



2007

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Recommended Citation

Karen E. Woody, *Diamonds on the Souls of Her Shoes: The Kimberly Process and the Morality Exception to WTO Restrictions*, 22 *Conn. J. Int'l L.* 335 (2007).

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DIAMONDS ON THE SOULS OF HER SHOES: THE KIMBERLY PROCESS AND THE MORALITY EXCEPTION TO WTO RESTRICTIONS

Karen E. Woody¹

INTRODUCTION

Al-haji Sawaneh, a child living in Sierra Leone, was kidnapped and conscripted into a rebel group.² Shortly thereafter, he became a member of the Small Boys Unit (“S.B.U.”) of the rebel group, participating in a number of horrific crimes against civilians and Sierra Leone’s government soldiers. Sawaneh was one of thousands of child soldiers in Sierra Leone who played a major role in a bloody, decade-long civil war that claimed over 75,000 lives.³ By the age of twelve, Sawaneh skillfully wielded an AK-47, issued to him because it was lightweight and more manageable for a small boy.⁴ The BBC reports that “(w)ithout the power of the gun, the guerrillas, and their child recruits, would simply not have been able to terrorize the country in the way they did.”⁵ Even more alarming to the international community, however, is that Sawaneh would not have received the AK-47 had it not been for the exchange of Sierra Leonean diamonds for guns and ammunition.

Now, five years after the Sierra Leone ceasefire agreement, it is an uncontested fact that conflict diamonds⁶ fueled, and continue to fuel, many of Africa’s wars.⁷ This fact has set the framework for numerous reports by various, non-governmental

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2. *Global Crime Report: The Child Soldiers of Sierra Leone*, BBC NEWS, available at http://www.bbc.co.uk/worldservice/programmes/global_crime_report/investigation/soldiers1.shtml.

3. *See id.*

4. *Id.*

5. *Id.*

6. “Conflict diamonds” are defined as “diamonds which originate from areas in Africa controlled by forces fighting the legitimate and internationally recognized government of the relevant country.” Global Witness, *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds* 1 (May 10, 2000), available at <http://globalwitness.org/reports/index.php?section=diamonds>.

7. *See* Juliette Bennett, *Public Private Partnerships: The Role of the Private Sector in Preventing Funding Conflict*, 35 VAND. J. TRANSNAT’L L. 711, 713 (2002); *see generally* Laura Forest, *Sierra Leone and Conflict Diamonds: Establishing a Legal Diamond Trade and Ending Rebel Control over the Country’s Diamond Resources*, 11 IND. INT’L & COMP. L. REV. 633 (2001) (reporting on the significant ties between diamonds and human rights violations in Sierra Leone); *see generally* Ralph Hazleton, *Diamonds: Forever or For Good?*, PARTNERSHIP AFRICA CANADA, Occasional Paper #3 (Mar. 2002), available at http://blooddiamond.pacweb.org/docs/diamonds_3e.pdf (providing statistics on diamond-funded conflict in the DRC, Sierra Leone, Angola, Liberia and the Central African Republic).

organizations ("NGOs") lambasting the human rights violations linked to the diamond trade.⁸ The United Nations ("U.N.") issued sanctions toward African nations and their rebel groups who capitalize on revenue from these gems.⁹ Subsequently, the Kimberley Process Certification Scheme, a multi-national diamond trade regulation system mandating certificates of origin, went into effect in 2003.¹⁰ The Kimberley Process is a direct result of strides made by the diamond industry, NGOs, and various governments to restrict the trade of rough conflict diamonds,¹¹ and thereby cut off one avenue of funding to rebel groups terrorizing Africa.¹²

Because the Kimberley Process restricts trade to members of the World Trade Organization ("WTO"), it violates certain articles of the GATT treaty. In May 2003, however, the WTO granted a waiver on trade restrictions in order to prohibit the exportation of rough diamonds to non-Participants in the Kimberley Process. The waiver has been reviewed on an annual basis, and was set to expire on December 31, 2006. In December 2006, the WTO extended the waiver for six years.

This Article analyzes the events predicated the Kimberley Process and examines the validity of the Kimberley Process in relation to international trade obligations. Part I describes the background of conflict diamonds and their role in African wars. The section outlines the need for regulation in the diamond industry and examines how other attempted measures at curbing the illicit diamond trade have fallen short. Part II details the Kimberley Process and its guidelines. This section analyzes the relevant U.S. legislation passed in 2003, the Clean Diamond Trade Act. Part II also suggests that because the Kimberley Process ("KP") is predicated upon voluntary compliance, the KP in its current form will have little to no impact on curbing trade in conflict diamonds because its parameters are not legally binding. Part III analyzes whether, despite the current WTO waiver, the KP is a violation of international trade law. This section discusses the use of morality in international trade and proposes that any WTO challenge to the legislation will not stand because the Kimberley Process warrants the general exception to GATT in Article XX(a).¹³ Therefore, this section argues that despite its renewal, the waiver is not necessary to preserve the goals of GATT and international trade laws.

8. See, e.g., Global Witness, *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds*, *supra* note 6.

9. See *infra* Section I.B.

10. See World Diamond Council, Conflict Diamonds, <http://www.diamondfacts.org/conflict/index.html> (last visited Apr. 17, 2007) (outlining the history of the Kimberley Process and providing detailed reports on the numerous meetings of participants).

11. NICOLAS COOK, DIAMONDS AND CONFLICT: BACKGROUND, POLICY, AND LEGISLATION, CONG. RESEARCH SERV., REPORT RL30751, at 18 (updated July 16, 2003), available at <http://www.royce.house.gov/UploadedFiles/RL30751.pdf>.

12. See Ian Smillie, *The Kimberley Process: The Case For Proper Monitoring*, PARTNERSHIP AFRICA CANADA, Occasional Paper #5, 1 (Sept. 2002), available at http://blooddiamond.pacweb.org/docs/KP_Monitoring.pdf (noting that conflict diamonds are often used for money laundering and tax evasion, and pose a threat to the stability of the diamond trade along with the political stability in Africa).

13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX(a) [hereinafter GATT].

I. BACKGROUND ON CONFLICT DIAMONDS AND THE NEED FOR REGULATION

A. Conflict Diamonds and Africa's Wars

Diamonds have long been the source of funding for both terrorism and rebel insurgencies in Africa, particularly in the Democratic Republic of Congo (DRC), Sierra Leone, Angola, and Liberia.¹⁴ Diamonds are small, extremely fungible, and consist of a high value-to-weight ratio that does not devalue very easily.¹⁵ Furthermore, diamonds are extremely hard to track and police.¹⁶ For these reasons, diamonds are often used by insurgent groups to buy arms or obtain funds for their rebel causes.¹⁷ Even today, diamond revenues are currently funding militia groups in the northern DRC, a country entangled in a war that directly involves six other

14. See The Secretary-General, *Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, delivered to the President of the Security Council*, U.N. Doc S/2001/1072 (Nov. 13, 2001) [hereinafter *Addendum*] (documenting the major players involved in the multi-national wars occurring in all of these areas and the relationship to natural resources. The U.N. reports that various countries capitalize on the instability in the DRC and other areas in order to exploit the natural resources of the region.); see also *Conflict for Profit*, OXFAM AMERICA, <http://www.oxfamamerica.org/advocacy/art826.html> (providing statistics on the number of deaths in civil wars in Sierra Leone, Angola, and the Democratic Republic of Congo, and noting the number of other African nations that are either involved in these wars or are directly affected by them).

15. See generally Global Witness, *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds*, *supra* note 6 (describing various types and average size of diamonds and noting the ease with which they can be smuggled).

16. Lucinda Saunders, Note, *Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds*, 24 *FORDHAM INT'L L.J.* 1402, 1413-14 (2001) (discussing the ease with which diamonds can be smuggled, and noting that "tracing the origin of conflict diamonds is further complicated by the smuggling culture in the diamond business"); see also Christian Dietrich, *Hard Currency: The Criminalized Diamond Economy of the Democratic Republic of the Congo and its Neighbours*, PARTNERSHIP AFRICA CANADA, Occasional Paper #4, 2-3 (June 2002), available at <http://www.reliefweb.int/library/documents/2002/pac-drc-17jun.pdf> (stating "diamonds require little investment, they are portable, and the trade is — or seems to be — virtually uncontrollable. Certainly, much of the international diamond trade is based on the free movement of diamonds from thousands of small mines to trading centres, a system that disregards national borders, supervision and taxation"); see also Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 *HASTINGS INT'L & COMP. L. REV.* 327, 330 (2001) (noting that diamonds are impossible to trace, in part because "no analysis reveals with certainty whether a diamond came from a legal mine" or if it "was extracted by slave laborers in Sierra Leone"); see also U.S. GEN. ACCOUNTING OFFICE, *TERRORIST FINANCING: U.S. AGENCIES SHOULD SYSTEMATICALLY ASSESS TERRORISTS' USE OF ALTERNATIVE FINANCING MECHANISMS*, 20 n. 35 (Nov. 2003) (quoting Congressional Research Service that that "a pound of diamonds in 2002 was worth around \$225,000, compared with a pound of cash that was worth \$45,000 and a pound of gold, which was worth \$4,800").

