

Legal perspectives on the regulation of trade in (conflict) diamonds in Zimbabwe by means of the Kimberley Process Regulation Scheme

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ABSTRACT

The Kimberley Process Certification Scheme was born out of international security concerns triggered by rebel groups that were using the proceeds of rough diamonds to fund conflict. Rebel groups used rough diamonds, acquired through gross human rights abuses, to fund conflicts aimed at overthrowing legitimate governments. The situation was particularly calamitous and ruinous in Angola, Sierra Leone, Liberia and the Democratic Republic of the Congo. In response to this situation a unique coalition of governments, civil society groups and stakeholders in the diamond industry, came together with the support of the United Nations and established a scheme to separate illicitly acquired diamonds from legally traded diamonds. The historical situation at the time allowed the KPCS to define conflict diamonds as "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments".

However, the exploitation of Marange diamonds in Zimbabwe shows that the use of the proceeds of so-called conflict diamonds is not limited to rebel movements aiming to wield power but such conflict can be political, economic and military in nature. In Zimbabwe, there was a link between human rights abuses and the ZANU PF led government. ZANU PF financed terror using Marange diamonds. There was international dissatisfaction with the way the KPCS scheme certified Marange diamonds. The USA maintained sanctions on Zimbabwe and Global Witness withdrew from the scheme in protest over the refusal of the scheme to evolve. On the other hand, some participant countries applauded the scheme for its work in certifying Marange diamonds. This study evaluates the efficacy of the scheme in curbing conflict diamonds brought into legal trade by legitimate governments. The study concludes that there is need for reform in the KPCS to successfully separate conflict diamonds from clean diamonds in the face of changing forms of conflict.

In meeting its objective, the KPCS applies an exclusion mechanism where participants of the scheme do not trade with non-participants. The World Trade Organisation (WTO) rules prohibit discrimination amongst participants and the KPCS clearly violated this

rule. Scholars have debated human rights exceptions in the General Agreement on Tariffs and Trade (GATT). There is strong legal support for the idea that the KPCS is justified under GATT article XX and XI. The KPCS is presently operating under a waiver granted from by the WTO under article IX (3) and (4). Another challenge the scheme faces is the legal nature of the scheme. Scholars do not agree on whether to classify the scheme as hard law or soft law. There is a need for clarity on the legal nature of the scheme.

Key words: conflict diamonds, blood diamonds, clean diamonds, human rights abuses, Kimberley Process Certification Scheme

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LIST OF ABBREVIATIONS

AFRC	Armed Forces Revolutionary Council
AIPPA	Access to Information and Protection of Privacy Act
Cardozo LR	Cardozo Law Review
CNRG	Centre for Natural Resource Governance
CO	Certificates of Origin
Conn J Int'l L	Connecticut Journal of International Law
DMC	Diamond Mining Corporation
DRC	Democratic Republic of Congo
DSM	Dispute Settlement Mechanism
EPO	Exclusive Prospecting Order
EU	European Union
GATT	General Agreement on Tariffs and Trade Treaty
GUNR	Government of Unity and National Reconciliation
GW	Global Witness
HCDCS	Harmonised Commodity Description and Coding System
HRW	Human Rights Watch
ICLQ	International and Comparative Law Review
IEA	Imports and Export Authority
IER	Imports and Exports Regulator
ILR	International Law Review
Ind J Global Legal Stud	Indiana Journal of Global Legal Studies
JWP	Joint Working Plan
KPCS	Kimberley Process Certification Scheme
MDC	Movement for Democratic Change
MFN	Most Favoured Nation
Mich J Int'l L	Michigan Journal of International Law
Minn J Global Trade	Minnesota Journal of Global Trade
MMCZ	Minerals Marketing Corporation of Zimbabwe
MoU	Memorandum of Understanding
MPRDA	Minerals and Petroleum Resources Development Act
NGO	Non-Governmental Organisation
PAC	Partnership Africa Canada

RUF	Revolutionary United Front
UN	United Nations
UNGA	United Nations General Assembly
UNITA	National Union for the Total Independence of Angola
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
WDC	World Diamond Council
WGAAP	Working Group on Artisanal and Alluvial Production
WGDE	Working Group of Diamond Experts
WGM	World Group on Monitoring
WGS	Working Group Statistics
WTO	World Trade Organisation
ZANU PF	Zimbabwe African National Union Patriotic Front
ZIMRA	Zimbabwe Revenue Authority
ZMDC	Zimbabwe Mining Development Corporation
ZMDCA	Zimbabwe Mining Development Corporation Act
ZRP	Zimbabwe Republic Police

CHAPTER ONE

Introduction

1.1 Introduction

Diamonds are mainly used to make jewellery because of their beautiful appearance and durability. Diamonds also have many industrial applications because of their unique properties. According to the World Diamond Council (WDC),¹ the global trade for rough diamonds is worth approximately US\$13 billion per year with approximately US\$8.5 billion coming from Africa. The WDC also estimates that worldwide, more than ten million people are employed in the diamond industry.² This makes the diamond industry a very important sector in terms of its contribution to the global economy.

However, in the early to mid-nineties, some diamonds were used to fund wars and human rights abuses by rebel movements seeking to overthrow legitimate governments. These diamonds are known as conflict diamonds or blood diamonds. Conflict diamonds tainted the legitimate trade in diamonds and there was a need to regulate the trade in rough diamonds. The objective of such regulation was to make sure that blood diamonds were not marketed within the legitimate trade of diamonds.

The international community comprising of different governments, stakeholders in the diamond mining industry and civil society groups came together and established the Kimberley Process Certification Scheme (KPCS).³ The scheme was set up to regulate the trade in diamonds with the purpose of flushing out conflict diamonds.

1 The WDC is an organisation that represents the diamond industry in the development and implementation of regulatory and voluntary systems to control the trade in diamonds embargoed by the UN or covered by the KPCS. www.worlddiamondcouncil.org.

2 <http://www.worlddiamondcouncil.org>.

3 The KPCS is an intergovernmental initiative that works together with civil society groups and the World Diamond Council to curb the trade of illegal diamonds. The scheme was found in 2003 and it operates based on voluntary implementation of internal controls by participating countries.

The KPCS limits the definition of conflict diamonds to those transacted by rebel movements and not those used by legitimate governments to fund abuses. Conflict diamonds are defined as:

Rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/66, or in other similar UNGA resolutions which may be adopted in future.⁴

Three years after the KPCS was established, Zimbabwe discovered huge deposits of diamonds in the Marange area in Manicaland province.⁵ There were human rights abuses in Marange by the Zimbabwean government against its people. The Zimbabwean government used the proceeds generated from the diamond trade to fund a campaign of terror against its people.⁶ The way in which the Zimbabwean government handled this particular discovery was met with significant global concern. The KPCS certified Marange diamonds compliant without tabling a solution on how to handle conflict diamonds from legitimate governments.

This concern brought into question the effectiveness of the KPCS to eliminate conflict diamonds in international trade. In particular, questions were asked about how the scheme had dealt with the Zimbabwean issue. The Marange problem lasted for more than four years, and the way in which the KPCS handled the issue revealed significant shortcomings inherent in the scheme. The Marange issue was a unique scenario. Whereas the KPCS targets abuses by rebel movements, in Zimbabwe a legitimate government committed human rights abuses. The drafters of the KPCS seem not to have anticipated the Zimbabwean scenario.

Dealing with Marange gems within the limited confines of the definition of conflict diamonds was a litmus test for the KPCS. The effectiveness of the scheme to eliminate blood diamonds was on trial. This research seeks to evaluate the effectiveness of the KPCS in regulating trade in conflict diamonds and to determine

4 *KPCS* 2003.

5 Marange is the name of the district where the deposits were found and will be used interchangeably with Chiadzwa the name of the particular village where the diamonds were found.

6 GW 2011 <http://www.globalwitness.org/sites/default/files/library/kpexity.pdf>.

whether it conforms to WTO requirements. Zimbabwe will be used as a case study to analyse the effectiveness of the scheme.

As a departure point, Chapter 2 gives a background to the KPCS and conflict diamonds emerging from Zimbabwe. The chapter shows the changing nature of conflict diamonds from those fuelled by rebel groups to involvement of legitimate governments. Chapter 3 will be a discussion of the scope of the scheme. In this chapter, there will be an outline of the principles underpinning the scheme. Chapter 4 shows how Zimbabwe implements the schemes internal controls and how the KPCS handled Marange diamonds. Chapter 5 will evaluate the nature of the KPCS. This section outlines the legal character of the KPCS and the contending views held by different schools of thought. The discussion in chapter 6 will focus on the relation between the KPCS and the WTO with the aim of evaluating the consistency of the KPCS to WTO obligations. Chapter 7 concludes the study by furnishing recommendations whilst conclusively answering the research questions.

CHAPTER 2

Changing nature of conflict diamonds

2.1 Introduction

Conflict diamonds are defined as "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments".⁷ The historical circumstances at the time the KPCS was established, justified defining conflict diamonds limited to those used by rebel movements. Rebel groups in Angola, Sierra Leone and the DRC used rough diamond trade to sponsor conflicts aimed at undermining legitimate governments. However, the discovery of Marange diamonds in Zimbabwe shows that legitimate governments also fuel conflict using rough diamond trade.

Human rights abuses linked to the Zimbabwe African National Union Patriotic Front⁸ (ZANU PF) led government were committed in Marange. The military played a significant role in the abuses and the underhand deals that took place. The Zimbabwean situation shows that conflict has a broad dimension that is political, economic and military in nature. The purpose of this chapter is to outline the changing nature of conflict diamonds from those used to sponsor rebels wielding power to those used to fuel political, economic and militarised conflict.

7 *KPCS* 2003.

8 ZANU PF is a political party led by Robert Mugabe. The party has been in power since 1980 when the country obtained independence from Rhodesia. In 2008, the party partially lost power to the Movement for Democratic Change (MDC) in controversial elections that were marred by violence. ZANU PF and MDC entered into a power sharing agreement from 2008 to 2013 when ZANU PF won another controversial election with the MDC still refusing to accept the outcome.

2.2 The nature of conflict diamonds

2.2.1 Angola

Global Witness⁹ (GW)¹⁰ a non-governmental organisation (NGO) concerning itself with the impact of blood diamonds on human rights abuses submits that, in the main, oil and diamonds financed the renewed civil war in Angola after the failed elections of 1992. The National Union for the Total Independence of Angola (UNITA), a rebel group fighting the government of Angola, controlled 60-70% of the diamond production in Angola.¹¹ The high financial returns from the diamond trade sustained the war efforts of UNITA. Peace efforts in Angola were significantly hampered by UNITA's war effort that was financed by trade in rough diamonds.

The United Nations Security Council Resolutions (UNSC) 1173 (1998)¹² and 1176 (1998)¹³ prohibited exports of Angolan diamonds not accompanied by Certificates of Origin issued by the Government of Unity and National Reconciliation (GUNR). The certificate of origin was required for diamonds from Angola only. The certificate of origin requirement had a loophole that could be abused. UNITA could export its diamonds through countries that did not require certificates,¹⁴ and as a result continue financing its activities.

2.2.2 Sierra Leone

In Sierra Leone, the rebel movement Revolutionary United Front (RUF)¹⁵ traded diamonds with Liberia in exchange for guns.¹⁶ Human Rights Watch (HRW)¹⁷ an

9 GW 2011 <http://www.globalwitness.org/sites/default/files/library/kpexity.pdf>.

10 GW is an international organisation that investigates and campaigns to prevent natural resource-related conflict and corruption and associated environmental and human rights abuses. It was established in 1993 and its first campaign was to stop illegal timber from Cambodia to Thailand. It was nominated jointly for a Noble-Peace Prize with Human Rights Watch in 2003 for its role in the establishing of the Kimberley Process Certification Scheme.

11 GW "A Rough Trade" 3.

12 UNSC Res 1173 (1998).

13 UNSC Res 1176 (1998).

14 GW reports that UNITA exported its diamonds through Zambia. GW "A Rough Trade" 11.

15 Revolutionary United Front (RUF) is the rebel group that fought a failed civil war in Sierra Leone from 1991 to 2002. Foday Sankoh, led in recruiting child soldiers and committed atrocities, formed RUF. The government of Liberia led by Charles Taylor supported RUF.

16 Shah 2001 www.globalissues.org/article/88/sierra-leone.

17 Human Rights Watch (HRW) is an international non-profit organization that defends and protects human rights around the world. It has been operating from 1978 to date. In 1997, the

international organisation that deals with human rights made several findings on the situation in Sierra Leone. HRW submits that, the rebel groups in Sierra Leone, Armed Forces Revolutionary Council (AFRC) and RUF committed widespread sexual violence against woman and girls that included individual and gang rape and sexual assault.¹⁸ These assaults took place over the nine-year long conflict in Sierra Leone.

The war and human rights abuses in Sierra Leone were largely sustained by the diamond trade between rebel movements and the Charles Taylor led Liberia.¹⁹ The UNSC passed Resolution 1306 (2000)²⁰ that prohibited the direct or indirect importation of rough diamonds from Sierra Leone without a certificate of origin.²¹ Any effective resolution would have immediately blocked diamonds from Liberia the gateway for diamonds from Sierra Leone. The resolution overlooked the fact that Sierra Leone blood diamonds were being traded through Liberia. Liberia would get conflict diamonds from Sierra Leone and trade the diamonds on the international market, making the diamond sanctions on Sierra Leone ineffective.

UNSC Resolution 1343 (2001)²² remedied the weakness in the resolution on diamonds from Sierra Leone-Res 1306 by prohibiting imports of all rough diamonds from Liberia. The ban on Liberian diamonds was not on condition that a certificate of origin must accompany them but was a total ban. The ban on diamonds from Sierra Leone without certificates of origin and the total ban of diamonds from Liberia did not close all the avenues that could be used to place conflict diamonds on the global market. These countries could still use other willing countries that did not require certificates of origin to trade their illegal diamonds on the global market.

organization won the Nobel Peace Prize for its efforts in promoting international peace. The organization is also a founding member of the International Campaign to ban landmines.

18 HRW 2001 www.hrw.org/news/2001/02/26/sexual-violence-within-seirra-leone-conflict.

19 HRW 2001 www.hrw.org/news/2001/02/26/sexual-violence-within-sierra-leone-conflict.

20 *UNSC Res 1306 (2000)*.

21 *UNSC Res 1306 (2000)*.

22 *UNSC Res 1343 (2001)*.

2.3 Kimberley Process Certification Scheme

The situation in these countries including DRC was the subject of international concern. The impact of conflicts fuelled by trade in blood diamonds on international peace and security became an international matter of apprehension. The United General Assembly (UNGA)²³ adopted a resolution that called the Security Council to:

...implement measures targeting the link between the trade in conflict diamonds and the supply to rebel movements of weapons, fuel and other prohibited materials.

The resolution further called for the creation and implementation of an international certification mechanism for rough diamonds.²⁴ The certification mechanism would be based on national certification schemes that would meet international agreed standards.²⁵ The resolution acknowledged efforts that were already underway in establishing the regulatory mechanism and offered the unwavering support of the UN.²⁶ The concern by UN member states and the reports by the civil society groups saw the establishment of the KPCS. The KPCS was born out of a joint initiative of governments, international diamond industry representatives and civil society organisations.

The main objective of the KPCS²⁷ is to "find a solution to the international problem of conflict diamonds" through the collective efforts of "exporting and importing states, the diamond industry and the civil society". One of the solutions provided by the KPCS is that certificates of origin should accompany shipments of rough diamonds on export.²⁸ For the certificates of origin to be effective shipments of rough diamonds are prohibited from being imported from or exported to a non-participant of the scheme.²⁹ The scheme will be discussed in detail in the next chapter.

23 *UNGA Res 55/56.*

24 *UNGA Res 55/56.*

25 *UNGA Res 55/66.*

26 *UNGA Res 55/66.*

27 Preamble of the *KPCS.*

28 S II (a) of the *KPCS.*

29 S III (c) of the *KPCS.*

2.4 Changing nature of conflict

2.4.1 Marange diamonds

In 2006, there was a diamond rush in Chiadzwa village, an area under chief Marange in Manicaland province Zimbabwe. Prior to the rush DeBeers³⁰ prospected for kimberlitic³¹ stones in the area. According to Chipangura³² an archaeological curator at the Mutare Museum, DeBeers' prospecting in Marange is traced back to between 1963 and 1965. Chipangura³³ states that during that period DeBeers misled the Ian Smith led Rhodesian government,³⁴ representing that there were no meaningful diamond deposits in the area where as DeBeers had actually discovered huge deposits. Chipangura reports that because of the liberation struggle that took place between 1965 and 1980, DeBeers stopped its prospecting activities in Marange for some years because of the unsafe environment in the country.³⁵ In 1994, fourteen years after Zimbabwe attained independence, an Exclusive Prospecting Order (EPO) was awarded to DeBeers.³⁶ DeBeers resumed prospecting in the area from 1994 to 2006. In 2006, DeBeers stopped prospecting and moved out of Marange. According to Mrs Goud the spokesperson of DeBeers, the company moved out of Marange after failing to find meaningful kimberlitic rocks.³⁷

Since DeBeers' exit from the Marange area there have been several questions raised about the true nature of DeBeers' activities in Marange. Dr Obert Mpfu, the former Minister of Mines and Mining Development, claimed that DeBeers looted close to 100, 000 metric tonnes of diamond ore in the 15 years it prospected for diamonds in Chiadzwa.³⁸ Minister Mpfu claims that when the government realised that DeBeers was looting diamond ore from Chiadzwa, the company disposed of its

30 DeBeers is one of the largest multinational companies that specialises in the exploration, mining and marketing of diamonds. It has been operating since 1888.

