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The Implementation and Effectiveness of the Kimberley Process Certification Scheme in the United States

ALBENA P. PETROVA*

I. Introduction

The Republic of Ivory Coast used to be the fourth-largest economy in Sub-Saharan Africa until the failed military coup attempt in 2002.¹ Since then the country has been split into two parts. The government controls the southern half, while rebellion groups have taken over the north, which is rich in diamond mines.² The diamonds originating from those mines are called “conflict” or “blood” diamonds because the rebellion forces use the revenues from the diamond sales to purchase arms, which halts peace-making efforts in the country.³ In 2004, the United Nations Security Council imposed a ban on imports of diamonds from Ivory Coast and renewed that ban in December 2005.⁴

Ivory Coast is a participant in the Kimberley Process, a forum in which participating countries have designed an international certification scheme for rough diamonds known

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1. See CIA—The World Factbook, Cote d’Ivoire, (Aug. 22, 2006), <http://www.cia.gov/cia/publications/factbook/geos/iv.html> (stating that Ivory Coast was among “the most prosperous . . . tropical African states” and that rebels took control over the northern half of the country after dissidents “launched a failed coup attempt in September 2002”); see also Lansana Gberie, *The Crisis in Ivory Coast* (June 24, 2004), <http://www.globalpolicy.org/security/issues/ivory/2004/0624analyze.htm>.

2. See Gberie, *supra* note 1.

3. See GLOBAL WITNESS, MAKING IT WORK: WHY THE KIMBERLEY PROCESS MUST DO MORE TO STOP CONFLICT DIAMONDS (2005) [hereinafter MAKING IT WORK], available at www.globalwitness.org/reports/show.php/en.00082.htm; see also United Nations Dep’t of Public Info., *Conflict Diamonds: Sanctions and War*, Mar. 21, 2001, available at <http://www.un.org/peace/africa/Diamond.html> (defining conflict diamonds).

4. See 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).

as the Kimberley Process Certification Scheme (KPCS).⁵ The KPCS aims to halt the illegal trade in conflict diamonds. The certification scheme allows trade in diamonds only between participating countries with the presence of a valid Kimberley certificate and forbids their importation and exportation from non-participants. Nevertheless, conflict diamonds continue to be smuggled from the northern part of Ivory Coast into the neighboring countries of Guinea and Mali, and then reach markets in developed countries.⁶ The United States remains “the world’s largest diamond jewelry market,” while Belgium and the United Kingdom are the major centers for the importation and exportation of rough diamonds.⁷ The continuing trade in illegal diamonds from Ivory Coast raises questions about the efficiency of the KPCS.

This article analyzes the implementation and effectiveness of the KPCS in the United States in a comparative perspective. Part I examines the origins and goals of the KPCS and the request for the World Trade Organization (WTO) waiver to allow KPCS participants to take the necessary measures to regulate the importation and exportation of conflict diamonds. Part I further presents the implementation of the KPCS in the United States and Belgium. Part II analyzes the effectiveness of the KPCS in the United States. It focuses on its limitations, the compilation of inconsistent statistics, and the lack of sufficient border control and verification in the United States. Part II also discusses the forthcoming expiration of the WTO waiver. Then, Part III recommends how to reform the KPCS and make it more efficient in the United States. Finally, the article concludes that the United States could learn from the implementation of the KPCS in Belgium.

II. The Kimberley Process Certification Scheme and Its Implementation

This background section explains how the Kimberley Process and its certification scheme came into existence. This section also describes the approval of the WTO waiver and the implementation of the KPCS in the United States and Belgium.

A. THE ORIGINS OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The KPCS is “a joint government, international diamond industry, and civil society initiative” to stop the trade in illegal diamonds that has contributed to military conflicts in countries such as Ivory Coast.⁸ The idea to create the KPCS originated in May 2000, when South Africa and other African diamond producing countries met in Kimberley, South Africa, to stop the trade in conflict diamonds that contributes to violent conflicts, terrorist

5. See Kimberley Process, Background, <http://www.kimberleyprocess.com:8080/site/?name=background> (last visited May 3, 2006) (hereinafter Background).

6. See Kimberley Process, *Summary of the Kimberley Process Review Visit to Guinea*, Apr. 23–28, 2005, available at http://www.kimberleyprocess.com:8080/site/www_docs/press1/summary_report_-_guinea.pdf (discussing the implementation of the Kimberley Process Certification Scheme in Guinea).

7. See Nw. Territories, *Diamond Facts 2004/05*, <http://www.iti.gov.nt.ca/diamond/industry.htm#polishbel> (last visited May 4, 2006) (providing statistics about diamond production and sales worldwide); see also Diamond-Key, Centers and Bourses, May 25, 2000, <http://www.diamond-key.com/bourses> (stating that rough diamonds are mined across four continents and are sorted in London and then distributed to the cutting centers around the world).

8. See Kimberley Process, The Kimberley Process, Jan. 1, 2006, available at <http://www.kimberleyprocess.com:8080/site/?name=home> (describing the origins of the Kimberley Process).

activities, and human rights abuses.⁹ On December 1, 2000, the United Nations General Assembly adopted a resolution to create an international certification process to prevent the illicit trade in rough diamonds that finances armed conflicts.¹⁰ United Nations Security Council Resolutions 1173 (1998), 1295 (2000), 1306 (2000), and 1343 (2001) supported the implementation of the KPCS.¹¹ The Interlaken Declaration of November 2002 launched the KPCS, as a solution to the international problem of conflict diamonds.¹² The certification scheme currently has forty-five participants, representing around ninety percent of the world's diamond trade.¹³ Each participant has to implement the KPCS and exchange ideas with the other participants during the annual plenary meetings.¹⁴