17. See Ian Smillie, *Motherhood, Apple Pie and False Teeth: Corporate Social Responsibility in the Diamond Industry*, PARTNERSHIP AFRICA CANADA, Occasional Paper #10, 10 (2003), available at http://blooddiamond.pacweb.org/docs/pac_csr_e.pdf (discussing the numerous reported incidents where diamonds are the source or reason behind armed conflict in Liberia, Sierra Leone, Democratic Republic of Congo, and Angola); see also Amman, *supra* note 16, at 330 (stating that in Sierra Leone, the rebels exchanged diamonds for guns as well as various types of drugs in order to force child soldiers into addiction and continued allegiance to the rebel group).

nations.¹⁸ The DRC, with some of the richest deposits of natural resources in the world, has been at war with itself and its neighbors for decades.¹⁹ Though the roots of these conflicts are complex, they are often centered around control of diamond mines.²⁰

Likewise, similar conflicts have raged, and to some extent, continue to rage in Sierra Leone and Angola.²¹ Sierra Leone produces a large proportion of high-quality gem diamonds and has been home to a significant amount of diamond mining and production since the 1930s.²² However, Sierra Leone has been plagued with conflict since its independence in 1961, and most recently had been involved in a civil war from 1991 until late 2001.²³ The civil war began when the Revolutionary United Front (RUF), infamous for cutting off limbs of civilians, invaded from Liberia.²⁴ This group kidnapped thousands of civilians, many of whom were children, and forced them into guerilla and militia training.²⁵ Throughout the civil war, the RUF was firmly entrenched in the eastern part of Sierra Leone near the Guinean and Liberian borders, called the Kono District.²⁶ This area is particularly diamond-rich and, because of its proximity to the border, allowed for the RUF to easily trade diamonds out of the country in exchange for weapons.²⁷ The RUF took control of these diamond-rich areas as a means of

18. See *Addendum*, *supra* note 14, ¶¶ 56-100 (specifically listing allegations against Rwanda, Uganda, Zimbabwe, Angola, and Namibia, including participation in the war in the DRC to their own material and financial gain).

19. See generally *Addendum*, *supra* note 14.

20. *Id.* at ¶ 44; see also Smillie, *The Kimberley Process: The Case For Proper Monitoring*, *supra* note 12, at 7 (stating "Uganda and Rwanda — countries with no diamonds of their own, but with troops operating in the diamond areas of the DRC — were declared as the source of \$3.7 million in Belgian diamond imports in 2001").

21. See generally Forest, *supra* note 7 (detailing the history of the Sierra Leonean conflict since the country's independence, as well as the current problems existing in Sierra Leone); see also Global Witness, *Can Controls Work? A Review of the Angolan Diamond Control System* (December 2001), available at http://www.reliefweb.int/library/documents/2001/gw_ago_26dec.pdf (outlining Angolan diamond industry and the role it has played in the 30 year war in Angola).

22. Ian Smillie, Lansana Gberie, & Ralph Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds, and Human Security*, PARTNERSHIP AFRICA CANADA 4 (Jan. 2000) available at <http://www.pacweb.org/e/pdf/heart%20of%20the%20matter%20summary.pdf>.

23. *Id.* at 1-2.

24. Forest, *supra* note 7, at 633 & 637 n. 34. It is worth noting that the eventual leader of the RUF, Foday Sankoh, aligned himself with Charles Taylor of Liberia. This fact serves to illustrate the point that the rebel insurgencies, as well as the illegal diamond trade, in both Sierra Leone and Liberia are closely connected. *Id.* at 637. See also Smillie, Gberie, & Hazleton, *supra* note 22, at 6 (noting Liberia's interests and involvement in Sierra Leone, particularly during the civil war, and stating "[b]y the end of the 1990s, Liberia had become a major centre for massive diamond-related criminal activity, with connections to guns, drugs and money laundering throughout Africa and considerably further afield. In return for weapons, [Liberia] provided the RUF with an outlet for diamonds, and has done the same for other diamond producing countries, fueling war and providing a safe haven for organized crime of all sorts.").

25. Forest, *supra* note 7, at 637; see also Thomas Dunfee & Timothy Fort, *Corporate Hypergoals, Sustainable Peace, and the Adapted Firm*, 36 VAND. J. TRANSNAT'L L. 563, 614 (2003) (underlining the fact that the RUF uses "murder, enslavement, torture, and child labor as a means of accomplishing its goals").

26. See Forest, *supra* note 7 at 640 (providing an historical outline to the maneuvers of the RUF during the decade-long war).

27. *Id.*

political leverage in seeking their demands during the war, and often traded diamonds for arms in order to outfit its militias.²⁸

Similarly, Angola is a country with vast natural resources and a high concentration of top-quality diamonds, yet it recently endured a twenty-seven year war.²⁹ The war, claiming over one million casualties, began in 1975 and lasted until a peace agreement was signed in April 2002.³⁰ The war in Angola involved the leading rebel group, the National Union for the Total Independence of Angola (UNITA), headed by Jonas Savimbi, and the Popular Movement for the Liberation of Angola (MPLA).³¹ It was well-known that UNITA funded its war efforts by selling diamonds mined in the territory it controlled, whereas MPLA funded its war efforts by controlling the nation's oil reserves.³² A U.N. report noted:

First, UNITA's ongoing ability to sell rough diamonds for cash and to exchange rough diamonds for weapons provide the means for it to sustain its political and military activities. Second, diamonds have been and continue to be an important component of UNITA's strategy for acquiring friends and maintaining external support. Third, rough diamond caches rather than cash or bank deposits constitute the primary and the preferred means of stockpiling wealth for UNITA.³³

Control and possession of diamonds by rebels and criminals results in continued funding of illegal activity and conflict. Likewise, a direct effect of the illegal diamond trade and mineral exploitation is that the producing countries, overrun by rebel groups, lose millions in possible revenue for the country.³⁴ This

28. See Tracy Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 11 (2003) (providing insight to the tactics of the RUF and other rebel groups in Sierra Leone, and stating that the group would "hold mines ransom in exchange for a more democratic system, while killing and mutilating the local villagers").

29. See Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict* 1-3 (1998) available at http://www.globalwitness.org/media_library_detail.php/90/en/a_rough_trade (detailing the history of Angola's war and noting that Angola had been in prior conflicts between 1961 and 1975, in which it fought for independence from Portugal).

30. Price, *supra* note 28, at 9.

31. *Id.* at 8-9.

32. See *id.* at 9 (noting the role that Angola's history, particularly its colonization history, has played in the recent uprisings and the country's overall instability. Price also describes the history of conflict between the MPLA and UNITA and how both groups used the country's vast natural resources to finance the war). See also Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict*, *supra* note 29, at 2 (noting a BBC report that "instead of going to pay for reconstruction efforts after 23 years of civil war, the oil revenues are being used by the MPLA government to fuel its side of the conflict with the rebel UNITA movement").

33. U.N. SCOR, Committee Established Pursuant to Resolution 864 (1993) Concerning the Situation in Angola, *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA*, ¶ 77, U.N. Doc S/2000/203 (March 10, 2000) [hereinafter *Angola Sanctions Report*]. MPLA won a U.N.-monitored free election in 1992, yet UNITA did not cease fighting until 2002, after the death of Savimbi. See Price, *supra* note 28, at 8 (stating that the death of Jonas Savimbi paved the way for a peace agreement between UNITA and the government of Angola).

