, 13.

\(^{157}\) Id.

\(^{158}\) Id. at 4.

\(^{159}\) Id.


\(^{161}\) FUGITIVES AND PHANTOMS, supra note 155, at 8.

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id. at 10.
If Brazil's Certificate 64 was not enough evidence of fraud in the KPCS, Fabio Tadeu Dias de Oliveira is yet another example. This young Brazilian died on July 17, 2001 in São Paulo.\textsuperscript{165} Interestingly, "[a]fter his death, Fabio's fortunes improved markedly."\textsuperscript{166} In the 2005 Brazil Mining Yearbook published by the DNPM, a list of the ten largest diamond producers for 2004 in decreasing order of value of production ranked Fabio as sixth in Brazil.\textsuperscript{167} Fabio was responsible for 8.14 percent of the country's commercialized diamond production a full three years after his death.\textsuperscript{168} This rank is curious and points directly to fraud.

If all this was not bad enough, "Fabio is not the only ghost" in Brazil's diamond export industry.\textsuperscript{169} In fact, PAC research found that 25 percent of Brazil's diamond exports "are the product of phantom miners."\textsuperscript{170} In April 2006, Brazil's own internal review showed that 49 of 147 KP certificates issued by Brazil were fraudulent.\textsuperscript{171} Thus, over 30 percent of KP certificates issued by Brazil have been fraudulent. The process in Brazil has exhibited significant flaws that need to be fixed. This could be accomplished by tighter internal regulations and oversight of the KP certificate-issuing agency. If the Brazilian government cannot do this internally, the KPCS Participant countries should either impose their own rules for Brazilian exports or vote to suspend Brazil from the KPCS.

In light of these discoveries and accusations, a KPCS Peer Review team was sent to visit Brazil on April 24, 2006. At the time of the visit, Brazil had voluntarily suspended its rough diamond exports.\textsuperscript{172} This suspension was done in conjunction with Operation Carbon, the above-mentioned "international and domestic criminal investigation of companies and individuals" that had obtained KP certificates using fraudulent techniques.\textsuperscript{173} Brazilian police told the team that the diamonds fraudulently exported came from three sources: Brazilian Indian reservations,
garimpeiro sites, and conflict zones in Africa. The 2006 peer review found no evidence that “diamonds from African conflict zones had reached Brazil”; however, the review noted that “the widespread smuggling and weakness of internal controls” in Brazil allows the possibility that conflict diamonds have already or could enter Brazil. This finding by the peer review team concretely illustrated that the definitions of conflict diamonds in the KPCS are too limited to actually prevent the illicit diamond trade because, though there was rampant smuggling detected, none actually violated the KPCS since no diamonds were conclusively identified as coming from African conflict zones. Thus, the KPCS participating nations had no responsibility to prevent the illegal trading.

Venezuela

Venezuela participates in the KPCS. However, though diamond mining continues there, “Venezuela has mysteriously recorded no diamond shipments since 2005.” A PAC investigation found that all of the country’s diamonds, an estimated 150,000 carats annually, were being illegally exported without complying at all with the KPCS.

In the PAC investigation, the group also found concrete evidence that Venezuelan diamonds are being smuggled into Guyana for export rather than complying with the KPCS. As Venezuelan diamond production has declined from around 300,000 carats per year to less than 30,000, Guyana’s diamond mining has skyrocketed, from close to 50,000 carats to just under 400,000 carats per year. The Venezuelan decline coincides with the implementation of the KP and the lack of reported diamond exports. Also, sadly, individual miners and cooperative officers openly admitted they hide a majority of their diamond production from the government and, thus, the KPCS.