The aim of the KPCS is to prevent the trade in conflict diamonds while helping to protect the legitimate trade in rough diamonds. KPCS's Preamble recognizes that trade in conflict diamonds is a "matter of serious international concern" and is linked to the "fuelling of armed conflict," and "proliferation of armaments."¹⁵ The Definitions Section defines conflict diamonds as only rough diamonds and not polished diamonds, or diamonds transformed into jewelry.¹⁶ A country of origin is defined as "the country where a shipment of rough diamonds has been mined or extracted;" a country of provenance is "the last [p]articipant from where a shipment of rough diamonds was exported, as recorded on import documentation;" a parcel of mixed origin is a "parcel that contains rough diamonds from two or more countries of origin, mixed together;" and a Kimberley Process certificate is "a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the . . . Certification Scheme."¹⁷

The goal of the certification scheme is to exclude conflict diamonds from legitimate trade.¹⁸ It allows participating countries to trade among themselves in non-conflict diamonds and prohibits participants from importing or exporting diamonds from non-participants.¹⁹ The KPCS requires governments of participating countries to implement systems of control to ensure that imported and exported diamonds are not conflict diamonds. Each country decides what system to put into place to certify that it is exporting and importing only "conflict-free" diamonds from other participating countries. Participation in the KPCS is open to all countries that are "willing and able to fulfill [its] requirements."²⁰

9. See Background, *supra* note 5 (providing information on the goals of the Kimberley Process Certification Scheme).

10. See *Conflict Diamonds: Sanctions and War*, *supra* note 3 (stating that the United Nations General Assembly unanimously adopted Resolution A/RES/55/56 of December 1, 2000).

11. Kimberley Process Certification Scheme, Nov. 5, 2002, pml., <http://www.kimberleyprocess.com:8080> (follow "Enter Public Area" hyperlink, then follow "KPCS" hyperlink) (last visited Jan. 11, 2007).

12. See *id.* at sec. 6.

13. See Kimberley Process, List of Participants, *available at* <http://www.kimberleyprocess.com:8080> (follow "Enter Public Area" hyperlink, then follow "List of Participants" hyperlink) (last visited Jan. 11, 2007) (listing the countries that presently participate in the Kimberley Process Certification Scheme).

14. See Kimberley Process, Rules of Procedure of Meetings of the Plenary, and Its Ad Hoc Working Groups and Subsidiary Bodies, *available at* <http://www.kimberleyprocess.com:8080> (follow "Enter Public Area" hyperlink, then follow "Kimberley Structure" hyperlink, then follow "Kimberley Process Rules of Procedure" hyperlink) (last visited Jan. 11, 2007) (listing the rules of procedure of meetings of the plenary).

15. See Kimberley Process Certification Scheme, *supra* note 11, pml.

16. *Id.* § I.

17. *Id.*

18. *Id.* §§ II, III.

19. *Id.*

20. *Id.* § VI.

The KPCS has developed a set of minimum requirements that each participant is required to implement.²¹ A “duly validated” Kimberley Process certificate must accompany each shipment of rough diamonds on import and export, and a confirmation of receipt containing the certificate number, the number of parcels, the carat weight, and the details of the importer and exporter, should be sent to the relevant exporting authority. Participating countries are not allowed to import or export shipments from non-participants.²²

Each participant also must “establish a system of internal controls . . . to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory.”²³ Participants should “designate an [i]mporting and [e]xporting [a]uthority,” and “ensure that . . . diamonds are imported and exported in tamper resistant containers,” and also must collect and maintain import and export statistics, and exchange such data with other participants.²⁴ Finally, each participant is required to amend and “enact the appropriate laws and regulations to implement and enforce” the KPCS.²⁵ The KPCS does not provide for uniform civil and criminal penalties for violators of its provisions.²⁶

The KPCS requires that each certificate bear the title of Kimberley Process Certificate and a statement that “[t]he rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds.”²⁷ Each certificate ought to be tamper- and forgery-resistant, contain the country of origin for shipment of parcels from a single origin, as well as a unique number, the dates of issuance and expiry, and the issuing authority. Each certificate also must identify the importer and exporter, the carat weight, the value of the diamonds in U.S. dollars, the number of parcels in the shipment, the relevant Harmonized Commodity Description and Coding System, and a validation of the certificate by the exporting authority.²⁸

The KPCS recommends that the exporter “submit a rough diamond shipment to the relevant Exporting Authority.”²⁹ The exporting authority should validate a Kimberley certificate after the exporter has presented a declaration that the exported diamonds are not conflict diamonds and should transmit an electronic message to the importing authority with information including the weight, value, country of origin or provenance, importer, and serial numbers of the diamonds.³⁰ The importing authority should subsequently open and inspect the shipment to verify the seals and to ensure that the exports comply with the KPCS requirements and match the details declared on the Certificate.³¹

The KPCS strongly encourages the collection of reliable and comparable data on the production and trade in conflict diamonds.³² Participants are encouraged to maintain data on the exportation and importation of diamonds, by origin, provenance, carat weight, and value, under the relevant Harmonized Commodity Description and Coding System

21. *Id.* §§ II, III.

22. *Id.* § III.

23. *Id.* § IV(a).

24. *Id.* § IV(b), (c).

25. *Id.* § IV(d).

26. *See id.* § IV.

27. *Id.* Annex I(A).

28. *Id.*

29. *Id.* Annex II(17).

30. *Id.* Annex II(18), (19), (22).

31. *Id.* Annex II(23).

32. *See id.* Annex III.

subheadings 7102.10, 7102.21, and 7102.31.³³ The participating countries are expected to keep and publish the data semi-annually.³⁴

Fearing that the certification scheme could violate provisions of the World Trade Organization's General Agreement on Tariffs and Trade (GATT),³⁵ KPCS participants requested a waiver for import and export restrictions on conflict diamonds and the WTO granted it.

