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Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process Will Ultimately Fail in Ending Conflicts Fueled By Blood Diamonds

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I. INTRODUCTION

“In America, it’s bling bling but out here it’s bling bang.”¹

Conflict diamonds, the so-called “blood diamonds” mined in the resource-rich nations of Africa, have led to the displacement and death of millions.² The decolonization of Africa and the arbitrary boundaries left by Europeans created a power vacuum and unnatural divide amongst people, creating the perfect breeding grounds for rebel movements.³ These counter-government forces use fear and poverty to drive the African peasantry to illegally mine rough diamonds.⁴ These diamonds are then sold back to the rebel forces that use the exorbitant profits to further fuel their reign of

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1. BLOOD DIAMOND (Warner Brothers Pictures 2006).
2. See Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberly Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. MIAMI BUS. L. REV. 217, 223, 231-32 (2005).
3. See *id.* at 221.
4. See Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT’L ECON. L. 835, 840 (2003).

oppression—fanning the flames of anarchy within the infantile nations.⁵ These rough diamonds, the sale of which would enable the building of infrastructure and the establishment of society, have turned into a curse for the countries in which they are found. These plagued African nations are hemorrhaging resources and potential for profits while the rebels usurp the blood, power, and labor of a people desperate to survive.⁶ For many, diamonds are the key to rebuilding Africa.⁷ Those who control the diamond mines are the keepers of the keys to a new African continent.

Polished diamonds abound in America. They are celebrations of accomplishment and love. But as global awareness of the conflicts in Africa continues to increase, diamonds are held to a new standard of clarity. Consumers continue to investigate the new clouds in their diamonds—how distasteful it is to sport a diamond, the sale of which funds murder and oppression.⁸ But while awareness among consumers is spreading, it is not spreading fast enough.

In 2003, under an initiative of the United Nations (U.N.), various nations of the world gave life to the Kimberley Process Certification Scheme (KPCS)—a method by which consumers of all levels could know the origin of their diamonds—with the Scheme only certifying those harvested from legal, government-run mines.⁹ The Scheme's drafters believed that, if given the choice, consumers would choose to buy diamonds mined legally, with profits flowing to legitimate sources of power.¹⁰ However, the KPCS as it stands is voluntary and lacks the teeth needed to deter its violators.¹¹ The KPCS lacks a binding arbitration agreement and needs a more articulate and sophisticated method of resolving disputes and violations among its signatory countries. This article will offer suggestions for increasing the efficiency of the KPCS.

Part II provides an explanation of the problem of conflict diamonds, including brief profiles of some of the most conflicted areas of Africa. Part III highlights the relevancy of conflict diamonds to Americans. Part IV explains the motivations for enacting the KPCS. Part V provides the

5. See Seth A. Malamut, *A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo*, 29 SUFFOLK TRANSNAT'L L. REV. 25, 28 (2005).

6. Fishman, *supra* note 2, at 219-21.

7. See Margo Kaplan, Note, *Carats and Sticks: Pursuing War and Peace Through the Diamond Trade*, 35 N.Y.U. J. INT'L L. & POL. 559, 565 (2003).

8. See generally Fishman, *supra* note 2, at 224-28 (explaining how the negative publicity surrounding blood diamonds led to the Kimberley Process Certification Scheme).

9. See *id.* at 225-27.

10. See generally *id.* at 227 (explaining how the KPCS can ease the worries of purchasers).

11. See *id.* at 234.

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relevant provisions of the KPCS. Part VI outlines the shortcomings of the KPCS, including its voluntary nature, vague wording, and lack of dispute resolution mechanism. Part VII describes the author's suggested modifications to the KPCS, including an enhanced method of dispute resolution and a binding arbitration clause. Part VIII concludes the article, addressing future hurdles to be faced.

II. WHAT ARE CONFLICT DIAMONDS?

“Conflict diamonds, also known as ‘blood’ diamonds, are rough diamonds used by rebel movements or their allies to finance armed conflicts aimed at undermining legitimate governments” throughout the African continent, with the primary trouble areas being the Democratic Republic of the Congo (DRC), Republic of Angola, Sierra Leone, and Cote d’Ivoire (the Ivory Coast).¹² These diamond-fueled and diamond-funded conflicts have “forced more than 6.5 million people from their homes in Sierra Leone, Angola, and the DRC,” and are responsible for the death of roughly 3.7 million people.¹³

The actual number of diamonds and the worth of these jewels, primarily discussed in their rough form, is staggering. Roughly \$8.5 billion worth of diamonds are exported from the African continent each year, with over sixty-five percent of the world's diamonds originating in African countries.¹⁴ The United States Department of State estimates that the international rough diamond trade generates \$30 billion annually.¹⁵ Of this number, the global trade of blood diamonds is worth approximately \$300 million a year.¹⁶ The following paragraphs provide brief synopses of the role of conflict diamonds in various African nations.

12. Kimberley Process Frequently Asked Questions, http://kimberleyprocess.com/faqs/index_en.html (last visited Jan. 10, 2010).

13. Fishman, *supra* note 2, at 231-32.

14. See World Diamond Council, *Diamond Facts*, <http://diamondfacts.org/facts/index.html> (last visited Nov. 2, 2010).

15. See United States Department of State, *Conflict Diamonds*, <http://www.state.gov/e/eeb/diamonds> (last visited Jan. 10, 2010).

16. Fishman, *supra* note 2, at 219. This number (i.e. \$300 million) is roughly 3%-15% of the total trade of diamonds worldwide. *Id.* However, these numbers represent only ascertainable percentages, and in actuality, the blood diamond trade may constitute a significantly larger portion of the global diamond trade. Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 25 (2003).