34. See Lansana Gberie, *West Africa: Rocks in a Hard Place: The Political Economy of Diamonds and Regional Destabilization*, PARTNERSHIP AFRICA CANADA, Occasional Paper #9, (May

type of exploitation only contributes to the vicious cycle of war and conflict.³⁵ For example, approximately \$854 million a year is stolen from the potential GDP of the DRC because diamonds are smuggled out of the country.³⁶ As a result, the DRC's infrastructure is further damaged, and rendered less capable of dealing with both domestic and international conflicts.³⁷ Similar figures are available for Angola and Sierra Leone. In Sierra Leone, the diamond exportation is measured at around \$1.5 million a year, despite a possible \$70 million in commercial value;³⁸ in Angola, reports allege that between \$1 million and \$1.2 million worth of diamonds are smuggled out of the country per day.³⁹

B. The U.N. Response

In the mid-1990's, the U.N. began to recognize the severe humanitarian crises occurring in Africa, as well as the financial link between diamonds and rebel funding. Subsequently, the Security Council voted to prohibit importation of diamonds from war-torn countries that produced conflict diamonds.⁴⁰ Despite its

2003), available at http://www.pacweb.org/e/images/stories/documents/w_africa_e.pdf (providing case studies of Liberia, Guinea, Côte d'Ivoire, Ghana, and Sierra Leone and reporting on speculated loss of revenue for each country as a result of the illegal diamond trade). See also Forest, *supra* note 7, at 641 (noting the dramatic decrease in diamond revenue in Sierra Leone between 1991 and 1995, during which time the civil war had begun).

35. See Forest, *supra* note 7, at 640 (noting "The RUF's continued control over Sierra Leone's diamond mines threatens the country's democratically elected government by providing the rebels the means with which to purchase more guns to enhance their military capability. The stronger the RUF's military capability, the greater the threat that the group will keep Sierra Leone hostage, both economically and politically, as it has throughout the almost decade-long civil war.").

36. 148 CONG. REC. E908 (daily ed. May 24, 2002) (Extension of Remarks of Rep. Tony P. Hall) (listing conflict diamond statistics in a preliminary effort to lobby for legislation by the U.S. Congress against these conflict diamonds). Likewise, in 2001, the Belgian diamond imports declared that \$3.7 million of imported diamonds were from Uganda and Rwanda, neighboring countries of the DRC, but which do not have any diamond areas of their own. Smillie, *The Kimberley Process: The Case For Proper Monitoring*, *supra* note 12, at 7-10 (analyzing the differences in stated exports and imports in the diamond industry).

37. See generally U.N. SCOR, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo* [hereinafter Final Report of Panel of Experts] U.N. Doc S/2002/1146 (2002) (providing detailed observations of the political and economic state of affairs in DRC).

38. Amanda Bryant Banat, Note, *Solving the Problem of Conflict Diamonds In Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin*, 19 ARIZ. J. INT'L & COMP. L. 939, 940-41 (2002) (relating these numbers to the amount of revenue that ended up in the hands of Sierra Leone rebels).

39. Global Witness, *Can Controls Work? A Review of the Angolan Diamond Control System*, *supra* note 21, at 1-2 (noting that "[t]he scale of this smuggling indicates that there continue to be major problems surrounding the international trade in rough diamonds and that the U.N. imposed sanctions are still not being fully enforced. It is an open secret in the diamond trade and elsewhere that uncertified Angolan diamonds are being described as Zambian, South African, or are mixed into parcels originating from the Democratic Republic of Congo and Congo Brazzaville.").

40. See G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Jan. 29, 2001) (noting the recognition by the international community of the problems and human rights violations linked with conflict diamonds in Africa).

efforts, U.N. policies and sanctions left numerous loopholes for rough diamonds to get into the market without regulation.⁴¹

In the case of the DRC, the U.N. intervened in an effort to establish peace among rebels and neighboring countries.⁴² The U.N. Panel of Experts then issued a report on the illegal exploitation of Congolese natural resources and alleged that rebels and armies of neighboring countries were continuing the conflict in order to gain access to diamond mines.⁴³ The Panel strongly recommended that Governments regulate and sanction those individuals and entities alleged to be committing illegal activities in the DRC.⁴⁴

In Sierra Leone, the U.N. imposed sanctions in 1997 after years of fighting and failed cease-fires.⁴⁵ Reports indicate that the RUF remained capable of continually acquiring guns and ammunition by trading diamonds even after these sanctions were in place.⁴⁶ The U.N. subsequently adopted Resolution 1306⁴⁷ in July 2000, which mandated a worldwide ban on the purchase of rough diamonds originating from Sierra Leone.⁴⁸ Eventually, the ongoing war in Sierra Leone and the ineffectiveness of U.N. sanctions to bring about peace or curb the trade in conflict diamonds pushed the issue of conflict diamonds into the public's eye, in part due to numerous reports from NGOs and the U.N. itself.⁴⁹

In the case of Angola, the U.N. imposed an embargo on any sale of weapons or petroleum to UNITA, with the first sanctions being introduced in 1993.⁵⁰ In 1998, the U.N. Security Council passed Resolutions 1173 and 1176, disallowing any exportation of unofficial diamonds from the country.⁵¹ However, a Global Witness report noted:

41. See Price, *supra* note 28, at 61 (alleging that U.N. sanctions did not provide any significant deterrence to the rampant illegal diamond trade in Sierra Leone, Angola, or the Democratic Republic of Congo).

42. See *id.* at 16-19 (stating that countries including Rwanda, Uganda, Burundi, and Zimbabwe are integral in the conflict in the DRC, calling the conflict "Africa's First World War," and noting that in only four years over 2.5 million people have been killed).

43. The Secretary-General, *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, ¶ 21-24, U.N. Doc S/2002/1146 (Oct. 16, 2002) [hereinafter *Final Report of Panel of Experts*].

44. See *id.* ¶ 170 (detailing the numerous recommendations proffered by the U.N. in an attempt to deal with illegal activity in the DRC).

45. See generally Banat, *supra* note 38, at 940-44 (describing history of conflict); see also Forest, *supra* note 7, at 644-47 (describing Resolution 1306, a U.N. effort to ban the purchase of Sierra Leonean diamonds whose origin is not officially certified by the Government of Sierra Leone and calling for a well-regulated diamond industry within the country. Forest notes that although Resolution 1306 was heralded by the international community, its duration was set for eighteen months).

46. See generally, *Global Crime Report: The Child Soldiers of Sierra Leone*, *supra* note 2 (providing a case study regarding Sierra Leonean rebels and their high quantity of guns).

47. S.C. Res. 1306, U.N. Doc. S/RES/1306 (July 5, 2000).

48. Forest, *supra* note 7, at 644.

49. See Global Witness, *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds*, *supra* note 6, at 1-2.

50. Angola Sanctions Report, *supra* note 33, ¶¶ 1-3.

51. S.C. Res. 1173, ¶ 12, S/RES/1173 (June 12, 1998); S.C. Res. 1176, ¶ S/RES/1176 (June 24, 1998); see Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict*, *supra* note 29, at 3 (noting that some diamonds could still be exported from Angola so long as they were accompanied by a certificate of origin issued by the government).

Whilst resulting in some reduction of revenue for UNITA, the implementation of UNSC Res. 1176 appears token at best. Investigations reveal that significant diamond exports still take place, mainly by air and in smaller quantities, through countries such as Zambia. Most of the diamonds are sold on the open market in Antwerp and in other countries.⁵²

Thus, in the midst of U.N. sanctions, conflict diamonds were easily finding their way to the market. For example, Belgian imports declared as originating in the Central African Republic (CAR) have exceeded the reported exports by a factor of three over the past few years, with the exception of 2001 when they were double the official exports.⁵³ Even after the U.N. imposed an embargo on diamonds, the sales from CAR increased and there were more diamond bureaus. These numbers and reports seem to indicate that the U.N. sanctions did not have a significant impact on curbing the illicit diamond trade.

C. The Diamond Industry

In 1998, the diamond industry produced about 115 million carats of rough diamonds, valued at about \$6.7 billion.⁵⁴ This amount of rough diamonds became 67.1 million pieces of jewelry, valued around \$50 billion.⁵⁵ Estimates show that conflict diamonds comprised between 3.7 and 15 percent of the world diamond trade in recent years.⁵⁶ Unsurprisingly, the United States is the world's biggest diamond market, with 1,800 licensed diamond dealers in New York alone.⁵⁷ De Beers ranks as the largest diamond company in the world, mining roughly 50 percent of the world's diamonds and controlling 70 to 80 percent of diamond sales.⁵⁸ Marketing and a positive industry image have played an important role in the diamond industry's success and, in particular, the success of De Beers.⁵⁹

52. Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict*, *supra* note 29, at 3.

53. Christian Dietrich, *Diamonds in the Central African Republic: Trading, Valuing, and Laundering*, PARTNERSHIP AFRICA CANADA, Occasional Paper #8, 5 (Jan. 2003), available at http://www.pacweb.org/e/images/stories/documents/car_e.pdf (detailing the role the Central African Republic plays as a conduit for illegal diamonds, particularly in relation to the fact that "approximately US\$50-60 million worth of diamonds mined in rebel territory in eastern and northern DRC 'disappear' into the global rough diamond pipeline every year").