B. THE WAIVER FROM THE WORLD TRADE ORGANIZATION

A request for a WTO waiver is a special procedure reserved for exceptional circumstances in which a member presents justifiable reasons to temporarily suspend specific WTO obligations. Articles IX:3 and IX:4 of the Agreement Establishing the World Trade Organization (WTO Agreement)³⁶ provide for the possibility of obtaining a waiver from the WTO obligations in question. A WTO member has to submit a request to the Council for Trade in Goods for a decision-making by consensus. If the Council for Trade in Goods is not able to reach consensus within a period of ninety days, then a decision to grant waiver should be taken by a three-fourths majority. The decision to grant waiver should state the exceptional circumstances that justify the decision and the date on which it terminates.

At the end of the period the Council for Trade in Goods must submit a report to the Ministerial Conference. A waiver is reviewed annually until its termination. The Ministerial Conference, on the basis of the annual review, might extend, modify, or terminate the waiver. Waivers may be granted to individual countries or to a group of countries.

On November 22, 2002, Canada, Japan, and Sierra Leone filed a request for a WTO waiver to allow them to take the necessary measures to regulate the importation and exportation of conflict diamonds according to the KPCS.³⁷ The request sought to institute a waiver from the provisions of most-favored nation treatment (GATT Article I:1),³⁸ elimination of quantitative restrictions (GATT Article XI:1),³⁹ and non-discriminatory administration of

33. *Id.* Annex III(b).

34. *Id.* Annex III(c).

35. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, 1867 U.N.T.S. 154 [hereinafter GATT 1994] (GATT 1994 did not replace GATT 1947, and both are read together).

36. See GATT 1994, *supra* note 35.

37. See Communication of Canada, Japan, & Sierra Leone, *Kimberley Process Certification Scheme for Rough Diamonds—Request for a WTO Waiver*, G/C/W/431 (Nov. 12, 2002).

38. GATT, *supra* note 35, art. I:1 (states in relevant part:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports and exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation . . . , any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.)

39. *Id.* art. XI:1 (states in pertinent part:

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

quantitative restrictions (GATT Article XIII:1)⁴⁰ between January 1, 2003, and December 31, 2006. The Philippines, Thailand, and the United Arab Emirates became part of the waiver request on November 21, 2002.⁴¹ Australia, Brazil, Israel, and the United States joined the request for a waiver on January 14, 2003.⁴² Countries that opposed the WTO waiver considered that GATT Article XXI (Security Exemptions)⁴³ or GATT Article XX (General Exemptions)⁴⁴ cover issues such as the KPCS.

On February 26, 2003, the WTO Council for Trade in Goods approved the request for a waiver for trade measures under the KPCS.⁴⁵ The WTO Council for Trade in Goods recognized that the trade in conflict diamonds is a matter of serious international concern,⁴⁶ noting its devastating impact, and noting that the United Nations Security Council Resolution S/RES/1459 (2003) supported the waiver.⁴⁷ The waiver exempts the countries that requested it, and others that subsequently join, from GATT provisions on most-favored nation treatment (GATT Article I:1), elimination of quantitative restrictions (GATT Article XI:1), and non-discriminatory administration of quantitative restrictions (GATT Article XIII:1) from January 1, 2003, through December 31, 2006.⁴⁸

40. *Id.* art. XIII:1 (states in relevant part:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.)

41. See Communication from Canada, Japan, and Sierra Leone, Corrigendum, *Kimberley Process Certification Scheme for Rough Diamonds—Request for a WTO Waiver*, G/C/W/431/Corr.1 (Nov. 21, 2002).

42. See Communication from Canada, Japan, and Sierra Leone, Corrigendum, *Kimberley Process Certification Scheme for Rough Diamonds—Request for a WTO Waiver*, G/C/W/431/Corr.2 (Jan. 14, 2003).

43. GATT, *supra* note 35, art. XXI (states in relevant part:

Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests. . . . (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.)

44. *Id.* art. XX (states in relevant part:

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

45. See Communication from Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, and United States, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, G/C/W/432/Rev.1 (Feb. 24, 2003) [hereinafter WTO Approved Waiver]; see also Press Release, WTO News, Agreement Reached on WTO Waiver for “Conflict Diamonds,” (Feb. 26, 2003) available at http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm (describing the waiver request and decision, and noting that WTO members could join the waiver decision even after it was adopted).

46. WTO Approved Waiver, *supra* note 45.

47. *Id.*

48. *Id.*

C. IMPLEMENTATION OF THE KIMBERLEY PROCESS CERTIFICATION
SCHEME IN THE UNITED STATES

The Clean Diamond Trade Act of 2003 implements the KPCS in the United States.⁴⁹ Section 2 of the Act introduces facts that demonstrate the deaths caused by trade in conflict diamonds, stating that around 3.7 million people have died in Africa as a result of wars funded from the sale of conflict diamonds.⁵⁰ Section 3 introduces the main terms used in the Act, defining a rough diamond as a “diamond that is unworked or simply sawn, cleaved, or bruted and classifiable under subheading 7102.10, 7102.21, or 7102.31 of the Harmonized Tariff Schedule of the United States.”⁵¹ Unlike the KPCS, this section fails to define the terms “country of origin” and “country of provenance,” and also does not define the term “polished diamonds.”⁵²

Section 4 of the Clean Diamond Trade Act states that the President of the United States must prohibit the importation into or the exportation out of the United States of any rough diamonds that are not controlled by the KPCS and also requires an annual review of the standards, practices, and procedures of any entity in the United States that issues Kimberley certificates.⁵³ Section 6 specifies the importing and exporting authorities in the United States as the U.S. Bureau of Customs and Border Protection (CBP) and the U.S. Census Bureau, respectively. The Act establishes a coordination committee, which includes the Department of Treasury, the State Department, the Commerce Department, the U.S. Trade Representative, and the Department of Homeland Security.⁵⁴