A. Republic of Angola

Following its secession from Portugal in the mid-1970s, Angola was split along the lines of two political factions vying for control of the country's resources.¹⁷ From 1975 to 1989, the National Union for the Total Independence of Angola (UNITA), backed by the former Soviet Union, had "virtually exclusive" control of the country's diamond mines.¹⁸ Because UNITA was receiving funds from the Soviets and the Angolan government was backed by the United States, neither side was in short supply of resources, thus allowing UNITA to stockpile diamonds for later sale.¹⁹ However, UNITA was forced to sell the diamonds at the close of the Cold War when the Soviets stopped supplying the necessary resources.²⁰

The sales from these illicit diamonds are estimated to be \$4 billion between 1992 and 1998.²¹ UNITA has "turned larger profits from diamond smuggling than any other Central African rebel group."²² Though the country is currently in a relative state of peace, since 1999 there has been evidence of UNITA's continued trade of diamonds for weapons, despite no longer having actual control over the mines.²³ This fact alone demonstrates the fragility of the situation in Angola.

B. Sierra Leone

The most prosperous diamond mines in the world are in Sierra Leone.²⁴ This wealth of natural resources has proven to be a curse, however, with the country marred by a diamond-funded war from 1991 to 2002.²⁵ The Revolutionary United Front (RUF), an insurgent group, maintained control over most of the country's mines and traded the diamonds in exchange for the essentials needed to fuel the rebel group's efforts.²⁶ The RUF sold \$25–\$125 million in rough diamonds each year to fuel its insurgent efforts,

17. Malamut, *supra* note 5, at 29.

18. *Id.* at 30.

19. *Id.*

20. *Id.*

21. *Id.*; see Kaplan, *supra* note 7, at 575.

22. Malamut, *supra* note 5, at 30.

23. Kaplan, *supra* note 7, at 565-66. Perhaps counter-intuitively, ceasefires have tended to increase the production of conflict diamonds by providing the rebels with downtime in which to stockpile more diamonds for later sales when armed conflict inevitably resumes. Malamut, *supra* note 5, at 43.

24. Malamut, *supra* note 5, at 30-33; see also Price, *supra* note 16, at 12.

25. Malamut, *supra* note 5, at 30-31; see also Price, *supra* note 16, at 16.

26. Malamut, *supra* note 5, at 31.

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committing atrocious crimes that eventually brought the blood diamond conflict to the global stage.²⁷ By action of the United Nations Security Council, Sierra Leone was sanctioned, faced a weapons embargo, and subsequently was able to disarm the RUF.²⁸ However, Sierra Leone remains the largest U.N. peacekeeping effort with troops patrolling the diamond-rich areas since 2002.²⁹

C. *The Democratic Republic of the Congo (DRC)*

Though the UNITA in Angola has been deemed the most prosperous and the land of Sierra Leone the most diamond-rich, “no place on Earth have conflict diamonds wreaked more havoc than in the DRC.”³⁰ Africa’s World War, as it has been coined,³¹ has led to the death of an estimated 2.5 million people in the DRC in just four years.³² The war in the DRC wages on today despite U.N. recognition of the connection between the conflict and the exploitation of diamond mines, with roughly \$50–\$60 million in rough

27. *Id.*; Price, *supra* note 16, at 15.

At the end of 1998, the London-based NGO Global Witness issued the first powerful and vivid account of the nature of the African conflicts fueled by diamonds. That report set off substantial press attention, even in the United States, primarily on the basis of the guerillas’ trademark atrocity of chopping off the hands or forearms of tribal villagers who resisted their authority They also liked to burn people—adults and children—alive.

Feldman, *supra* note 4, at 840.

28. Malamut, *supra* note 5, at 31.

29. *Id.*

30. *Id.* at 32.

[The] DRC provides an exaggerated example of a country lacking the infrastructure necessary to establish effective internal controls. While Sierra Leone and Angola have a long history of poor governance and armed conflict, both countries have seen relative peace in recent years, allowing for growing infrastructures. The DRC, on the other hand, remains plagued by constant violence. In contrast to Angola where at least 50%-75% of diamond mining takes place under formal government supervision, the DRC’s recognized mining sector accounts for only 25% of all official reports.

Id. at 50.

31. Price, *supra* note 16, at 16. The war was given this name because of the involvement of troops from seven African nations including Zimbabwe, Chad, Namibia, Angola, Uganda, Burundi, and Rwanda. Malamut, *supra* note 5, at 32.

32. Price, *supra* note 16, at 16 (calculating deaths from 1999-2003).

diamonds smuggled out of the country each year.³³ Until the country can control more than this small portion of its resources, it will be hard pressed to make meaningful progress in other sectors of government and society.

D. Republic of Ivory Coast

Until a failed coup d'état in 2002, the Republic of the Ivory Coast was the fourth largest economy in Sub-Saharan Africa.³⁴ Now the country lies in the midst of crisis with rebels controlling the diamond-rich north.³⁵ Like many African nations, the United Nations Security Council imposed a ban on the importation of any diamonds coming from the Ivory Coast in 2004, and subsequently renewed the ban in 2005.³⁶ The U.N. reported that the illicit diamonds were being smuggled through Ghana in violation of a U.N. embargo.³⁷ As of October 2009, the embargo on arms and rough diamonds, as well as other sanctions, is still in place.³⁸ The continued renewal of this embargo, as well as accusations of foreign complicity and even importation of illicit diamonds coming from the Ivory Coast, is evidence that the situation in this country is far from resolved.³⁹

III. RELEVANCY OF CONFLICT DIAMONDS TO THE UNITED STATES

There are various reasons the United States should take a vested interest in the legitimacy and efficiency of the diamond trade worldwide. First, the

33. Malamut, *supra* note 5, at 32-34. The diamonds are generally smuggled out of the DRC into the Brazzaville, the capital of the Republic of Congo (ROC). *Id.* The ROC is an attractive locale because of the already established trade routes, geographic proximity, and lower export taxes than other African nations. *Id.*

34. Albena P. Petrova, *The Implementation and Effectiveness of the Kimberley Process Certification Scheme in the United States*, 40 INT'L LAW. 945, 945 (2006).