Far more alarming, however, is the fact that in the 18 months since a name change in the Ministry of Mines left no one with legal authority to

175. Id. at 13.
176. Visit to Brazil, supra note 172, at 3.
177. Killing Kimberley, supra note 24, at 15.
179. Id. at 1.
180. Id. at 4.
181. Id. at 14.
182. Id. at 15.
sign KP certificates, no one in Venezuela's government has had the will or interest to make the simple change to fix the problem. Currently, no one in Venezuela can issue KP certificates and no one seems to care. Through its investigation, PAC believes that a significant number of Venezuelan diamonds left the country without KP certificates and entered the United States and Europe. These findings imply that a considerable subset of the world's rough diamond buyers do not comply with the Kimberley Process.

One can guess that little attention had been paid to these deficiencies in Venezuela until PAC arrived because there is no proven link between these illicit stones and conflict diamonds from rebel zones. The narrow definition of conflict diamonds that the KPCS currently uses prevents flaws in the system, like those purported in Venezuela, from being remedied in a timely fashion. The illicit trade in diamonds needs to be stopped, just like the trade in conflict stones does. Fortunately, a high-level review mission from the KPCS will be sent to Venezuela sometime in the near future to ascertain if it should be allowed to remain in the KPCS.

POSITIVE STEPS

Recently, the Kimberley Process participants have decided to publish, for the first time, figures on rough diamond production and trade data. "While there was not consensus on this degree of transparency when the scheme began [in 2002], all participants now agree to the new level of openness." This new publication provides tangible hope that the participants want to make the process more clear and accountable. By allowing public access to this information, hopefully countries like the United States, that are currently lacking in the reporting requirements of the KPCS, will feel pressure from the international community to report. This is a positive step in the KPCS.

While the peer review team in Brazil noted significant flaws, they also praised its public database. The peer review noted that the Brazilian Cadastro Mineiro represents a level of transparency and public access that

183. Id. at 4.
184. Id.
185. Id. at 4.
186. See id. at 17.
188. See European Commission, supra note 187 (quoting Benita Ferrero-Waldner, European Commissioner for External Relations and Neighborhood Policy).
CONFLICT DIAMONDS

is a best practice that could be emulated by other KPCS participants.189 If this database were connected into “a reporting and verification structure,” it could become “a powerful tool in building a system to eliminate the potential presence of conflict diamonds and to combat fraud and money laundering” in the industry.190

Finally, in 2006, the Working Group on Statistics (WGS) reported that the KPCS “monitored $37.6 billion in rough diamonds exports representing more than 500 million carats of rough diamonds.”191 “Participants issued 59,000 certificates to accompany those shipments,”192 and “[t]he WGS reported that participants are reporting data regularly and the quality of the data and the analysis has improved.”193 Thus, while this article has pointed out the flaws in the KPCS in many participating countries, there are many other countries that have taken the KPCS seriously. These statistics prove that the KPCS, while not perfect, is workable with a few changes needed to make it more sound than it currently is.

CONCLUSION

It should not matter to the international community whether a diamond is illicit or a conflict stone; both are illegal and should be prevented from entering the legitimate diamond market. However, the current drafting of both the KPCS and the domestic CDTA place emphasis on this difference and it affects how effective each scheme is. As PAC has aptly noted,

There may be a feeling that conflict diamonds are “over”, that massive diamond fraud under the KP banner in countries like Brazil and Guyana is “just” money laundering or theft or some other thing, and that the Kimberley Process need not be concerned. If true, this makes a fraud of the KP process itself.194

It is up to the diamond industry, governmental and non-governmental organizations, and, on a more fundamental level, the end consumer of the diamonds to stand up and say that whether illicit or conflict, illegal diamonds will not be tolerated. They harm our global community and all illegal diamonds should be prevented from entering the legitimate diamond markets that benefit so many. The KPCS and the CDTA need to reflect this
change in scope if diamonds are to ever be rid of their less than shiny uses in illegal activities. As WDC Chairman Eli Izhakoff said, “for the international diamond industry and all its dependants around the world, failure [of the KPCS] is not an option.”195 Thus, the international and domestic community needs to make the issue of illicit diamonds a priority in the coming years to ensure that the KPCS does not fail.

195. See Partnership Africa Canada, supra note 29.