54. Smillie, Gberie, & Hazleton, *supra* note 22, at 1.

55. *Id.* at 1

56. COOK, *supra* note 11, at 12 (reporting to Congress on the background of conflict diamonds, the steps taking on an international scale to deter trade in conflict diamonds, and the current posture of the Bush administration regarding recent conflict diamond legislation).

57. Global Witness, *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds*, *supra* note 6, at 5. See Ban "Conflict Diamonds," Oxfam America, Ban "Conflict" Diamonds, available at <http://www.oxfamamerica.org/Plone/contents/art701.html> (last visited Apr. 17, 2007) (stating that the United States is the largest importer of diamonds in the world, with Americans currently buying 65% of the world's market).

58. Saunders, *supra* note 16, at 1407-08 n.22 (illustrating the broad reach that De Beers holds within the diamond industry and arguing that the company should be held liable for various human rights violations related to conflict diamonds).

59. De Beers, the most lucrative diamond company in the world, is known for initiating one of the most successful marketing campaigns of the 20th century when it introduced the "Diamonds Are

However, due to reports by various NGOs on the diamond-fuelled wars in Sierra Leone, the diamond industry began to worry about its product image.⁶⁰ It is worth noting that prior to the press on conflict diamonds resulting from pressure by international NGOs, the diamond industry had not taken any significant measures to ensure against trade in conflict diamonds.⁶¹ The negative press forced the diamond industry to act so that it could avoid losing millions from potential consumer abandonment, as the fur industry had years earlier.⁶²

Consequently, in May 2000, the South African government held a meeting for NGOs, diamond industry leaders, and governmental leaders to discuss the ramifications of the conflict diamond trade, which led to the creation of the Kimberly Process.⁶³ Implementation of the Kimberly Process Certification Scheme occurred on January 1, 2003 after a series of meetings, including the Interlaken Convention of November 2002, which marked the official certification of the scheme.⁶⁴ Thirty-six countries and the European Community were present at

Forever" campaign. The success of this campaign underscores the importance of marketing and product image in the diamond industry. De Beers at one point had a corner on the diamond market by employing a strategy of "buying all of the diamonds on the market in an effort to control and stabilize the price of diamonds," yet the company has since changed its policy. *Id.* at 1430-31. However, commentators suggest that De Beers would often purchase diamonds from smugglers in order to maintain control over the supply of diamonds. *See id.* at 1431 n.144. Another reason the diamond industry has been successful yet highly unregulated is the nature of its transactions. "According to industry experts and government officials, U.S. and international diamond firms do not share trade information freely and business may be conducted on the basis of a handshake, with limited documentation." U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL TRADE: CRITICAL ISSUES REMAIN IN DETERRING CONFLICT DIAMOND TRADE, 12 (June 2002).

60. *See* Dunfee & Fort, *supra* note 25, at 610-15 (noting that the reports linking diamonds and human rights violations prompted the World Diamond Council to take proactive steps to change the public perception out of fear of the impact negative product or industry image could have upon the industry).

61. In 1997, the CEO of De Beers made a statement at a press conference evincing a business relationship between UNITA and De Beers. He noted, "One of the essential jobs that we De Beers [sic] carry out worldwide is to ensure that diamonds coming onto the markets do not threaten the overall price structure and therefore although we have no direct relationship with Unita, there is no doubt that we buy many of those diamonds that emanate from Unita-held areas in Angola...." Global Witness, *Conflict Diamonds: Possibilities for the Identification, Certification, and Control of Diamonds*, *supra* note 6, at 8. In light of increasing worldwide awareness of conflict diamonds, De Beers has since claimed they have never purchased diamonds from UNITA. *Id.*

62. *See* Dunfee & Fort, *supra* note 25, at 615. Interestingly, the fur trade has significantly declined in recent decades, ostensibly as a result of negative press related to the industry's cruelty towards animals. For instance, in 1981, four million mink pelts were produced, as opposed to 2.5 million in 2001. The Humane Society of the United States attributes this drop in the industry to the increasing consumer awareness about the inhumane treatment of animals in fur farming. Press Release, The Humane Society of the United States, The HSUS Is Encouraged By Decline In Domestic Mink Industry (Aug. 29, 2001), available at <http://www.hsus.org/ace/11913>.

63. *See* World Diamond Council, *The Essential Guide to Implementing the Kimberly Process* 11, available at <http://www.jvclegal.org/kimberely.pdf> (outlining the history of the Kimberly Process and providing detailed reports on the numerous meetings of participants).

64. *Id.* at 1, 5. World Diamond Council, *Interlaken Declaration of 5 November 2002 on the Kimberly Process Certification Scheme for Rough Diamonds* (Nov. 5, 2002) available at <http://www.worlddiamondcouncil.com/Updated%20documents%202003/Interlaken%20Declaration.shtm> (providing the text to the document signed by all intending participants of the KP, including the statement that the participants will "ensure that the measures taken to implement the Kimberly Process Certification Scheme for rough diamonds will be consistent with international trade rules").

the Interlaken Convention.⁶⁵ The original list of participants was agreed upon in July 2003, listing forty members.⁶⁶ Participation in the scheme, however, is contingent upon meeting certain qualifications discussed below.

II. THE KIMBERLEY PROCESS

A. Goals and Guidelines

The primary goal of the Kimberley Process is to restrict the flow of conflict diamonds by requiring all rough diamonds to be accompanied by certificates of origin.⁶⁷ The KP also seeks to protect the legitimate diamond industry as well as contribute to international peace and security by keeping conflict diamonds out of the hands of rebels and terrorists.⁶⁸ Accordingly, each diamond-producing nation must be able to account for its diamonds from the mines to the point of exportation.⁶⁹ It is worth noting, however, that in its present form, the Kimberley Process deals only with rough diamonds, because the source of the diamond is what is at issue.⁷⁰ In other words, the most pressing issue regarding conflict diamonds is centered on the diamond mines rather than the later stages of diamond production such as cutting, polishing and setting.⁷¹

65. World Diamond Council, *Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds*, *supra* note 64.

66. See Press Release, Amnesty International, *Kimberley Process Finally Agrees Membership List But Lack of Monitoring Undermines Credibility* (July 31, 2003), available at <http://web.amnesty.org/library/Index/ENGPOL300112003> [hereinafter *Lack of Monitoring Undermines Credibility*]. The original forty members included: Angola, Armenia, Australia, Belarus, Botswana, Canada, Central African Republic, People's Republic of China, Chinese Taipei, DRC, Republic of Congo, Cote D'Ivoire, Croatia, the European Community, Guinea, Guyana, Hungary, India, Israel, Japan, Republic of Korea, People's Republic of Laos, Lebanon, Lesotho, Mauritius, Namibia, Poland, the Russian Federation, Sierra Leone, Slovenia, South Africa, Sri Lanka, Switzerland, Tanzania, Thailand, Ukraine, United Arab Emirates, USA, Venezuela, Zimbabwe. World Diamond Council, *The Essential Guide to Implementing the Kimberley Process*, *supra* note 63, at 1. The Kimberley Process currently has forty-seven active members. Kimberley Process, *List of Participants*, available at <http://www.kimberleyprocess.com/site/participants.html> (last visited Apr. 17, 2007).

67. World Diamond Council, *A System for International Rough Diamond Export and Import Controls* (Oct. 17, 2000), available at <http://www.worlddiamondcouncil.com/system.shtml>.

68. Kimberley Process, *Report of the Kimberley Process to the United National General Assembly as per Resolution 55/56 of 1 December 2000*, available at http://www.kimberleyprocess.com:8080/site/www_docs/related_docs1/report_to_unga.pdf (illustrating the many goals of the Kimberley Process and its hope to deter the humanitarian crises surrounding conflict diamonds).

69. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 485 (2002) (noting that if the regulation does not track the entire course of the diamond, from extraction to exportation, then regulation will have little to no legal effect).

70. See COOK, *supra* note 11, at 31.

71. Rough diamonds, as compared to those that have been cut and polished, are easier to trace. "Although rough diamonds can be marked, once they are cut and polished, any form of identification is erased." U.S. GEN. ACCOUNTING OFFICE, *INTERNATIONAL TRADE: CRITICAL ISSUES REMAIN IN DETERRING CONFLICT DIAMOND TRADE*, *supra* note 59, at 8.