Section 8 explains civil and criminal penalties, providing that any person who violates or attempts to violate the Act may be subject to a civil penalty not exceeding \$10,000.⁵⁵ Any person who willfully violates or attempts to violate provisions under this Act upon conviction may be fined not more than \$50,000.⁵⁶ The executive branch must keep and publish statistics on the imports and exports of rough diamonds, and make them available to interested parties.⁵⁷ The President is required to issue annual and semi-annual reports containing statistical information on the importation and exportation of rough diamonds.⁵⁸

The U.S. Kimberley Process Authority (USKPA) is the issuing authority for rough diamond export certificates in the United States.⁵⁹ Rough diamonds exported from the United States need to have a U.S. Kimberley Process Certificate issued by the USKPA. Each certificate is assigned a unique number by the Automated Export System (AES) of the

49. See Clean Diamond Trade Act, Pub. L. No. 108–19, § 3901, 117 Stat. 631 (2003) (former Congressman Amory Houghton (R-New York) introduced H.R. 1584, which was passed by both houses and signed by the President into law on April 25, 2003). See generally NICOLAS COOK, DIAMONDS AND CONFLICT: BACKGROUND, POLICY, AND LEGISLATION (2003) (providing information about the implementation of the Kimberley Process Certification Scheme in the United States).

50. Clean Diamond Trade Act, *supra* note 49, § 2.

51. *Id.* § 3.

52. *Id.*

53. *Id.* §§ 4, 5.

54. *Id.* § 11.

55. *Id.* § 8(a)(1).

56. *Id.* § 8(a)(2).

57. *Id.* § 10(b).

58. *Id.* § 12.

59. See Automated Export System Mandatory Filing for Export (Reexports) of Rough Diamonds, 68 Fed. Reg. 59,877 (Oct. 20, 2003) (to be codified at 15 C.F.R. pt. 300).

U.S. Census Bureau.⁶⁰ Companies have to register with CBP to obtain such a number. An internal transaction number (ITN) is issued automatically with an AES number.⁶¹ USKPA licensees must report monthly to the USKPA, which informs the State Department and the Census Bureau of the use of the certificates and the destination of each shipment.

D. IMPLEMENTATION OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME IN BELGIUM

Belgium is a member of the European Union (EU), which is a KPCS member.⁶² The EU has implemented the KPCS through Council Regulation No. 2368.⁶³ The Council Regulation is binding and directly applicable to all EU Member States such as Belgium. Article 2 of the Resolution defines a "Community authority" as the authority designated by an EU Member State to use, validate, or verify Kimberley certificates.⁶⁴ So far, four EU Member States have designated Community authorities.⁶⁵ Those states are Belgium, the Czech Republic, Germany, and the United Kingdom.⁶⁶ A certificate has to be "duly issued and validated by a participant's competent authority identifying a shipment of rough diamonds."⁶⁷ The Council Regulation prohibits the importation of rough diamonds in the EU that are not accompanied by a valid certificate and are not in tamper-resistant containers with an export seal.⁶⁸ All containers and certificates are subject to verification.⁶⁹ Community authorities must provide the European Commission with a monthly report describing all the certificates submitted for verification.⁷⁰ As the EU representative to the KPCS, the EU Commission ensures compliance with the provisions of the Council Regulation implementing the KPCS.⁷¹

Additionally, the Council Regulation prohibits the exportation of rough diamonds unless the rough diamonds are in a tamper-resistant container and are accompanied by a certificate issued and validated by a Community authority.⁷² The Community authority may issue an export certificate if the exporter has provided conclusive evidence that the rough diamonds

60. *See id.*

61. *See id.*

62. The Kimberley Process Certification Scheme refers to European Communities. In this article, I use the term European Union in lieu of European Communities.

63. *See* Council Regulation 2368/2002, 2002 J.O. (358) 28 [hereinafter EU Council Regulation of 2002], available at http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/L_358/L_358/1_35820021231en00280048.pdf.

64. *See id.* art. 2.

65. Europa, Helpful Addresses: Community Authorities (acting as Kimberley Process Authorities in the EC), available at http://europa.eu.int/comm/external_relations/kimb/intro/address.htm (listing the contact information for the community authorities).

66. *See* Commission Regulation 762/2003, 2003 J.O. (109) 10; Commission Regulation 1214/2003, 2003 J.O. (169) 30; *see also* Europa, Helpful Addresses: Community Authorities (acting as Kimberley Process Authorities in the EC), available at http://europa.eu.int/comm/external_relations/kimb/intro/address.htm (listing the contact information for the community authorities).

67. *See* EU Council Regulation of 2002, *supra* note 63.

68. *Id.* art. 3.

69. *Id.* art. 4.

70. *Id.* art. 10.

71. *See* Europa, *Implementing the KPCS Inside the EC/EU*, http://europa.eu.int/comm/external_relations/kimb/intro/implement.htm (last visited May 4, 2006).

