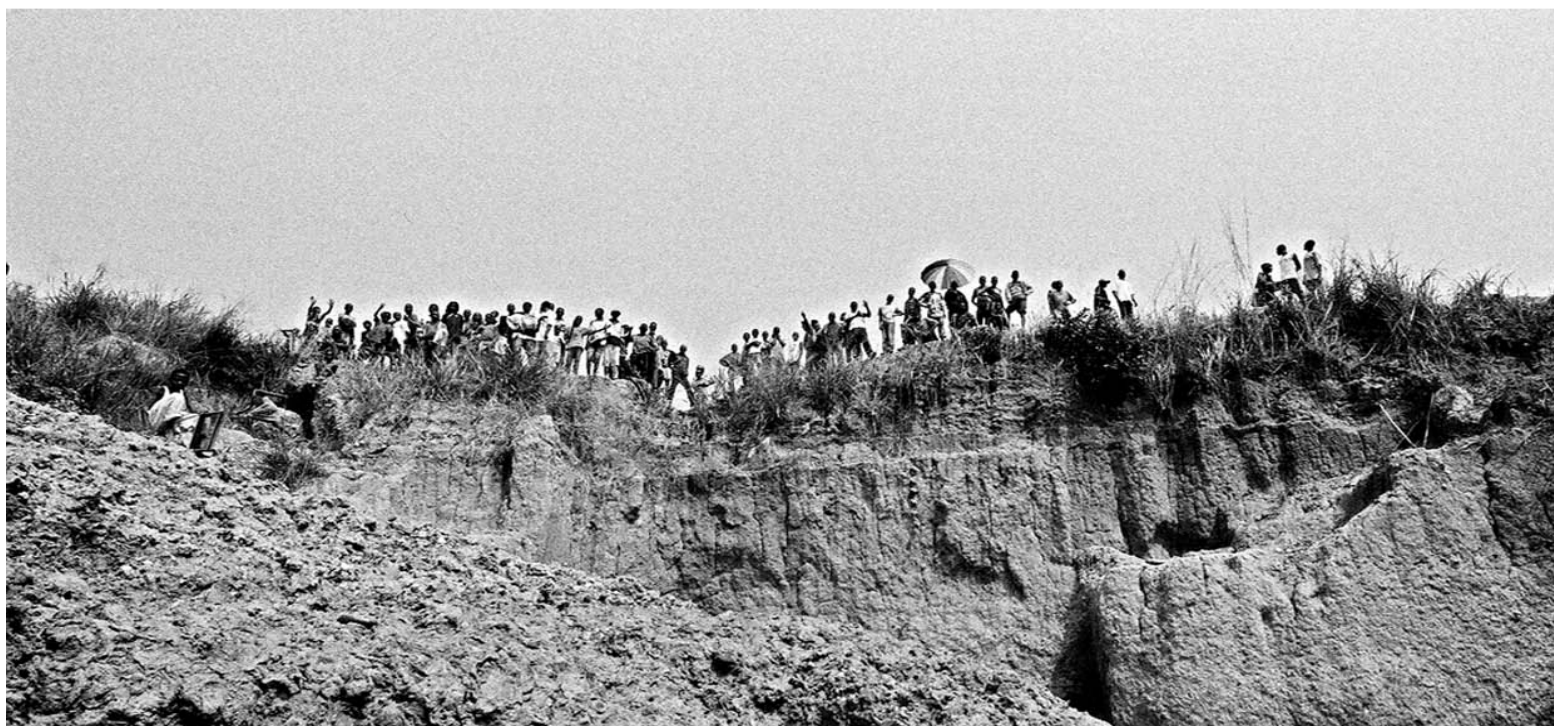




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An Independent Commissioned Review Evaluating the Effectiveness of the Kimberley Process



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CONTENTS

1. ABOUT THIS REPORT	3
2. EXECUTIVE SUMMARY	4
3. KEY RECOMMENDATIONS	4
4. THE IMPLEMENTATION PHASE: WHAT HAS BEEN ACHIEVED IN THREE YEARS?	5
Collaboration and Consensus	
Proving Adaptability	
Building on Success	
5. AREAS FOR ATTENTION: WHERE IS KIMBERLEY FALLING SHORT?	8
Achieving Effective Internal Control Measures	9
Using the Peer Review Monitoring System to Achieve Conformance	
Ensuring adequate follow-up on visit findings and recommendations	
What adjustments are necessary?	
Formalizing Information Flows	
Elevating the Role of Industry Self-regulation	
Activating a Robust Data Collection and Assessment Program	15
The Promise of Statistical Evaluation	
Experience to Date	
Has form outlived function?	
Addressing Compliance	17
Entry/Initial Credentialing	
Statistical Non-Compliance	
Ad-Hoc Expulsion and Readmission	
Setting Priorities for the Next Phase	19
Governance and Administration	
Transparency and Communication	
6. SUMMARY OF RECOMMENDATIONS	21
7. ABOUT THE AUTHOR	24
8. ENDNOTES	25

ABOUT THIS REPORT

This report was commissioned by Global Witness on the occasion of the three-year review of the Kimberley Process Certification Scheme. Compiled by an independent consultant, Pamela Wexler, Esq., the report assesses implementation of the KPCS to date, and is intended to offer Participants both a framework for organizing future work and specific ideas for enhancing effectiveness. The report draws from both publicly-available and KPCS-confidential materials, as well as interviews with representatives of NGOs, governments and industry.

THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The Kimberley Process Certification Scheme (KPCS), negotiated by governments, civil society organizations and the diamond trade is an international certification scheme aimed at preventing the world diamond trade from funding conflicts and fuelling human rights abuses.

Launched in January 2003, the scheme requires governments to implement import/export control regimes and to adopt control systems overseeing their private sectors so as to create a documentary record of rough diamonds as they travel from mine to polished form. KPCS requires diamonds to be shipped in sealed containers and for exporting agencies to certify that parcels are free from conflict diamonds. Members agree to prohibit entry of uncut stones arriving unsealed or without proper certification.

Currently counting close to 70 member countries, the KPCS requires each Participant to pass enabling legislation to effect these procedures and to prevent the entry of conflict diamonds into legal shipments.