31 Kimberlites are rocks that contain diamonds.

32 Mukarati 2012 www.sundaymail.co.zw.

33 Mukarati 2012 www.sundaymail.co.zw.

34 Rhodesia was the name of current day Zimbabwe before the 1980 Independence. Ian Smith was the Prime Minister of Rhodesia between 1964 and 1979.

35 Mukarati 2012 www.sundaymail.co.zw.

36 Mukarati 2012 www.sundaymail.co.zw.

37 Mabhena 2012 www.sundaynews.co.zw/index.php?options=com.

38 Musarara 2013 newzimbabwe.com.

EPO.³⁹ African Consolidated Resources (ACR), a London stock exchange listed company, acquired the EPO from DeBeers. A few months after ACR started mining; the government withdrew its licence under unclear circumstances.⁴⁰ Ray Ndlovu, a political journalist with the Mail and Guardian, speculates that the withdrawal could have been because of ACR's links to Britain, Zimbabwe's former colonial masters.⁴¹ Zimbabwe and Britain have been at loggerheads since the late nineties when Britain imposed financial sanctions on the ZANU PF leaders and companies linked to the party over human rights abuses.⁴²

Ndlovu⁴³ further reports that after withdrawing ACR's licence the government encouraged "enterprising individuals to mine for diamonds in Chiadzwa and sell their finds to the state run Minerals and Mines Marketing Corporation of Zimbabwe (MMCZ)". The move seems to have been an attempt by ZANU PF to garner popular support.⁴⁴ Thousands of people descended on the fields in the diamond rush that preceded the Marange diamond controversies.

2.4.2 Marange diamonds becoming conflict diamonds

The Marange diamond rush of 2006 continued unabated for some months, turning Marange into a haven of illegal activities such as prostitution, drug dealing, and gambling. Violent clashes between illegal miners became the order of the day.⁴⁵ Organised syndicates smuggled diamonds out of the country through Mozambique.⁴⁶ Marange experienced unprecedented lawlessness and violence of proportions never experienced in the area.⁴⁷ After several months of chaos and illegal activities, law enforcement agents moved into the diamonds fields to restore order. The government used a "firm hand" to take control of the fields through various

39 Musarara 2013 newzimbabwe.com.

40 Ndlovu 2010 mg.co.za/article/2010-07-23-maranges-field-of-broken-dreams.

41 Ndlovu 2010 mg.co.za/article/2010-07-23-maranges-field-of-broken-dreams.

42 <https://www.gov.uk/government/publications/financial-sanctions-zimbabwe>.

43 Ndlovu 2010 mg.co.za/article/2010-07-23-maranges-field-of-broken-dreams.

44 Ndlovu 2010 mg.co.za/article/2010-07-23-maranges-field-of-broken-dreams.

45 Mukarati 2012 www.sundaymail.co.zw.

46 Mukarati 2012 www.sundaymail.co.zw.

47 Anon 2012 www.theafricapost.com/News-Analysis/the-story-of-zimbabwes-marange-diamonds-pollution-politics-power.html.

operations.⁴⁸ Law enforcement responsible for these operations consisted of the Zimbabwe Republic Police (ZRP) and the Zimbabwe National Army (ZNA).

The most brutal of these operations was operation *hakudzokwi* (do not come back). The name of the operation gives an indication of the type of force applied to send a clear message to the illegal miners. GW⁴⁹ reported that 200 people were murdered by law enforcement agents, whilst 5 000 were tortured and 36 000 displaced in this operation.

PAC⁵⁰ reported on the role the military played in turning the diamond fields of Marange into fields of terror. Passmore Nyakureba, a human rights lawyer in Zimbabwe, stated that:

Police drove the miners into an ambush using a helicopter, and fired tear gas and live ammunition. The miners escaped the diamond fields and hid in nearby mountains. This became an everyday experience.⁵¹

The KP monitor, Mr Abel Chikane,⁵² submitted in his final report that there was a need to withdraw the military from the diamond fields. The Parliamentary Portfolio on Mines and Energy report on Marange diamonds (hereafter Chininga report) called for the withdrawal of the military from the diamond fields.⁵³

Activists who blew the whistle on the abuses in Marange were harassed. Kabemba⁵⁴ notes that police harassed and arrested the Director of the Centre for Research and Development Trust (CRD),⁵⁵ Farai Maguwu, for exposing the human rights atrocities perpetrated in Marange. Families who lived in the fields before the diamond discoveries were also harassed. Kabemba states that:

48 Mukarati 2012 www.sundaymail.co.zw.

49 GW 2011 http://www.globalwitness.org/sites/default/files/library/A_GOOD_DEAL_FOR_ZIMBABWE_0.pdf.

50 PAC 2009 www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-ENG.pdf.

51 PAC 2009 www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-ENG.pdf.

52 Chikane 2010 www.diamonds.net/Docs/HumanRights/kimberly-001.pdf.

53 nehandaradio.com/2013/06/25/diamond-mining-in-zimbabwe-the-chininga-report/.

54 Kabemba 2010 www.boell.de/en/navigation/africa-kimberley-process-chiadzwa-diamonds-Zimbabwe-challenges-effectiveness-9755.html.

55 CRD is a Zimbabwe Advocacy group that documents human rights abuses in the country.

...the government through the District Administrator of Mutare Rural District Council, gave a verbal two-week notice to more than ten families of Chiadzwa to start preparing for relocation to Arda transau far.⁵⁶

These families survived on subsistence farming, and in Marange they had schools and clinics to cater for basic amenities. When they were relocated, basic services were not immediately availed to them.⁵⁷ Companies that were mining in Marange later build schools and clinics at the relocation sites. However, these families had to endure a considerable period without basic services.⁵⁸

That there were human rights abuses in Marange is beyond doubt. The inquiry should be on whether these abuses were directly or indirectly linked to ZANU PF and the government of Zimbabwe.

2.4.3 ZANU PF and human rights abuses

The Zimbabwean national budget for 2012/2013 was revised downwards from US \$4 billion to US \$3.4 billion. The reason given by the then finance minister Tendai Biti was that the US \$600 million that was supposed to be paid into treasury from diamond proceeds did not reach treasury.⁵⁹ The Chininga report⁶⁰ collaborated Mr Biti's assertions. The report noted that the country had not realized any meaningful contributions from Marange diamonds.⁶¹ The Chininga report identified serious discrepancies between the revenue government registered and the revenue diamond mining companies claimed to have remitted to treasury.⁶² Mbada Diamonds, the only company that was willing to provide the portfolio committee with information, claimed to have remitted a dividend of over US\$ 117million to treasury

56 Kabemba 2010 www.boell.de/en/navigation/africa-kimberley-process-chiadzwa-diamonds-Zimbabwe-challenges-effectiveness-9755.html.

57 Anon 2012 www.theafricapost.com/News-Analysis/the-story-of-zimbabwes-marange-diamonds-pollution-politics-power.html.

58 Anon 2012 www.theafricapost.com/News-Analysis/the-story-of-zimbabwes-marange-diamonds-pollution-politics-power.html.

59 www.gta.gov.zw/index.php/component/content/article/113-november/5997-diamond-revenue-revised-downwards.

60 Parliament of Zimbabwe 2012 nehandaradio.com/2013/06/25/diamond-mining-in-Zimbabwe-the-chininga-report/.

61 Parliament of Zimbabwe 2012 nehandaradio.com/2013/06/25/diamond-mining-in-Zimbabwe-the-chininga-report/.

62 Parliament of Zimbabwe 2012 nehandaradio.com/2013/06/25/diamond-mining-in-Zimbabwe-the-chininga-report/.

in 2012.⁶³ However, Treasury reported to have received a total dividend of US \$41 million in 2011 and US \$41million in 2012.⁶⁴ Despite these serious discrepancies, there is neither a report on where the balance went, nor any known prosecution against anyone who might have been responsible for the missing revenue. Emily Armistead, spokesperson for GW stated that:

It appears there is a mixture of corruption enriching specific individuals and some funds going to security operations. Our concern is that it could be used to fund repression and human rights abuses.⁶⁵

PAC supports the assertion by GW, and notes that the ruling elite have stolen diamonds worth US \$2billion to finance a parallel government of police and military officers loyal to Mugabe. Maguwu⁶⁶ submits that:

Diamond revenues are failing to find their way into treasury; instead, they are being channelled towards political campaign strategies, funding political violence, and intimidation campaigns countrywide.

Since the beginning of active government involvement in diamond mining in Marange, ZANU PF used diamond proceeds to sustain brutal political machinery.⁶⁷ The University of Zimbabwe late political science Professor John Makumbe asserted that ZANU PF managed to stay in power because of illicit diamond deals.⁶⁸ This assertion is supported by the report by GW that looked into the actors behind the diamond mining companies in Marange. The report found that Trans-frontier Mining Company Limited owns 25% of Mbada's shares.⁶⁹ A network of linked companies and individuals in the Hong Kong and British Virgin Islands own Trans-frontier.⁷⁰ GW submits that:

Half of Trans-frontier Mining is owned by Quorum Nominees, and half by Golden Universe. Quorum Nominees is owned by Leslie Chang. Golden Universe is half-

63 Parliament of Zimbabwe 2012 nehandaradio.com/2013/06/25/diamond-mining-in-Zimbabwe-the-chininga-report/.

64 Parliament of Zimbabwe 2012 nehandaradio.com/2013/06/25/diamond-mining-in-Zimbabwe-the-chininga-report/.

65 Jamasmie 2013 www.mining.com/zimbabwes-2bn-diamond-revenue-nowhere-to-be-found-77768.

66 www.freedomhouse.org/blog/zimbabwe-s-diamond-wealth-interview-farai-maguwu.

67 Writer 2008 www.sokwanele.com/thisiszimbabwe/archives/2600

68 Smith 2011 www.theguardian.com/world/2011/jan/30/diamond-zimbabwe-sanction-mugabe.

69 GW 2012 www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FOR%20ZIMBABWE_0.pdf.

70 GW 2012 www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FOR%20ZIMBABWE_0.pdf.

owned by Mehta Nominees and half by Billy Li. Fifty per cent of Mehta Nominees is owned by Vibury and fifty per cent by Connetty Nominees. Finally, two companies registered in the British Virgin Islands (Express Agents and Leisure Star) each own half of Vibury and Connetty Nominees.⁷¹

GW⁷² states that the company's structures are located in secret tax havens and secret jurisdictions. The consequences of such a set-up include possible tax evasion, and the opportunity to fund abuses using offshore state assets.⁷³ Anjin Investments is another controversial company operating in Chiadzwa. Anjin's executive board comprises of the following law enforcement officials and ZANU PF members:

- Mr Martin Rushwaya - permanent secretary in the Ministry of Defence
- Mr Oliver Chibage - a commissioner in the Zimbabwe Republic Police
- Ms Nonkosi M Ncube - a commissioner in the ZRP
- Mr Munyaradzi Machacha - a ZANU PF director of publications
- Mr Morris Masunungure - a retired officer in the Zimbabwe defence Forces
- Mr Romeo Daniel Mutsvunguma - a retired colonel in the ZDF⁷⁴

The inclusion of the abovementioned individuals on the executive board of Anjin Investments is serious cause for concern. The same law enforcement agents implicated in abuses in Marange sit on the board of a company involved in diamond mining in Marange.⁷⁵ Mbada Diamonds and Anjin Investments are the same companies that have not been remitting revenue to the Treasury as pointed out by the former finance minister.

However, the former chairperson of the Zimbabwe Mining Development Corporation (ZMDC) Mr Masimirembwa attributes the low revenue from Marange diamonds to the effects of sanctions imposed on diamond mining firms by the USA government

71 GW 2012 www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FOR%20ZIMBABWE_0.pdf.

72 GW 2012 www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FOR%20ZIMBABWE_0.pdf.

73 GW 2012 www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FOR%20ZIMBABWE_0.pdf.

74 GW 2012 www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FO20ZIMBABWE_0.pdf.

75 GW 2012 www.globalwitness.org/sites/default/files/library/A%20GOOD%20DEAL%20FOR%20ZIMBABWE_0.pdf.

and the European Union (EU).⁷⁶ The EU in September 2013 lifted sanctions it had imposed on diamond firms operating in Marange.⁷⁷ The current Minister of finance Mr Patrick Chinamasa revealed that treasury has not received any proceeds from diamond revenue in the 9 months leading up to September 2013.⁷⁸ The sanctions excuse advanced by Mr Masimirembwa does not explain the revenue discrepancies pointed out by the parliament committee. The lifting of sanctions by the EU shows that this is not a valid explanation for the discrepancies.

It is not clear where the diamond revenue is going. This raises serious concerns and at the same time shows a link between the human rights abuses in Marange and ZANU PF led Zimbabwe government. The hand of ZANU PF is clearly visible in the companies mining in Chiadzwa and the militarized control of the diamond fields.

2.5 Conclusion

Zimbabwe diamonds became the game changer in the KPCS. Conflict can no longer be limited to rebel movements but legitimate governments can also be perpetrators. It is submitted that there is enough preliminary prima facie evidence suggesting that Marange diamonds could be conflict diamonds. Conflict by rebel movements was set at wielding power but conflict by legitimate governments takes an economic, militarized form. The question becomes whether the KPCS is effective to handle the changing face of conflict under its limited scope.

76 www.gta.gov.zw/index.php/component/content/article/113-november/5997-diamond-revenue-revised-downwards.

77 Anon 2013 www.eubusiness.com/news-eu/zimbabwe-sanctions.gni.

78 Kachembere 2013 www.dailynews.co.zw/articles/2013/11/06/diamond-revenue-missing-china-masa.

CHAPTER 3

Scope and Implementation of the KPCS

3.1 Introduction

In evaluating whether the KPCS is effective to deal with conflict diamonds from legitimate governments, the scheme should have a clear scope and strong implementation mechanisms. The scheme provides minimum requirements that are complimentary to the measures participants set for their respective countries. The KPCS⁷⁹ provides that:

Each Participant should:

- (a) Establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory;

A participant's internal controls are the base on which the KPCS is built upon. Minimum requirements are integrated in participant's internal controls. Participant's internal controls reflecting the KPCS minimum requirements must be effective to separate illicitly acquired diamonds from legally traded diamonds. The value chain of diamonds from the mine to the consumer should provide clean diamonds. To achieve this, every role player from the mine to the consumer has an obligation to ensure that the diamonds traded are clean diamonds.

This chapter will look at the KPCS minimum requirements that are integrated in participant's internal controls. As a starting point, the first part will outline the diamond value chain from the mine to the consumer. The second section will focus on the minimum requirements of the scheme and the last section will look at the principles that underline the scheme.

3.2 Diamond value chain

For a diamond to end up as a beautiful ring or a necklace, it goes through various processes. Geologists state that diamonds form from pure carbon under intense

79 S IV of the KPCS 2003.

pressure in the earth's core.⁸⁰ Deep-source volcanic eruptions move the formed diamonds to the earth's surface.⁸¹ As they move to the earth's surface, they pick up microscopic particles that geologists believe influence the colour and clarity of the gems.⁸² On the earth's surface, diamonds are located in kimberlitic rocks. By testing for changes in magnetic fields, prospectors explore for kimberlitic rocks. This process is exploration; it is the first step in the value chain of diamonds.⁸³ The second stage will be extracting the diamonds from the kimberlitic rocks. This is usually done via open cast mining,⁸⁴ underground mining,⁸⁵ or alluvial mining.⁸⁶

The mined gems are rough diamonds that are then taken for sorting. The rough diamonds are sorted into many categories depending on size, shape, quality and colour.⁸⁷ After sorting, the next process is cutting and polishing of the rough diamonds by experts called Diamantes. The gems are cut into shapes that include brilliant, oval, pear, heart and emerald.⁸⁸ The diamonds are then polished and classified according to their cut, colour, clarity and carat weight.⁸⁹ Diamond wholesalers buy the gems and in turn sell them to jewellery designers who manufacture jewellery.⁹⁰ The jewellery designers pass to retailers who sell it to consumers.⁹¹ This completes the value chain of diamonds.

The objective of the KPCS is to curb illicit diamonds from the value chain of diamonds. To meet this objective, the KPCS has measures it encourages participants to integrate into national policies as internal controls to implement the

80 <http://geology.com/articles/diamonds-from-coal/>.
81 <http://geology.com/articles/diamonds-from-coal/>.
82 <http://geology.com/articles/diamonds-from-coal/>.
83 [http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20\(The%20Diamond%20Industry\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf).
84 Open cast mining is the extraction of diamonds from the surface of the earth.
85 Underground mining is the excavation of diamonds from below the ground.
86 When deposits are in the sand, gravel or clay, extraction is by alluvial mining. Individuals usually do this.
87 [http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20\(The%20Diamond%20Industry\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf).
88 [http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20\(The%20Diamond%20Industry\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf).
89 [http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20\(The%20Diamond%20Industry\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf).
90 [http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20\(The%20Diamond%20Industry\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf).
91 [http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20\(The%20Diamond%20Industry\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf).

scheme. The measures of the KPCS are guidelines and complementary to internal controls by participants.

3.3 Scope of the KPCS

3.3.1 Participation

Participation in the KPCS is open to all applicants who are able to fulfil the requirements of the scheme. Participation is on a global non-discriminatory basis.⁹² Currently there are forty-five countries participating in the KPCS.⁹³ Participation in the KPCS is either as a Participant or an Observer. Governments form the group of Participants whereas civil society,⁹⁴ the diamond industry,⁹⁵ non-participating governments and international organisations are Observers.⁹⁶ Although Observers influence decision making in the KPCS, they do not have voting powers. The KPCS restricts trade in diamonds to participants only.⁹⁷ In chapter 4, the study will show that such an application violates the rules of trade as defined by the WTO.