35. *Id.*

36. *Id.*; S.C. Res. 1643, U.N. Doc. S/Res/1643 (Dec. 15, 2005), available at http://www.un.org/docs/sc/unsc_resolutions05.htm (follow "S/RES/1643 (2005)" hyperlink); S.C. Res. 1572, U.N. Doc. S/RES/1572 (Nov. 15, 2004), available at http://www.un.org/Docs/sc/unsc_resolutions04.html (follow "Security Council Resolution 1572 (2004)" hyperlink).

37. Reuters, *Ivory Coast Rebels Deny Blood Diamond Trade*, MSNBC.COM, Dec. 7, 2006, <http://www.msnbc.msn.com/id/16094952/>. The U.N. estimates that the rebels of the Ivory Coast are smuggling between \$9-\$23 million worth of diamonds. *Id.*

38. Reuters, *Israel Rejects UN Allegations It Exports 'Blood Diamonds'*, HAARETZ, Oct. 29, 2009, available at <http://www.haaretz.com/hasen/spages/1124476.html>.

39. *Id.* "Along with Israel, the panel . . . named the United Arab Emirates, Lebanon, Guinea[,] and Liberia as some of the countries that needed to step up efforts to enforce a four-year-old U.N. embargo on buying rough diamonds mined in the Ivory Coast." *Id.*

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United States is the world's largest consumer of diamonds.⁴⁰ As Americans become increasingly conscious of their social responsibility as consumers, knowing how their products are made and where they come from becomes ever more important in their buying decisions. Wearing diamonds, the sale of which funds anti-government movements and fuels the human rights violations committed by these rebel organizations, is hardly viewed as *en vogue*.

Second, from a political standpoint, the diamond trade is an integral facet of Africa's ability to build its infrastructure, establish long-standing governments, and free itself of its financial dependence on Western aid. As a Western power with political, social, and economic ties to the continent, the United States has a strong interest in the establishment of legitimate governments and means of trade. The largest consumer of diamonds, the United States, must combat conflict diamonds, the sale of which allows rebel forces to undermine the very sources of power the United States supports.

Ending the illicit sale of conflict diamonds will not change the fate of the African continent overnight. Converting the illicit diamond trade into a government-regulated sector is very expensive—many African nations simply do not have the funds.⁴¹ Because these countries cannot afford to spend money fighting off rebel forces, it is up to consumers to refuse to buy illegitimate diamonds in the hope of driving the rebels out of business. Only then will diamond-rich African nations be able to legitimately mine the diamonds and use the funds to build infrastructure and eradicate the causes of poverty that drive the peasant miners to sell the diamonds to the rebels. Legitimizing the diamond industry holds infinite promise for the African nations that house some of the richest diamond mines in the world.⁴²

Under the Bush administration, Congress enacted the Clean Diamond Trade Act of 2003, implementing the KPCS in the United States.⁴³ The Act

40. The jewelry industry in the United States was estimated at \$26 billion for the year 2000. Fishman, *supra* note 2, at 231; Price, *supra* note 16, at 42.

41. Certain groups argue that “[d]iamond smuggling will continue to flourish for two reasons: lack of governmental control over licensing, and the artisanal miner’s extreme poverty levels.” Malamut, *supra* note 5, at 44.

42. According to the World Diamond Council, roughly ten million people worldwide are directly or indirectly supported by the diamond industry, and over five million people have access to healthcare because of diamond revenues. World Diamond Council, *Diamond Facts*, <http://diamondfacts.org/facts/index.html> (last visited Jan. 10, 2010). In the DRC, roughly \$40 million of taxes are unpaid each year. Fishman, *supra* note 2, at 220. Essentially, the government is unable to benefit from the sales of the country’s resources. *Id.*

43. Petrova, *supra* note 34, at 951. Clean Diamond Trade Act, 19 U.S.C. § 3901 (2003).

itself states that roughly 3.7 million people have died in Africa as a result of wars funded from the sale of conflict diamonds.⁴⁴ This legal initiative demonstrates the United States' willingness to partake in the effort to end diamond-driven bloodshed.

IV. BIRTH OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The KPCS was ultimately adopted to “break the link between trade in blood diamonds and armed conflict in Africa” and to help the legitimate governments of these conflicted nations regain control of their nations' natural resources, allowing them to rightfully profit off the sale of diamonds in the hopes of building and rebuilding the infrastructure of their countries.⁴⁵

By 2000, bad press; growing public awareness and outcry; and pressure from NGOs, including Global Witness and Oxfam, “motivated the South African government to summon all interested governments, members of the diamond industry, and NGOs to meet and discuss ways to solve the blood diamond problem.”⁴⁶ In late 2000, the United Nations General Assembly voted unanimously in support of the KPCS, a diamond certification scheme that had arisen from this and subsequent meetings.⁴⁷ Two years later, thirty-nine diamond-trading countries officially adopted the KPCS at Interlaken, Switzerland, and on January 1, 2003, all participating countries implemented the Scheme.⁴⁸ Currently, the KPCS has forty-nine member states representing seventy-five countries, with the European Union and its member states counting as an individual participant.⁴⁹

V. THE LOGISTICS OF THE KPCS

The preamble of the KPCS denotes its purpose as countering the “devastating impact of conflicts fuelled by the trade in conflict diamonds on the pace, safety[,] and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in

44. Clean Diamond Trade Act § 3901.

45. Fishman, *supra* note 2, at 233.

46. *Id.* at 224. The group met in Kimberley, South Africa, thus giving the Process its name. *Id.* at 225. The Kimberley Process was officially accepted by the United Nations under G.A. Res. 55/56 pmb. (2000), available at <http://www.state.gov/e/eeb/diamonds/c19974.htm> (last visited Nov. 8, 2010) [hereinafter KPCS].

47. Fishman, *supra* note 2, at 224.

48. *Id.* at 224-25.

49. Kimberley Process Frequently Asked Questions, http://kimberleyprocess.com/faqs/index_en.html (last visited Jan. 10, 2010).