LIST OF ACRONYMS

ADPR	Administrative Decision on Peer Review
DDI	Diamond Development Initiative
KP	Kimberley Process
KPCS	Kimberley Process Certification Scheme
PC	Participation Committee
PRMS	Peer Review Monitoring System
WGM	Working Group on Monitoring
WGS	Working Group on Statistics
WTO	World Trade Organization

EXECUTIVE SUMMARY

By many measures, the Kimberley Process Certification Scheme (KPCS) -- initiated in an effort to end the phenomenon of conflict diamonds -- evidences international cooperation at its best. In just three short years of operation, the scheme can be credited with sizeable increases in legitimate diamond exports. In some of the most conflict-ridden areas, accords supported by U.N. peacekeeping missions are holding in part because Kimberley controls have reduced enormously the market for illicit diamonds. Beginning in 2000 and onward, negotiations alone helped shed light on the issue of conflict diamonds, starving rebel armies of funds for weapons and ammunition. Close to 70 nations are participating, and they appear quite serious in their commitments -- all have passed implementing legislation and many have seized diamond shipments operating outside the KPCS. Quite simply, Kimberley is driving the illicit part of the diamond industry above ground.

Although there is much to praise about the inaugural phase, the scheme has not yet evolved into a fully credible check on the international movement of diamonds. Foremost are gaps in oversight, specifically of internal control systems in individual countries and of the peer review monitoring system (PRMS) overall. Another main weakness is the inadequate check on private industry by individual governments or on an overall system basis. Data collection and analysis, although improving, is uneven at best. Recent administrative decisions have sought to strengthen the relationship between compliance and participation, but the rules are not well-fleshed out and have yet to be tested. If Kimberley is to be fully credible, Participants will need to squarely address the issue of conformance without jettisoning widespread participation on which the scheme depends.

Participants will need to consider governance and resource issues if the

Kimberley Process is to evolve into a robust, dependable regime. So far, KPCS has flourished with an ad-hoc, voluntary system of administration, but deficiencies are emerging as the regime transitions from implementation to compliance. Participants will need to consider how to improve on the informal structure yet preserve the flexibility and political practicality that has been a hallmark of this novel, voluntary model for multilateral agreement and action. The shift to compliance also will reveal inevitable differences in capacity and commitment among countries. Participants will need to draw on the strong political will already in place to set priorities, allocate needed resources and verify compliance at all points along the chain.

KEY RECOMMENDATIONS

- The PRMS must be strengthened so that it can be an effective measure of performance.
- The PRMS must be enhanced so that it can effectively assist Participants to conform.
- Governmental responsibility to monitor and verify industry self-regulation must be made explicit, and industry efforts must be better integrated into the overall scheme.
- The underlying statistical database must be made accurate and complete.
- Statistical assessments must be made useful and integrated into the overall working of the scheme.
- Criteria for entry into Kimberley must be made more rigorous and applied consistently.
- The regime must develop a consistent approach for addressing and eventually expelling chronic underperformers who damage the regime's integrity.
- The KPSC must become more accessible and understandable.
- The KPCS must bolster its institutional presence in order to effectively support its operations and communicate with external organizations.

THE IMPLEMENTATION PHASE: WHAT HAS BEEN ACHIEVED IN THREE YEARS?

The positive imprint of the Kimberly Scheme on the movement of diamonds is unmistakable. Three years into operation, the scheme is credited with exponential growth in legitimate diamond exports. In 2005, for example, Sierra Leone exported \$142 million of diamonds, up from \$26 million in 2001.¹ In 2003, the DRC had its best diamond export year in history. The vast majority of international trade and production is now moved through official Kimberley channels.

Collaboration and consensus

Kimberley enjoys an unprecedented level of cooperation among countries, the private sector and NGOs. Close to 70 nations -- including the vast majority of states interested in the production and trade of rough diamonds -- have become Participants and several more are seeking entry. Every member has passed national laws to establish import and export control regimes aimed at excluding conflict diamonds, and virtually all are voluntarily welcoming review visits to assess their progress. Participation at the day-to-day level is also well-established: most countries are represented at annual plenaries and many are engaged in the decisionmaking process which requires consensus. NGOs and experts from throughout the diamond industry have played a vital role and their input is accepted (if not expected) as if they were states.

The high degree of collaboration among nations, industry and NGOs is especially remarkable given that the scheme was not mandated by an international body. Although Kimberley was patterned after the U.N. sanctions on Angola and buoyed by various General Assembly and Security Council resolutions², Kimberley exists as a stand-alone arrangement. It took just 30 months to negotiate -- blazing speed by U.N.

standards -- and operates wholly ad hoc. There is no permanent Secretariat, all labor is voluntary, and technical and financial assistance has been distributed intermittently on a bilateral basis. Business is overseen by an annually-elected Chair, and conducted through various working groups and committees, the composition of which is settled through informal negotiation. Maintenance of the KPCS website rotates with the Chair, currently Botswana, and the statistics website is managed by the Canadian Department of Natural Resources which so far has taken responsibility for collecting data and generating reports. The imperative, to form a rapid international response, in practice has evolved into a successful model for achieving performance using only limited elements of compulsion. The threat of expulsion for non-compliance, which carries a ban on trading in diamonds with other members, has been sufficient incentive to sustain a high degree of cooperation. Through sharing of information and experience, with heavy reliance on consensus and diplomatic pressure, Kimberley offers a novel approach for addressing urgent global issues.

Proving adaptability

A particularly notable element of the arrangement has been its ability to make incremental enhancements in response to accumulating political momentum and consensus. A case in point is the monitoring provision. While at adoption there was not sufficient support for a system to review national implementation, less than 10 months into operations Participants reached a deal on a peer review monitoring system. Key countries in each region immediately requested visits, and their experiences helped legitimize the approach. Review visits still are not mandatory, but in practice have become an unavoidable aspect of participation: as of mid-February

2006, all but a handful of countries in the KPCS had requested a review mission.

With just three years of operational experience, quantifying Kimberley's specific impact on the diamond trade is not yet possible. The same factors that make diamonds so attractive to all manner of illegal activity -- they are easy to conceal and smuggle, they are traded and mixed many times over before they reach polished form, and they are easily used in lieu of currency -- makes it tricky to obtain verifiable data about true commodity flows. And the problem is heightened by the phenomenon of alluvial mining, easily-accessed deposits requiring little capital investment and conducted over vast land areas, mostly outside of government control. The diamond trade is notoriously secretive also, such that records have been incomplete and unreliable, even where they do exist. Although many in the diamond trade are improving their recordkeeping and transparency, there are still many key players who have not. Quantifying the value of Kimberley is made more difficult because the volume and value of illicit diamond trading has been fluid, with estimates as high as 25% or more of the global trade. Conflict diamonds specifically may have represented as much as 15% of total global trade in the mid-1990s, declining to as much as four percent at the beginning of this decade. The current volume is estimated at something under one percent.