3.3.2 Licensing of Diamond Mines and Industry

After discovering diamond fields, Participants should ensure that mines that mine rough diamonds are licenced. Security measures to ensure that conflict diamonds do not contaminate clean diamonds must be in place.⁹⁸ The KPCS recognises artisan and informal diamond miners. Although artisan miners mine informally using simple methods, licensing them is an imperative.⁹⁹ The minimum information requirements

92 S VI (8) of *KPCS* 2003.

93 Participants in the *KPCS* include Angola, Armenia, Australia, Bangladesh, Belarus, Botswana, Brazil, Canada, Central African Republic, China, Cote d'Ivoire, Croatia, Dem. Rep. of Congo, European Community, Ghana, Guinea, Guyana, India, Indonesia, Israel, Japan, Laos, Lebanon, Lesotho, Malaysia, Mauritius, Namibia, Norway, New Zealand, Russia, Separate Customs territory of Taiwan, Sierra Leone, Singapore, South Africa, South Korea, Sri Lanka, Switzerland, Tanzania, Thailand, Togo, Ukraine, US, Venezuela, Vietnam, and Zimbabwe.

94 The civil society organisations participating in the *KPCS* as observers when it was started were GW and Partnership Africa Canada.

95 The World Diamond Council represents the diamond industry in the *KPCS*.

96 S VI (10) of *KPCS* 2003.

97 S III (c) of *KPCS* 2003.

98 Annex II (9, 10) *KPCS* 2003.

99 Annex II (11) *KPCS* 2003.

for licensing records are name, address, nationality and/or residence status and the area of authorised diamond mining activity.¹⁰⁰

The KPCS also requires Participants to licence diamond buyers, sellers, exporters, agents and courier companies operating within the participant's countries.¹⁰¹ Participant countries should make provisions that require buyers, sellers and exporters to keep records of clients buying or selling and exporting diamonds. The records should have the names, license numbers, amounts and value of the rough diamonds exported or purchased.¹⁰² This implies that for one to be engaged in the trade of rough diamonds they should be licensed. Licensing diamond miners including artisan miners in the diamond industry assists participants seeking to trace the gems mined.

3.3.3 *Exporting procedure*

Before licensed miners export their gems, they should follow certain procedures. The KPCS requires that a certificate of origin accompany shipments of rough diamonds.¹⁰³ The purpose of certificates of origin is to ensure that diamonds are clean. The Imports and Exporting Authorities (IEA) in a participant's country perform the administration of certificates of origin. Participants must establish IEAs to oversee the shipments of gems into and out of a participant's country.¹⁰⁴ The Exporting Authority should record all the details of rough diamond shipments on a computerised database.¹⁰⁵ The obligations of the IEAs include ensuring that rough diamonds are imported and or exported in tamper resistant containers.¹⁰⁶ The Authority should also validate the certificates issued out for rough diamond exports.¹⁰⁷ Another function of the IEAs is to collect data on the import and export of rough diamonds. The IEAs are also responsible for processing this data and

100 Annex II (12) *KPCS* 2003.

101 Annex II (13) *KPCS* 2003.

102 Annex II (15) *KPCS* 2003.

103 S III (a) *KPCS* 2002.

104 S IV (b) *KPCS* 2003.

105 Annex II (20) *KPCS* 2003.

106 S IV (c) *KPCS* 2003.

107 Annex II (18) *KPCS* 2003.

exchanging it with other Participants.¹⁰⁸ The exchange of data is through the Chairperson of the KPCS.¹⁰⁹

An exporter should issue out a Certificate of Origin validated by the relevant Exporting Authority and the original should be readily accessible for a period of no less than three years.¹¹⁰ The exporter is required to declare together with the Exporting Authority that the diamonds are not conflict diamonds.¹¹¹

3.3.3.1 Certificates of Origin

The certificate should bear the title "Kimberley Process Certificate" and the following statement:

...the rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds.¹¹²

The certificate should also show that the parcels contain diamonds that are coming from the same origin. It should also have a unique numbering system with the Alpha 2 country code, according to ISO 3166-1.¹¹³ Certificates should incorporate an English translation with an option of using any other language.¹¹⁴

The certificate should also show the issue and expiry date. The inclusion of the identity of the exporter/importer and issuing authority is imperative. The carat weight, value in US\$ and number of parcels in the shipment should be indicated in the certificate. Certificates of Origin must be contained in the Relevant Harmonised Commodity Description and Coding System (HCDCS).¹¹⁵ The HCDCS is an international nomenclature for the classification of products for customs purposes.¹¹⁶ Certificates of origin are important because they attest to the legality of the gems

108 S IV (e) *KPCS* 2003.

109 S V (a) *KPCS* 2003.

110 S III (b) *KPCS* 2003.

111 Annex II (18) *KPCS* 2003.

112 Annex I A *KPCS* 2002.

113 The unique numbering assists in tracing the country of origin. It indicates the exact place of origin of the diamonds.

114 Annex I A *KPCS* 2002.

115 Annex I A *KPCS* 2002.

116 <http://unstats.un.org/unsd/trade/kb/Knowledgebase/Harmonized-Commodity-Description-and-Coding-Systems-HS>.

traded. Information on the certificates of origin assists in tracing diamonds to their source.

3.3.3.2 Optional Requirements

The main procedure is that on export, certificates of origin accompany diamond shipments. The KPCS provides that packaging should be in tamper resistant containers¹¹⁷ but does not prescribe a type of tamper resistant container. However, as an option, shipments can be in transparent security bags. Another optional requirement is to replicate the unique certificate number on the container.¹¹⁸ The KPCS is thus clearly a flexible mechanism that provides guidelines for participants.

3.3.4 Importing Procedures

There are obligations for participants importing rough diamonds. The IEA of an importing participant should receive a message prior to or upon arrival of the diamonds.¹¹⁹ The message should be in email form and should give details on the certificate issued by the exporter that includes carat weight, value, the identity of the exporter and the country of origin.¹²⁰ The IEA should inspect the shipment to ensure that the contents of the shipment conform to the Certificate of Origin.¹²¹ If requested, the IEA of the importer should send an acknowledgment of receipt to the IEA of the exporter.¹²² The IEA, should record all the details of the shipments on a computerised database.¹²³

3.3.5 Shipments in Transit

Section III¹²⁴ provides that where diamonds are in transit, Participants through whose territory shipments pass should ensure that the shipments are not tampered with and that the shipments leave the territory in the exact state in which they entered the territory. However, if the shipments are opened whilst in transit, participants in whose

117 S IV (c) *KPCS* 2003.

118 Annex 1 C *KPCS* 2003.

119 Annex II (21) *KPCS* 2003.

120 Annex II (21) *KPCS* 2003.

121 Annex II (22) *KPCS* 2003.

122 Annex II (24) *KPCS* 2003.

123 Annex II (25) *KPCS* 2003.

124 S III of *KPCS* 2003.

territory the shipments transit should treat the shipments as if they originate in its country.¹²⁵

3.3.6 *Review mechanism*

The scheme operates on a peer review system. The scheme provides guidelines assimilated into the national policies of participants. A participant periodically allows other participants to analyse its internal controls.¹²⁶ Where the threat of conflict diamond proliferation is identified, more reviews are recommended. The first review should take place within the first three years of implementing the scheme.¹²⁷ If after a review there is non-compliance, disciplinary measures are instituted against the participant.

3.3.7 *Non-Compliance with KPC measures*

In cases of non-compliance or suspected non-compliance with KP measures, a Participant who recognises non-compliance informs the Chair who in turn informs other Participants.¹²⁸ Dialogue on how to address the challenge is encouraged and if necessary, review missions are sent to assess the challenges that lead to the non-compliance.¹²⁹ The consent of the affected Participant is needed before a review mission is dispatched to a suspected non-complying Participant.¹³⁰ The Chair, with the consent of the Participant and in consultation with other Participants, determines the terms of reference, size, composition and periods of the mission.¹³¹

The review team should pass results considering compliance verification measures to the Chair and the concerned Participant within three weeks of completion of the mission.¹³² The Participant has an opportunity to comment on the report that is posted on a restricted access section of an official Certification Scheme website.¹³³

125 S III (d) of *KPCS* 2003.

126 S VI of the *KPCS* 2003.

127 S VI of the *KPCS* 2003.

128 S V (e) *KPCS* 2003.

129 S VI (16) *KPCS* 2003.

130 S VI (14) *KPCS* 2003.

131 S VI (14) *KPCS* 2003.

132 S VI (15) *KPCS* 2003.

133 S VI (15) *KPCS* 2003.

The KP core document does not deal with the measures that are taken after such report is tabled before the affected participant and other participants. Precedence shows that, depending on the nature of the report, sanctions such as suspension from the scheme for a certain period¹³⁴ or even expulsion from the process¹³⁵ are some of the measures that can be taken.

3.4 Administration of the scheme

For the scheme to be effective there is administrative support. The support is necessary to:

- (a) to serve as a channel of communication, information sharing and consultation between the Participants with regard to matters provided for
- (b) to maintain and make available for the use of all Participants a collection of those laws, regulations, rules, procedures, practices and statistics notified pursuant to Section V;
- (c) to prepare documents and provide administrative support for Plenary and working group meetings;
- (d) to undertake such additional responsibilities as the Plenary meetings, or any working group delegated by Plenary meetings, may instruct.¹³⁶

The scheme currently operates with the following working groups:

- (1) Working Group of Diamond Experts (WGDE)
- (2) Working Group on Monitoring (WGM)
- (3) Working Group Statistics (WGS)
- (4) Working Group on Artisanal and Alluvial Production (WGAAP)

The WGDE solves technical problems in the implementation of the KPCS like proposing changes to the Harmonised System Code.¹³⁷ The WGM is one of the most important groups in the administration of the scheme. It is responsible for peer review mechanisms and organised review visits.¹³⁸ It also deals with crises of implementation in specific countries where these might endanger the KPCS. Since

134 In 2000, Zimbabwe was suspended from the *KPCS* for non-compliance with the minimum requirements of the scheme.

135 On 9 July 2004, the Republic of Congo (also known as Congo Brazzaville) was removed from the KP following a review mission. The Republic of Congo could not account for large quantities of diamonds it was exporting.

136 S VI (7) of the *KPCS* of 2003.

137 <http://www.kimberleyprocess.com/en/diamond-experts-wgde>.

138 <http://www.kimberleyprocess.com/en/monitoring-wgm>.

the KPCS functions on participant internal control measures, the WGM is an important organ in that it monitors how the internal controls are working in participant countries. Participants access each other's internal control measures through the WGM.¹³⁹ The WGAAP was recently established. This group promotes effective controls on the production and trade of alluvial diamonds.¹⁴⁰ This group is important because it covers alluvial mining that is not formalised and is thus the largest threat to the legitimate trade in diamonds.¹⁴¹ The WGS is responsible for identifying anomalies in statistics presented to the Chair, and the effective implementation of the scheme.¹⁴²

3.5 Principles underpinning the KPCS

The proper functioning of the KPCS is hinged on the principles of transparency and cooperation.¹⁴³ States participate voluntarily in the scheme; therefore, cooperation with the requirements of the scheme is vital for its success. With the aim of the scheme being to eliminate blood diamonds from the legitimate trade of diamonds, transparency is an imperative. Blood diamonds enter the legal market where there is a lack of transparency and participants do not cooperate with each other and the scheme. The lifeblood of these principles is information sharing amongst participants.¹⁴⁴ Participants should share information through the Chairperson of the KPCS. The preferred mode of communication is in an electronic form with all data being computerised.

In furthering these principles, information sharing is fundamental because without proper information blood diamonds can enter the market disguised as clean diamonds. The information that should be shared includes statistics on imports and exports, challenges encountered in implementing the process, and the regulations/legislation used by participants in their respective states.¹⁴⁵ Sharing statistics on imports and exports assists participants to trace clean diamonds and

139 <http://www.kimberleyprocess.com/en/monitoring-wgm>.

140 <http://www.kimberleyprocess.com/en/artisanal-and-alluvial-wgaap-0>.

141 <http://www.kimberleyprocess.com/en/artisanal-and-alluvial-wgaap-0>.

142 <http://www.kimberleyprocess.com/en/statistics-wgs>.

143 S V of *KPCS* 2003.

144 S V (a) of *KPCS* 2003.

145 S V (a) of *KPCS* 2003.

recognise leakages of blood diamonds within the trade. Since the scheme only provides for minimum requirements, sharing legislation used by participants in enforcing the KPCS assists participants to see and adopt best practice. In South Africa the trade in diamonds is regulated by a single piece of legislation, the *Diamond Act 56 of 1986*, whereas in Zimbabwe there are numerous pieces of legislation regulating the trade in diamonds. Sharing legislation amongst participants will help capture the advantages of a diamond framework captured in one Act versus a multiplicity of legislation.

Participants should cooperate with other participants in resolving problems. There should be cooperation between law enforcement agencies and between customs agencies of Participants.¹⁴⁶ The cooperation of law enforcement agents helps to curb smuggling. By curbing smuggling, a great part of the fight against blood diamonds will be won. One would opine that, the principles of cooperation and transparency are the hinges on which the fight for a blood diamond free trade swings.

3.6 Conclusion

Although the purpose of the KPCS is to flush out conflict diamonds from the legitimate trade in rough diamonds, it does not outline mechanisms to identify conflict diamonds. Civil society organisations played a major role in documenting the effects of blood diamonds and these reports led to the establishing of the KPCS. However, one would notice that the founding document of the KPCS does not clearly state the role of the NGOs outside of their being mentioned as observers. NGOs provide checks and balances to the KPCS by facilitating transparency and reporting on the implementation of the scheme. If the role of NGOs is not clearly defined, it leaves the scheme vulnerable to politicisation. This in turn will undermine existing and necessary checks and balances. Apart from the role of NGOs, the KPCS has a developmental framework. Providing minimum standards leaves room to improve the mechanism at national level and eventually improve the international scheme.

146 S V (g) of *KPCS 2003*.

CHAPTER 4

Application of the KPCS to Marange diamonds

4.1 Introduction

The KPCS requires participants to establish a system of internal controls.¹⁴⁷ The controls are meant to eliminate conflict diamonds from shipments of rough diamonds.¹⁴⁸ Zimbabwe has been a member of the KPCS from the inception of the scheme in 2003. Participants' internal controls include amending or enacting appropriate laws or regulations to implement and enforce the scheme and to punish transgressors.¹⁴⁹ Zimbabwe has two main pieces of legislation that govern minerals, the *Mines and Minerals Act* Chapter 21:05 (hereafter the *Minerals Act*)¹⁵⁰ and the *Precious Stones Trade Act* Chapter 21:06 (hereafter the *Precious Stones Act*).¹⁵¹

Other subordinate legislations to the *Minerals Act* and *Precious Stones Trade Act* also regulate mining issues in Zimbabwe. These include the *Minerals Marketing Corporation of Zimbabwe Act* Chapter 21:04¹⁵² (hereafter *Minerals Marketing Act*) and the *Zimbabwe Mining Development Corporation Act* Chapter 21:08¹⁵³ (hereafter *Mining Development Act*). One would note that all the above-mentioned pieces of legislation came into force before the KPCS was established. Zimbabwe has used the different legislation to implement the KPCS and has no specific diamond legislation.

The first section of the discussion in this chapter will look at the internal controls established by Zimbabwe. The discussion in the second section will outline how the KPCS handled the challenge posed by the controversial gems from Marange. The challenge was that the scheme limited blood diamonds to those financing rebel movements but in the case of Marange, blood gems were financing a legitimate government. This chapter will place the challenges of the KPCS in a suitable context.

147 S IV KPCS 2003.

148 S IV (a) KPCS 2003.

149 S IV (d) KPCS 2003.

150 *Mines and Minerals Act* Chapter 21:05 (MMA).

151 *Precious Stones and Trade Act* Chapter 21:06 (PSTA).

152 *Minerals Marketing Corporation of Zimbabwe Act* Chap 21:04 (MMCZA).

153 *Zimbabwe Mining Development Corporation Act* Chap 21:08 (ZMDCA).

4.2 Internal controls in Zimbabwe

4.2.1 Mines Act

The *Mines Act* deals with a number of broad mining issues that include the setting up of a mining affairs board to advise the minister of mines,¹⁵⁴ the acquisition and registration of mining rights,¹⁵⁵ prospecting and pegging,¹⁵⁶ mining leases,¹⁵⁷ rights of claim holders and landowners,¹⁵⁸ royalties, offences and penalties.¹⁵⁹ Section 6 of the *Mines Act*¹⁶⁰ establishes the Mining Affairs Board that works with the Minister of mines and mineral resources issuing licences to miners and dealers. Although section 7 of the *Precious Stones Act*¹⁶¹ gives the minister of Mines and Minerals the exclusive right to issue and cancel licences, the minister exercises this right through the Mining Affairs board. The issuing of licences is in line with the KPCS that contemplates that all mines, informal and artisan miners, buyers, sellers, exporters, agents and courier companies must be licensed.¹⁶²

Part XIX of the *Mines Act*,¹⁶³ deals with special grants that can be issued to persons who want to carry out mining operations. Section 301¹⁶⁴ reposes the power to issue out the special grants in the president. The Centre for Natural Resource Governance (CNRG)¹⁶⁵ submits that all the companies mining in Chiadzwa acquired their rights through special grants without the normal tender procedures.¹⁶⁶ CNRG further notes that one of the companies that benefited from the enforcement of this section of the *Mines Act* had its licence revoked. In the on-going court case, it is reported the company alleges the minister of mines had demanded diamond bribes from the company.¹⁶⁷ If these allegations were true, the licensing procedures of Zimbabwe

154 Part II *MMA*.

155 Part IV *MMA*.

156 Part V *MMA*.

157 Part VIII *MMA*.

158 Part X *MMA*.

159 *MMA* Part XIV, XXVI.