Participants may only trade rough diamonds with countries that are also participants in the KP.⁷² This is mandated by a political agreement between participating countries as signatories of the KP.⁷³ The KP does not constitute a binding international treaty; rather, it is more akin to an international political agreement between nations, and thus, is largely self-enforced.⁷⁴ Despite the fact that the KP is not an official treaty, the U.N. has backed the KP initiative, and this support serves to buttress the international legitimacy of the process.⁷⁵

Specifically, participating countries set national policies mandating the certification scheme, requiring that certificates of origin accompany all imported and exported rough diamonds.⁷⁶ Each certificate of origin must include a label stating “Kimberly Process Certificate” and the statement: “The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberly Process Certification Scheme for rough diamonds.”⁷⁷ Furthermore, any shipment of diamonds must be tamper-resistant and include other specifics such as the date of issuance and expiration, the identification of the exporter and importer, the weight, the amount in US dollars.⁷⁸

Participants also must set up a system of internal controls and regulations aimed at prohibiting any shipment of rough diamonds into its borders.⁷⁹ This is essentially the monitoring arm of the KP. Participating countries are required to pass domestic legislation, and consequently, any infraction of the KP would be policed by domestic agents, as such a violation would be a violation of that particular country’s national law. Likewise, participants must designate an “Importing and Exporting Authority (ies),” as well as a system of documentation of imports and exports.⁸⁰

72. Kimberly Process, Background, available at <http://www.kimberlyprocess.com/site/background.html> (last visited Apr. 17, 2007).

73. See Price, *supra* note 28, at 37 (outlining the general guidelines laid out in the Kimberly Process Certification Scheme).

74. *Id.* at 66.

75. See Press Release, Security Council, Security Council Expresses Strong Support For ‘Kimberly Process’, Aimed At Halting Illicit Diamond Trade Used To Fuel Conflicts, U.N. Doc. SC/7648 (Jan. 28, 2003), available at <http://www.un.org/News/Press/docs/2003/sc7648.doc.htm> (issuing press release detailing the U.N. backing to the recent strides made in implementing the Kimberly Process) [hereinafter Security Council Press Release Supporting Kimberly Process]. Because the U.N. expressed its support in this document and in Resolution 55/56, the Kimberly Process gained both international recognition and support. Furthermore, the U.N. endorsement renders the KP less likely to be susceptible to a WTO challenge. See *infra* Section II.C.1.

76. See Kimberly Process, *Kimberly Process Certification Scheme 7*, available at <http://www.kimberlyprocess.com/site/content/KPCS.pdf>.

77. *Id.* at 12. See also Kimberly Process, Background, *supra* note 72 (explaining why these strict guidelines were adopted and why compliance with them is essential to the success of the KP).

78. Kimberly Process, *Kimberly Process Certification Scheme*, *supra* note 76, at 14-15. The Kimberly Process outlined specific guidelines to ensure universal application of the scheme and to provide regulations for domestic customs agencies.

79. See generally Smillie, *The Kimberly Process: The Case For Proper Monitoring*, *supra* note 12 (articulating the importance of stringent domestic regulation and enforcement in order to ensure any success of the KP).

80. *Id.* at 14. The system of documentation for imports and exports is similar to that of a national customs agency and ensures that goods both entering and leaving the country meet the relevant standards, as outlined in domestic legislation.

The KP's biggest flaw lies in the fact that, at present, there is no international monitoring body and thus, no legally binding compliance standards.⁸¹ The reality of this is that the KP, while a step in the right direction towards slowing the illicit diamond trade, does not have any international system of enforcement. The extent of any monitoring lies within the realm of domestic enforcement for any violation of domestic legislation.⁸² However, this enforcement could be sporadic at best, and entirely at the discretion of the participating country. As a result, it is unlikely that the KP will be effective in producing participants' compliance due to the lack of sanctioning measures and monitoring capabilities, unless the countries are committed to monitoring with their domestic police power.⁸³

Another problem related to a lack of substantial monitoring is that of transshipment.⁸⁴ Transshipment occurs when conflict diamonds are transported from one country to another but pass through at least one country before their final destination point. There is a significant risk that upon entry into the transit country, the diamonds could be stolen and subsequently re-exported with fraudulent claims of origination from the transit country. This process would circumvent the KP and its corresponding legislation. Moreover, this type of illegal transaction could occur if the diamonds do not have any record of the chain of custody, and if transit countries are not likely to closely monitor goods that are simply passing through their borders.⁸⁵

81. This flaw has been harped on by various NGOs endorsing the Kimberley Process. See, e.g., Amnesty International, *The True Cost of Diamonds – Kimberley Process*, available at <http://web.amnesty.org/pages/ec-diamonds-eng> (last visited Apr. 17, 2007) (stating that Amnesty International has continually warned of the possible failure of the scheme due to the possibility of noncompliance, and imploring the participants to set up formal arrangements for effective monitoring). See also Lack of Monitoring Undermines Credibility, *supra* note 66 (issuing a statement announcing its recommendation for participating countries to allow for impartial reviews every two years; otherwise, the Kimberley Process Certification Scheme risks ineffectiveness).

82. See Lack of Monitoring Undermines Credibility, *supra* note 66 (reporting on the progress of Kimberley Process regulation and stating: "The 40 countries that did make the list only meet the requirements on paper. The Participation Committee did not assess how laws and regulations are being implemented and enforced. This underlines the urgent need for regular and impartial monitoring of in [sic] the Kimberley Process to assess whether diamond control systems work effectively in practice. Currently there are no formal arrangements for effective monitoring, and many governments are even reluctant to discuss the subject.").

83. See generally Smillie, *The Kimberley Process: The Case For Proper Monitoring*, *supra* note 12.

84. See Price, *supra* note 28, at 65-66 (noting the possible loopholes to the KP due to its structure of being a "system of national laws" and stating that flaws still exist in the current system).

85. See Smillie, *The Kimberley Process: The Case For Proper Monitoring*, *supra* note 12, at 5 (stating that three reasons governments have been reluctant to effectuate monitoring are high costs, commercial confidentiality, and national sovereignty). For these same reasons, governments may be reluctant to vigilantly monitor goods passing through their borders. Furthermore, it should be noted that at present, the Kimberley Process involves a mere forty members. Thus, the illicit diamond trade may remain alive and well among non-members without the threat of international sanctions to some extent. Although the KP is not an actual treaty, it is similar in its effect. Timothy Glut aptly notes that treaties may be the "strongest" form of international law because "they are written, binding agreements between nations. A significant drawback to treaties, however, is that a particular treaty binds only those nations party to it. Without custom for support, treaties are a poor source of international law among outside parties." Timothy Glut, Note, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1212-13 (1995). Countries that are not WTO members or KP Participants but who either produce or trade in diamonds are Armenia, Andorra,

B. WTO Regulations and U.S. Legislation

The KP operates as a result of national legislation passed by each participant that agrees to the certification scheme.⁸⁶ Because of this, specific countries must enact domestic legislation in compliance with the KP in order to meet the requirements of participation.⁸⁷ Twenty-four countries were on the original, but not final, list of participants;⁸⁸ these countries were excluded from the final list because they did not pass the corresponding domestic legislation to the KP.⁸⁹ Because the KP deals directly with international trade regulations, it must comport with WTO guidelines. The WTO is an international institution that oversees international trade disputes and procedures. The relevant treaty to the KP is the General Agreement on Tariffs and Trade (GATT).⁹⁰ GATT was signed by twenty-three contracting parties in 1947, a few years after the termination of World War II.⁹¹ After numerous rounds of negotiations, the contracting parties to GATT created the WTO Agreement, which became effective in 1995.⁹² The creation of WTO expanded upon the GATT treaty and established mechanisms for international dispute settlement related to trade. The thrust of GATT is the promotion of fair international trade. Thus, under Article XI of GATT, members of WTO are not allowed to restrict trade to other members.⁹³

The initial hesitation of many countries, including the United States, to becoming a participant in the KP was a concern that there existed possible WTO challenges to the structure of the KP.⁹⁴ A challenge to the KP could be warranted because, in its current state, the KP violates Article XI of the GATT treaty, which holds that no member may make quantitative restrictions to international trade with

Bermuda, Belarus, British Virgin Islands, Iran, Lebanon, Monaco, Saudi Arabia, Taiwan, and Ukraine. Price, *supra* note 28, at 5 n. 27.

86. See World Diamond Council, *The Essential Guide to Implementing the Kimberley Process*, *supra* note 63 (detailing the requirements for participation in the KPCS).