Yet the seemingly small role of conflict diamonds is deceptive. Recent fighting in Cote D'Ivoire -- and findings from both the U.N. and Global Witness that revenue from diamond production is providing income to the *Forces Nouvelles* -- makes clear that the certification scheme, as currently operating, has not eliminated the problem of diamond-financed insurgencies. In fact, the failure of the KPCS to respond quickly or effectively to address the role of diamonds in the conflict in Cote D'Ivoire raises questions about whether the scheme could effectively respond to even greater threats. There is

also strong evidence that diamonds from Liberia, which remains under U.N. sanction, are being smuggled into bordering Kimberley Participants. Serious problems also persist on the Democratic Republic of Congo. There is no doubt that a range of loopholes exist, and in areas with unregulated artisanal alluvial mining, the unsafe, unhealthy and poorly-paid work continues to breed chaos and instability.³ Kimberley is an important tool for the international community in its effort to prevent diamonds from fueling instability as they have done in the past.

Of course, the Kimberley organizers never expected the scheme to alone stop conflict. The hope was that certification would make trade in illicitly-obtained stones more difficult, diminishing the amount of profits available for conflict. On that score, all indications are that Kimberley is contributing to the peace, albeit fragile, that is holding in previously conflict-riddled areas. In Angola, there is no question that as resource-rich areas come under government control, KPSC is helping governments reorganize a sector in disarray. Better control is encouraging greater foreign investment, which in turn is increasing international dialogue and accountability. In Sierra Leone, the government office tasked with implementing Kimberley functions with a level of transparency unmatched by other institutions in the country. The specific role Kimberley plays in maintaining peace may be hard to pinpoint -- the relative calm that presides is due to myriad factors -- but stemming the tide of illegally traded diamonds surely is a crucial piece of the puzzle.

Building on Success

One meaningful signal of Kimberley's impact may be found in the surge in reported exports. If nothing else, the figures reveal that much greater volumes of diamonds are moving through official channels. It is this aspect of progress that speaks to the promise of Kimberley not just

for conflict diamonds but for the commodity generally: tracking trade reduces opportunities for diamonds to be traded outside government control. Enhanced transparency also helps to expose the link

between diamonds and a range of illicit activities: arms trading, smuggling, money laundering,⁴ and the financing of terrorist activities.⁵

AREAS FOR ATTENTION: WHERE IS KIMBERLEY FALLING SHORT?

The most obvious criticism of the scheme lies in the uneven adoption and enforcement of specific measures -- the "system of internal controls" -- that each country must develop and implement in order to track the origin of diamonds and ensure that no conflict diamonds are being exported or entering the formal trade. Because the KP agreement does not specify any mandatory controls, the result has been adoption of weak measures in many key countries. Even where controls appear adequate on paper, there are substantial deficiencies with implementation and enforcement. A significant issue for Participants is how to **facilitate and ensure development, implementation and enforcement of an effective set of internal control measures in each Member country.**

The promise of statistical evaluation has been largely unfulfilled in the start-up phase, both because of spotty data submission and the lack of an overall plan for how data is to be organized and scrutinized. Systematic examination of data about exchanges between countries at the transactional level has the potential to isolate illegal trading because of the extent to which the commodity moves internationally, but only if data is adequately and openly collected, organized and shared. If the credibility of Kimberley is to be strengthened in the next phase of operations, Participants will need to **activate a robust and transparent data assessment program and reinforce the link between provision of statistical data and membership.**

The greatest challenge to Kimberley Participants may be achieving compliance, particularly with provisions that are not compulsory but which are essential to the regime's integrity. As might be expected of an arrangement that is overwhelmingly

voluntary, the Kimberley technical document is silent as to compliance policies or

procedures. A recent administrative decision on statistical non-compliance and accompanying guidelines offer the blueprint for an expulsion procedure, but details will need to be fleshed out before the rules can be fully applied. A strict in-or-out approach also might prove more difficult to apply for non-explicit provisions that over time in effect become compulsory, and does little to promote real success -- measured as conformance by all Participants with minimum standards. With an eye to carefully balancing the value of widespread participation with the need to ensure the regime's integrity, Participants may wish to **consider criteria, procedures and timelines for entry, and for expulsion and readmission due to non-compliance.**

How Participants substantively build on Kimberley's initial phase is necessarily linked with decisions to be taken about the scheme's structure and governance. Informal volunteerism has enabled remarkable progress in just a short time, but some of the scheme's shortcomings may reflect the limitations of indefinitely relying for administration on individuals who have been volunteered by their governments or organizations. There is a sense that too much is decided ad hoc, but there may be no stomach for a lengthy re-negotiation that could reopen settled points or divert resources from the real business of improving operations. Lessons are being learned, but there is no institutional presence to collect and integrate them into the scheme's policies or operational principles, or to share them with other multilateral actors. Participants should **consider priorities for the next phase and determine what changes in governance or administration will be necessary to accomplish them.**

ACHIEVING EFFECTIVE INTERNAL CONTROL MEASURES

The most obvious criticism of the scheme lies in the uneven adoption and enforcement of specific measures -- the "system of internal controls" -- that each country must develop and implement in order to track the origin of diamonds and ensure that no conflict diamonds are being exported or entering the formal trade. Internal controls go to the essence of the KPCS: the pledge about origin that appears on the certificate itself. Each warranty accompanying a shipment must represent a verifiable and auditable trail from extraction to export. Otherwise, the entire Kimberley scheme is reduced to nothing more than an elaborate exchange of meaningless assurances.