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such conflicts.”⁵⁰ The KPCS is based on “simple and workable certification” for rough diamonds,⁵¹ the standard of which is internationally agreed upon.⁵² Perhaps the most glaring word of the preamble is “voluntary.” The KPCS is admittedly a voluntary system of self-regulation that can only enjoy credibility to the extent that “all [p]articipants have established internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting[,] and importing rough diamonds within their own territories”⁵³

Section II of the KPCS states that each participant should ensure that: a Kimberley Process Certificate (Certificate) accompany each export of rough diamonds; its process for issuing Certificates meets the standard set out in Section IV;⁵⁴ the Certificate itself meets the requirements of Annex I;⁵⁵ and

50. KPCS, *supra* note 46, pmbl.

51. According to the definition provided by the KPCS, “‘rough diamond’ means diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 710.31.” *Id.* § 1. Conspicuously absent is the inclusion of polished diamonds, diamonds already included in jewelry, and other precious stones. *See infra* Part VI and accompanying notes for why this is one of the KPCS’s most obvious shortcomings.

52. KPCS, *supra* note 46, pmbl.

53. *Id.*

54. Section IV outlines the recommended undertakings for internal controls, by stating that each participant should:

- (a) establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territories; (b) designate an Importing and an Exporting Authority(ies); (c) ensure that rough diamonds are imported and exported in tamper resistant containers; (d) as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions; (e) collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V; (f) when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.

Id. § IV.

55. Annex I requires the Certificate to at least contain the following information: “title ‘Kimberley Process Certificate’ and the following 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; English language translation (if Certificate is not printed in English); unique numbering with the Alpha 2 country code; tamper and forgery resistant; date of issuance; date of expiry; issuing authority; identification of exporter or importer; carat weight/mass; value in U.S. dollars; number of parcels in shipment; relevant Harmonised Commodity Description and Coding System; and validation of Certificate by the Exporting Authority. *Id.* Annex I(A).

that the participant notify the other participants of the features of its Certificate.⁵⁶

Section III of the KPCS denotes the requisite undertakings with respect to the international trade in rough diamonds.⁵⁷ Specifically, each participant should require that a valid Certificate accompany every exported shipment.⁵⁸ It also requires that each imported shipment reaching a participant country must be accompanied by a valid certificate, that a confirmation of receipt be sent to the relevant exporting authority, and that the original Certificate be accessible for a period of no less than three years.⁵⁹ Participants must ensure that no shipment of rough diamonds be imported or exported from a country not participating in the KPCS.⁶⁰ Lastly, shipments passing through participant countries must leave the country in an identical way in which they entered—that is to say “the shipment must be unopened and not tampered with.”⁶¹

Section IV denotes the internal controls to be taken by participating countries.⁶² Essentially, this section stresses the importance of establishing proper authorities, maintaining internal controls, enforcing the requirement that diamonds be transferred in tamper-resistant containers, maintaining proper data on imports and exports, and establishing and maintaining “dissuasive and proportional penalties for transgressions.”⁶³ Annex II, providing more detailed recommendations relevant to Section IV, includes the suggestion that, “Participants that produce diamonds and that have rebel groups suspected of mining diamonds within their territories are encouraged to identify the areas of rebel diamond mining activity.”⁶⁴ They are also encouraged to name the companies or individuals convicted of activities in violation of the KPCS.⁶⁵ Lastly, there is the recommendation that all cash

Section B of Annex I also provides “Optional Certificate Elements” including: characteristics of a Certificate, quality characteristics of the shipped diamonds, and a recommended import confirmation that should include the country of destination, identification of importer, carat/weight in U.S. dollars, relevant Harmonised Commodity Description and Coding system, date of receipt by Importing Authority, and authentication by Importing Authority. *Id.* Annex I(B).

56. *Id.* § II(c).

57. *Id.* § III.

58. *Id.* § III(a).

59. *Id.* § III(b).

60. *Id.* § III(c).

61. *Id.* § III(d).

62. *See supra* note 55 for full text of document regarding Annex I.

63. KPCS, *supra* note 46, § IV(a)–(e).

64. *Id.* Annex II(5).

65. *Id.* Annex II(6).

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purchases be routed through “official banking channels.”⁶⁶ Section V outlines the regulations for “[cooperation] and transparency.”⁶⁷

Section VI denotes the administrative matters of the KPCS.⁶⁸ The participants and observers meet in plenary annually, or more frequently if deemed necessary, with the purpose of evaluating the effectiveness of the KPCS.⁶⁹ The meetings are held in the country in which the chair, who is elected each year, resides.⁷⁰ Ad hoc “working groups” may be formed during these meetings for various purposes.⁷¹ Regarding decision making, the KPCS says only: “Participants are to reach decisions by consensus,” and when “consensus proves impossible, the Chair is to conduct consultations.”⁷² The vagueness of this last statement is crippling, as will be discussed in depth in Part VI.⁷³

The same section of the KPCS states that “[p]articipation in the Certification Scheme is open on a global, non-discriminatory basis to all [a]pplicants willing and able to fulfill the requirements of that Scheme.”⁷⁴ Participants are expected to prepare reports explaining how the KPCS requirements are being implemented in their countries.⁷⁵ If further clarification is deemed necessary, per the recommendation of the chair, measures in accordance with national and international law may be implemented.⁷⁶ These measures include, but are not limited to, requests for

66. *Id.* Annex II(7).

67. This section suggests that each participant should provide the others with synopses in English of the relevant laws and procedures within its country. *Id.* § V(a). It encourages dialogue regarding the best practices and suggestions for improvements in implementing the KPCS. *Id.* § V(c)–(d). It also suggests a minimal watchdog requirement that participants inform the chair if they believe the practices of another participant “do not ensure the absence of conflict diamonds,” and that there should be cooperation in resolving problems that arise “from unintentional circumstances . . . which could lead to non-fulfillment of the minimum requirements for the issuance and acceptance of the Certificates” *Id.* § V(e)–(f). Most obvious is the suggested cooperation amongst the relevant officials of each participant. *Id.* § V(g).