160 *Zimbabwe Mining Development Corporation Act* 31 of 1982 (ZMDCA).

161 *PSTA*.

162 Annex II (9), (11), (13) *KPCS*.

163 Part XIX of *MMA*.

164 S 301 of *MMA*.

165 CNRG is an NGO that operates in Mutare. Its main function is monitoring how diamonds from Chiadzwa are being governed.

166 CNRG "An analysis of the Zimbabwe Diamond Policy" 5.

167 CNRG "An analysis of the Zimbabwe Diamond Policy" 5.

would need to be transformed so that any loopholes that may foster blood diamonds are plugged. Weak licensing procedures will create room for blood diamonds to be mixed with clean diamonds. Diamond companies will pledge allegiance to individuals and hence further individual interests instead of national interests.

4.2.2 *Precious Stones Trade Act*

Whereas the *Mines Act* regulates all mining activities in Zimbabwe, the *Precious Stones Act* is a mineral specific Act; it regulates the mining of diamonds and emeralds. Section 2 of the Act defines precious stones as:

Rough or uncut diamonds, other than those suitable only for industrial purposes, or rough or uncut emeralds or any other substance which is, in terms of subsection (2), declared to be precious stones for the purposes of this Act...

The *Precious Stones Act* is the relevant legislation that deals directly with diamonds and the implementation of the KPCS in Zimbabwe. The *Precious Stones Act*¹⁶⁸ provides that, for one to deal with precious stones they have to be licensed. Dealing in precious stones without a licence is an offence punishable by a prison sentence of not less than three years but not exceeding five years.¹⁶⁹ An offender shall also be liable to a fine; however, if the accused provides exceptional reasons why such a sentence should not be imposed, a lesser fine and an imprisonment not exceeding three years or both will be imposed.¹⁷⁰ These sections conform to the minimum requirements of the KPCS¹⁷¹ pertaining to the licensing of miners and dealers.

The *Precious Stones Act*¹⁷² further provides for information regarding precious stones to be kept in registers by holders of mining locations and licensed dealers. The holder of a mining location is required to enter information regarding precious stones mined from his location. The information includes, the amount of precious stones recovered or disposed of by him, and the amount held by him at the end of the preceding month.¹⁷³ This information should be entered onto the register on or

168 S 3 of *PSTA*.

169 Ss 3 (3) 9(a) and (b) of *PSTA*.

170 S 15 of *PSTA*.

171 Annex II (9), (11), (13) *KPCS* 2003.

172 S 6 (1) *PSTA*.

173 S 6 (1) *PSTA*.

before every tenth day of each month.¹⁷⁴ Licensed dealers are required to enter details of transactions within twenty-four hours of the transactions' taking place.¹⁷⁵ The licensed dealer is also required to submit a prescribed form and required documents to the Secretary of the Ministry of Mines every tenth day of each month. The form and documents should show the details of transactions done by the buyer, more importantly, they should show the stones received and disposed.¹⁷⁶

These sections are in harmony with the provisions of the KPCS that call for meticulous record keeping. The capturing of statistics supports the principle of transparency, which is fundamental to the regulation of rough diamonds. The PSTA¹⁷⁷ makes it an offence for one to be in possession of more stones than are indicated on the register. Unaccounted rough diamonds are an indication of the possibility of conflict diamonds infiltrating the legitimate trade in diamonds. Annex III of the KPCS states that:

...reliable and comparable data on the production and international trade in rough diamonds is an essential tool for the effective implementation of the Certification Scheme and particularly for identifying any irregularities or anomalies, which could indicate that conflict diamonds are entering the legitimate trade...

The *Precious Stones Act* decisively deals with the possible infiltration of conflict diamonds into the legitimate trade of diamonds. Accountability and transparency strengthen the legitimate trade in rough diamonds and curb conflict diamonds that taint the trade in diamonds. The *Precious Stones Act*¹⁷⁸ provides that precious stones shall not be dispatched by post. The KPCS¹⁷⁹ minimum requirements for the transmission of rough diamonds provide that shipments shall be imported and exported in tamper resistant containers. The *Precious Stones Act* only provides that transmission of stones through the post is not permissible but does not provide for the type of containers that the stones must be shipped in. This section is not sufficient to cover the transmission of rough diamonds in a manner that curbs conflict diamonds from creeping into legitimate trade.

174 S 6 (1) *PSTA*.

175 S 2 (a) *PSTA*.

176 S 6 (b) *PSTA*.

177 S 6 (3) *PSTA*.

178 S 11 of *Precious Stones Act*.

179 S IV (c) of the *KPCS*.

Sections 14 and 16 of the *Precious Stones Act* provide for the searching of licensed dealers and the seizure of unaccounted precious stones that are then forfeited to the State. These sections are necessary in the fight to eradicate blood diamonds but section 14 is silent on the procedure that the police should follow when performing their duty. This silence opens the PSTA to possible abuse by law enforcement agents. Law enforcement agents are accused of playing a major role in the diamond activities that played out in Marange. Without proper mechanisms directing how the law enforcement agents should handle confiscated stones, blood diamonds will continue being present in Zimbabwe.

4.2.3 Imports and Exports Regulator

The *Minerals Marketing Act* establishes the Minerals Marketing Corporation of Zimbabwe (MMCZ).¹⁸⁰ The functions of the MMCZ include amongst others to act as the sole marketing and selling agent for all minerals.¹⁸¹ The KPCS expects participants to designate Import and Export Authorities. The MMCZ and the Zimbabwe Revenue Authority (ZIMRA) are the appointed authorities in Zimbabwe. Having two bodies operating as the Import and Export Authority could lead to a duplication of duties. It is suggested that an independent Import and Export Regulator (IER) with sole responsibility for the regulation of diamonds should be established in Zimbabwe. The IER will be independent of the government hence there will be limited opportunity for the infiltration of blood diamonds into legitimate trade in cases where the government is the perpetrator.

The implementing legislation of the KPCS in Zimbabwe does not provide for certificates of origin. Having considered other shortcomings in the different pieces of legislation highlighted above, one would conclude that there is a need to create a unique piece of legislation that will regulate rough diamonds in Zimbabwe. This legislation is necessary considering how the diamond industry has grown over the years. It is also necessary to effectively enact the KPCS into Zimbabwe, since all the existing pieces of legislation outdate the KPCS.

180 S 4 of *MMCZ*.

181 S 4 of *MMCZ*.

4.3 Marange diamonds compliance with the KPCS

The operation of the KPCS relies on participant internal controls. Zimbabwe has internal controls in place. This section will discuss how Zimbabwe handled Marange diamonds using the KPCS guidelines integrated into its internal controls.

Special mining leases¹⁸² to carry out mining operations were allocated to four mining companies in line with Annex II (9) of the KPCS¹⁸³ that provides that:

Participants are encouraged to ensure that all diamond mines are licensed and to allow only those mines so licensed to mine diamonds.

The four companies are Mbada Diamond Company; Anjin Investments Limited, Diamond Mining Company and Marange Resources. ZMDC owns a 50% stake in Mbada, Anjin and Diamond Mining Company through Marange Resources. Special mining leases are issued in terms of section 159(2)(e) if the Mining Development Board:

...considers that it is desirable in the interests of the development of Zimbabwe's mineral resources to consider the grant of a special mining lease to the applicant.¹⁸⁴

The mining board is at liberty to grant licences to companies without following any tender procedures. GW¹⁸⁵ argues that the granting of licenses through special grants does not reflect international best practice. This is because the licences were granted to companies without any proven record in diamond mining. The Centre for Natural Resources Governance (CNRG)¹⁸⁶ argues that licensing mines via special grants creates questionable companies in the diamond sector. One submits that, with the high-level of transparency required in the diamond sector, companies investing in the diamond sector need to be of unquestionable reputation. Such companies must be selected using an inclusive monitored criterion. The war against blood diamonds is more difficult to wage in the absence of transparent licensing procedures.

182 Special mining leases are issued out in terms of ss 158 and 159 of the *Mines Act*.

183 Annex II (9) of the *KPCS* 2003.

184 *Mines Act*.

185 GW 2011 <http://www.globalwitness.org/sites/default/files/library/KPexity.pdf>.

186 CNR 2013 <http://www.eisourcebook.org/cms/Zimbabwe%20Diamond%20Policy%20Analysis%20-%20Centre%20for%20Natural%20Resource%20Governance.pdf>.

Licensing diamonds mines was not the only requirement government had to meet in order to comply with KPCS minimum standards. The government had to make sure that mining companies maintained security standards that would ensure that conflict diamonds did not contaminate the legitimate production of diamonds.¹⁸⁷ The government had to ensure that there were no avenues for conflict diamonds spoiling the legitimate trade in diamonds. These avenues include illegal mining, diamond smuggling, weak law enforcement strategies and discrepancies in statistics. The Zimbabwean government acknowledged that it was not meeting these requirements.¹⁸⁸

There was smuggling of diamonds into Mozambique and illegal mining was indeed taking place.¹⁸⁹ ZRP held diamond exhibits totalling 26 116, 76 carats.¹⁹⁰ Approximately 1 824 people were arrested for being found in unlawful possession of diamonds.¹⁹¹ These numbers show the high level of illegal mining and possible smuggling of diamonds that was taking place. Zimbabwe also had discrepancies of approximately 40 000 carats in its statistics.¹⁹² Marange Resources indicated that it had a diamond stockpile of 279,726,19 carats but in a letter to the KPCS the Government of Zimbabwe indicated that it had issued KP certificates for a stockpile of close to 320,000 carats.¹⁹³ In 2010, Marange diamonds shipped in violation of KP monitoring requirements were intercepted in Dubai, United Arab Emirates.¹⁹⁴ Zimbabwe did not provide the KPCS with estimated monthly production in Marange.¹⁹⁵ Illegally mined diamonds could easily be placed in the shipments and this would defeat the objectives of the KPCS. Zimbabwe was not KPCS compliant and it had to put in place mechanisms to acquire such status.

In 2009, the Zimbabwean government took the first step to correct its non-compliance with KPCS minimum requirements by subjecting shipments from

187 Annex II (10) of the *KPCS* 2003.

188 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

189 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

190 Chikane 2010 www.diamonds.net/Docs/HumanRights/kimberly-001.pdf.

191 Chikane 2010 www.diamonds.net/Docs/HumanRights/kimberly-001.pdf.

192 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

193 Chikane 2010 www.diamonds.net/Docs/HumanRights/kimberly-001.pdf.

194 Anon 2010 <http://www.zimbabwesituation.org/?p=19746>.

195 Chikane 2010 www.diamonds.net/Docs/HumanRights/kimberly-001.pdf.

Marange to supervised examination by a KP monitor before export.¹⁹⁶ Zimbabwe initiated a Joint Working Plan (JWP) to address its non-compliance challenges.¹⁹⁷ The effect of this decision was that Zimbabwe technically suspended itself from the KPCS. Zimbabwe has to seek approval from a KP monitor to export diamonds from Marange. The Plenary session of the KPCS of November 2009 took an Administrative Decision that supported the JWP of Zimbabwe.¹⁹⁸ Mr Abbey Chikane was appointed as KP monitor¹⁹⁹ for Zimbabwe in February 2010. As KP monitor, Mr Chikane was to assist Zimbabwe in implementing the JWP which was to be reviewed at the Intercessional and Plenary Sessions of the KP in 2010. The JWP targeted conflict diamonds. The question is, to what extent did the JWP succeed in ensuring that conflict diamonds did not taint the legitimate production and trade in rough diamonds. The section below addresses this question.

4.3.1 Joint Working Plan

The JWP identified the strategic issues that had to be addressed and outlined the action necessary to address the issues. It also had an organ responsible for implementing each action, including a timeline for implementation. The JWP outlined the following, amongst other actions:

- (1) Acknowledgement of non-compliance
- (2) Requesting for technical assistance and support
- (3) Curbing illegal digging
- (4) Curbing leakages and smuggling
- (5) Improving accounting for recovered diamonds by ZRP
- (6) Providing security in the Marange area
- (7) Enhancing security and control measures at MMCZ and ZMDC
- (8) Reconciliation Audit
- (9) Regional cooperation initiative
- (10) Monitoring and evaluation
- (11) Supervised export mechanism

196 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

197 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

198 KPCS 2009 www.kimberlyprocess.com/en/2009-administrative-decision-zimbabwe-jwp.

199 Zimbabwe Watch 2010 www.zimbabwewatch.org/eng/News/2010/Abbey-Chikane-monitor-Kimberly-Process.

(12) Foot-printing²⁰⁰

The government of Zimbabwe attempted to uphold the principles of co-operation and transparency in implementing the JWP. The government wrote a letter to the KPCS Chair requesting technical assistance and support from the KPCS.²⁰¹ Some of the actions taken to curb illegal mining included subdivision of resource areas into manageable areas, identifying potential investors, setting up of adequate security infrastructure, developing control systems including removing incentives for smuggling.²⁰² The removal of incentives for smuggling was to be done in conjunction with the Mozambican government since Mozambique was the gateway for smuggled diamonds. The government also undertook to withdraw military personnel from the fields. This was an important step considering the reports²⁰³ of serious human rights violations committed by the military in the fields. One may note that withdrawing the military from the fields was not an admission by the government that the military had committed abuses. The military was gradually withdrawn, as there was more stability in the diamond fields.

Zimbabwe also sought to adhere to Annex III of the KPCS²⁰⁴ that provides for reliable statistics on the production and sale of rough diamonds. There were discrepancies in statistics from the production between 2007 and 2009. During the KP monitor's first fact-finding mission, he received statistics showing a stockpile totalling 279,726.19 carats whereas the government letter to the KPCS showed KP certificates issued totalled 320,000 carats. The government agreed to conduct a reconciliation of stockpiles and records together with the KP monitor. The KP monitor in his second fact-finding report stated that the discrepancies were because:

- (a) the closing stock in the fact finding mission report and that of the ministry letter were different
- (b) the cut-off dates used in these documents were not the same and were not synchronized

200 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

201 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

202 Ministry of Mines Zimbabwe 2009 www.state.gov/documents/organization/133851.pdf.

203 PAC 2009 www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-ENG.pdf.

204 Annex III of *KPCS* 2003.

- (c) when the ministry document was produced for purposes of a clarification on Zimbabwe/Dubai shipments, the author seems to have done so without diligence.²⁰⁵

Zimbabwe showed a resolve to comply with the KPCS minimum standards in most aspects. The KPCS at the Kinshasa Plenary meeting of 2011 endorsed the exports of diamonds mined by two companies, namely, Marange Resources and Mbada Diamond's.²⁰⁶ The plenary meeting further endorsed KP monitored exports from the other two mining companies in Marange.²⁰⁷ Mr Abbey Chikane and Mr Mark van Bockstael were appointed as KP monitors for Zimbabwe.²⁰⁸ In November 2011 and January 2012, the two KP monitors undertook compliance verification exercises at Anjin Investments (Pvt.) Ltd and Diamond Mining Corporation.²⁰⁹ In the verification exercises, the monitors considered security at the mining sites and sorting houses, the impact of the mining on the environment and subsequent corrective measures implemented by the companies. The team visited the site where the former inhabitants of Chiadzwa are now located. The team considered whether the companies had provided basic amenities such as schools, roads, clinics and clean water for these families. The issues considered by the KP monitors are in line with the standards of the KPCS.

4.3.2 Certification of Marange diamonds

On the 16th of November 2011, the KP monitors concluded that Anjin was fully KPCS compliant,²¹⁰ and on the 16th of January 2012, DMC was declared fully KPCS compliant.²¹¹ The effect of the compliance reports was that the two companies would now wait for endorsement by the KPCS plenary meeting. Subsequently they would be allowed to export their production. At the Washington Plenary meeting of 2012, the KPCS lifted the restrictions imposed on Zimbabwe and granted Zimbabwe the

205 Chikane 2010 www.diamonds.net/Docs/HumanRights/kimberly-001.pdf.

206 KPCS 2011 www.kimberlyprocess.com/en/marange-2011-ad31-zimbabwe.

207 KPCS 2011 www.kimberlyprocess.com/en/marange-2011-ad31-zimbabwe.

208 KPCS 2011 www.kimberlyprocess.com/en/marange-2011-ad31-zimbabwe.

209 The compliance verification exercise of Anjin Investments (Pvt) Ltd took place from the 5th to 9th of November 2011 and for Diamond mining Company took place from December 2011 to January 2012.

210 Chikane 2011 <http://www.kimberlyprocess.com/en/system/files/documents/MarangeComplianceVerificationReportDMC.pdf>.

211 Chikane 2011 <http://www.kimberlyprocess.com/en/system/files/documents/MarangeComplianceVerificationReportDMC.pdf>.

same status that applied to all participants when exporting rough diamonds. This decision technically lifted Zimbabwe's suspension from the KPCS.

The road to Marange diamonds certification brought with it some lessons that the KPCS community could utilise going into the future. The KPCS in dealing with the Marange diamonds did not address the human rights violations the Zimbabwean government had committed in Marange. The scheme certified Zimbabwe diamonds according to the JWP by the Zimbabwean government. As such, the KPCS must have handled the certification process differently.