The reasons for weak or non-existent controls and uneven enforcement are not new: capacity, technological shortcomings, corruption. Governments lack political will. Borders are porous, and there is little regional cooperation to stop illicit trading. Controls in trading centres are spotty, providing ample opportunities for conflict diamonds to be inserted into the legal trade. It comes as no surprise that the most problematic area for internal controls is in countries where alluvial diamonds are produced by artisanal miners, outside the formal sector. Countries vulnerable to conflict diamonds in the first place are the least able to adopt or enforce strong control measures. The problem goes beyond countries in conflict however. Recent arrests in Brazil, following the exposure of weak internal controls by Partnership Africa Canada, suggest that weak vigilance may be more widespread than imagined.⁶

Naturally, concerns about wide variations in implementation and enforcement are prompting calls to make a minimum set of control measures compulsory. But such a solution ignores the political compromise that allowed each country to devise its own system of internal controls was key to

achieving an agreement in the first place. After all, the concept of individual control systems enshrines the idea that there would be different approaches to implementation of minimum requirements. There is also general unease about accumulating more paper obligations when measures already in place are not being properly implemented and/or enforced. Making a set of control measures mandatory may advance political will, but it is not likely to change the situation on the ground unless countries develop the necessary capacity to make improvements.

An important first step in developing such capacity is establishing a body of knowledge about specific internal control measures. Work in this regard is already underway pursuant to the efforts of the ad-hoc subgroup on alluvial production, and builds on the recommendations for small-scale diamond mining found in the technical document. But these general recommendations must be further developed, and similar ones must be generated for each type of relevant activity, including production, trading, and cutting/polishing. The recently-formed Diamond Development Initiative (DDI) may help with this, but it is still very new. For Kimberly to achieve greater effectiveness, implementation and verification of best practices for every sector along the chain must be seen as an expected element of minimum performance, regardless of whether specific measures are made mandatory.

Using the Peer Review Monitoring System to Achieve Conformance

Another alternative to making some set of controls mandatory is to rely on the existing peer review mechanism to facilitate conformance. Voluntary arrangements often employ cooperative rather than punitive tools in recognition of the fact that participants have different circumstances and capacities. Kimberley's monitoring system appears suitable then in that it is focused on helping Participants meet the

requirements of the scheme and relies heavily on information sharing, regular review and targeted technical assistance.

The peer review monitoring system already enjoys widespread acceptance and in practice is working much better than ever envisioned. In a significant number of cases, there is clear evidence that the recommendations of review visits and the constructive interaction between reviewers and Participants have helped to identify and rectify specific implementation issues. Originally conceived as voluntary, it has evolved in just two years into an unavoidable aspect of KP participation. By the end of 2006, the vast majority of Participants will have received or invited review visits.

Many of the monitoring scheme's disappointments seem mostly to stem from the pace at which the mechanism was expected to take on business rather than its operating premise. A host of policies and procedures had to be developed on the fly, e.g., the steps to be taken in the event of serious non-compliance, and the procedures for conducting follow-up visits. And the unexpected but patchy enthusiasm to participate has resulted in unsystematic scheduling with no real sense of priorities.

What Adjustments are necessary?

With enhancement, the cooperative, constructive approach of the current system could effect a minimum standard of performance without resorting to mandatory controls. For the monitoring system to better facilitate conformance, Participants must strengthen several key aspects: scheduling and prioritizing; ensuring adequate follow-up; and formalizing tracking and communication.

- ***Participants first will need to establish how the system of review visits will proceed after 2006.*** Given the widespread acceptance of the peer review monitoring scheme, it seems

sensible for Participants to consider how all or parts of the monitoring system could be made compulsory at this time.

Even if there is no agreement to make monitoring a compulsory obligation, Participants still will need to define more clearly the visit schedule after 2006. The Administrative Decision on Peer Review (ADPR) referred to the occasion of the three-year review only as a target date for arranging as many visits as possible, but did not spell out plans for subsequent rounds or policies for countries who did not invite a visit in the first period.

In addition, the ADPR contains only limited specific provisions for follow-up to review visit findings, and the WGM has interpreted this to mean that the provisions of the AD are to be used only in cases where there are serious concerns about a Participant's compliance. In this regard, Participants will need to more clearly set out the responsibility of the review team to recommend how much time should elapse before a subsequent review visit is conducted. Some have suggested a two-tier approach -- a 36-month interval where there is evidence of conformance with minimum standards, and an 18-month interval where findings suggest further improvements are called for. In either event, Participants should establish clear criteria on which a review team is to base its recommendation.

- ***Participants will need to ensure adequate follow-up on review visit findings and recommendations.*** If the monitoring system is to become a robust check on implementation and enforcement of internal controls, it is crucial that Participants standardize a process for ensuring adequate follow-up. The WGM has an affirmative duty to "advise Participants on ways to improve internal controls" and "facilitate assistance in response to requests," but follow-up is uneven in practice. The idea of the Review Team Leader taking

responsibility for making follow-up inquiries has been contemplated, but Participants will need to develop a more formal follow-up process.

Foremost, the monitoring system must be explicitly linked to opportunities for learning. Voluntary arrangements depend to a large extent on effective sharing of experiences to achieve conformance, but this aspect has not been stressed under through the monitoring system so far. In addition to formalizing the process for compiling and disseminating information on best practices, Participants need to develop strategies for using the monitoring system to advance implementation and enforcement of the measures. There has also been scant attention given to peer-to-peer exchange, another tactic that has proven extremely effective in raising standards of behavior in voluntary arrangements where specific measures are not compulsory.⁷ The process should be well integrated with the monitoring function generally, so that findings and recommendations of review visits are taken into account as countries develop plans to improve implementation.

Secondly, the peer review process should take a more formal role in identifying the needs for and ensuring the provision of technical assistance. Already review visits are increasingly being used in a more focused way to identify and provide technical assistance related to statistical reporting, but this aspect must be enhanced. Much more will need to be done in this regard with respect to controls in countries with alluvial production. The strong set of recommendations contained in a 2005 declaration on alluvial mining⁸ is a first step, but concrete steps must be put into place to assist with implementation. Technical assistance can address some but not all of the needs and other approaches may need to be identified. For instance, review teams could take a more active role in identifying cases where third-party services of audit firms to track the internal movement of diamonds might be appropriate.

Thirdly, Participants should develop a standardized system for judging and measuring improvements. Voluntary agreements often measure success through benchmarks that demonstrate continuous improvement, and Kimberley can do likewise given that countries have discretion on how to implement internal controls. Since the regime does not assume specific measures will achieve particular results, the Kimberley monitoring system could serve as an effective performance measurement system. With the recognition that poorly performing countries face different barriers, the PRMS should measure each Participant's ability to demonstrate compliance with each of the regime's essential elements.

- ***Participants must formalize information flows.*** If the monitoring function can be expected to optimize implementation of internal controls, Parties will need to normalize the ways in which information from review visits is gathered and shared, and also how those who receive review visits then report, both to Plenary and publicly, on the implementation of review visit recommendations.