72. EU Council Regulation of 2002, *supra* note 63, art. 11.

are transported in a tamper-resistant container and were lawfully imported and destined to the territory of a participant.⁷³ A Community authority cannot validate a certificate until it verifies the contents of the containers by opening each of them or by risk analysis, or another similar system.⁷⁴ There is a uniform EU tamper-resistant certificate that is used by each of the above-mentioned Community authorities.⁷⁵ A shipment may arrive at any EU port of entry, but if the EU Member State has not been designated a Community authority, the shipment will go to a country that is a Community authority.⁷⁶ Verification is suspended until arrival at a Community authority.⁷⁷

Belgium is the largest center for diamond trade in the entire world.⁷⁸ The Belgian city of Antwerp is known as the diamond capital of the world.⁷⁹ More than 85 percent of all the rough diamonds in the world pass through Antwerp.⁸⁰ More than 50 percent of the world's production of rough, polished, and industrial diamonds enters Antwerp.⁸¹ Additionally, more than 99 percent of all imported diamonds are exported again from Antwerp to other countries.⁸² Antwerp has four diamond exchanges and 1500 diamond companies.⁸³

The Belgian Federal Public Service Economy (FPSE)⁸⁴ administers a licensing system for the import and export of diamonds.⁸⁵ FPSE collects data about the qualifications, country of origin, country of provenance, weight, and value of the imported and exported diamonds.⁸⁶ An import or export license is required for every shipment of diamonds from or to non-EU countries.⁸⁷ All diamond dealers must be officially recognized and registered by the FPSE.⁸⁸ All diamonds imported into and exported from Belgium must be inspected by the Diamond Office in Antwerp.⁸⁹ The Diamond Office is the customs office for diamonds and is operated by the Diamond High Counsel⁹⁰ in collaboration with the FPSE. The Diamond Office oversees whether diamonds exported from Belgium are correctly appraised according to their invoice. Its seven customs officers check the diamonds, the bills of lading,

73. *Id.* art. 12.

74. *Id.*

75. *Implementing the KPCS Inside the EC/EU*, *supra* note 71.

76. *Id.*

77. *Id.*

78. See DIAMOND HIGH COUNCIL, PROGRESS REPORT, <http://www.conflictdiamonds.com/pages/Interface/reportframe.html> (last visited on Mar.17, 2006) (presenting the general positioning of the Belgian diamond market).

79. See Antwerp, *Diamond Centre of the World*, http://www.visitantwerpen.be/diamant_uk.html (last visited May 3, 2006).

80. *See id.*

81. *See id.*

82. See DIAMOND HIGH COUNCIL, *supra* note 78 (follow "Belgian Diamond Market" hyperlink).

83. *Id.*

84. See Federal Public Service Economy, *available at* http://mineco.fgov.be/menu/new_en.asp (last visited May 2, 2006).

85. See DIAMOND HIGH COUNCIL, *supra* note 78 (follow "Belgian Diamond Market" hyperlink); *see also* GLOBAL WITNESS, THE KEY TO KIMBERLEY INTERNAL DIAMOND CONTROLS: SEVEN CASE STUDIES 12 (2004), *available at* <http://www.globalwitness.org> [hereinafter THE KEY TO KIMBERLEY].

86. See THE KEY TO KIMBERLEY, *supra* note 85.

87. *See id.* (referring to the Royal Decree of October 23, 1987).

88. *Id.*

89. *Id.*

90. See HRD, HRD Structure, <http://www.hrd.be/index.php?id=12> (last visited May 2, 2006) (explaining that the Diamond High Counsel is the coordinating body and official representative of the diamond industry in Belgium and that it is the official liaison for the Belgian diamond sector with the government).

the invoices, and the licenses.⁹¹ All diamond dealers have an obligation to file a declaration with the FPSE.⁹² The Diamond Office publishes monthly statistics.⁹³

Import licenses are required for imports of diamonds from Ivory Coast, Mali, and Guinea.⁹⁴ All rough diamonds entering and leaving Belgium have to be inspected by diamond experts who are sworn in by the FPSE.⁹⁵ These inspections are centralized in the Diamond Office and performed under the supervision of the FPSE while customs officers are present.⁹⁶ Sworn experts and officials of the FPSE inspect the goods in detail if a gemologist determines that they do not correspond to the mentioned origin.⁹⁷ Customs officers investigate if a country of origin that has no diamond production is listed.⁹⁸ Customs officers also investigate cases of unknown origin, which includes mixtures of diamonds from different origins.⁹⁹

III. Analyzing the Effectiveness of the Kimberley Process Certification Scheme

As currently implemented, the KPCS is nothing more than a voluntary agreement between nations that lacks the strength necessary to compel uniform global compliance.

A. LIMITATIONS OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The KPCS has no effect in non-participating countries. As a result, non-participants, such as Mali, continue to serve as a gateway for conflict diamonds. Illicit diamonds from Ivory Coast are smuggled into Mali and are exported illegally to participating countries. KPCS participants that have adopted a weak implementation of the certification process, such as Guinea, also serve as gateways for conflict diamonds. Conflict diamonds from Ivory Coast are smuggled into Mali and Guinea, enter developed countries, and become substantially transformed into jewelry. The cutting and polishing of a diamond changes the character of the outer surface of the gemstone and results in its substantial transformation. Further work or material added to an article effects a substantial transformation and, when performed in a country other than the country of origin, renders the other country the country of origin.¹⁰⁰ Therefore, a rough diamond from Ivory Coast, once polished in Belgium or the United States, has undergone substantial transformation and has become a polished diamond from Belgium or the United States.

The narrow definition of conflict diamonds does not include polished stones and jewelry. This adversely affects the overarching goals of the KPCS. Polished or cut diamonds are currently not verified through certificates of origin, which are only required for rough

91. *See id.*

92. *Id.*

93. *Id.*

94. *See* DIAMOND HIGH COUNCIL, *supra* note 78.

95. *See* KEY TO KIMBERLEY, *supra* note 85.

96. DIAMOND HIGH COUNCIL, *supra* note 78.

97. *See id.*

98. *Id.*

99. *Id.*

100. *See Diamonds and Armed Conflict in Sierra Leone: Proposal for Implementation of a New Diamond Policy and Operation* (USAID, Working Paper 05-08-00, 2000), available at http://www.usaid.gov/hum_response/oti/country/sleone/diamonds.html.

diamonds. The certification scheme does not verify polished diamonds for country of origin through a certification system and it does not verify diamonds that have been substantially transformed into jewelry. Moreover, countries participating in the KPCS must establish uniform internal controls. Despite these attempts at control, the certification system is too vague in terms of internal controls. The KPCS does not specifically state what constitutes an appropriate law or what action should be taken against violators. There is no guarantee that a country's internal controls will prevent diamonds from being imported or exported illegally.