87. See Kimberley Process, Background, *supra* note 72.

88. Lack of Monitoring Undermines Credibility, *supra* note 66.

89. *Id.* See also BS Commodities Bureau, *WTO Waiver for Kimberly [sic] Norm on Diamond Trade* (March 5, 2003), available at <http://www.rediff.com/money/2003/mar/05wto.htm> [hereinafter BS Commodities Bureau] (noting that Brazil and the Philippines were granted a WTO waiver yet are not presently participants in the certification scheme).

90. GATT, *supra* note 13.

91. Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE, 75, 79 (1998). After the passage of GATT, the US and Great Britain proposed an International Trade Organization to regulate international economic affairs, and increase world trade. However, this proposed charter failed to pass in Congress, so GATT remained the "primary mechanism for coordinating global trade policy for the next half-century." *Id.* at 80-81.

92. *Id.*

93. See GATT, *supra* note 13, art. XI.

94. 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, 1181 (2003) (noting that some WTO members feared the KP was inconsistent with WTO rules). See also Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON 477 (1991) (outlining the requirements for meeting GATT guidelines for international trade and noting the cases where the GATT general exceptions have been applied).

other members.⁹⁵ At the KP's inception, thirty-seven diamond-producing countries were members of the WTO but were not participants in the KP.⁹⁶ As a result, American policy-makers hesitated to sign the agreement out of fear that involvement in the KP risked a WTO challenge because it prohibited any trade in diamonds with these other WTO members.⁹⁷ The WTO subsequently provided a waiver for eleven countries, including the United States to any possible Article XI infraction in February 2003.⁹⁸ However, the waiver stipulates that all WTO members retain the right to bring concerns of inconsistent application of the KP, as related to potential benefits to certain WTO members at the expense of other members.⁹⁹ The waiver is analyzed by members of the WTO each year, and was recently renewed until December 2012.¹⁰⁰

As a direct result of the WTO waiver, the United States passed the Clean Diamond Trade Act, which became Public Law on April 25, 2003.¹⁰¹ The law allows for the President to implement regulations consistent with the KP.¹⁰² As noted above, the legislation specified that its reach extended only to rough diamonds.¹⁰³ This is significant because the U.S. imports the highest amount of diamonds a year, rough or polished, amounting to about \$597.38 million in 2001, and nearly \$10.06 billion in polished diamonds that have not yet been mounted or

95. GATT, *supra* note 13, art. XI.

96. Price, *supra* note 28, at 5 n.27 (listing the countries that had not signed on to the Kimberley Process but were current members of the WTO, including Austria, Barbados, Congo, Cyprus, Denmark, Egypt, Finland, The Gambia, Greece, Guyana, Hong Kong, Hungary, Ireland, Indonesia, Kenya, Kuwait, Madagascar, Malaysia, Malawi, Malta, Mauritius, Morocco, Mozambique, Netherlands, Nigeria, Panama, Peru, Philippines, Poland, Rwanda, Sri Lanka, Tunisia, Turkey, Uganda, Uruguay, United Arab Emirates, and Venezuela).

97. GATT, *supra* note 13. See Price, *supra* note 28, at 48-51 (noting that although some countries still hold that the WTO waiver of the requirements of GATT Article XI was unnecessary, the United States refused to be a participant without the waiver; this refusal stemmed from WTO restrictions against any discrimination between goods on a non-product related basis). However, many participants held that Article XX and Article XXI of GATT protected the KP from WTO challenge because the intention of the KP was enforcing human and national security.

98. Council for Trade in Goods, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, G/C/W/432/Rev.1 (Feb. 24, 2003) [hereinafter *Waiver Concerning KP*]. See also BS Commodities Bureau, *supra* note 89 (noting that the waiver extends from January 1, 2003 until December 31, 2006). The eleven countries that were granted this exemption are: Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, and the United States.

99. *Waiver Concerning KP*, *supra* note 98.

100. See Council for Trade in Goods, *Extension of Waiver Concerning Kimberley Process Certification Scheme For Rough Diamonds*, G/C/W/559/Rev.1 (Nov. 17, 2006), available at <http://docsonline.wto.org/DDFDocuments/t/G/C/W559R1.doc>.

101. Clean Diamond Trade Act, Pub. L. No. 108-19, 117 STAT. 631 (2003) (specifying what diamond import and export controls will be put into American trade law, in compliance with Kimberley Process guidelines). The legislation was introduced as H.R. 1584.

102. *Id.* § 5(a), 117 STAT. at 634. Statement on Signing the Clean Diamond Trade Act, 1 PUB. PAPERS 386 (April 25, 2003). This legislation marks over a decade's worth of policy geared toward the issue of conflict diamonds. The Clinton Administration held numerous conferences to discuss conflict-ridden, diamond-producing countries. Likewise, the Clinton Administration sought international sanctions to prevent the trade in conflict diamonds, and tried to assist Angola and Sierra Leone to improve their diamond export certification systems. COOK, *supra* note 11, at 23-30 (detailing the steps the current and previous administrations have taken regarding conflict diamonds and corresponding legislation).

103. COOK, *supra* note 11, at 30-31.

set in jewelry.¹⁰⁴ Critics of the bill initially asserted that there are many loopholes inherent in regulating only rough diamonds.¹⁰⁵ For instance, rough diamonds can easily be disguised as jewelry by merely putting them in some sort of setting, and thereby circumventing any federal regulation.¹⁰⁶ Nonetheless, the bill passed with an overwhelming majority and is regarded as a positive step in a fight against the illegal diamond trade.

III. DIAMOND LEGISLATION: IMMUNE FROM A WTO CHALLENGE

A. General Exceptions: Articles XX and XXI

As noted above, the United States refused to pass domestic legislation related to the KP without the safeguard of the WTO waiver.¹⁰⁷ However, the WTO draft waiver, allowing eleven countries to pass legislation that would be consistent with international trade law, specified certain caveats, including that any member may bring an issue before the General Council if the member considers that measures regulating the import or export of rough diamonds covered by this waiver are being applied inconsistently.¹⁰⁸ Furthermore, the waiver was enacted for a set duration of time, and was set to expire December 31, 2006¹⁰⁹ but was renewed until December 2012.¹¹⁰ Because the waiver itself does not negate all possible challenges to the Kimberley Process,¹¹¹ one must examine whether, despite the waiver, the KP can be considered legitimate in the eyes of international law. An examination of the GATT treaty and its exceptions is necessary in order to determine if the KP comports with international trade law.

The GATT Treaty prohibits blocking trade of goods with other members of WTO, yet retains certain exceptions to this prohibition.¹¹² These exceptions are found in Articles XX and XXI. Article XX of the GATT treaty allows for members of the WTO to adopt measures restricting trade if these measures are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”¹¹³

104. *Id.* at 12 (providing statistics on American diamond imports, based on U.S. International Trade Commission).

105. *See Id.* at 31.

106. *Id.*

107. *See infra* Section II.B.

108. Waiver Concerning KP, *supra* note 98. The waiver states that any member may bring an issue before the General Council if the member “considers that measures regulating the import or export of rough diamonds covered by this waiver are being *applied inconsistently* with this waiver or that any *benefit accruing to it under the GATT 1994 may be or is being impaired unduly* as a result of measures to implement the Kimberley Process Certification Scheme covered by this waiver and that considers that consultations have proved unsatisfactory.” *Id.* (emphasis added).

109. *Id.*

110. *See* Council for Trade in Goods, *Extension of Waiver Concerning Kimberley Process Certification Scheme For Rough Diamonds*, *supra* note 100.

111. Waiver Concerning KP, *supra* note 98.

112. GATT, *supra* note 13, art. XI.

113. *Id.* art. XX (noting general exceptions to the treaty).

Likewise, in order to warrant the exception provided in Article XX, the restricting measures must be deemed, "a) necessary to protect public morals; b) necessary to protect human, animal or plant life or health" ¹¹⁴ Likewise, Article XXI stipulates that any trade restriction invoked for the purpose of national security or taken in pursuit of any obligations under the U.N. Charter will qualify for an exception. ¹¹⁵

International trade disputes are settled within WTO by way of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, hereinafter "DSU"). ¹¹⁶ A contracting party to GATT is able to bring a dispute under Article XXIII by stating that any benefits "accruing to it under GATT had been 'nullified or impaired'" as a result of another contracting party's restrictive measures. ¹¹⁷ The exceptions listed in Article XX are the only provisions that justify any violation of GATT and therefore grant immunity to any challenge made by a contracting party. A two-fold analysis is used to determine if an exception under Article XX will stand legally. First, the regulation must be in compliance with the exception, meaning that the regulation must be necessary to protect public morals and public health, among other things. ¹¹⁸ Second, the regulation must comply with the chapeau, or introductory clause, of Article XX. ¹¹⁹ Compliance with the chapeau simply entails that contracting parties must "refrain from acts which would defeat the object and purpose of a treaty." ¹²⁰

Article XX(b) is often invoked as an exception to GATT obligations. ¹²¹ This article allows for restrictive trade measures for the sake of protecting public health or animal welfare. Notable cases dealing with Article XX(b) include the Tuna-Dolphin cases, ¹²² the Shrimp-Turtle case, ¹²³ and disputes concerning animal leg

114. *Id.*

115. *See* GATT, *supra* note 13, art. XXI (stating a general exception for national security issues or restrictive measures taken in compliance with the U.N. charter).