First, Participants should regularize the process of how review findings are made. The WGM has endorsed a checklist for review visits and missions, but Participants should formalize this process, as well as standardize the format of visit reports. A consistent quality of review visits is imperative if visit findings are to be used as a basis for making decisions about technical assistance needs and judging whether Participants are achieving minimum performance standards. Second, Participants must ensure that complete review visit reports consistently are made available, at least on the private portion on the website, and that summaries (if not the complete report) are posted to the public area in a timely fashion. Making full visit

reports publicly available (perhaps with redacting of confidential business information) would greatly improve efforts to connect with multilateral actors beyond Kimberley, especially in the development arena.

- ***Participants must ensure adequate working arrangements.*** The WGM has been operating ad hoc, using various mechanisms for ensuring adequate follow-up, including: requesting (and receiving Plenary approval) that Participants provide information in their Annual Reports on steps taken to follow up on review visit recommendations, and inviting Participants to report orally to a special Plenary session on follow-up steps taken. To bolster these efforts, Participants should strongly consider the development of an “on-line monitoring book” that would provide a overview of the current status of implementation in each country, as well as details on specific progress made on recommendations, difficulties encountered, and options for further consideration. Currently, this information is communicated via email, but the volume of information is increasingly unworkable. Organizing country information in this way should also help isolate problems with full and timely posting of information and summaries of visits, and further enhance the ability of the WGM to make specific recommendations regarding technical assistance.

Participants also need to seriously discuss whether the working arrangements of the WGM are sufficient to take on enhanced responsibility for ensuring follow up of recommendations. So far, the working methods of the WGM have facilitated efficient operations, but have depended heavily on substantial commitment of volunteered human resources. Whether the human investment can be sustained at

adequate levels in the future is unlikely, especially if the monitoring function is strengthened to provide coordinated and adequate follow-up on review findings, a critical aspect of overall regime effectiveness.

Participants may at the occasion of the three year review wish to consider whether it might be appropriate to infuse the monitoring function with professional support. Such an effort could automate much of the day-to-day administration, freeing the Chair and Participants to concentrate on substantively enhancing implementation. In addition to ensuring timely and transparent communication of information, another area where better administration could be immediately useful is in managing the administration of reviews. Professional management could ensure adequate balance of representation on review teams, especially as to visit leadership, and could verify reviewer impartiality as there have been concerns about potential conflicts of interests in the haste to compose and dispatch review teams. The ability of review teams to communicate in the language of the host country might also be improved with the standardization of translation services arranged by some sort of permanent staffing.

Elevating the Role of Industry Self-regulation

Early critics of Kimberley pointed out that one of the scheme’s main weaknesses was its failure to subject certain important activities to mandatory controls. Specifically, there are no mandatory controls on the flow of rough diamonds from the mine or field to the point of first export, or on the period upon import to subsequent point(s) of sale or to re-export. These intra-country transactions, which offer significant opportunity for illicit diamonds to enter the chain and be legitimized by a Kimberley certificate at the time of export, are covered only by the industry system of self-

regulation in which participation is voluntary and monitoring and enforcement are self-regulated.

Overall, the system of self-regulation is falling short of what was unveiled in January 2003 by the diamond industry (represented by the World Diamond Council). That plan included a code of conduct, a system of warranties, and education, and was to have served as a mechanism to help governments track rough diamond transactions. In practice, NGO reviews have found industry application of the self-regulation provisions to be incomplete and inconsistent, and that there is no clear understanding of what self-regulation actually means in practice. The most glaring defect has been the paucity of government oversight, a problem that also has been identified through the peer review monitoring system. Nor has there been any assessment of how self-regulation is working in practice. Neither industry nor the KP overall has thought seriously about measuring or monitoring implementation, so it not surprising that two years in there is not even a common standard for effectively verifying compliance with self-regulation.

One example where governments are taking steps to ensuring industry compliance is in the European Union where strong government controls on the private sector were adopted in December 2002 as part of the EC Council Regulation. The EU's scheme licenses traders in rough diamonds, and requires them to record and certify, in auditable fashion, each sale and purchase transaction. In Belgium, this is enhanced by a requirement that each company's auditor confirms the company's Kimberley compliance, and this is backed by a system of random government spot checks. Granted, with no private sector production the EU does not have to address a mining sector where the potential for illegal flows is greatest. But the EU, along with Israel and a handful of other countries, are providing examples of how governments can monitor and verify industry compliance

with the self-regulation provisions of Kimberley.

It may be the perverse result of Kimberley's remarkable initial success that there is little political will to achieve more private sector oversight. But with private enterprise providing the easiest means through which conflict diamonds can be laundered into the legal chain, it is essential that the Kimberley Participants agree on further steps to ensure that countries are exercising adequately oversight on their industries. To be fully credible, Participants will need to elevate the importance of industry oversight to the regime generally, assist countries to implement industry controls, and make clear that demonstrating industry conformance, including robust checks to verify compliance, is an essential element of Kimberly compliance.

- ***The KP must do more to encourage and assist governments put effective internal controls into place at all points in the chain, not just the points of entry and departure.*** The system of industry self-regulation has so far been seen as an independent element of Kimberly, but Participants must take steps to integrate it into the overall scheme. As discussed above, Participants should in conjunction with the WGM, provide more specificity on measures to verify industry compliance in each of the relevant sectors, including production, trading, and cutting and polishing, and establish processes to share best practices. Implementing adequate industry oversight should be facilitated through the same mechanisms and with the same level of attention as is given to establishing effective controls at points of import and export.
- ***The KP must make the verification of compliance with industry self-regulation an integral element of Kimberley performance.*** Participants must be held accountable for all

activities within their borders, including the conduct of their private industries. To demonstrate conformance with Kimberley, Participants should be required to demonstrate effective industry oversight, and evidence must include verification of compliance. The most essential element of demonstrating industry compliance will be evidence obtained through spot checks and third-party audits, and Participants should expressly call for the adoption of such measures.