Similarly, the Clean Diamond Trade Act does not specify that rough diamonds, when exported from the country in which they were extracted, have to be sealed in a secure, transparent container or bag by appropriate government officials of that country.¹⁰¹ The Clean Diamond Trade Act does not state that jewelry containing diamonds could not be imported into the United States unless the exporting country is a KPCS participant and has implemented internal controls for the import and export of diamonds.¹⁰² As a result, diamonds mined in Ivory Coast and cut in Belgium become products of Belgium for country of origin marking purposes.

The CBP has concluded that a substantial transformation occurs when "an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing."¹⁰³ The cutting of a quality gem diamond by cleaving or sawing to shape the stone and eliminating flaws is a process that requires considerable skill and attention to detail.¹⁰⁴ This process significantly alters the shape and appearance of a diamond, and enhances its value and uses.¹⁰⁵ The CBP has referred to Treasury Decision 44370 from November 1930, which states that diamonds mined in South Africa and cut in Holland were products of Holland for country of origin marking purposes.¹⁰⁶

The CBP has also stated that diamonds that are cut, faceted, and polished in Thailand undergo a substantial transformation.¹⁰⁷ The finished diamond is set into a ring.¹⁰⁸ The finished diamond and the ring are the finished products.¹⁰⁹ Moreover, the CBP has noted that the cutting and polishing of a ruby performed in Austria had the effect of changing the character of the outer surface of the gemstone resulting in substantial transformation.¹¹⁰ The CBP has noted that further work or material added in another country effects a substantial

101. See Clean Diamond Trade Act, *supra* note 49.

102. See *id.*

103. See Michael Stern, CBP Ruling on Tariff Treatment Applicable to Jewelry Set With Stones in Costa Rica, HQ 556457 (U.S. Customs & Border Patrol, Mar. 5, 1992) (citing *Texas Instruments, Inc. v. United States*, 681 F.2d 778 (1982)), available at <http://rulings.cbp.gov/index.asp?>

104. See *id.*

105. *Id.*

106. *Id.*

107. See Stuart I. Rich, CBP Ruling on the Tariff Classification and Eligibility for Duty-Free Treatment under the GSP of Diamond Rings from Thailand, NY J 80098 (U.S. Customs & Border Patrol, Jan. 15, 2003), available at <http://rulings.cbp.gov/index.asp?>

108. See *id.*

109. *Id.*

110. See Scott Reynolds, CBP Ruling on the Tariff Classification and Country of Origin of Cut and Polished Rubies from Austria, NY K 85866 (U.S. Customs & Border Patrol, May 14, 2004), available at <http://rulings.cbp.gov/index.asp?>

transformation and renders such country the country of origin.¹¹¹ Therefore, the KPCS participants need to address the principle of substantial transformation with respect to diamonds and increase the scope of the certification scheme to jewelry containing diamonds. The inconsistent statistics in the United States are also problematic.

B. INCONSISTENT STATISTICS IN THE UNITED STATES

Trade statistics are crucial to detect indirect imports and smuggling of conflict diamonds. Such information restricts instances of changing classification of diamonds. The Belgian FPSE maintains a detailed national database on every import and export of diamonds, and updates its statistics and reports monthly.¹¹² It compiles data about the classification, weight, value, provenance, origin, and destination of diamonds.¹¹³ These numbers are verified against the declarations submitted annually by diamond traders and manufacturers.¹¹⁴

The Clean Diamond Trade Act states that the President has the authority to ban the import and export of diamonds that do not comply with the KPCS, but it does not go into detail about how to keep the statistics.¹¹⁵ Statistics in the United States do not include the country of origin of the diamonds. This is an obstacle to the monitoring of indirect trade in conflict diamonds. The United States has not been consistent in reporting its statistics.¹¹⁶ For example, in 2003 the United States reported that it exported twice as many diamonds than it imported.¹¹⁷ In 2004, the United States reported that it exported only 46 percent more diamonds than it imported.¹¹⁸ Those discrepancies are significant because the United States is not a diamond producing country and smuggling most likely occurred. In addition, the United States has misclassified diamonds. CBP officials have classified polished diamonds as rough diamonds.¹¹⁹ Thus, statistical reports in the United States are inconsistent and do not reflect the exact numbers of imports and exports of diamonds.

C. INSUFFICIENT BORDER CONTROL AND VERIFICATION IN THE UNITED STATES

The KPCS as implemented in the United States does not require sufficient supervision over exports and imports of conflict diamonds. The infrequent examination of diamond

111. See Gibson, Dunn, & Crutcher LLP, *CBP Ruling on Country of Origin, Substantial Transformation, Rough Rubies Mined in Burma, Heat Treatment, Cutting and Polishing*, HQ 563127 (U.S. Customs & Border Patrol, Dec. 15, 2004), available at <http://rulings.cbp.gov/index.asp?>

112. See MYRIAM VANDER STYCHELE, *CONFLICT DIAMONDS: CROSSING EUROPEAN BORDERS? A CASE STUDY OF BELGIUM, THE UNITED KINGDOM AND THE NETHERLANDS* (Neth. Inst. for S. Afr., 2001), available at <http://www.niza.nl/docs/200301211132143514.pdf>.