4.4 Conclusion

The KPCS certified Marange diamonds based on the JWP presented by Zimbabwe. The KPCS is complimentary to the mechanisms implemented by participants. In the JWP presented by Zimbabwe, the government did not acknowledge the human rights abuses in Marange. Similarly, the KPCS certification process did not address the human rights violations. The scheme certified Marange diamonds on the strength of Zimbabwe's standards.

This led to a fall out amongst participants and observers. The United States of America (USA) and GW, amongst other participants and NGOs, did not embrace this position. The USA and GW pushed participants to individually impose trade restrictions on Marange gems. Their argument was that Marange diamonds are still blood diamonds because of the human rights abuses that are taking place in Zimbabwe. The USA maintained sanctions on the state mining company ZMDC. Nkala²¹² quotes the US State department special adviser on conflict diamonds Brad Brook-Rubi stating that the US would maintain trade restrictions on gems from Zimbabwe because of human rights violations committed by the Zimbabwe government. GW withdrew from the KPCS and continued campaigning for participants to impose trade restrictions on diamond mining companies in Zimbabwe. One reason for GW withdrawal was that the scheme:

212 Nkala 2011 www.miningweekly.com/print-version-us-to-maintain-ban-on-marange-diamonds-despite-kimberley-process-green-light-2011-11-11.

- (1) ...proved unwilling to stop diamonds fuelling corruption and violence in Zimbabwe.²¹³

America and GW argued that, there had to be guarantees that diamonds from Marange were not fuelling abuses before the diamonds trade on the global market. Questions were raised on the effectiveness of the KPCS to deal with conflict diamonds from legitimate governments. To evaluate the effectiveness of the scheme to deal with conflict diamonds from legitimate governments, the next chapter will evaluate the legal nature of the scheme.

213 GW 2011 <http://www.globalwitness.org/sites/default/files/library/KPexity.pdf>.

CHAPTER 5

Legal nature of the KPCS

5.1 Introduction

The KPCS was a joint initiative of governments, diamond industry representatives and civil society organisations. Although the UN supported and influenced its formation, the scheme is not an agreement formulated under the UN. The scheme was also not set up under the WTO, the competent body that deals with international trade agreements.²¹⁴ The coalition involved in the establishment of the scheme is unique. This has generated debate amongst scholars on how the scheme is classified in international law. It is unique in that most international agreements are usually influenced by states only, whereas governments, NGOs and diamond industry players influenced the setting up of the KPCS. Some scholars have propounded the idea that the scheme is a memorandum of understanding (MoU); others submit that it is a political agreement, whereas others argue that it is soft law.

In this chapter, the discussion will be on the contending views on the legal nature of the KPCS. An analysis on the disparate views on the type of international agreement that the KPCS can be classified under will be conducted. The discussion will further look at the relationship of the KPCS with the WTO. This discussion will focus on the consistency of the KPCS with WTO obligations.

5.2 Legal nature of the scheme

There has been considerable debate amongst scholars on the nature of the KPCS, with some arguing that it is neither a treaty, nor a legally binding agreement. Others present convincing arguments suggesting that the KPCS can be regarded as a treaty. Schram²¹⁵ argues that the formation of the "KP enjoyed no formal or diplomatic status and no treaty documents were signed or ratified". Although no documents were signed as treaty documents, one cannot ignore the fact that an agreement was signed. Therefore, the debate should be about the classification of

214 The WTO is a forum for governments to negotiate trade agreements at www.wto.org.

215 Schram "The legal aspects of the Kimberley Process" 7.

the document signed. Schram²¹⁶ also argues that the language used in a document is indicative of the documents legal status. The use of words like 'shall', 'agree', 'undertake' indicates an intention to enter into a formal treaty whilst phrases like 'participants recommend' and 'are encouraged', do not.²¹⁷ The KPCS uses less imperative phrases like "encourages" and "recommend". The argument by Schram is that:

This type of language with the lack of formal, treaty-like final clauses, or a registration requirement, is strongly indicative that the document is a political agreement or 'Memorandum of Understanding' (MoU) and not a proper treaty.²¹⁸

Schram suggests that although the KPCS cannot be a treaty in the proper sense of a treaty it has characteristics of a treaty. Curtis²¹⁹ propounds that the KP is a voluntary non-binding agreement based on collective participation. The view of Curtis stems from the participant structure of the KPCS, which consists of non-state actors such as NGO's and the diamond industry. The KPCS is neither a UN agreement nor is it a WTO agreement²²⁰. This argument fails to recognise that although the KPCS is not directly a UN agreement, it came about partly from concern expressed by the UN regarding the effects of conflict diamonds on the world trade in rough diamonds. Wexler²²¹ argues that the KP "itself imposes no binding obligations under international law".²²² Woody²²³ seems to be in agreement with the school of thought that the KPCS is not a binding international treaty but she argues that it is a political agreement between nations. The argument presented by Woody fails to recognise the place of non-state actors, NGOs and the diamond industry in the KPCS. Hence, making the KPCS solely a political agreement between nations may well be a fallacious proposition.

The most common type of international agreement is a treaty. Schram argues that the KPCS is not a treaty based on the absence of language common in treaties. However, dismissing a document simply based on the language usage and

216 Schram "The legal aspects of the Kimberley Process" 7.

217 Schram "The legal aspects of the Kimberley Process" 7.

218 Schram "The legal aspects of the Kimberley Process" 7.

219 Curtis 2007 *IRL* 10.

220 Curtis 2007 *IRL* 10.

221 Wexler 2010 *Cardozo LR* 1747-1748.

222 Wexler 2010 *Cardozo LR* 1748.

223 Woody 2007 *Conn J Int'l L* 345.

registration requirements is unreasonable. A further discussion will be undertaken to compare the nature of the KPCS and the characteristics of treaties. The Vienna Convention on the Law of Treaties (VCLT) governs the general operation of treaties. Article 80²²⁴ of the VCLT requires that treaties, after entry into force, be registered with the UN secretariat. However, non-registration does not imply that the terms of the VCLT cannot be applied to the agreement. The VCLT²²⁵ states that:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law...shall not affect:

- (a) The legal force of such agreements;
- (b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
- (c) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

The KPCS is not registered as a treaty under the VCLT but according to Article 3, that does not necessarily exclude the application of the terms of the VCLT. However, the status of NGOs needs to be established. The argument will be whether NGOs can be international subjects. This is axiomatic if an evaluation of whether the KPCS is a treaty is to be undertaken. Article 3 applies to agreements concluded between States and other subjects of international law. The KPCS is an agreement between participants that are subjects of international law²²⁶ and NGOs whose status is not clear. Martins²²⁷ submit that the question of NGOs in international law is *terra incognita* (it is unknown land). Article 71 of the UN charter²²⁸ recognises NGOs for consultation purposes and not as state actors. Nowrot²²⁹ submits that NGOs are non-state actors but they have an advocating role and influence in international decision-making. Kamminga²³⁰ points out that NGOs do not have capacity to conclude treaties.

224 Article 80 of the VCLT.

225 Article 3 of the VCLT.

226 Article 6 of the VCLT.

227 Martins 2002 *Voluntas* 272.

228 UN Charter 1945.

229 Nowrot 1998 *Ind J Global Legal Stud* 580.

230 Kamminga "The evolving status of NGOs" 93-111.

One would conclude for the purposes of this discussion that NGOs are not subjects of international law. However, the KPCS recognizes governments as participants, and NGOs and the diamond industry representatives as observers. Thus, article 3 would be applicable in that governments that qualify as state actors are the participants who signed the KPCS and have voting powers. Furthermore, Article 1²³¹ provides that "the present Convention applies to treaties between States". NGOs are recognised on a consultative basis. The KPCS certainly warrants an investigation into its treaty status.

5.3 Treaty Cycle v KPCS Framework

Viljoen²³² outlines the requirements of what constitutes the ecosystem of a treaty. Although not conclusive, he gives a framework of what can be regarded as constituting a treaty. With due regard for these requirements the discussion below will weigh the phases of a treaty against the framework of the KPCS .The Vienna Convention²³³ defines a treaty as:

An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

The KPCS was concluded between states in a written form that is embodied in the instrument establishing the scheme. From the definition of a treaty, the KPCS can be regarded to be a treaty but it has to be tested against the characteristics of a treaty. Viljoen²³⁴ distinguishes seven phases in the life cycle of a treaty. The seven phases are:

- (a) Elaboration
- (b) Adoption
- (c) Adherence
- (d) Entry into force
- (e) Operationalization
- (f) Domestication

231 Article 1 of the VCLT.

232 Viljoen *International human rights* 20.

233 VCLT 1969.

234 Viljoen *International human rights* 21.

(g) Internalization²³⁵

The discussion below will compare the life phases of treaties with the KPCS and consider whether the KPCS can be treated as a treaty.

5.3.1 *Elaboration*

This is the process where need for reform is identified, followed by discussions. The discussions move from an informal phase to a formalized phase where negotiations and drafts are put in place. Negotiations culminate in a diplomatic conference.²³⁶

The KP started with identification of the problem by civil groups GW²³⁷ and the HRW. The problem was trade in conflict diamonds that was fuelling armed conflicts and human rights abuses in some African countries.²³⁸ The UNGA recognized the problem and in Res 55/66²³⁹ urged:

...all states to support efforts of the diamond producing, processing, exporting and importing countries and the diamond industry to find ways to break the link between conflict diamonds and armed conflict, and encourages other appropriate initiatives to this end, including improved international cooperation on law enforcement;

Once a problem was identified, things moved from an informal phase to a formalised stage where the United Nations recognised and pushed for a framework to deal with the problem. Insofar as the elaboration stage is concerned, the KPCS meets the requirements of the phase.

5.3.2 *Adoption*

At this stage, a final draft is placed before a "political body or policy making organ for its adoption".²⁴⁰ The treaty does not become effective immediately but it is up for ratification and signature. The VCLT states that adoption is either by consent²⁴¹ or by an in favour vote by two thirds of all the parties present.²⁴²

235 Viljoen *International human rights* 20-23.

236 Viljoen *International human rights* 20-21.

237 GW "A Rough Trade" 1-14.

238 *United Nations General Assembly Res 55/66* in its preamble acknowledges the problem by stating that: The General Assembly, Expressing its concern over the problem of conflict diamonds fuelling conflicts in a number of countries and the devastating impact of these conflicts on peace, safety and security for people in affected countries.

239 *UNCS Res 55/66* of 2001.

240 Viljoen *International human rights* 21.

241 Article 9 (1) of *VCLT* 1969.

242 Article 9 (2) of *VCLT* 1969.

After having gone through several rounds of negotiations, the KPCS was adopted on the 5th of November 2002.²⁴³ However, implementation was effected on the 1st of January 2003. The EU delayed implementation to the 13th of February 2003 due to administrative issues that needed to be finalised. However, one may note that the implementation of the KPCS and the process of ratification are two distinct processes. Ratification is a more comprehensive process that at times takes years to finalize. For example, the VCLT was adopted in 1969 but only came into force in 1980. Thus to say the process of ratification is the same as the effective date of operation would be fallacious. The VCLT²⁴⁴ states that:

The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Therefore, the KPCS was duly adopted as it was a voluntary scheme. Countries duly adopted it by signing up as participants of the scheme. It is noted that the coming into effect of the KPCS was not dependent upon it being signed by a certain number of states. Instead, when the KPCS was adopted, most states signed the agreement and an effective date was set.

5.3.3 Adherence

This is the expression by a state of its intention to be bound by the agreement. Adherence can be in the form of ratification or it can be in the form of accession. Viljoen²⁴⁵ notes that a signature is a "formal recognition of the authenticity of the adopted text". Ratification is usually at national level whereby the treaty is approved by a state's parliament, although this may differ from state to state. On the international stage, ratification is when "a state deposits an instrument of ratification with the appropriate body".²⁴⁶

With the KPCS, it is difficult to distinguish between the phases of adoption and adherence. After adoption, member states began adhering to the framework from its effective date. The only exception was the EU that adhered later courtesy of some administrative issues it had to address first. Accession applies to states that are not

243 S VI (21) of KPCS 2003.

244 Article 14 (2) of the VCLT 1969.

245 Viljoen *International human rights* 21.

246 Viljoen *International human rights* 21.

part of the negotiations or adoption, but join at a later stage. Their joining and intention to be bound is called accession. According to Section VI of the KPCS.²⁴⁷

Any applicant wishing to participate in the Certification scheme should signify its interest by notifying the Chair through diplomatic channels. This notification set forth in paragraph (a) of section V²⁴⁸ must be circulated to all participants within one month.

There is thus a clear difference between the adherence process and the certification process where it is by application. The process of approval is not a tedious one. It can be completed within a month.

5.3.4 *Entry into Force*

Here a required number of states have ratified the treaty and it starts to be implemented. Article 24 of the *VCLT*²⁴⁹ provides that "a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree". Section VI of the KPCS²⁵⁰ points out that:

The Certification scheme should be established at the Ministerial meeting on the Kimberley process Certification scheme for rough diamonds in Interlaken on 5 November 2002.

The Certification Scheme did not have a quorum requirement for it to enter into force. Its entry into force was through its establishment. After the parties agreed to the scheme in Interlaken, the scheme was adopted and it entered into force from the 1st of January 2003.

247 *KPCS* 2003.

248 S V (a) *KPCS* 2002-(a) provide to each other through the Chair information identifying their designated authorities or bodies responsible for implementing the provisions of this Certification Scheme. Each Participant should provide to other Participants through the Chair information, preferably in electronic format, on its relevant laws, regulations, rules, procedures and practices, and update that information as required. This should include a synopsis in English of the essential content of this information.

249 Article 24 of *VCLT* 1969.

250 *KPCS* 2003.

5.3.5 Operationalization

Operationalization is "establishing the conditions to ensure the body's effective functioning".²⁵¹ Viljoen²⁵² notes that this process is time consuming. Section VI²⁵³ of the KP provides for Administrative Matters that operationalize the treaty. The scheme operates through four working groups namely:

- (1) Working Group of Diamond Experts (WGDE)
- (2) Working Group on Monitoring (WGM)
- (3) Working Group on Statistics (WGS)
- (4) Working Group on Artisanal and Alluvial Protection (WGAAP)²⁵⁴

The groups carry out the different functions of the KPCS and they report to the different sessions of the scheme. This phase was crafted in order to fast track the operations of the KP.

5.3.6 Domestication

This is the process whereby the treaty is made part of the domestic law of the participating state. This is done either by incorporation or by transformation.

Section IV²⁵⁵ states that Each Participant should:

- (a) Establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds Imported into and exported from its territory.
- (b) As required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions.

The KP provides for domestication of the regulatory mechanism. Domestication will not always be via legislation but it can be in the form of policy transformation. Participant countries have domesticated the KPCS according to suit each participants' needs. It should be noted that the KPCS is not a model law but it

251 Viljoen *International human rights* 22.

252 Viljoen *International human rights* 22.

253 *KPCS* 2003.

254 *KPCS* 2003 www.kimberleyprocess.com/en/working-groups.

255 *KPCS* 2002.

provides the minimum requirements that should be met in the implementation of the scheme.

4.3.7 *Internalization*

Viljoen²⁵⁶ describes this last stage as "norm-acceptance" where compliance is brought about without force but through "personal motivation". The KPCS is a voluntary mechanism that countries implement without any coercion. It might be too early to have a concise analysis of the internalisation of the KPCS. The scheme is still evolving and in time, its development can be assessed.

One can conclude that the KPCS cannot be classified as a treaty. Although some aspects in the KPCS are consistent with the characteristics of treaties, one cannot definitively say that the KPCS is a treaty. The language used in the KPCS is reflective of a more flexible agreement. The KPCS is not registered and is administered outside UN structures. Other scholars have suggested that the KPCS is best described as soft law. This is an emerging type of international agreement.

5.4 *KPCS as Soft Law*

Soft law is best understood when contrasted with hard law. There three dominant views on how hard law and soft law operate. According to Schaffer,²⁵⁷ legal positivists opine that hard law consists of legal obligations of a formally binding nature, while soft law obligations are not formally binding. Rationalists on the other hand are of the view that hard and soft law have different characteristics chosen by states according to the legal objectives they want to meet.²⁵⁸ However, rationalists contend that the two regimes are not mutually exclusively. Constructivists argue that "state interests are formed through a socialisation process of interstate interaction which hard and soft law can facilitate".²⁵⁹ These different views converge to agree that hard law has a formal character whereas soft law is less formal in nature.

256 Viljoen *International human rights* 23.

257 Shaffer and Pollack 2009 *Minn LR* 707.

258 Shaffer and Pollack 2009 *Minn LR* 707.

259 Shaffer and Pollack 2009 *Minn LR* 707.

Viljoen²⁶⁰ outlines that soft law takes the form of declarations and resolutions of international organisations. He argues that the declarations, although not legally binding, purvey serious punitive measures for non-compliance. Soft law can evolve into hard law with time. Dupuy²⁶¹ describes soft law as a "trouble-maker", an ambiguous phenomenon. This is because it presents a legal classification headache because the notion of soft law postulates a conceptual oxymoron. Dupuy²⁶² gives three reasons for the development of soft law that are:

- (i) the evolving of 'permanent institutions at a global and regional level'.
- (ii) arrival of underdeveloped countries on the international stage. The latter fact precipitated the need for a modification of existing rules on the international scene.
- (iii) The last stage is that of greater state cooperation together with rapid developments in science and technology.