- ***Participants must do more to encourage governments to regulate and/or dialogue with a wider representation of the private sector, including the insurance industry.*** A specific area Participants may wish to consider is the cutting and polishing industry. Although polished diamonds are outside of current Kimberley controls, adequate oversight at cutting and polishing centres that receive rough stones is becoming especially important because of the trend for mining countries to establish cutting and polishing industries. Botswana's 2003 Diamond Cutting Act is an example of how governments can effectively expand oversight and increase transparency. The law stipulates monthly submission of records regarding purchases of rough gems, and using agreed-upon parameters of loss, requires reconciliation of figures with sales and residuals. In many places, systems to calculate total monthly loss in carat weight from each individual diamond as it works its way from rough to polished product are already in place for business purposes, and can easily be used by auditors to check KP compliance.
- ***Participants must do more to promote dialogue with other public agencies*** such as law enforcement and intelligence.

- ***Participants should explore mechanisms for improving industry compliance.*** As noted above, Participants should be held explicitly accountable for demonstrating evidence of industry oversight, including verification of compliance. The KP also could periodically monitor and/or evaluate industry compliance, perhaps through a subgroup, or even through an independent international council made up of representatives from industry, NGOs, and governments.

ACTIVATING A ROBUST DATA ASSESSMENT PROGRAM

The Promise of Statistical Evaluation

The importance of data assessment to the overall credibility of the Kimberley scheme cannot be overstated. Reconciling import and export figures can reveal anomalies that may indicate illicit trade, and can help authorities pinpoint weaknesses in internal control systems. Even with limited collection or assessment in the initial phase, the potential of data already has been revealed. In the case of the Republic of Congo, bogus data triggered the review mission that led to the country's expulsion in 2004. It is not coincidental that data submission is one of the scheme's few mandatory obligations.

The Working Group on Statistics, supported to a large extent by the government of Canada, has made substantial progress in a number of areas. The web site itself has matured into an effective tool in the collection and dissemination of statistics, and Participants can now directly enter data on-line. Multi-purpose tabulations of the statistical information gathered are regularly returned to Participants and are available on the Rough Diamond Statistics web site. These tabulations, updated regularly, are also being provided annually to the Monitoring Working Group to be integrated with each Participant's annual report. Statistical reviews and analyses are prepared by the working group on an ongoing basis for review visits, and provide good opportunities to identify and resolve statistical issues.

Experience to date

Despite these stalwart efforts, the promise of statistical evaluation has been largely unfulfilled in the start-up phase. Granted, some countries had to change existing laws, while others had to develop procedures for transmitting data electronically and/or internationally. But there remain persistent

issues with achieving timely and complete submission of statistics. And protracted efforts to gather late submissions from Participants have drawn scarce resources away from other undertakings. Where countries simply lack political will, a recent draft Annex regarding the process and timeline for statistical submissions in concert with the *Guidelines to the Participation Committee for Statistical Non-Compliance* should make member obligations with respect to data submission much clearer.

The recent *Guidelines* may not be particularly applicable in cases where data is submitted, but in a form that is inconsistent with agreed-upon formula. Many countries submit data as recorded on the KP certificate, but some have laws that require them to provide data only in the form collected by customs officials. There are processes in place to provide technical assistance, for instance the preparation and upcoming redistribution of a tutorial CD, and through the help feature on the web site. There has also been some discussion of developing a manual on data collection, submission and review. Progress clearly continues to be made, but there is still a need to improve the quality and consistency so that the underlying statistical database can be made accurate, complete and useful for purposes of comparison.

The most glaring disappointment of the inaugural phase has been the lack of any comprehensive data analysis. In all fairness, one cannot ignore the fact that no significant work in operationalizing the KPCS statistical collection and analysis had been done beyond the definitions and statements that appear in the technical document. Unlike most well-planned statistical collection activities that normally require many months of planning before initiation, the WGS was playing catch-up from the outset. The WGS has adopted a proposed methodology for such an analysis and a pilot exercise is underway, but considerable further efforts are needed before a comprehensive

analysis of the statistical data can be undertaken and regularized. There are also deficiencies in how data is integrated into other operations, such as monitoring and compliance. Opportunities are being missed to use data more proactively, for instance to help shape priorities for review missions, identify where technical assistance may be helpful, or pinpoint where third-party assessment is called for. As the regime matures, it will be important for Participants to update the statistical methodology so that it can adequately address priorities as they emerge.⁹

Has form outlived function?

As with other imperfections in the Kimberley regime, it is difficult to ignore the limitations of an all-volunteer force. While the members of the Statistics Working Group have performed selflessly, providing ongoing statistical services to a multilateral arrangement with close to 70 states and countless other observers may need firmer underpinning than the goodwill of the Canadian government. Even the WGS Chair has advised that the existing organization and resource levels cannot guarantee accomplishment of statistical objectives.

It seems inevitable that Participants will need to consider options for shifting the day-to-day business of data collection and synthesis, perhaps to an independent body reporting to the Chair of the working group.

This in and of itself would return the workload of the WGS to a manageable level, and free WGS members to focus their attentions on developing policies to normalize data collection, review and dissemination, inside the regime and externally. Professionalizing the data function would also confer attendant benefits, especially with respect to publication of information. A permanent function could better oversee the website and ensure that it meets the regime's changing needs. It could also routinize the collection and dissemination of submitted data, and mechanize notifications about late submissions, corrections, and non-submission. To date, all of these communications have been conducted by email, but many have complained that this is unwieldy and increasingly difficult to track. A permanent data collection bureau could develop an on-line, "one-stop" presentation of data and reporting status: what is due and when, what reminders and notifications have been sent, what the responses have been and what corrective steps are underway. While such an endeavor will necessarily require new financial commitments, the shift should greatly enhance the ability of the WGS to focus on its true priority: realizing the potential of data to discern anomalies.

ADDRESSING COMPLIANCE

Obviously, a scheme like Kimberley rests to a much greater degree on assisting countries achieve compliance than on making them ineligible to participate. After all, expulsion is a drastic measure in an arrangement that is premised on collective participation. Excluding too many countries, or a few key ones, could topple the scheme. On the other hand, there must be some element of compulsion or the regime's credibility will be diminished.

In fact, Participants have accepted some degree of compulsion. For instance, applicants wishing to issue certificates must be "able to fulfill the requirements of th[e] [s]cheme,"¹⁰ including development of a suitable certificate and establishing a system of internal controls. Once a participant, there are obligations to trade rough diamonds only with other Participants, provide annual reports, regularly furnish figures about trade, and respond to inquiries. The recent adoption of guidelines on non-submission of statistical data offers a blueprint for an effective expulsion process that can be adapted for other obligatory provisions.