113. *Id.*

114. *Id.*

115. See Clean Diamond Trade Act *supra* note 49, §§ 4, 5.

116. See KIMBERLEY PROCESS, *SUMMARY OF KPCS REVIEW VISIT TO THE UNITED STATES OF AMERICA*, available at <http://www.kimberleyprocess.com:8080/site/?name=documents> (last visited Mar. 31, 2005) (follow "Review Visit: USA Summary" hyperlink) (summarizing the deficiencies found in the implementation of the Kimberley Process Certification Scheme in the United States) [hereinafter SUMMARY OF KPCS REVIEW].

117. See *id.*

118. *Id.*

119. See U.S. GENERAL ACCOUNTING OFFICE, *INTERNATIONAL TRADE: CRITICAL ISSUES REMAIN IN DETERRING CONFLICT DIAMOND TRADE* 18 (2002), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-02-678> (noting that the inaccuracies in U.S. data make it harder for the United States to detect and deter conflict diamonds).

parcels in the United States increases the chances of diamond smuggling and defeats the purpose of the Clean Diamond Trade Act. It is vital that KPCS participants maintain controls that track diamonds back from their point of export to the location in which they were mined.¹²⁰

The FPSE in Belgium checks all the relevant documents, including issued import and export licenses and certificates of origin of diamonds coming from countries where conflict diamonds originate. Export inspectors report irregularities to the FPSE, which launches an investigation of the irregularities.¹²¹ The FPSE is the only agency that can grant export and import licenses in Belgium.

The Diamond Office in Antwerp is Belgium's only entry port for all diamonds. All diamonds are checked and cleared here before entering the territory of Belgium. The seven customs officers at the Diamond Office complete the clearance formalities, verify the supplied information, check the documents that accompany the parcels, and verify the actual weight and value of the diamonds. Every parcel of diamonds is inspected.¹²²

The eleven certified experts are selected, appointed, and sworn by the FPSE after passing an exam.¹²³ Inspectors determine on a case-by-case basis whether a more thorough inspection is necessary. A qualified gemologist is consulted if questions arise as to the origin of the diamonds. The gemological department of the Diamond High Council has put together an illustrated atlas describing the characteristics of diamonds from Africa and methods to recognize them. The inspection takes place under the control of officials from the FPSE. Those officials decide which expert will check the parcel and inspections are videotaped.

The U.S. government issues the Kimberley certificates through the USKPA. Neither the USKPA nor CBP, however, examines the exports physically, except on a random and infrequent basis.¹²⁴ Likewise, imports of rough diamonds are rarely checked by CBP and no licenses are required for diamonds imported and exported to and from the United States. Not every diamond parcel is inspected in the United States.¹²⁵ Enforcement measures are selective and targeted. CBP does not check to see whether the diamonds come from the stated country of origin, nor do they verify the authenticity of the certificates of origin. They do not contact the authorities in Ivory Coast to verify the authenticity of the certificates. The KPCS only sets the minimum standards, and the United States should impose more rigorous measures to carry out its mission.

D. THE EXPIRATION OF THE WORLD TRADE ORGANIZATION WAIVER

The above-discussed WTO waiver expires in December 2006, raising the issue of its extension. The WTO waiver has both proponents and opponents. Opponents of the waiver argue that GATT Articles XX and XXI allow WTO member countries to take measures to deal with situations like those presented by the current trade in conflict diamonds without violating their WTO obligations. GATT Article XXI provides exceptions on security

120. See KEY TO KIMBERLEY, *supra* note 85, at 1, 16.

121. DIAMOND HIGH COUNCIL, *supra* note 78.

122. *Id.*

123. *Id.*

124. SUMMARY OF KPCS REVIEW, *supra* note 116 (follow "Review Visit: USA Summary" hyperlink).

125. *Id.*

grounds.¹²⁶ GATT Article XXI(b) allows for exceptions when such measures are necessary to protect a Member State's "essential security interests" that relate to traffic in arms and other goods related to the purpose of establishing a military establishment. Terrorism threats justify invoking GATT Article XXI.¹²⁷ Al Qaeda has been involved in the smuggling of conflict diamonds across borders and has profited from their sales. Thus, the war on terrorism could possibly justify an import ban on conflict diamonds under GATT Article XXI(b). Supporters of the waiver argue that there are no cases so far to offer such interpretation and any future WTO panel rulings might not reach the same results.

Opponents also argue that countries might be able invoke GATT Article XXI(c). This provision allows for security exceptions taken "in time of war or other emergency in international relations," or in "pursuance of . . . obligations under the United Nations Charter for the maintenance of international peace and security."¹²⁸ It is unclear, however, whether the provision of GATT Article XXI(c) applies to actions based on U.N. Security Council resolutions or covers General Assembly resolutions, as well.

In addition, the general exceptions in GATT Articles XX(a) and (b) might also apply.¹²⁹ GATT Article XX(a) applies to measures "necessary to protect 'public morals.'"¹³⁰ Arguably, this provision could apply to conflict diamonds because trade in blood diamonds finances military activities and causes serious human rights violations. According to GATT Article XX(b), measures are justified if necessary to "protect human . . . animal or plant life or health."¹³¹ It is important to stop the trade in conflict diamonds to save human life and stop wars in Africa. Proponents of the waiver argue that conflict diamonds might not fall under the public morals exception. There have not been any cases so far that justify the Kimberley Certification measures under GATT Article XX(b).

The next step is to evaluate whether the measure falls within the chapeau of GATT Article XX. The chapeau requires that the "measures must not be applied '*in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*'" or as a "disguised restriction on international trade."¹³² Thus, the panel has to determine whether the measure is discriminatory in its application, and if so, whether there is an arbitrary or disguised discrimination. A measure does not constitute a means of arbitrary or unjustifiable discrimination if all exporting countries have a similar opportunity to negotiate an international agreement. The KPCS is open to all interested countries, and the United Nations has recognized its appropriateness.¹³³ Restrictions against non-participants in the KPCS should not be seen as arbitrary and disguised actions. The certification scheme applies to all conflict diamonds around the world, requires Kimberley certificates from participating countries, and bans trade in diamonds from

126. See Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds,"* 24 MICH. J. INT'L L. 1177, 1186 (2003) (arguing that a WTO waiver was unnecessary).