These three reasons necessitate a new legal scheme that is less rigid and provides ease of application for all the players, including the developing countries. Hillgenburg²⁶³ refers to soft law as non-treaty agreements. He lists the reasons for creating non-binding agreements as follows:

- Need for mutual confidence building
- Need to stimulate developments still in progress
- Impetus for coordinated national legislation
- Rapid finalisation-consensus is obtained much faster
- Avoidance of cumbersome domestic approval procedures
- Greater confidentiality
- Agreements can be made with parties that do not have the power to conclude treaties under international law

Hillegenburg²⁶⁴ argues that with greater awareness non-binding agreements can end up being "hard obligations". Boyle²⁶⁵ contrasts soft law with hard law and finds that

260 Viljoen *International human rights* 28.

261 Dupuy 1990 *Mich J Int'l L* 420.

262 Dupuy 1990 *Mich J Int'l L* 421.

263 Hillgenberg *Eur Journal of International Law* 501.

264 Hillgenberg *Eur Journal of International Law* 501.

265 Boyle 1999 *ICLQ* 901.

hard law is binding and soft law is non-binding. Boyle²⁶⁶ gives four reasons why soft law is an alternative to law-making by treaty:

- (i) agreements are easier to reach
- (ii) non-binding instruments can be easier to adhere to as they won't have to go through the treaty ratification process
- (iii) it is less rigid, can be easily amended and be replaced
- (iv) its application is faster, as it does not have to wait for ratification and entry into force.

An assessment of the KPCS will conclude that the mechanism can fall under soft law. The KPCS was not reached through a very cumbersome process on the international and domestic scene but instead there was prompt finalisation of the mechanism. The way the KPCS is currently administered is aimed at confidence building, with robust debates that stimulate the development of the scheme. The KPCS cannot be classified as a treaty but it can be classified as a non-treaty agreement qualifying as soft law.

The argument that soft law is ambiguous suggests that the KP is soft law. This is evidenced by the lack of agreement by scholars on the nature of the KP. Current discussions on the KPCS are focussing on how to evolve the scheme into a binding agreement. The effectiveness of the KPCS in its current state will determine how the mechanism can be strengthened into a hard obligation. The KPCS is best described as soft law that is still developing into hard law. The advantage of soft law is that instead of waiting for ratification and accession processes necessary in treaty making processes, agreements are implemented as they develop.

5.5 Conclusion

Legal scholars are yet to reach agreement on the legal classification of the KPCS. Legal scholars have interpreted the nature of the KPCS differently. However, the KPCS seems to best identify with the features of soft law. Overtime the KPCS will evolve and its true legal nature will be easily identifiable. As the class of soft law develops further, more agreements will fall within it. Soft law, unlike treaty law, is not rigid and inflexible. International agreements are easily formulated and implemented

266 Boyle 1999 *ICLQ* 902.

under soft law. Soft law seems to serve the interests of the KPCS better than any alternative. The flexible nature of soft law made for an expeditious implementation of the KPCS. On the other hand, the KPCS may straddle different classes of international agreements. This could be considered as a characteristic of soft law. Without the KPCS falling into a clear class, evolving it will take long. The reason will be the uncertainty of what is being evolved, a hard law mechanism or a soft law mechanism. Another challenge will be what the KPCS is evolved into. Hard law and soft law have advantages and disadvantages, a hybrid of both might create an effective scheme, and this is yet to be tested.

CHAPTER 6

Consistency of the KPCS with WTO obligations

6.1 Introduction

Meanwhile, participants of the KPCS are also members of the World Trade Organisation (WTO), which places certain trade obligations on its members. One of the obligations enacted in the General Agreement on Tariffs and Trade Treaty²⁶⁷ (GATT), is that of non-discrimination. The KPCS violates this principle by restricting trade to participants only, which is an act of discrimination. Therefore, before implementing the KPCS participants have to make sure that the mechanism does not violate GATT.

The World Trade Organisation (WTO) is a "forum for governments to negotiate trade agreements".²⁶⁸ The platform created by the WTO is intended to encourage trade and solve trade conflicts that countries encounter. Some of the objectives of the WTO are:

- Resolving trade disputes between member states
- Committing to lowering customs tariffs
- Removal of trade barriers
- Liberalization of trade
- Allowing permitted exceptions to restricting trade²⁶⁹

One way to meet the objectives of the WTO is through trade rules. One set of these trade rules administered by the WTO is the General Agreement to Tariffs and Trade (GATT).²⁷⁰ The GATT treaty is applied by WTO member states that have ratified and/or acceded to the treaty through the various application provisions provided for in the treaty. The objectives of GATT²⁷¹ are:

- Raising standards of living

267 GATT 1947.

268 www.wto.org/english/thewto-e/whatis_e/who_we_are_e.htm.

269 www.wto.org/english/thewto-e/whatis_e/who_we_are_e.htm.

270 GATT 1947.

271 GATT 1947.

- Ensuring full employment, a large and growing volume of real income and effective demand
- Making full use of the resources of the world
- Expanding the production and exchange of goods

The objectives of the GATT²⁷² are aimed at:

...the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce.

In realising the above objectives, the GATT operates on principles that include sustainable development, non-discrimination, prohibition of quantitative restrictions and resolving disputes within the framework of GATT.²⁷³ GATT member countries should abide by the principles established by the GATT.

Debate has focused on the consistency of the KPCS with WTO obligations. The KPCS clearly discriminates against non-participants whereas the WTO is a proponent of non-discrimination in trade. Participants of the KPCS had to make sure that there was no violation of WTO rules before implementing the scheme. The discussion below will look at whether the KPCS is consistent with GATT principles and how potential violations are resolved.

6.2 Potential violations of the GATT

6.2.1 Article I.1

Article I.1 of the GATT²⁷⁴ spells out the Most Favoured Nation (MFN) principle. This principle requires that trade privileges that are extended to one contracting party must be extended immediately and unconditionally to all contracting parties of the

272 GATT 1947.

273 GATT 1947.

274 GATT 1947 Article I.1. 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 or 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, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, 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.

WTO. The MFN principle forbids discrimination based on nationality, origin or destination of similar products. Whether a violation of Article I.1 has occurred or not is determined by a three tier test with the inquiry as follows,

- (1) whether the measure at issue confers an 'advantage' upon the products originating in or destined for the territories of all other members or any other country?
- (2) whether the products in question are 'similar'?
- (3) whether the advantage at issue was granted 'immediately and unconditionally' to all like products?²⁷⁵

Kundan²⁷⁶ submits that advantage includes rules and formalities relating to importation and exportation. The KPCS only gives an advantage to participants of the scheme. The trade in rough diamonds is limited to participants and non-participants are excluded from legitimate trade. The first requirement is therefore violated. The second requirement considers whether the products are "similar" products. Here "physical properties, end-users, customer tastes and habits and tariff classification are considered".²⁷⁷ The KPCS regulates rough diamonds that ultimately are all the same; they end up with end users who use them mainly for jewellery. Therefore, the second requirement is met. Applying the third tier of the test, one finds that an advantage was granted immediately and unconditionally thus there is a violation. Kundan²⁷⁸ submits that:

...once a WTO Member has granted an advantage to a country, it cannot impose conditions on other WTO Members for them to benefit from the same advantage.

The KPCS requires participation in the KPCS in order for trade in rough diamonds to take place between two countries. The KPCS²⁷⁹ provides that:

Each Participant should ensure that no shipment of rough diamonds is imported from or exported to a non-Participant.

275 Kundan 2012 http://ssrn.com/sol3/papers.cfm?abstract_id=2124295&download=yes.

276 Kundan 2012 http://ssrn.com/sol3/papers.cfm?abstract_id=2124295&download=yes.

277 Kundan 2012 http://ssrn.com/sol3/papers.cfm?abstract_id=2124295&download=yes.

278 Kundan 2012 http://ssrn.com/sol3/papers.cfm?abstract_id=2124295&download=yes.

279 S III (c) KP Working Document 1/200.

The KPCS endorses discrimination against non-participants by participants and this is a violation of Article I.1 of the GATT. Schram²⁸⁰ argues that, participation is open to all applicants on a non-discriminatory basis; Article I.1 requires that an advantage be extended unconditionally to another member. Therefore, there is a violation of Article I.1 of the GATT treaty that needs to be remedied before member countries of the WTO can implement the KPCS.

6.2.2 Article XI.1

Another GATT provision that could potentially be violated by the KPCS would be Article XI.1.²⁸¹ The provision in Article XI.1 forbids quantity restrictions on products from other members other than "duties, taxes, or other charges".²⁸² Under the KPCS, trade in rough diamonds is conducted by means of a certificate and other requirements highlighted in the KPCS documents, hence, requiring certificates at importation is a violation of Article XI.1.²⁸³ Article XI.2²⁸⁴ provides exceptions to Article XI.1. The exceptions apply where it is necessary to (i) prevent or relieve critical shortages of foodstuffs, (ii) to apply standards or regulations for the classification, grading or marketing of commodities, and finally they apply to (iii) agricultural or fisheries' products necessary for the enforcement of governmental measures.²⁸⁵ One would note that the exceptions are not applicable to the KPCS since the scheme seeks to protect human rights.

Price argues that when the GATT treaty is interpreted in accordance with the Vienna Convention, Article XI.1 cannot be applicable to multilateral agreements initiated like the KPCS. However, it may apply to inter-member conduct.

280 Schram "The Legal aspects of the Kimberley Process" 26.

281 GATT 1947 Article XI.1 No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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.

282 GATT 1947.

283 Article XI.1 of GATT 1947.

284 Article XI.2 of GATT 1947.

285 Article XI.2 of GATT 1947.

6.3 *Escape clauses*

6.3.1 *Article XX*

Potential clashes between the GATT and KPCS could be circumvented by relying on the exceptions to the provisions of the GATT treaty. Article XX (b)²⁸⁶ provides that:

- (b) 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 Members of measures ... necessary to protect human, animal or plant life or health...

The Appellate Body in the *Automotives*²⁸⁷ case stated that the chapeau²⁸⁸ expresses the manner of application of the exceptions provided from (a) to (j). The text of the chapeau serves the purpose of preventing abuse of the exceptions. In the *Shrimp-Turtle*²⁸⁹ case, the Appellate Body held that the chapeau establishes three standards for the application of the exceptions. These are that there should not be any (i) arbitrary discrimination (ii) unjustifiable discrimination and; (iii) disguised restriction on international trade.

In applying the exceptions, one moves from the exception itself to the chapeau. The first test will be if the KPCS is necessary to protect human life or health. Schram²⁹⁰ notes that the problem with applying this provision to the KPCS is that the protection of human life pertains to another territory and not the one imposing the measure. This creates challenges where one needs to show the depth of the problem in another country. The *Tuna Dolphin*²⁹¹ case suggests that applying this provision extra territorially is not justifiable.

286 *GATT* 1947.

287 United States-Imports of Certain Automotive Spring Assemblies BISD 305/107 par 56.

288 In International law it is an unnumbered introductory clause or paragraph covering several subsequent provisions at <http://www.wordnik.com/words/chapeau>.

289 United States-Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/RW 22 October 2001.

290 Schram "The legal aspects of the Kimberley Process" 31.

291 United States-Eestrictions on Imports of Tuna, DS29/R GATT Panel Report 16 June 1994 (unadopted).

Such extra-territorial application requires complex monitoring and entails a delicate balancing of sovereignty²⁹² versus the rights that should be protected. However, the KPCS provides a monitoring mechanism that does not denigrate state sovereignty. Participants voluntarily participate in the scheme and hence subject themselves to external monitoring of their human rights reputations. It is submitted that the exception should apply to the KPCS because there is no arbitrary discrimination. Any discrimination is based on concrete evidence detailing the impact of blood diamonds. The discrimination seeks to protect human life and is thus justifiable. Furthermore, the discrimination is not a disguised restriction on international trade; it applies to all participants on a voluntary and consistent basis.

6.3.2 Article XXI

Article XXI provides another way to circumvent conflict between the GATT and KCPS. Article XXI²⁹³ provides for security exceptions to GATT provisions by stating the following:

Nothing in this Agreement shall be construed...

- (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 directly or indirectly for the purposes of supplying a military establishment;
- (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.

The security exception in Article XXI respects the right of all nations to protect themselves against external and internal threats. The exception also respects the right of nations to pursue their obligations, under the United Nations, to maintain international peace and security.

The KPCS was created in response to the effects of the trade in conflict diamonds. These diamonds were sponsoring armed rebel movements that undermined

292 The principle of sovereignty means the intentional independence of a state, combined with the right and powers of regulating its internal affairs without foreign interference <http://legal-dictionary.thefreedictionary.com/sovereignty>.

293 GATT 1994.

legitimate governments. The blood diamonds would be traded to sponsor illicit trafficking of ammunition and implements of war, small arms and light weapons that were used to further the interests of rebel groups.²⁹⁴ The wars threatened world peace and action was taken to eliminate the financial lifeblood of these wars. The KPCS is consistent with the Article XXI (b) (ii) security exception and can be used to justify possible violations of the GATT²⁹⁵ by the KPCS.

However, Schram²⁹⁶ and Price²⁹⁷ argue that the provisions of Article XXI²⁹⁸ (b) are too arbitrary since they allow actions that a member "considers necessary" and "essential"²⁹⁹ and hence they are susceptible to abuse. This provision is applied by many countries and is not prone to arbitrary application and abuse. The UN about the threat to international peace and security that was posed by conflict diamonds birthed the KPCS because of the concern. The UNGA expressed this concern in several resolutions,³⁰⁰ the main one being Res 55/56.³⁰¹ The UN passed a resolution that led to the implementation of KP and it makes the security exception covered by Article XXI (c) applicable to cover possible violations of the GATT by the KP.

6.4 WTO Waiver

In order to obtain absolute certainty that the KP complied with WTO rules some members³⁰² applied for a waiver from the WTO. A waiver is granted where a measure by a member *prima facie* violates the WTO treaty.³⁰³ The effect of the waiver is to make that which would otherwise be a violation legitimate. Waivers are catered for in Article IX (3) and (4) of the WTO Agreement.³⁰⁴ The WTO authorises the Ministerial Conference to waive an obligation of the WTO Agreement or any Multilateral Trade Agreement. The decision should be adopted by three quarters of

294 Preamble to the *KPCS* 2003.

295 *GATT* 1947.

296 Schram "The Legal Aspects of the Kimberley Process" 29.

297 Price 2003 *Minn J Global Trade* 1 60.

298 *GATT* 1947.

299 Article XXI (b) *GATT* 1947.

300 Among the resolutions were RES/11739(1998); RES/1778 (1998) RES/1295(2000); RES/1343 (2001).

301 *UNGA RES* 55/56 (2001).

302 The members that were granted the waiver are Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, and the United States.

303 Pauwelyn 2002 *Mich J Int'l L* 1177-1207.

304 *WTO Agreement* 1994.

the members.³⁰⁵ Waivers are granted periodically and Article IX (4) gives the Ministerial Conference the power to review the waiver decision annually, subject to the terms and conditions of the waiver.³⁰⁶ A waiver does not grant the right to act arbitrarily; other WTO members can still raise their concerns where there is an inconsistent application of the measure covered by the waiver leading to apparent violations of the GATT measures.³⁰⁷

Against this background, on the 12th of November 2002, Australia, Brazil, Canada, Israel, Japan, the Philippines, Sierra Leone, Thailand, the United Arab Emirates and the United States requested a KPCS waiver from the Council in Trade in Goods of the WTO. The waiver request³⁰⁸ provided that:

The waiver would apply to domestic measures, necessary to give effect to the import and export restrictions and prohibitions outlined in the KPCS, Section III, paragraph (c).

The requested waiver was for WTO member obligations under Article 1.1 - most favoured nation treatment, Article XI.1 - elimination of quantitative restrictions and Article XIII.1 - non-discriminatory administration of quantitative restrictions.³⁰⁹ On the 26th of January 2003, the WTO council on the Trade in Goods agreed to recommend to the General council that the requested waiver be granted.³¹⁰ The waiver would be effective from the 1st of January to the 31st of December 2006.³¹¹ On the 20th of November 2006, the Council on the Trade in Goods recommended that the waiver be extended for another six years.³¹²

It should be noted that in making the recommendation, the council acknowledged the devastating effects that the trade in conflict diamonds had on the people in the countries where these diamonds originate.³¹³ Upon the lapse of the extension of the waiver, the requesting members requested another extension until December

305 *WTO Agreement* 1994.

306 *WTO Agreement* 1994.

307 Woody 2007 *Conn J Int'l L* 347.

308 http://www.wto.org/english/news_e/news03_e/goods-council-26fev03_e.htm.

309 *GATT* 1947.

310 http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm.

311 http://www.wto.org/english/news_e/7_news03_e/goods_council_26fev03_e.htm.

312 http://www.wto.org/english/news_e/news06_e/ctg_20nov06_e.htm.

313 http://www.wto.org/english/news_e/news06_e/ctg_20nov06_e.htm.

2018.³¹⁴ This request was informed by the need to continue implementing the KPCS. The waiver provides relief to KPCS implementing members. Members of the WTO who believe that the waiver is being applied inconsistently can bring the matter before the General Council of the WTO, which will attend to it and make appropriate recommendations.³¹⁵

6.5 Conclusion

Most scholars agree that the KPCS is consistent with WTO obligations. Scholars agree that the exceptions in articles XX and XXI of the GATT are applicable to the KPCS. The KPCS is a human rights protectionist measure that is justified under the GATT. Disagreement arises as far as the waiver application is concerned. One school of thought argues that it is not necessary to use the WTO waiver whilst others are of the view that the waiver protects the KPCS from legal challenges (i.e. conflict with the GATT). However, one may still opine that the waiver is not necessary; the exceptions under XX and XXI of GATT fully apply to the KPCS. Applying the waiver to the KPCS creates uncertainty about the future of the scheme, in particular because of its relation to WTO obligations. The waiver will show hesitation on the part of the KPCS participants. Lifting the waiver will assist in that, if participants of the scheme are taken to the Dispute Settlement Mechanism (DSM) of the WTO on grounds of discrimination, the DSM will settle the issue and create certainty within the scheme.