68. *Id.* § VI.

69. *Id.* § VI(1).

70. *Id.* § VI(3)–(4).

71. *Id.* § VI(4).

72. *Id.* § VI(5).

73. *See infra* Part VI for reasons why vague wording is problematic in this context.

74. KPCS, *supra* note 46, § VI(8). Applications to the KPCS should entail a request to the chair through diplomatic means. *Id.* § VI(9). This request is then circulated to all participants within one month of submission to the chair. *Id.*

75. *Id.* § V(11), (13).

76. *Id.* § V(13).

additional information or review missions by other participants “where there are credible indications of significant non-compliance with the Certification Scheme.”⁷⁷ These review missions are only conducted with the permission of the participant concerned, and the circumstances of each suspected transgression determine the “size, composition, terms of reference[,] and time-frame” of the mission.⁷⁸

The KPCS includes just one paragraph regarding “compliance and dispute prevention.”⁷⁹ Essentially, when an issue regarding compliance arises, concerned participants must notify the chair who is then responsible for informing other participants “without delay” and to “enter into dialogue on how to address it.”⁸⁰ Section VI calls for the periodic review of the KPCS, specifically a three-year review, to be conducted in 2006.⁸¹ Annex III of the KPCS requires participants to keep reliable and comparable data on exportation and importation of rough diamonds for publishing and compilation on a semi-annual basis.⁸²

VI. LIMITATIONS AND SHORTCOMINGS OF THE KPCS

While the mere birth of the KPCS demonstrates a changing global sentiment and commitment to both the rebuilding of Africa and the integrity of trade on a global scale, it is severely limited by shortcomings that threaten to cripple its long-term effectiveness. The document stands to be more articulate, stern, and inclusive of delineated methods of dispute resolution.

A. *Vague Wording*

One of the most glaring shortcomings (it should be noted that this problem is not unique to the KPCS, but rather is one that plagues most international agreements) is vague wording and inarticulate direction. The KPCS talks of “proportional penalties for transgressions”⁸³ but never articulates what these penalties would be or how to ascertain the proportionality to the transgression. The KPCS goes on to assert that decisions be reached by “consensus,” though it never states what types of

77. *Id.* § V(13)(a)–(b).

78. *Id.* § V(14). A report of the mission is circulated to the chair and other participants within three weeks of completion of the mission. *Id.* § V(15).

79. *Id.* § V(16).

80. *Id.* The KPCS also calls for participants and observers to make every effort to observe strict confidentiality. *Id.*

81. *Id.* § V(20).

82. *Id.* Annex III(a), (c).

83. *Id.* § IV(d).

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voting mechanisms should be used.⁸⁴ It further states that if such “consensus” cannot be reached, the chair should conduct consultations.⁸⁵ But what would these consultations entail? How would impartiality be ensured? Is there a time frame for reaching some semblance of a conclusion from these consultations? While these questions, and likely many more, seem intuitive and worthy of concern, they are never addressed in the text of the KPCS and thus leave the door open for confusion, word-play, and prohibitive interpretation.

For another example of vague—or more appropriately, non-existent—wording, look to the Compliance and Dispute Prevention Clause of Section VI,⁸⁶ which includes just one paragraph to address the disputes that are causing major conflict and war. Understandably, the dispute resolution clauses and enforcement mechanisms of multinational treaties are often opaque because of the difficulties faced in finding consensus. However, it is worth spending the time to argue through and come to an agreement, because without the dispute resolution aspect, the rest of the treaty faces the prospect of disintegrating because of conflict among signatories.

Another glaring shortcoming, though not within the breadth of this article, is that the KPCS’s definition of “diamond” is excessively narrow and “does not include polished stones and jewelry.”⁸⁷ This is problematic because it allows diamonds that are smuggled or illicitly purchased to be transformed, polished, turned into jewelry, and then imported to go virtually undetected.⁸⁸

B. Voluntary Membership

Perhaps the most troubling shortcoming is the voluntary nature of the KPCS. The KPCS relies “too heavily on Participants policing themselves” and makes compliance with the KPCS voluntary, thus allowing countries to ignore the recommendations provided to them by other participants and the chair.⁸⁹ Further, as the KPCS is neither treaty nor law, it has no effect in non-member countries, including those that are members of the United

84. *Id.* § VI(5).

85. *Id.*

86. *Id.* § VI(16).

87. Petrova, *supra* note 34, at 954.

88. *Id.* at 954-55.

89. Malamut, *supra* note 5, at 47-49.

Nations.⁹⁰ Not only does this undermine the integrity of the KPCS by demonstrating a lack of political will and compassion on the part of non-members, it opens the door to a host of logistical issues including the use of non-participating countries as corridors for smuggling diamonds from the mines to the consumer nations.⁹¹

Lastly, the KPCS has run aground on some of the provisions of the World Trade Organization that promotes freer movements of goods and the promotion of “free trade.” The crux of the issue here is that “without a ban on trade with non-participants, the Kimberley Process could have no significant effect.”⁹² However, a trade ban of this sort appears to be a “red-flag violation” of the General Agreement on Tariffs and Trade (GATT), the foundation of the World Trade Organization.⁹³

As the system stands, the KPCS does not allow for private rights of action by individuals against other individuals, companies, or countries in violation of the KPCS.⁹⁴ If this private cause of action were established, industry leaders, as well as countries, would be able to participate more aggressively in the system.⁹⁵ Like other methods of prosecution, many industry and government leaders would find the threat of suit deterrence enough, looking to avoid bad press (an often fatal blow in the realm of luxury goods). However, until the KPCS becomes formalized law, or at the very least binding among its signatories, this cause of action remains a fiction.