Entry/Initial Credentialing

Participants should establish a more formal and objective procedure for ensuring that applicants have the capacity to meet ongoing compliance expectations. To date, the Participation Committee has mainly focused on reviewing a country's ability to meet the minimum requirements, i.e. development of a tamper-proof certificate and whether appropriate laws and regulations are in place. But there has been scant investigation as to whether a country has the capacity to enforce the law it has enacted, or whether systems are in place to enable timely and adequate provision of data -- behaviors that although not explicitly called for in the technical document, form the basis of what over the past three years has become expected.

Since it would be useless to admit countries only to have them promptly cited for non-conformance, Participants should consider entry an opportunity to fully assess an applicant's ability to comply. A full set of questions should be standard procedure, perhaps including a requirement to provide information about optional measures in force. After entry, provision of optional information may no longer be required, but as a condition of entry it speaks to the applicant's ability to conform and is an important basis for decision-making. Where concerns about a country's application are identified, a review visit should be undertaken to examine whether a country has adequate systems in place.

Although admission must remain open and non-discriminatory as per the terms of the agreement, it does not follow that entry should essentially be automatic. With entry often linked to U.N. embargoes, as is the current case with Liberia, a thorough, consistent entry procedure is needed to give the international community assurances that a country can meet KP requirements before sanctions are removed. Even absent sanctions, the scheme's credibility is enhanced by a rigorous, impartial admission process that provides a verifiable assessment about the country's ability to remain Kimberley-compliant.

Statistical Non-Compliance

In response to repeated failures by a small number of countries to submit statistical data, the Participants in November 2005 approved a process for addressing non-submission of statistical reports. A draft Annex on the process and timeline for statistical submissions, together with Guidelines for the PC, include clearly established timeframes for submitting and correcting data, and processes for delivering official notifications and for referring non-compliance to the Chair for further action. The rules only just recently began to be applied, and they are likely to need further elaboration or adjustment. An

“exceptional circumstances” loophole leaves both the PC and the Chair with considerable discretion, and that may need to be clarified over time. Generally though the draft Annex and Guidelines lay the foundation for a much-needed consistent approach to statistical non-submission.

Ad-Hoc Expulsion and Readmission

Kimberley has had the occasion to expel one Participant: Congo-Brazzaville in 2004.¹¹ In this case, questionable data triggered a review visit, after which Participants were presented with evidence that the country’s conformance was seriously deficient. Although the expulsion was conducted completely ad hoc, the decision was somewhat straightforward because the transgressions were obvious. For the time being then, Participants may find it acceptable to address serious non-compliance ad hoc procedures.

A greater challenge to Kimberley Participants may be addressing non-conformance that does not rise to the level of serious non-compliance, but over time damages the overall credibility of the scheme. There is a recognition that some type of specific exclusion mechanism is called for, but concern about using an ad hoc arrangement to address chronic rather than palpable non-conformance. The idea that continued participation obligates countries to meet the scheme’s minimum obligations is well-established,¹² yet a strict in-or-out procedure as is used for serious non-compliance seems inappropriate where there has been no specific violation of an obligation. The peer review monitoring function provides a good example. Peer-review is not compulsory, yet all but a handful of countries have invited review visits. In the future, persistent reluctance of a very small number countries to comply with the elements of the monitoring provisions (i.e., host review visits, have the

implementation and enforcement of their internal controls reviewed, and act and report on recommendations for improvement) will threaten the integrity of the regime.¹³ In these instances, the focus will need to be on assisting countries to perform, and improving incentives for conformance. But for the regime to be fully credible, it will need to establish mechanisms to assist, but if necessary expel, chronic “underperformers.”

One obvious path for promoting conformance is to tie findings of deficiencies with targeted technical assistance, as has been suggested above (see, *infra*: *Adjusting the peer review monitoring system*). At this stage, all that may be necessary technically is that Participants preserve the regime’s right to expel a member for non-conformance that over time damages the overall credibility of the scheme while focusing on improving mechanisms and incentives for improving performance. What is also required is a sustained effort to discern why countries are not achieving minimum performance standards, and this includes regular, inclusive communication about implementation measures. This may entail more resources to conduct targeted follow-up with countries, but if expulsion is to be credible, there will need to be guidelines in place to help reviewers determine why countries are not meeting certain requirements, and to help reviewers differentiate between a lack of political will and technical incapacities.

Accountability also can be a powerful tool in promoting conformance. The circulation and posting of lists detailing compliance with statistical submissions and other requirements needs to be regularized, and Participants should consider expanding such notification to non-compulsory aspects as well.

SETTING PRIORITIES FOR THE NEXT PHASE

Governance and Administration

Even in the face of considerable progress in a short time, a small number of countries and observers have proposed that the Kimberley arrangement be made more formal and binding. Some are suggesting that at a minimum, major new elements such as review visits should be legally fixed. The predilection for formality stems in part from unfamiliarity with models other than accords requiring national ratification. The calls also seem to respond to perceived limitations of a scheme that primarily relies on voluntary participation and is highly dependent on varying levels of political will and industry commitment.

Interest in a wholesale change in structure belies the fact that the Kimberley scheme is not voluntary in the strict sense of the word. Every member has passed national implementing legislation, there is strong buy-in to peer-review monitoring, and Participants have just adopted expulsion guidelines for non-submission of data. In fact, the fact that Kimberley hinges on national legislation is what gives it strength. The monitoring function should be enhanced so that the regime can facilitate more consistent behavior among countries, but it is not clear that a permanent, free-standing body to administer and police internationally-accepted standards would achieve any better results, even if there was political will or the resources to create it.

The day-to-day working arrangements are more problematic. There is widespread approval for Kimberley's working group structure overall, which has built a high degree of trust and solidarity. Email and regular conference calls enable good and constant communication, and members have been very successful at developing understanding to arrive at consensus. In some areas though, specifically statistics, it is obvious that voluntariness has exhausted

itself. Even the Chair of the WGS has suggested that achieving statistical objectives will require more resources and professional support. The ad-hoc nature has also diminished transparency. For outsiders (and even some Participants), the various procedures, guidelines and revisions are difficult to understand and track in a coherent way.

As for the Chair function, there is general agreement that the volunteer arrangement has worked well so far, although there is some concern about whether there is a sufficient pool of countries to take on the role in the future. The chief criticism is that the one-year term should be lengthened to two years in the interests of efficiency. Some Participants have raised the issue of the Chair's considerable discretion and whether it might be appropriate to define the position's roles and responsibilities through Administrative Decision. Still other countries and observers have indicated a clear preference for depoliticizing the Chair function, perhaps by shifting to a professional administrator.