314 <https://www.diamondintelligence.com/magazine/magazine.aspx?id=11136>.

315 [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E& CatalogueIdList=49791,3681,42337,43438&CurrentCatalogueIdIndex=0&FullTextSearch=.](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=49791,3681,42337,43438&CurrentCatalogueIdIndex=0&FullTextSearch=)

CHAPTER 7

Recommendations and Conclusion

7.1 Introduction

There are several lessons drawn from the administration of the KPCS in light of the recent certification of Marange diamonds. The KPCS's main objective is to have a global trade that is free of conflict gems. This regulatory scheme provides a mechanism for eradicating conflict diamonds and having a blood diamond free trade. However, if the scheme is to remain effective, it needs to evolve and address all the causes of conflict diamonds. The Marange diamond saga has exposed several legal loopholes in the scheme. This chapter will highlight challenges in the KPCS and propose recommendations to solve the challenges.

7.2 Human rights debate

The KPCS was established to eliminate conflict diamonds from the legitimate international trade in diamonds. The scheme was established in order to protect human rights which were being violated by actors financed by the trade in conflict diamonds. Arguments justifying the schemes' discriminatory nature are based on the human rights protections purveyed by the KPCS. Harrison³¹⁶ submits that human rights based measures demand greater justification before they can be acceptable before the WTO Dispute Settlement Mechanism (DSM). The greater justification will be through authorisation from organisations such as the UNSC and the International Labour Organisation (ILO).³¹⁷ Harrison³¹⁸ also argues that greater justification can be found in the "...widespread multilateral support for a particular trade based measure such as the KPCS which targets extreme human rights violations without itself causing widespread deprivation".

Arguments supporting the KPCS as a human rights protection mechanism are sound and can stand the test of consistency with WTO policy. However, the KPCS also

316 Harrison *The human rights impact* 178.

317 Harrison *The human rights impact* 178.

318 Harrison *The human rights impact* 178.

limits its scope of application to diamonds used by rebel movements or their allies to undermine legitimate governments. The Marange diamond issue showed that legitimate governments can also use diamonds to sponsor human rights abuses against their own people. One would submit that the definition of conflict diamonds should be widened to include diamonds used to sponsor human rights abuses by both rebel movements and legitimate governments. Such a definition would help advance the core purpose of the KPCS. I propose the following definition, "Conflict diamonds are diamonds used to finance human rights abuses". Such a definition is simple yet comprehensive addressing all entities that may use diamond proceeds to finance human rights abuses.

The above definition also covers all abuses. The KPCS definition in its current form limits conflict diamonds to those financing conflict aimed at undermining legitimate governments. However, the proposed wider definition is aimed at covering any form of human rights abuse. The problem with a wide definition is that it can be stretched to permit protectionist policies or otherwise undermine the selfsame international human rights standards³¹⁹ it is intended to protect. Another mechanism that can be used to prevent the abuse of the proposed wide definition, is the strengthening of the role of NGOs in the KPCS framework. This will be discussed below.

7.3 Polished diamonds

Diamonds pass through different processes; from their being mined as rough diamonds to polishing and cutting into the final product, usually jewellery. The KPCS regulates diamonds at one level, i.e. when they are still rough diamonds. The proposed definition does not limit the type of diamonds regulated to rough diamonds only but calls for the regulation of diamonds throughout the value chain. The problem with regulating rough diamonds only is that illegal polished diamonds can enter the legal market. According to UN statistics,³²⁰ between 2004 and 2006 Congo Brazzaville, Uganda and Zambia traded in polished diamonds worth over US\$ 4.7 million. Zambia and Uganda are not diamond producers and they do not have

319 Harrison *The human rights impact* 178.

320 UN Comtrade comtrade.un.org/db/default.aspx.

polishing centres. This raises questions as to the origin of these traded diamonds. GW³²¹ states that there are four possible explanations here, namely:

- The three countries have polishing factories that are illegally importing rough diamonds from KP participants or non-participants then selling them onto the world market
- Rough diamonds are smuggled into the countries, then are deliberately misclassified, and then are exported as polished diamonds.
- The countries are transit sites for polished diamonds
- The diamonds being imported have been partially treated and are outside the KP

There is no official explanation addressing the origin of these polished diamonds and this raises serious concerns. These could be conflict diamonds. With the exclusion of polished diamonds from the KPCS, conflict diamonds can still find a way into the legitimate trade in diamonds. Regulating one stage only creates loopholes that can be utilised at other unregulated levels, making the fight against conflict diamonds impossible. It is submitted that if the KPCS is to win the war against blood diamonds, the industry needs to regulate the diamond trade as a whole. This means regulation must extend to polished diamonds as well. This can be done by widening the definition of conflict diamonds to be inclusive of all diamonds, rough and polished. The same minimum standards that apply to rough diamonds must also apply to polished diamonds.

7.4 Regulating non-participating countries

Non-participants should be encouraged to join the KPCS. Participation in the KPCS is voluntary and this has resulted in very real challenges. Blood diamonds can be smuggled into non-participating countries and traded there. The KP monitor for Zimbabwe says that diamonds from Chiadzwa are believed to have been smuggled into Mozambique which is a non-participant.³²² Mozambique became an accessory to the trade in illegal diamonds; a role it embraced with impunity. This illustrates the

321 GW 2010 <http://www.globalwitness.org/library/loopholes-kimberley-process-summary-trade-statistics-review>.

322 Chikane 2010 <http://www.diamonds.net/Docs/HumanRights/kimberly-001.pdf>.

problem. This situation makes it difficult to eliminate blood diamonds from the global trade in rough diamonds. UN statistics in the above discussion also showed a participant country might import blood diamonds from non-participants and export them as polished diamonds in breach of the KPCS agreement. The challenge of conflict diamonds will be difficult to overcome without the inclusion of non-participants in the scheme. Chikane in his report on Zimbabwe urges Zimbabwe to encourage Mozambique to participate in the scheme so that illegal diamonds finding their way through Mozambique can be stopped.³²³ It is submitted that one way to encourage non-participants to join the scheme is to highlight the resultant stability in countries formerly affected by blood gems. Other incentives for participation may also be created.

7.5 The role of civil society

Civil society groups played a major role in the formation of the KPCS. They exposed the violations of human rights by rebel movements that were being sponsored by the trade in rough diamonds. Although the status of NGOs is that of Observers, their role cannot be downplayed. NGOs act as watchdogs and their position in the KPCS needs to be strengthened if the fight against conflict diamonds is to be won. NGOs report the abuses committed in different countries and evaluate the implementation and effectiveness of the KPCS. NGOs provide objective or independent opinions on the effectiveness of the scheme. Measures promoting the free operation of NGOs strengthen what is an important check within the KPCS. The second Zimbabwean KP monitors' report showed that the legal environment in Zimbabwe does not encourage the free operation of civil society groups. The KP Civil Society Coalition representative Mr Farai Maguwu was arrested after meeting the KP monitor.³²⁴ Mr Maguwu's arrest came after he handed over a classified document to the KP monitor, in violation of the *Official Secrets Act* [Chapter 11.09].³²⁵ The KP monitor stated in his report:

323 Chikane 2010 <http://www.diamonds.net/Docs/HumanRights/kimberly-001.pdf>.

324 Zimbabwe Watch 2010 www.zimbabwewatch.org/eng/Zimbabwe-Actueel/CRD-Director-Farai-Maguwu-Arrested.

325 *Official Secrets Act* [Chapter 11.09].

... the KP Monitor was accompanied by officers of state agencies, including intelligence agencies. A man dressed in black and claiming to be from the 'Presidency' was seated less than a meter away from the KP Monitor and Mr Maguwu.³²⁶

Mr Chikane in another part of his report states that several important documents regarding his mission were stolen from his briefcase and photocopied. The documents were leaked to a state newspaper that subsequently made damaging allegations about the KP Monitor.³²⁷ This highlights the dangerous environment that NGOs and KPCS officials have to operate in. Repressive legislation may also make the work of NGOs difficult.

The *Official Secrets Act*³²⁸ in Zimbabwe prohibits the possession of documents rendered prejudicial to the interests of Zimbabwe. However, the Act does not define the parameter of what is prejudicial to the interests of Zimbabwe; therefore, the Act can easily be abused and applied arbitrary. The *Access to Information and Privacy Act* [Chapter 10:27]³²⁹ (hereafter AIPPA) is another piece of legislation that makes the work of civil society difficult and risky. Section 17 of *AIPPA*³³⁰ criminalises the disclosure of information that is considered prejudicial to national security, whilst section 19³³¹ criminalises the publishing or possession of information relating to the interests of a public body or the state. *AIPPA* is a draconian piece of legislation that threatens the work of civil groups in Zimbabwe. *AIPPA* does not protect the disclosure of information that is in the public interest. Civil Society groups provide necessary checks and balances for the KPCS. Civil society groups observe the implementation of the KPCS by participants and report any identified irregularities.

As highlighted above, NGOs played a major role in exposing the situation in Angola, Sierra Leone and the DRC. Their reports greatly influenced the formation of the scheme. If civil society groups operate in uncertain legal environments where their work is hindered by draconian legislation, the transparency of the KPCS becomes questionable. The fight against conflict diamonds can only be won if there is

326 Chikane 2010 <http://www.diamonds.net/Docs/HumanRights/kimberly-001.pdf>.

327 Chikane 2010 <http://www.diamonds.net/Docs/HumanRights/kimberly-001.pdf>.

328 S 3 of the *Official Secrets Act*.

329 *Access to Information and Protection of Privacy Act* [Chapter 10:27].

330 S 17 of *AIPPA*.

331 S 19 of *AIPPA*.

transparency. Transparency is enhanced when NGOs can conduct their work without the fear of reprisal.

I accept that the KPCS does not have the power to force individual participants to change legislation that is detrimental to the functioning of NGOs. However, where such legislation is present in participant countries, public interest defence clauses must be incorporated in the legislation. The principles of transparency and cooperation are instructive for the protection of civil society organisations. Sharing statistics and other information is vital in the fight against conflict diamonds. An independent source of statistics and information, apart from government, is necessary. NGOs provide independent information that can be used to test the credibility of government information. Protecting NGOs against repressive laws will help the fight against conflict diamonds. Although this is difficult to achieve, it must be pursued if the certification scheme is to win the war against conflict diamonds.

7.6 Mine to mine certification v country by country certification

The certification process needs to be reformed. The debate amongst participants and observers is whether certification should be done on a country-by-country basis or on a mine-by-mine basis. The normal practice has been that it is done on a country-by-country basis. The certification of Marange diamonds was done on a mine-to-mine basis and thus was a deviation from the norm. According to Shiri:³³²

KPCS certification is rarely done on a mine-by-mine basis; it is usually conducted on a country-by-country basis. Zimbabwe is unnecessarily being subjected to stringent compliance measures in a bid to frustrate trade in its diamonds.

Mine to mine certification purveys both advantages and disadvantages *vis-a-vis* country-by-country certification. The advantage of certification on a mine to mine basis is that the non-compliance of one mine does not prejudice the mining activities of other compliant mines within the same country. The problem is that where a mine is not compliant it can still illegally export some of its diamonds through another mine. Country-by-country certification is disadvantageous because, to put it simply, one bad apple is here prejudicial to the rest of the apples in the basket.

332 Shiri 2012-2013 *Diamond Gazette* 11.

Mine to mine certification is ideal if mechanisms are put in place to ensure that the non-compliant mine cannot export their diamonds through other mines. Mine-to-mine certification is ideal within the current framework that targets diamonds used by rebel groups, as only mines from rebel-controlled areas are targeted. However, if the framework is to accommodate a wider definition as proposed above, a country-to-country certification scheme is more appropriate. Ultimately the system that will be adopted is dependent upon the scope of the definition of conflict diamonds.

7.7 *Spending profits from diamonds*

Schefer³³³ states that conflict diamonds undermine human rights in two ways: (1) the trading process; and (2) the spending of the resultant trade profits. Rough diamonds become conflict diamonds because of the way they are mined. This is the case where forced labour and child labour are used. Rough diamonds also become conflict diamonds when the resultant trade profits support individuals, groups, and networks that perpetrate human rights violations.³³⁴ The KPCS is concerned with the diamond trade profits being spent on gross human rights violations. Most of the measures in the KPCS are concerned with regulating the trading process but no direct measures address the use of trade profits. The certificates of origin and other internal controls are all directed at the trading process and do not address the spending process. A participant may be compliant throughout the trading process, mining diamonds in the prescribed way, and trading them in the correct way but the resultant profits are channelled to individuals and networks perpetuating human rights abuses. The link between trade profits and human rights abuses is easier to establish where rebels control the mines. However, where a legitimate government uses trade profits to sponsor human rights violations it is difficult to establish such a link.

South Africa has mineral policies that can be used as a starting point in shaping the diamond revenue policies of the KPCS. The *Minerals and Petroleum Resources Development Act 28 of 2002* (MPRDA) captures policies that the South African

333 Schefer "Stopping trade in conflict diamonds" 391-450.

334 Schefer "Stopping trade in conflict diamonds" 391-450.

government uses to ensure that natural resources benefit the people. Section 100 of the Act provides that the Minister of Mineral Resources must:

- (a) ...develop a housing and living conditions standard for the mining industry; and... (2)(a)... allow such South Africans to benefit from the exploitation of mining and mineral resources.

The Act ensures that revenue from mineral resources is used to benefit the people. Ndlovu-Mitchell³³⁵ states that legislation such as the MPRDA plays a meaningful role in redressing the social inequalities of the past and uplifting the lives of the people. Ndlovu-Mitchell³³⁶ also states that it is important to guard against the abuse of these legislative imperatives. Kabemba³³⁷ notes that in order for there to be successful implementation, there has to be sufficient political will. Kabemba³³⁸ further argues that the KPCS focuses on the diamond trade and not on governance issues. It is suggested that the KPCS encourage participants to advance good governance in their respective countries. In countries where there are good governance models, the fight against conflict diamonds is that much easier. The KPCS must regulate the spending of diamond trade profits and this necessitates the adoption of good governance models by all participants.

7.8 Conclusion

The KPCS is an evolving regulatory scheme that seeks to rid the legitimate trade in diamonds of all conflict diamonds. The scheme gives hope to those who have suffered gross human rights violations due to the trade in diamonds. The commitment to stop the abuses is encouraging but the war can only be won in the presence of a strong legal framework. The KPCS, as a mechanism, has its strong points evidenced by the extent of participation, currently more than 54 countries including the European Union block. These strong points include the principles of transparency and cooperation espoused by the scheme. The minimum requirements that should be adhered to are a strong starting point for the positive transformation of the scheme. The scheme does have real challenges.

335 Ndlovu-Mitchell *Commonwealth Law Bulletin* 700.

336 Ndlovu-Mitchell *Commonwealth Law Bulletin* 700.

337 Kabemba 2010 *Perspectives* 7.

338 Kabemba 2010 *Perspectives* 7.

It is submitted that if the scheme is to remain effective, it needs to make the transition to a wider scheme that captures any and all trade in diamonds. The scheme needs to extend its scope to incorporate good governance. This can be done by first establishing a legally certain scheme. The schemes consistency with WTO rules, widening the definition of conflict diamonds and the role of NGOs, are the other areas that need to be addressed to make the scheme more effective. A review of all internal controls will speak to the governance challenge. In conclusion, I submit that the current legal framework of the KPCS is not competent to deal with blood diamonds. The scheme needs to evolve. With sufficient commitment from all the stakeholders, the KPCS can be reformed and the fight against conflict diamonds can be won.