C. *Lacking an Enforcement Mechanism*

While in theory the goals of the initiative are sound and feasible, in practice they will fail to solve the blood diamond trade problem. A system

90. “The KPCS is not a legally binding document, as matter of international law. However, the KP Participant countries have considered it necessary to voluntarily fulfill the KPCS minimum requirements at the national level and have adopted relevant laws and/or executive acts to that effect.” THE KIMBERLEY PROCESS CERTIFICATION SCHEME: THIRD YEAR REVIEW 5 (Oct. 2006), *available at* <http://www.worlddiamondcouncil.org/download/resources/documents/Kimbeley%20Process%20Third%20Year%20Review%20%281-11-2006%29.pdf> [hereinafter KPCS REVIEW].

91. Petrova, *supra* note 34, at 954. Weak countries essentially serve as gateways for smuggling. Further, it provides a loophole of sorts with regards to the “country of origin” specification; a rough diamond from the Ivory Coast, smuggled into non-participant Mali, and transformed in Belgium or the United States now becomes “a polished diamond from Belgium or the United States.” *Id.*

92. Feldman, *supra* note 4, at 855.

93. *Id.*

94. Fishman, *supra* note 2, at 235.

95. *Id.*

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that requires no international watchdog or universal guidelines, and instead merely suggests ways for nations to conduct their investigations and punish violators, invites abuse and inefficiency.⁹⁶

In April 2003, at the first plenary meeting of the KPCS participants, it was discovered that several participating countries failed to implement regular and independent monitoring for all participants.⁹⁷ Despite this shortcoming being called to light, no action was taken to establish any regular monitoring systems. This inaction certainly diminishes the credibility of the KPCS, a significant shortcoming given its short existence.

D. KPCS Third Year Review—Ineffective Implementation

In 2006, the KPCS compiled the results of a questionnaire circulated to its participants in the form of a third-year review and critique of the system.⁹⁸ The review focused on three major areas: (1) the impact and effectiveness of the KPCS “on the international trade in rough diamonds;” (2) whether the technical provisions of the KPCS are adequate as planned or require improvement; and (3) the effectiveness and efficiency of the operations of the KPCS.⁹⁹ Though the questionnaire returned largely positive results, the major problem cited was the “effective implementation of internal controls.”¹⁰⁰ Essentially, as predicted by many, the KPCS was great on paper but hard to implement without proper funding and clearer guidelines.¹⁰¹ The review also stated that there was a “lack of agreement on non-compliance and the procedures for removing Participants that are deemed to be in significant non-compliance with the KPCS.”¹⁰² While this is certainly disconcerting, it demonstrates the discontent of some nations with the KPCS and the need to continue dialogue on how to make the dispute resolution aspect of the KPCS more effective.

The review notes the one occasion “on which the formal provisions of the [Kimberly Process] for dispute resolution ha[s] been invoked.”¹⁰³ In 2004, just one year after implementation, the Republic of Congo (ROC) was

96. *Id.* at 218.

97. *See* KPCS REVIEW, *supra* note 90, at 63.

98. *See id.* at 8-10.

99. *Id.* at 3.

100. *Id.*

101. *See generally id.*

102. *Id.* at 7.

103. *Id.*

found to be improperly issuing Certificates for over five million carats of rough diamonds.¹⁰⁴ A review mission confirmed these suspicions and deemed the ROC to be in “major non-compliance of the KPCS.”¹⁰⁵ One month after this mission, the ROC was removed from the list of countries participating in the KPCS.¹⁰⁶ While other participating countries were self-congratulatory on the ROC’s removal because it served to “enhance the reputation” of the KPCS, the country now serves as a corridor of illegal smuggling.¹⁰⁷ This situation demonstrates that the removal of a rogue country, while sparing the other participants a tarnished reputation, does little to control the diamond trade or reign in the rebels.

The review also notes the Ivory Coast’s dissatisfaction with the KPCS.¹⁰⁸ The Ivory Coast stated that the KPCS “has not effectively responded to the mandate given by the relevant U.N. General Assembly resolution to combat the threat of conflict diamonds, because, despite the implementation of the [KPCS], Ivorian diamonds have been sold to the international market without any sanctions for those involved in the trade.”¹⁰⁹ The Ivory Coast expresses these sentiments despite KPCS monitoring since early 2005, a special envoy of the KPCS chair, and investigations conducted by the U.N. and Global Witness.¹¹⁰ While the situation appears to have improved in other previously conflicted countries, the KPCS is admittedly falling desperately short in the case of the Ivory Coast.¹¹¹

Zimbabwe is the most recent and relevant strain on the KPCS. In 2006, diamonds were discovered in the Marange region of eastern Zimbabwe.¹¹² Since 2009, these diamonds have been denied certification because of clear evidence that the military has overrun the area, with individuals rather than legitimate government entities profiting from the diamonds, many of which are being smuggled through neighboring Mozambique.¹¹³ At the three day

104. *Id.* at 63.

105. *Id.*

106. *Id.*

107. *Id.* at 66.

108. *Id.* at 17.

109. *Id.*

110. *Id.*

111. *See id.* at 23-24 (sharing positive updates on countries, including the DRC, Sierra Leone, and the Republic of Angola). *But cf. id.* at 17-20 (discussing the failures of the KPCS in the Ivory Coast).

112. Alan Cowell, *Group Allows Limited Sale of Zimbabwe’s Diamonds*, N.Y. TIMES, July 17, 2010, at A5, available at http://www.nytimes.com/2010/07/17/world/africa/17diamonds.html?ref=alan_cowell.

113. Sara Toth Stub, *Talks Stall on Zimbabwe Diamonds*, WALL ST. J., June 24, 2010, available at <http://online.wsj.com/article/SB10001424052748704629804575325021274013424.html>. If fully

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2010 plenary meeting of the KPCS held in Tel Aviv in June, KPCS members could not come to a consensus on whether or not to certify Zimbabwe's diamonds.¹¹⁴ The definition of "conflict diamond" was a point of contention—as it stands the definition includes diamonds sold to finance anti-government rebel groups.¹¹⁵ However, in Zimbabwe, where the government controls the diamond mines, the issue is over reported human rights violations at the hands of the government.¹¹⁶ For seemingly obvious reasons, the definition should be amended to be inclusive of diamonds that provide funding for groups known to violate human rights.