116. Feddersen, *supra* note 91, at 81-82.

117. *Id.* at 82-83.

118. GATT Article XX grants exceptions for measures related to the following: the protection of public morals; the protection of human, animal or plant life or health; the importation or exportation of gold or silver; compliance with laws and regulations including customs and monopolies enforcement, protection of patents, trademarks and copyrights, and prevention of deceptive practices; products of prison labor; the protection of natural resources; exports of domestic materials necessary to ensure essential quantities of materials for domestic processing industries when the domestic price of materials is held below the world price; the distribution of products in general or local short supply. GATT, *supra* note 13, art. XX.

119. *See* GATT, *supra* note 13, art. XX (stating that all measures must be "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 . . .").

120. Price, *supra* note 28, at 54.

121. *See, e.g.*, Appellate Body Report, *United States - Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, (Oct. 12, 1998) [hereinafter Appellate Body Shrimp-Turtle Report].

122. *See generally*, Panel Report, *United States- Restrictions on Imports of Tuna*, WT/DS21/R (Sept. 3, 1991) [hereinafter GATT Tuna Report]. This case is commonly referred to as Tuna I, and the appeal of this case is referred to as Tuna II. Under the ruling of Tuna II, the United States must use measures that are "reasonable available" in its attempt to ban products. Tuna II stood for the standard that restrictions in trade policy must be "primarily aimed at" and "strictly necessary" for whatever protection or intent at which the policy is aimed. The WTO stated that the U.S. could not impose trade barriers to force other countries to comply with their environmental standards and policies. Peter V.

traps.¹²⁴ The Tuna-Dolphin case involved a U.S. attempt to adopt a restrictive trade policy, the Marine Mammal Protection Act, which was aimed at protecting dolphins by setting regulations on methods of tuna fishing. The GATT Panel did not adopt the ruling, but did hold that the U.S. could not reach beyond its jurisdiction to hold other countries to an American standard.¹²⁵ Similarly, in the Shrimp-Turtle case, the WTO Appellate Body held that the U.S. law setting a standard for shrimp trawling, aimed at protecting sea turtles, was discriminatory.¹²⁶ The WTO held that because the U.S. was requiring other WTO members in different conditions to adhere to regulatory standards established by the U.S., this regulation was a violation of WTO trade policy.¹²⁷

Commentators have expressed that because one of the stated aims of the KP is to protect human life, the KP could fall under exception XX(b) of GATT.¹²⁸ In accordance with the ruling of the Tuna-Dolphin case, the KP does not involve a country overreaching its jurisdiction and forcing standards upon other countries. The KP is a voluntary agreement involving numerous countries, rather than a result of one country imposing a regulation on the others. The KP requirements were created not by a single country or institution but rather by a conglomeration of governments, diamond industry leaders, and NGO representatives. Thus, the restrictions and standards instituted by the KP are not a result of one WTO country reaching beyond its jurisdiction and imposing its standards upon another country. Instead, any country willing to meet the requirements of the KP is eligible to become a participant.

The KP could also be excepted from GATT under Article XXI, which provides an exception based on national security reasons, due to a possible link between conflict diamonds and terrorist groups.¹²⁹ Likewise, Article XXI provides an

Michaud, Note, *Caught in a Trap: The European Union Leghold Trap Debate*, 6 MINN. J. GLOBAL TRADE 355, 371 (1997).

123. See generally, Appellate Body Shrimp-Turtle Report, *supra* note 121.

124. See generally Michaud, Note, *supra* note 122 (detailing the debate surrounding animal leghold traps and the WTO disputes between fur trappers and the European Union).

125. See GATT Tuna Report, *supra* note 122, ¶¶ 6-7.

126. See Appellate Body Shrimp-Turtle Report, *supra* note 121, ¶¶ 163, 184-88.

127. *Id.*

128. See Price, *supra* note 28, at 53-54. Price analyzes the KP in relation to the Shrimp-Turtle case and makes the point that because the KP is available for any country to sign, it is not an exclusive regulation. Rather, the Kimberly Process is multilateral, which will insulate it from any challenges based on arbitrary or discriminatory application or standards. *Id.* at 58. See also Michaud, *supra* note 122, at 367-374 (outlining the findings in Tuna I and Tuna II, including the standard for a XX(b) exception).

129. GATT, *supra* note 13, art. XXI. Though not the focus of this comment, Article XXI of GATT is relevant due to recent connections between conflict diamonds and terrorist groups. See COOK, *supra* note 11, at 7 (providing details linking terrorist networks to conflict diamonds). Numerous reports, one of which was in the Washington Post, have shown that terrorist groups have used diamonds as a non-reported source of fungible assets. Douglas Farah, *Al Qaeda Cash Tied to Diamond Trade*, WASHINGTON POST, Nov. 2, 2001, available at www.washingtonpost.com/ac2/wp-dyn/A27281-2001Nov1. Because of this link, one of many legislative intents in passing the Clean Diamond Trade Act involved cutting off the illicit diamond trade in an effort to prevent terrorist groups intent on harming the U.S. from obtaining funds via that avenue. See COOK, *supra* note 11, at 25 (noting the reasons why the recent U.S. legislation was introduced).

exception for actions taken in accordance with the U.N. Charter.¹³⁰ Thus, because the U.N. passed a resolution backing the implementation of the KP, this exception could be applicable as well.¹³¹ However, despite the possibility of a valid Article XX(b) or Article XXI exception, the XX(a) exception, granting protection to trade restrictions based upon public morals, is also a plausible safeguard for the KP against any possible WTO challenge.

An example of a trade restriction that most likely would warrant a possible XX(a) exception is the recent legislation surrounding importation of goods made through the use of child labor.¹³² The U.S. Congress passed the Trade and Development Act of 2000, aimed at deterring child labor by preventing any importation of goods made by indentured or forced child labor.¹³³ This trade restriction could claim the XX(b) exception because child labor is considered a hazard to human health.¹³⁴ However, it can also be argued that child labor is considered contrary to public morality.¹³⁵ For instance, if a country could prove its child labor was performed under completely safe circumstances and did not affect the childrens' health, the country could attempt to challenge a XX(b) exception. Consequently, the products of voluntary child labor would not be banned. An exception to products produced by child labor, based on XX(a), however, would be trickier to challenge because it would involve proving that the public morality had shifted to the point that child labor was no longer considered contrary to public morals. A morality exception is more encompassing, applying to the means of production as well as the commodity being traded, and its standards are slightly more nebulous than those necessary for proving a danger to public health.

B. The Morality Exception: Article XX(a)

Unlike other cases in which the XX(b) exception has been used, such as the Tuna-Dolphin case¹³⁶ or cases surrounding animal leg-traps,¹³⁷ in which the process

130. GATT, *supra* note 13, art. XXI(c).

131. G.A. Res. 56/263, U.N. Doc. A/RES/56/263 (April 9, 2002). *See also* Security Council Press Release Supporting Kimberley Process, *supra* note 75 (announcing unanimous adoption of Security Council Resolution 1459, which endorsed the Kimberley Process).

132. *See* Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 740-42 (1998) (explaining why child labor could fall under a public morals exception). Charnovitz argues that under child labor regulation, the "products of children working voluntarily would continue to be permitted" and therefore, "a health defense under Article XX(b) would be awkward." *Id.* at 740-41. *See also* Glut, *supra* note 85, at 1208 (underlining the fact that child labor is contrary to American values, noting that "child labor contributes to poverty rather than ameliorating it. By working, children neglect their education, damage their health, and restrict their future earning capacity. Consequently, children may grow up without the skills necessary for more advanced, higher-paying jobs.").

133. Matthew T. Mitro, Comment, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. U. L. REV. 1223, 1227-28 (2002).

134. *See id.* at 1257.

135. *See* Charnovitz, *supra* note 132, at 740-41.