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Annexures

KIMBERLEY PROCESS CERTIFICATION SCHEME

PREAMBLE

PARTICIPANTS,

RECOGNISING that the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons;

FURTHER RECOGNISING the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts;

NOTING the negative impact of such conflicts on regional stability and the obligations placed upon states by the United Nations Charter regarding the maintenance of international peace and security;

BEARING IN MIND that urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states;

RECALLING all of the relevant resolutions of the United Nations Security Council under Chapter VII of the United Nations Charter, including the relevant provisions of Resolutions 1173 (1998), 1295 (2000), 1306 (2000), and 1343 (2001), and determined to contribute to and support the implementation of the measures provided for in these resolutions;

HIGHLIGHTING the United Nations General Assembly Resolution 55/56 (2000) on the role of the trade in conflict diamonds in fuelling armed conflict, which called on the international community to give urgent and careful consideration to devising effective and pragmatic measures to address this problem;

FURTHER HIGHLIGHTING the recommendation in United Nations General Assembly Resolution 55/56 that the international community develop detailed proposals for a simple and workable international certification scheme for rough diamonds based primarily on national certification schemes and on internationally agreed minimum standards;

RECALLING that the Kimberley Process, which was established to find a solution to the international problem of conflict diamonds, was inclusive of concerned stake holders, namely producing, exporting and importing states, the diamond industry and civil society;

CONVINCED that the opportunity for conflict diamonds to play a role in fuelling armed conflict can be seriously reduced by introducing a certification scheme for rough diamonds designed to exclude conflict diamonds from the legitimate trade;

RECALLING that the Kimberley Process considered that an international certification scheme for rough diamonds, based on national laws and practices and meeting internationally agreed minimum standards, will be the most effective system by which the problem of conflict diamonds could be addressed;

ACKNOWLEDGING the important initiatives already taken to address this problem, in particular by the governments of Angola, the Democratic Republic of Congo, Guinea and Sierra Leone and by other key producing, exporting and importing countries, as well as by the diamond industry, in particular by the World Diamond Council, and by civil society;

WELCOMING voluntary self-regulation initiatives announced by the diamond industry and recognising that a system of such voluntary self-regulation contributes to ensuring an effective internal control system of rough diamonds based upon the international certification scheme for rough diamonds;

RECOGNISING that an international certification scheme for rough diamonds will only be credible if all Participants have established internal systems of control designed to eliminate the presence of conflict diamonds in the chain of producing, exporting and importing rough diamonds within their own territories, while taking into account that differences in production methods and trading practices as well as differences in institutional controls thereof may require different approaches to meet minimum standards;

FURTHER RECOGNISING that the international certification scheme for rough diamonds must be consistent with international law governing international trade;

ACKNOWLEDGING that state sovereignty should be fully respected and the principles of equality, mutual benefits and consensus should be adhered to;

RECOMMEND THE FOLLOWING PROVISIONS:

SECTION I

Definitions

For the purposes of the international certification scheme for rough diamonds (hereinafter referred to as "the Certification Scheme") the following definitions apply:

CONFLICT DIAMONDS means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future;

COUNTRY OF ORIGIN means the country where a shipment of rough diamonds has been mined or extracted;

COUNTRY OF PROVENANCE means the last Participant from where a shipment of rough diamonds was exported, as recorded on import documentation;

DIAMOND means a natural mineral consisting essentially of pure crystallised carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42;

EXPORT means the physical leaving/taking out of any part of the geographical territory of a Participant;

EXPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant from whose territory a shipment of rough diamonds is leaving, and which are authorised to validate the Kimberley Process Certificate;

FREE TRADE ZONE means a part of the territory of a Participant where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory;

IMPORT means the physical entering/bringing into any part of the geographical territory of a Participant;

IMPORTING AUTHORITY means the authority(ies) or body(ies) designated by a Participant into whose territory a shipment of rough diamonds is imported to conduct all import formalities and particularly the verification of accompanying Kimberley Process Certificates;

KIMBERLEY PROCESS CERTIFICATE means a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the Certification Scheme;

OBSERVER means a representative of civil society, the diamond industry, international organisations and non-participating governments invited to take part in Plenary meetings; *(Further consultations to be undertaken by the Chair.)*

PARCEL means one or more diamonds that are packed together and that are not individualised;

PARCEL OF MIXED ORIGIN means a parcel that contains rough diamonds from two or more countries of origin, mixed together;

PARTICIPANT means a state or a regional economic integration organisation for which the Certification Scheme is effective; *(Further consultations to be undertaken by the Chair.)*

REGIONAL ECONOMIC INTEGRATION ORGANISATION means an organisation comprised of sovereign states that have transferred competence to that organisation in respect of matters governed by the Certification Scheme;

ROUGH DIAMONDS means diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31;

SHIPMENT means one or more parcels that are physically imported or exported;

TRANSIT means the physical passage across the territory of a Participant or a non-Participant, with or without transshipment, warehousing or change in mode of transport, when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the Participant or non-Participant across whose territory a shipment passes;

SECTION II

The Kimberley Process Certificate

Each Participant should ensure that:

- (a) a Kimberley Process Certificate (hereafter referred to as the Certificate) accompanies each shipment of rough diamonds on export;
- (b) its processes for issuing Certificates meet the minimum standards of the Kimberley Process as set out in Section IV;
- (c) Certificates meet the minimum requirements set out in Annex I. As long as these requirements are met, Participants may at their discretion establish additional characteristics for their own Certificates, for example their form, additional data or security elements;
- (d) it notifies all other Participants through the Chair of the features of its Certificate as specified in Annex I, for purposes of validation.

SECTION III

Undertakings in respect of the international trade in rough diamonds

Each Participant should:

(a) with regard to shipments of rough diamonds exported to a Participant, require that each such shipment is accompanied by a duly validated Certificate;

(b) with regard to shipments of rough diamonds imported from a Participant:

- require a duly validated Certificate;
- ensure that confirmation of receipt is sent expeditiously to the relevant Exporting Authority. The confirmation should as a minimum refer to the Certificate number, the number of parcels, the carat weight and the details of the importer and exporter;
- require that the original of the Certificate be readily accessible for a period of no less than three years;

(c) ensure that no shipment of rough diamonds is imported from or exported to a non-Participant;

(d) recognise that Participants through whose territory shipments transit are not required to meet the requirement of paragraphs (a) and (b) above, and of Section II (a) provided that the designated authorities of the Participant through whose territory a shipment passes, ensure that the shipment leaves its territory in an identical state as it entered its territory (i.e. unopened and not tampered with).

SECTION IV

Internal Controls

Undertakings by Participants

Each Participant should:

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

Principles of Industry Self-Regulation

Participants understand that a voluntary system of industry self-regulation, as referred to in the Preamble of this Document, will provide for a system of warranties underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry, which will help to facilitate the full traceability of rough diamond transactions by government authorities.

Section V Co-operation and Transparency

Participants should:

- (a) provide to each other through the Chair information identifying their designated authorities or bodies responsible for implementing the provisions of this Certification Scheme. Each Participant should provide to other Participants through the Chair information, preferably in electronic format, on its relevant laws, regulations, rules, procedures and practices, and update that information as required. This should include a synopsis in English of the essential content of this information;
- (b) compile and make available to all other Participants through the Chair statistical data in line with the principles set out in Annex III;
- (c) exchange on a regular basis experiences and other relevant information, including on self-assessment, in order to arrive at the best practice in given circumstances;
- (d) consider favourably requests from other Participants for assistance to improve the functioning of the Certification Scheme within their territories;
- (e) inform another Participant through the Chair if it considers that the laws, regulations, rules, procedures or practices of that other Participant do not ensure the absence of conflict diamonds in the exports of that other Participant;
- (f) cooperate with other Participants to attempt to resolve problems which may arise from unintentional circumstances and which could lead to non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates, and inform all other Participants of the essence of the problems encountered and of solutions found;
- (g) encourage, through their relevant authorities, closer co-operation between law enforcement agencies and between customs agencies of Participants.

Section VI

Administrative Matters

MEETINGS

1. Participants and Observers are to meet in Plenary annually, and on other occasions as Participants may deem necessary, in order to discuss the effectiveness of the Certification Scheme.
2. Participants should adopt Rules of Procedure for such meetings at the first Plenary meeting.
3. Meetings are to be held in the country where the Chair is located, unless a Participant or an international organisation offers to host a meeting and this offer has been accepted. The host country should facilitate entry formalities for those attending such meetings.
4. At the end of each Plenary meeting, a Chair would be elected to preside over all Plenary meetings, *ad hoc* working groups and other subsidiary bodies, which might be formed until the conclusion of the next annual Plenary meeting.
5. Participants are to reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations.

ADMINISTRATIVE SUPPORT

6. For the effective administration of the Certification Scheme, administrative support will be necessary. The modalities and functions of that support should be discussed at the first Plenary meeting, following endorsement by the UN General Assembly.
7. Administrative support could include the following functions:
 - (a) to serve as a channel of communication, information sharing and consultation between the Participants with regard to matters provided for in this Document;
 - (b) to maintain and make available for the use of all Participants a collection of those laws, regulations, rules, procedures, practices and statistics notified pursuant to Section V;
 - (c) to prepare documents and provide administrative support for Plenary and working group meetings;
 - (d) to undertake such additional responsibilities as the Plenary meetings, or any working group delegated by Plenary meetings, may instruct.

PARTICIPATION

8. Participation in the Certification Scheme is open on a global, non-discriminatory basis to all Applicants willing and able to fulfill the requirements of that Scheme.
9. Any applicant wishing to participate in the Certification Scheme should signify its interest by notifying the Chair through diplomatic channels. This notification should include the information set forth in paragraph (a) of Section V and be circulated to all Participants within one month.
10. Participants intend to invite representatives of civil society, the diamond industry, non-participating governments and international organizations to participate in Plenary meetings as Observers.

PARTICIPANT MEASURES

11. Participants are to prepare, and make available to other Participants, in advance of annual Plenary meetings of the Kimberley Process, information as stipulated in paragraph (a) of Section V outlining how the requirements of the Certification Scheme are being implemented within their respective jurisdictions.
12. The agenda of annual Plenary meetings is to include an item where information as stipulated in paragraph (a) of Section V is reviewed and Participants can provide further details of their respective systems at the request of the Plenary.
13. Where further clarification is needed, Participants at Plenary meetings, upon recommendation by the Chair, can identify and decide on additional verification measures to be undertaken. Such measures are to be implemented in accordance with applicable national and international law. These could include, but need not be limited to measures such as;
 - a. requesting additional information and clarification from Participants;
 - b. review missions by other Participants or their representatives where there are credible indications of significant non-compliance with the Certification Scheme.
14. Review missions are to be conducted in an analytical, expert and impartial manner with the consent of the Participant concerned. The size, composition, terms of reference and time-frame of these missions should be based on the circumstances and be established by the Chair with the consent of the Participant concerned and in consultation with all Participants.
15. A report on the results of compliance verification measures is to be forwarded to the Chair and to the Participant concerned within three weeks of completion of the mission. Any comments from that Participant as well as the report, are to be posted on the restricted access section of an official Certification Scheme website no later than three weeks after the submission of the report to the Participant concerned. Participants and Observers should make every effort to observe strict

confidentiality regarding the issue and the discussions relating to any compliance matter.

COMPLIANCE AND DISPUTE PREVENTION

16. In the event that an issue regarding compliance by a Participant or any other issue regarding the implementation of the Certification Scheme arises, any concerned Participant may so inform the Chair, who is to inform all Participants without delay about the said concern and enter into dialogue on how to address it. Participants and Observers should make every effort to observe strict confidentiality regarding the issue and the discussions relating to any compliance matter.

MODIFICATIONS

17. This document may be modified by consensus of the Participants.
18. Modifications may be proposed by any Participant. Such proposals should be sent in writing to the Chair, at least ninety days before the next Plenary meeting, unless otherwise agreed.
19. The Chair is to circulate any proposed modification expeditiously to all Participants and Observers and place it on the agenda of the next annual Plenary meeting.

REVIEW MECHANISM

20. Participants intend that the Certification Scheme should be subject to periodic review, to allow Participants to conduct a thorough analysis of all elements contained in the scheme. The review should also include consideration of the continuing requirement for such a scheme, in view of the perception of the Participants, and of international organisations, in particular the United Nations, of the continued threat posed at that time by conflict diamonds. The first such review should take place no later than three years after the effective starting date of the Certification Scheme. The review meeting should normally coincide with the annual Plenary meeting, unless otherwise agreed.

THE START OF THE IMPLEMENTATION OF THE SCHEME

21. The Certification Scheme should be established at the Ministerial Meeting on the Kimberley Process Certification Scheme for Rough Diamonds in Interlaken on 5 November 2002.

22. ANNEX I

Certificates

A. Minimum requirements for Certificates

A Certificate is to meet the following minimum requirements:

- Each Certificate should bear the title “Kimberley Process Certificate” and the following statement: “The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds”
- Country of origin for shipment of parcels of unmixed (i.e. from the same) origin
- Certificates may be issued in any language, provided that an English translation is incorporated
- Unique numbering with the Alpha 2 country code, according to ISO 3166-1
- Tamper and forgery resistant
- Date of issuance
- Date of expiry
- Issuing authority
- Identification of exporter and importer
- Carat weight/mass
- Value in US\$
- Number of parcels in shipment
- Relevant Harmonised Commodity Description and Coding System
- Validation of Certificate by the Exporting Authority

B. Optional Certificate Elements

A Certificate may include the following optional features:

- Characteristics of a Certificate (for example as to form, additional data or security elements)
- Quality characteristics of the rough diamonds in the shipment
- A recommended import confirmation part should have the following elements:
 - Country of destination
 - Identification of importer
 - Carat/weight and value in US\$
 - Relevant Harmonised Commodity Description and Coding System
 - Date of receipt by Importing Authority
 - Authentication by Importing Authority

C. Optional Procedures

Rough diamonds may be shipped in transparent security bags.
The unique Certificate number may be replicated on the container.

Annex II

Recommendations as provided for in Section IV, paragraph (f)

General Recommendations

1. Participants may appoint an official coordinator(s) to deal with the implementation of the Certification Scheme.
2. Participants may consider the utility of complementing and/or enhancing the collection and publication of the statistics identified in Annex III based on the contents of Kimberley Process Certificates.
3. Participants are encouraged to maintain the information and data required by Section V on a computerised database.
4. Participants are encouraged to transmit and receive electronic messages in order to support the Certification Scheme.
5. Participants that produce diamonds and that have rebel groups suspected of mining diamonds within their territories are encouraged to identify the areas of rebel diamond mining activity and provide this information to all other Participants. This information should be updated on a regular basis.
6. Participants are encouraged to make known the names of individuals or companies convicted of activities relevant to the purposes of the Certification Scheme to all other Participants through the Chair.
7. Participants are encouraged to ensure that all cash purchases of rough diamonds are routed through official banking channels, supported by verifiable documentation.
8. Participants that produce diamonds should analyse their diamond production under the following headings:
 - Characteristics of diamonds produced
 - Actual production

Recommendations for Control over Diamond Mines

9. Participants are encouraged to ensure that all diamond mines are licensed and to allow only those mines so licensed to mine diamonds.
10. Participants are encouraged to ensure that prospecting and mining companies maintain effective security standards to ensure that conflict diamonds do not contaminate legitimate production.

Recommendations for Participants with Small-scale Diamond Mining

11. All artisanal and informal diamond miners should be licensed and only those persons so licensed should be allowed to mine diamonds.
12. Licensing records should contain the following minimum information: name, address, nationality and/or residence status and the area of authorised diamond mining activity.

Recommendations for Rough Diamond Buyers, Sellers and Exporters

13. All diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed by each Participant's relevant authorities.
14. Licensing records should contain the following minimum information: name, address and nationality and/or residence status.
15. All rough diamond buyers, sellers and exporters should be required by law to keep for a period of five years daily buying, selling or exporting records listing the names of buying or selling clients, their license number and the amount and value of diamonds sold, exported or purchased.
16. The information in paragraph 14 above should be entered into a computerised database, to facilitate the presentation of detailed information relating to the activities of individual rough diamond buyers and sellers.

Recommendations for Export Processes

17. An exporter should submit a rough diamond shipment to the relevant Exporting Authority.
18. The Exporting Authority is encouraged, prior to validating a Certificate, to require an exporter to provide a declaration that the rough diamonds being exported are not conflict diamonds.
19. Rough diamonds should be sealed in a tamper proof container together with the Certificate or a duly authenticated copy. The Exporting Authority should then transmit a detailed e-mail message to the relevant Importing Authority containing information on the carat weight, value, country of origin or provenance, importer and the serial number of the Certificate.
20. The Exporting Authority should record all details of rough diamond shipments on a computerised database.

Recommendations for Import Processes

21. The Importing Authority should receive an e-mail message either before or upon arrival of a rough diamond shipment. The message should contain details such as

the carat weight, value, country of origin or provenance, exporter and the serial number of the Certificate.

22. The Importing Authority should inspect the shipment of rough diamonds to verify that the seals and the container have not been tampered with and that the export was performed in accordance with the Certification Scheme.
23. The Importing Authority should open and inspect the contents of the shipment to verify the details declared on the Certificate.
24. Where applicable and when requested, the Importing Authority should send the return slip or import confirmation coupon to the relevant Exporting Authority.
25. The Importing Authority should record all details of rough diamond shipments on a computerised database.

Recommendations on Shipments to and from Free Trade Zones

26. Shipments of rough diamonds to and from free trade zones should be processed by the designated authorities.

Annex III

Statistics

Recognising that reliable and comparable data on the production and the international trade in rough diamonds are an essential tool for the effective implementation of the Certification Scheme, and particularly for identifying any irregularities or anomalies which could indicate that conflict diamonds are entering the legitimate trade, Participants strongly support the following principles, taking into account the need to protect commercially sensitive information:

- (a) to keep and publish within two months of the reference period and in a standardised format, quarterly aggregate statistics on rough diamond exports and imports, as well as the numbers of certificates validated for export, and of imported shipments accompanied by Certificates;
- (b) to keep and publish statistics on exports and imports, by origin and provenance wherever possible; by carat weight and value; and under the relevant Harmonised Commodity Description and Coding System (HS) classifications 7102.10; 7102.21; 7102.31;
- (c) to keep and publish on a semi-annual basis and within two months of the reference period statistics on rough diamond production by carat weight and by value. In the event that a Participant is unable to publish these statistics it should notify the Chair immediately;
- (d) to collect and publish these statistics by relying in the first instance on existing national processes and methodologies;
- (e) to make these statistics available to an intergovernmental body or to another appropriate mechanism identified by the Participants for (1) compilation and publication on a quarterly basis in respect of exports and imports, and (2) on a semi-annual basis in respect of production. These statistics are to be made available for analysis by interested parties and by the Participants, individually or collectively, according to such terms of reference as may be established by the Participants;
- (f) to consider statistical information pertaining to the international trade in and production of rough diamonds at annual Plenary meetings, with a view to addressing related issues, and to supporting effective implementation of the Certification Scheme.