A follow-up visit to Zimbabwe in August 2010 resulted in approval of a limited sale of diamonds after the monitor (a South African diamond expert) revealed the diamonds to be "clean."¹¹⁷ The "limited" sale was for 900,000 carats of diamonds worth \$72 million.¹¹⁸ Whether the KPCS can handle the situation in Zimbabwe remains to be seen. But what is clear is that if the KPCS cannot control the diamond trade out of Zimbabwe, a large portion of the world's diamonds will enter the market uncertified, thus allowing profits to flow into the hands of governments that continue to violate human rights. An atrocity of this magnitude would surely cripple the credibility of the KPCS.

The purpose of this paper is to shed light on these shortcomings and offer suggestions for increasing efficiency so that the KPCS may function as intended.

VII. WHAT WOULD THE ENHANCED KPCS LOOK LIKE?

Logistically, a modification of the KPCS would require consensus by the participants and may be proposed in a written statement to the chair by

mined, diamonds from this region of Zimbabwe could make up twenty-five percent of the world's supply of diamonds, valuing in the billions of dollars. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* Human Rights Watch, an NGO, has reported corruption, miners being forced to work at gunpoint, and a massacre of 200 workers in 2008. *Id.*

117. Arthur Bright, *Zimbabwe Restarts Diamond Sales Amid 'Blood Diamond' Accusations*, CHRISTIAN SCI. MONITOR, August 12, 2010, available at <http://www.csmonitor.com/World/terrorism-security/2010/0812/Zimbabwe-restarts-diamond-sales-amid-blood-diamond-accusations>.

118. *Id.*

any one of the participants, at least ninety days prior to the next plenary meeting.¹¹⁹

Substantively, the modification would call for a binding arbitration agreement to replace the inefficient method of discussion and dialogue by the chair. The method of dialogue and forum in which complaints would be brought would need to be clear and not yield to the existing ad hoc working groups. The arbitrators would come from participating countries—observers,¹²⁰ diamond industry experts, and counsel from the United Nations and relevant private industry specializing in alternative forms of adjudication.

The modification would also make the review missions¹²¹ required for every member country, or at the very least, countries where conflicts are continuing. While countries would still be able to voluntarily sign on to the KPCS, this would require a relinquishing of power and privacy. However, given the amount of money to be made from diamonds, even when sold legally, which is admittedly less than when sold on black markets, this would be a small price to pay to be able to certify one's diamonds as legitimate, thus increasing their value in the consumer marketplace.

According to the KPCS Review, some participating countries believe that “government monitoring and verification of industry compliance should be made an explicit minimum requirement” of the KPCS.¹²² This requirement, joined with a binding dispute resolution agreement, would force participating countries to be policed by the KPCS. While for some this steps on the toes of sovereignty, those committed to changing the diamond industry for the proper reasons would find it a worthwhile sacrifice and small price to pay.

The modification would also call for more specific punishments for transgressing nations, individuals, or companies. The United Nations Security Council is granted the power to administer sanctions under Chapter VII of its Charter “to maintain or restore international peace and security.”¹²³ KPCS participants in violation of the proposed binding agreement and subsequent action taken by the proposed tribunal would face targeted

119. KPCS, *supra* note 46, § VI(17)–(18). The chair would then need to circulate the proposal to all participants and observers and place it on the agenda of the next meeting. *Id.* § VI(19).

120. As defined by the KPCS, “observer” means a “representative of civil society, the diamond industry, international organizations and non-participating governments invited to take part in Plenary meetings.” *Id.* § I.

121. *Id.* § VI(14)–(15).

122. KPCS REVIEW, *supra* note 90, at 53.

123. UN Security Council Sanctions Committees, *Security Council Sanctions Committees: An Overview*, www.un.org/sc/committees/ (last visited Nov. 1, 2010).

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sanctions by the United Nations.¹²⁴ However, these sanctions would need to be accompanied by major press coverage because ultimately it would be up to the consumers to choose to stop purchasing diamonds from illegitimate, sanctioned sources.

I suggest that the KPCS should use the dispute settlement scheme of the World Trade Organization (WTO) as a model for increasing effectiveness and achieving the aforementioned changes and goals. Such a system would give much-needed teeth to the well intended but ultimately too soft KPCS. A more effective dispute resolution system would make the KPCS more legitimate, secure, and predictable.

The WTO dispute resolution mechanism is applicable to the KPCS for various reasons. The WTO provides a solid example for the KPCS as both documents seek the same end—efficient and quick dispute resolution with priority given to settling these disputes through consultation.¹²⁵ Further, the nature of the disputes to be settled is similar enough to almost seamlessly apply WTO standards to the KPCS.¹²⁶ Lastly, the WTO previously experienced many of the problems plaguing the KPCS—“no fixed timetables,” easily blocked rulings, and disputes and infractions that dragged on “for a long time inconclusively.”¹²⁷

The modifications to the WTO agreement, achieved at the Uruguay Round, provided a “more structured process with more clearly defined stages in the procedure.”¹²⁸ This would be particularly helpful to the KPCS, which, as it stands, has no distinct stages. Further, the KPCS lacks any real structure because the dispute resolution is based on the actions of a chair who changes every year and the ad hoc working groups who, by their definition, are tailored to each situation. A case, under WTO standards,

124. Targeted sanctions are narrower than general comprehensive trade or economic sanctions. Targeted sanctions can include freezing assets, blocking financial transactions by certain individuals or organizations, and prohibiting the international movement of these individuals and organizations. *Id.*

125. World Trade Organization, Understanding the WTO: Settling Disputes: A Unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 22, 2010) [hereinafter WTO Disputes].