127. See Peter Lindsay, Note, *The Ambiguity of GATT Article XX: Subtle Success or Rampant Failure*, 52 DUKE L.J. 1277, 1313 n.91 (2003) (arguing that the application of national security principles under GATT Article XX remains contested).

128. *Id.*

129. See Chairman's Non-Paper, Kimberley Process Workshop on WTO Conformity (Feb. 15–17, 2002), available at http://www.kimberleyprocess.com:8080/site/www_docs/related_docs1/wto_conformity_paper.pdf (noting the possibility for exceptions under GATT Articles XX and XXI).

130. *Id.*

131. *Id.*

132. *Id.*

133. See Lindsay, *supra* note 127, at 1313 n.91.

non-participating countries. Lastly, opponents of the waiver state that the WTO waiver could affect future trade restrictions imposed for humanitarian purposes that result without any waiver.

Therefore, the KPCS falls as an exception under GATT Articles XXI or XX, and an extension of the WTO waiver is unnecessary. Even if the WTO fails to extend the waiver, participating countries could continue to enforce the KPCS measures against other participants in the process and ban any imports and exports from non-participants.

IV. Recommendations on How to Improve the Effectiveness of the Kimberley Process Certification Scheme

A. BROADEN THE SCOPE OF THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The KPCS should strive to increase its membership. It is crucial that non-participating countries get involved because smuggling currently occurs mostly from non-participants. It is also important that participants implement more rigid internal controls because smuggling also occurs from participants that have implemented weak controls. The certification scheme should be expanded to include not only unpolished diamonds, but also polished diamonds and jewelry. Rough diamonds are smuggled into a non-participating country or a participant with weak internal controls, and go through a substantial transformation process. From rough diamonds, they become transformed into jewelry, and then are exported into a participating country. The jewelry is no longer banned even though it is made of conflict diamonds. Polished diamonds should be verified through their country of origin. In addition, KPCS participating countries should share manuals that list in detail the characteristics of diamonds from every diamond-producing nation to be shared by all participants. Belgium should share with KPCS participants the Diamond Office's illustrated atlas describing the characteristics of diamonds from Africa and methods to recognize them. That way, customs officials would be able to examine whether the diamonds come from the country of origin stated on the certificate and whether they are blood diamonds. The KPCS should not be a process only existing on paper. It should require uniformity of verification and border control, and accurate statistics.

B. STRENGTHEN VERIFICATION AND BORDER CONTROL IN THE UNITED STATES

The United States has much to learn from Belgium in terms of verification and border control. The Clean Diamond Trade Act does not require the U.S. Kimberley Process Authority to examine the contents of parcels for export.¹³⁴ Diamonds exported from the United States are only randomly physically inspected by CBP. Few parcels are opened on imports and almost none on exports.¹³⁵ The infrequent examination of diamond parcels in the United States facilitates diamond smuggling. The United States should check all the relevant documents, issued import and export licenses, and certificates of origin of diamonds

134. See Clean Diamond Trade Act, *supra* note 49.

135. See KEY TO KIMBERLEY, *supra* note 85.

coming from non-participating countries such as Mali. All diamonds should be examined and cleared at the ports of entry before entering the territory of the United States. The CBP officers should complete the clearance formalities, verify the supplied information, check the documents that accompany the parcels, and verify the actual weight and value of the diamonds.

The CBP officials should regularly examine the diamonds entering and leaving the United States to ensure that the description in the Kimberley certificate matches the contents of the diamond boxes and those diamonds do not come from non-participants. The U.S. Kimberley certificates should also include the country of origin. CBP officials should have handy an illustrated atlas describing the characteristics of diamonds from Africa and methods to recognize them. CBP officers should verify the authenticity of the certificates of origin and should contact the authorities in Ivory Coast to verify the authenticity of the certificates. Carefully maintained statistics are equally important as they allow one to evaluate import and export trends and to detect the path of illegal smuggling.

C. MAINTAIN ACCURATE STATISTICS IN THE UNITED STATES

Accurate data is crucial to detecting indirect imports and the smuggling of conflict diamonds, and the United States should maintain such statistics. The figures of diamonds that are imported and exported to the United States would make it easier to detect any abnormalities and any increase of imports or exports from certain countries.

Similar to the Belgian FPSE, the United States could maintain accurate data on every import and export of diamonds. The United States should update its statistics and reports monthly. Those statistics should include data about the classification, weight, value, provenance, origin, and destination of diamonds. This information should be checked against the declarations submitted annually by diamond traders and manufacturers. Such reforms would ensure that statistical reports are reliable and reflect the exact numbers of imports and exports of diamonds.

V. Conclusion

The smuggling of diamonds from Ivory Coast to Mali and Guinea continues in spite of the December 2005 ban by the United Nations Security Council. This calls into doubt the efficiency of the KPCS. The KPCS only sets minimum standards and has limitations. Its definition of conflict diamonds excludes polished diamonds and jewelry. KPCS participants have failed to establish uniform and reliable internal controls. The United States has neither implemented regular verifications of diamond imports and exports nor maintained accurate statistics. The United States has much to learn from Belgium. The United States should strengthen its internal controls to halt the smuggling of diamonds through its territory and should maintain accurate statistics. A strict implementation of the KPCS by the United States, which is among the largest importing centers of diamonds in the world, would contribute to less human rights abuses and tension in Ivory Coast and the rest of Africa.