136. *See generally* GATT Tuna Report, *supra* note 122 (commonly referred to as Tuna I, and the appeal of this case is referred to as Tuna II). These cases were not adopted by GATT but do illustrate what is necessary to overcome an exception defense by way of a WTO challenge. These cases stand for the idea that any regulation must be in accordance with the GATT, yet even a measure intended to protect animal life or health under exception XX(b) cannot be "accomplished by unilateral action or by

for obtaining the regulated goods was clearly endangering animal welfare, the process for obtaining or mining diamonds does not necessarily endanger human life.¹³⁸ Although numerous reports by NGOs have established a significant link between conflict diamonds and human security, this link cannot be shown to encompass *all* rough diamonds, which is the scope of the KP's regulation.¹³⁹ A non-participant could bring a challenge stating that the trade of rough diamonds is not inextricably tied to the protection of human life, as is necessary for a XX(b) exception because less than one percent of rough diamonds are considered "conflict diamonds," according to the World Diamond Council.¹⁴⁰ Thus, a non-participant could argue that the XX(b) exception does not apply when the goods the policy aims to restrict account for less than one percent of the traded commodity. This is why an exception based on morality, XX(a), rather than on protection of human health, XX(b), is a safer bet.

For instance, a valid distinction between the Trade and Development Act and the Clean Diamond Trade Act is that a restriction on goods made from forced child labor could be considered more closely related to the exceptions on restrictive legislation than the conflict diamond legislation. Restrictions against forced child labor regulate the direct product of what is considered contrary to either public morals or public health. The means of production of the restricted goods is what is at issue in the child labor legislation. In this sense, all goods produced by child labor fall under the statute, and there is no risk that goods produced by other means would fall under the umbrella of the Trade and Development Act.

The KP legislation, however, poses a more tenuous link between the actual goods, rough diamonds, and the activity the regulation is intending to prohibit-- in this case, the human rights violations of war and the illegal funding of war criminals. In other words, the actual goods being regulated by the KP include goods that do not necessarily coincide with the aims of the KP. All rough diamonds are restricted, including rough diamonds that do not originate from rebel-held territories but, for whatever reason, do not carry a certificate of origin with them. In that sense, and unlike the child labor legislation, the KP exception based

means reaching beyond United States territory and into the jurisdiction of another." Mitro, *supra* note 133, at 1249.

137. See Charnovitz, *supra* note 132, at 736-37. These cases arose out of recent European legislation banning any imports of goods derived from animals if the animals had been caught with leghold traps. The legislation asserted that use of these traps was inhumane. Charnovitz, uses a two-step analysis in which he analyzes whether the policy falls under the range of XX(a) and subsequently determines if the policy is a necessity for the protection of public morals. He argues that because the leghold trap is not an issue of animal health, the only exception for such a trade restriction would be found under XX(a). See *id.* at 737-38.

138. The Shrimp-Turtle case and the Tuna-Dolphin cases invoked Article XX(b) in order to protect animal life because the process involved in acquiring these goods was inherently dangerous to animal life. The Kimberley Process, in contrast, is designed to regulate trade in diamonds and to curb the potential evils of illegal diamond trading. The process of mining the diamonds themselves is not necessarily "inherently dangerous" to human life, nor is it the aim of the Kimberley Process to regulate the mining process.

139. See *infra* Section II.A.

140. World Diamond Council, Diamond Facts, <http://diamondfacts.org/facts/index.html> (last visited Apr. 17, 2007).

on XX(b) could be considered overbroad. However, because there has been such strong international support for the KP, and clear indications that conflict diamonds are related to human rights violations, it is unlikely the exception based on a morality determination that challenges restrictive legislation made in compliance with the KP will be challenged.

In regards to the possibility of a XX(a) exception for the KP, the essential question hinges on whether trade in questionable rough diamonds is not in line with "public morals." If this can be proven true, then an Article XX(a) exception would stand.¹⁴¹ International treaties have long included morality exceptions.¹⁴² Unlike the history of litigation behind the XX(b) exception, however, no member state has challenged a morally-based import ban.¹⁴³

The morality exception is applicable for the KP because the KP aims to regulate a type of good not because the *goods* are against public morals (as the case may be for pornography, for example), nor that the *means of production* of those goods are against public morals (i.e., child labor), but because the goods have been significantly linked to the human rights violations, terrorist activity, and other evils acts.¹⁴⁴ Thanks to extensive campaigns by NGOs and the U.N. elucidating the link between conflict diamonds and war crimes, as well as the publicity derived from Hollywood blockbusters, the public awareness of the controversy surrounding the diamond trade has grown.¹⁴⁵ As a result, a XX(a) exception, claiming the KP is in line with public morals that are offended by the subsidization of criminals and their violent acts, will be difficult to challenge.

CONCLUSION

Africa's wars have been prolonged by the ability of rebel groups to fund their efforts by illegally trading diamonds for either cash or munitions. Due to reports

141. See GATT, *supra* note 13, art. XXI(a). Article XX(a) is designed to uphold national sovereignty in the sense that national values are respected. This allows for "a contracting party to pursue its own public policy goals; by the same token, Article XX cannot allow a contracting party to dictate another contracting party's public policy goals." Feddersen, *supra* note 91, at 117. Since its inception, GATT has undergone different rounds of negotiation, yet this exception was not elaborated upon in the various editions of the treaty. *Id.* at 84 (outlining the history of GATT and its redactions, including the most recent Uruguay Round negotiations which proffered modifications to numerous articles of the treaty). Feddersen notes that every draft of Article XX has included exceptions based on the protection of public morals, yet the actual meaning of the statement remains ambiguous. He discusses whether the phrase "public morals" is equal to the legal concept of *ordre public* (public order), "a conflict-of-laws rule relevant when jurisdictional problems occur between states." *Id.* at 118. Likewise, Charnovitz notes the long history of including a moral exception in international law treaties, and states that "[m]ost of these exceptions linked moral and humanitarian goals." Charnovitz, *supra* note 132, at 710. These treaties regulating goods that also included moral exceptions dealt with regulations on slave trade, opium, narcotics, and coca leaf. See *id.*; see also Shira Pridan-Frank, *Human-Genomics: A Challenge to the Rules of the Game of International Law*, 40 COLUM. J. TRANSNAT'L L. 619, 655 (2002) (stating that GATT Article XX(a) should be interpreted in such a way that it incorporates human rights norms).

142. Charnovitz, *supra* note 132, at 710.

143. See *id.* at 731.

144. See *supra* Section I.A.

145. For one example, among many, the recent Leonardo DiCaprio movie, *Blood Diamond*, detailed the horrors of wars and conflicts surrounding diamond mining in Africa.

by vigilant NGOs, this international issue came to the attention of the diamond industry and the governments of affected countries. As a result, the Kimberley Process came into being. The Kimberley Process is a necessary evolution from fairly ineffective U.N. sanctions and other attempts at regulating conflict diamonds that are exported from Africa at the expense of thousands of African citizens who must live with war.¹⁴⁶ The Process involves blocking trade of rough diamonds that do not accompany a certificate of origin to non-participants. This restrictive measure is technically in violation of GATT.¹⁴⁷

Although a strong argument exists that the KP could warrant an exception to WTO and GATT restrictions based on Article XX(b) or Article XXI, a compelling argument may also be made that Article XX(a) grants an exception to the KP. The amount of press and international attention given to the issue of conflict diamonds, by NGOs, governments, and pop culture has, in essence, shaped our morality on this issue. Because the KP was instituted in hopes of keeping the diamond trade aligned with public morals, it should warrant a Article XX(a) exception should any WTO challenge arise. Overall, the Kimberley Process represents a positive step made by the international community, governments, and the diamond industry to keep the diamond trade clean. One can hope that with further adjustments and rectifications of the inherent flaws in the system, the KP will be effective in keeping conflict diamonds out of the market and thereby restricting funding to terrorist and rebel groups in Africa. With the safeguard of a WTO exception, the Kimberley Process should continue to shape international law and trade and, ideally, bring hope and stability to war-torn Africa.

146. See *infra* Section I.A.

147. Although the Kimberley Process will most likely be insulated from any WTO challenges on the basis that it falls under the exception of Article XX(a), if not XX(b) or XXI, the Process will have limited success, if any, until a monitoring body is installed. Without proper monitoring, even the participants who have passed corresponding domestic legislation will be able to easily circumvent the intention and ideals of the Process if this legislation is not policed. Therefore, the Kimberley Process framers, and its participants, should establish an impartial, international monitoring group to ensure that the certification system is followed.