126. The WTO identifies the crux of its disputes as “broken promises.” *Id.* Specifically, a “dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreement, or to be a failure to live up to obligations.” *Id.* Similarly, a dispute within the KPCS would consist of one country failing to take proper policing action and thereby failing to live up to its obligation to regulate the diamond trade within its borders.

127. *Id.*

128. *Id.*

normally takes about one year—fifteen months if appealed.¹²⁹ While this may seem lengthy given the transgressions that could continue during the dispute process, it is unfortunately realistically indicative of the true timeframe for both domestic disputes and disputes resolved in the U.N., barring any emergency or unilateral action. Rulings under the WTO are automatically adopted unless a consensus rejects it.¹³⁰ That is to say that any country, including the parties to the dispute, must convince all other members to move to block the settlement.¹³¹ In the WTO, unlike the KPCS, the action stands unless opposed. In the KPCS, the action must be actively agreed upon by the member states *before* it would become effective. Clearly, the WTO arrangement provides for swifter dispute resolution.

The KPCS would need to adopt a standing dispute resolution body similar to the Dispute Settlement Body of the WTO. It would be the sole authority of this body to create a panel of experts to hear the case. It would also be this body's responsibility to accept or reject the ultimate decision at the conclusion of the proceedings.¹³² Some participating countries of the KPCS have already "expressed interest in a dedicated, funded, administrative body to work in close collaboration" with the chair.¹³³ While some other participants oppose the creation of such a body for fear of bureaucratic slowdown, it should be noted that with ineffectiveness running as high as it is, a slow pace from a functioning body is better than the current stagnation resulting from the inexistence of such a body.

The first stage in the KPCS's new dispute settlement procedure, as adopted from the WTO, would be consultation that could last up to sixty days.¹³⁴ The KPCS chair would be the initial mediator in this consultation. He would be able to request assistance from experts or outside counsel from other observers, participating countries, or both, if he felt that he was either unfit or biased in the matter.

The second stage of the dispute resolution process would be the panel. There would be a set number of days—in the case of the WTO it is forty-five—in which the panel would be composed and another six months for the panel to examine and ultimately conclude on its findings.¹³⁵ The dispute would only reach this stage if the mediation of the consultation phase failed,

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. KPCS REVIEW, *supra* note 90, at 58.

134. WTO Disputes, *supra* note 125.

135. *Id.*

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and further, it would be at the discretion of the complaining party to ask for the appointment of such panel.¹³⁶

It is the job of the panel to assist the settlement body in drafting a ruling. As to the workings of the panel, each side would initially present its case in writing and then make its case at a “first hearing.”¹³⁷ The hearings would proceed with opportunities for rebuttals and the presentation of experts.¹³⁸ The panel then provides both sides with interim reports that they can review, and then ultimately provides them with a final report that is circulated to the disputing parties and the rest of the organization’s members.¹³⁹ The report would then become a ruling within sixty days unless the other members reject it.¹⁴⁰ The new system would also include a method of appeal.¹⁴¹

I suggest the WTO dispute resolution agreement as a jumping off point and functioning model. The KPCS would require modifications, some of which have been previously discussed, to tailor the settlement to its particular needs. What cannot be compromised, however, are the timeframes within which disputes are resolved, and the binding nature of both becoming a signatory and the subsequent process of adjudicating disputes and distributing justice.

VIII. CONCLUSION

Ultimately, the KPCS is representative of a good faith effort and acknowledgement on the part of many of the plight of the African nations that are cursed with diamond-rich land. However, the six-year-old KPCS stands to undergo modifications including an all-out revamping of its means of enforcing provisions and keeping participating countries in line.

In the end, the African continent is plagued with troubles that far exceed the blood diamond conflicts. However, success in bringing down the illicit

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* Appeals would have to be based on points of law and could not involve a reweighing of the evidence or presentation of new issues. *Id.* A three-member panel of a permanent seven-member body created specifically for the purpose of handling appeals would hear the appeal. *Id.* The members of this panel would come from participating countries, though they would be experts, lawyers, and not politically affiliated with any government. *Id.* The appeal would not last more than sixty days, and the dispute settlement body would have to accept or reject it within thirty days of the new holding. *Id.* Again, rejection would only be possible by a consensus of the members. *Id.*

diamond trade would provide these countries with lucrative business—the profits of which could be used to tackle the other pressing issues of infrastructure rebuilding, education, the HIV/AIDS epidemic, and extreme poverty. With this said, regaining a hold of the diamond mines is absolutely crucial.

But even if the KPCS enacts more stringent rules, it will come down to the consumers to ultimately drive the rebels out of business. Feldman has alluded to the economics that presumably would accomplish this end.¹⁴² Ultimately, the mining, transportation, and sale of blood diamonds carry a huge risk, and “[t]hose who incur the increased risk will want to be paid a large premium for doing so. But the buyer of illegal diamonds will want to pay a lower price for goods that lack legitimate credentials.”¹⁴³ Literally, the clean diamonds would drive the blood diamonds out of the market.¹⁴⁴

However, this theory relies heavily on an educated and compassionate consumer. But the problem in America and other parts of the world is that the atrocities of blood diamonds break into Western media channels with pathetic infrequency. Consumers need to be educated not only of the atrocities being committed to harvest these diamonds but also on the illegality of the process that turns these rough diamonds into shiny engagement rings. They must also be educated on the KPCS itself and how and where to obtain properly certified stones. While many jewelers claim to sell only the best in quality and origin—certainly no one would advertise their diamonds coming from illegitimate sources—the conflicts in Africa still rage on. Clearly, there is a disconnect between the message consumers are hearing and the legal logistics of truly cleaning up the diamond industry. At the end of the day, the participating governments, as well as the diamond industry heavy hitters, will have to find a vested interest in the plight of the African nations and the integrity of consumers before major changes will occur.

142. Feldman, *supra* note 4, at 867.

143. *Id.*

144. *Id.*