Administratively, the KPSC has grown unwieldy. Simply annexing certain documents to the Technical Document will not suffice to clarify obligations and procedures. To facilitate conformance, Participants should seriously investigate an undertaking to group and cross-reference the various Administrative Decisions, Revisions and Guidelines that build upon the 2003 technical document, perhaps in a regularly updated handbook or guide as is used by other international accords.¹⁴ Participants should also consider establishing a consistent nomenclature or dating system for documents and meetings, and creating an accurate historical record of official documents issued to date.¹⁵ One strain of thinking calls for establishing a professional secretariat to standardize and administer the range of activities where deficiencies have been identified. Securing permanent funding is the biggest drawback to such a solution, but there is little doubt

that a stable, formal institutional presence would be able to take on all of Kimberley's operational flaws. Another significant benefit of taking this course would be the co-location of relevant activities, leading to improved integration of critical functions such as statistics and monitoring.

Short of authorizing a full-scale administrative body, another option would be to pursue targeted measures that address specific deficiencies. Given Kimberley's generally favorable progress and the political mood, this more creative approach might be a good first step. Participants could address the most glaring operational defects, yet preserve flexibility to revisit operations after a time. The two most obvious candidates for professional support, statistics and monitoring, are discrete functions and improving the administration of them need not be expensive or burdensome. Electronic communication provides considerable flexibility and Participant should investigate creative options for assigning staff and pooling resources.

Transparency and Communication

The absence of institutional oversight has diminished the scheme's transparency in a variety of ways. Documents are not consistently posted, or they are not posted in a timely manner. Much important communication is buried in voluminous amounts of emails. For newcomers, it is difficult to get a complete or historical

perspective of the regime off the website, and there is no obvious point of contact for inquiry. The technical document establishing the scheme is not available for public view. And as would be expected, the lack of transparency translates into diminished accountability.

The institutional void also impacts how efforts to eliminate conflict diamonds are integrated with allied international efforts. Participants recognize that Kimberley will only be successful if related issues, such as fundamental problems in the mining sector that make the sector vulnerable to exploitation, are tackled too. Yet there is no voice of Kimberley to develop and sustain partnerships with multilateral development organizations. For example, the World Bank must be encouraged to take on alluvial diamond mining issues specifically when investing in the mining sector. There are other instances where access to information gathered under Kimberley could be of value to wider audiences. Specifically, encouraging systematic reporting of seizures and the names of convicted individuals could greatly assist law enforcement or other processes seeking to isolate sources of illicit trade. That information may be reported to the Chair, but there is no process for posting or communicating it. Lastly, Kimberley has developed its own nomenclature that does not parallel typical U.N. accords, which makes it less accessible to external international organizations and bodies.

SUMMARY OF RECOMMENDATIONS

Achieving Effective Internal Control Measures

The PRMS must be strengthened so that it can be an effective check on performance.

Participants should:

- formalize the obligation to host regular review visits;
- establish a system for scheduling review visits post-2006;
- regularize the collection of information by review teams;
- formalize the processes for communicating on steps taken to implement review visit recommendations;
- ensure that information gathered on review visits, recommendations and follow-up is accessible to both Participants and outsiders, and is presented in a form that is adequate for assessment by the WGM or some other independent body;
- consider providing professional support to the WGM to assist with day-to-day operations and to improve the management of visits and follow-up.

The PRMS must be enhanced so that it can effectively assist Participants to conform.

Participants should:

- commence a program to collect and disseminate best practices;
- formalize the link between review visit recommendations and provision of technical assistance and/or third-party services;
- establish opportunities for regular peer-to-peer exchange

The system of industry self-regulation must be elevated in importance, and industry commitments must be better integrated into the overall Kimberley scheme.

Participants should:

- make explicit the obligation of governments to adequately monitor and verify industry self-regulation, and evaluate governmental oversight of industry in the context of the PRMS;
- expressly call for the adoption of measures to verify industry compliance, such as spot checks and third-party audits;
- undertake an assessment of industry self-regulation;
- establish mechanisms for sharing best practices and promoting adoption of industry codes of conduct in each of the relevant sectors, including production, trading, and cutting and polishing;
- facilitate wider representation from the private sector and other relevant public sector authorities;
- following the model of the alluvial sub-group, establish a cutting and polishing subgroup to explore ways in which oversight can be expanded, especially in producing countries seeking to enter the cutting and polishing trade.

Activating a Robust Data Collection and Assessment Program

The underlying statistical database must be made accurate and complete.

Participants should:

- strictly adhere to the Process and Timeline for Statistical Submissions, and implement procedures as put forth in the Guidelines to the Participation Committee for Statistical Non-submission;

Statistical assessments must be made useful and integrated into the overall working of the scheme.

Participants should:

- settle on a methodology and framework for data assessment;
- determine what types of support are needed to ensure adequate and ongoing statistical collection and analysis, including for instance, an independent body reporting to the Chair of the working group.

Addressing Compliance

Entry procedures must be made consistent and more rigorous.

Participants should:

- strengthen the admission process so that it assesses an applicant's capacity to comply with the overall scheme.

The regime must develop a consistent approach for addressing and eventually expelling chronic underperformers who damage the regime's integrity.

Participants should:

- make explicit the obligation to show evidence of compliance, including the results of spot checks and audits throughout the chain;

- develop guidelines for determining and reporting unacceptable progress;
- establish a clear link between continuous improvement and compliance;
- institute mechanisms for communicating implementation deficiencies.

Setting Priorities for the Next Phase

The KPSC must become more accessible and understandable.

Participants should:

- develop and regularly update a handbook that presents the scheme's various obligations and procedures;
- develop a consistent nomenclature and numbering system for official documents;
- ensure timely posting of information and proper notification of its availability;
- consider adopting a presumption that official documents are to be public unless specifically withheld.

The KPSC must create an institutional presence that effectively supports its operations and facilitates a much higher degree of communication and cooperation with Participants as well as external organizations.

Participants should:

- establish arrangements, whether a Secretariat or otherwise, that appropriately address operational and administrative weaknesses;
- identify resources to assist countries with compliance, and institute an understandable, transparent process for accessing technical assistance and policy support;
- investigate mechanisms to automate the sharing of information with other international bodies, for

instance, sharing with law enforcement and intelligence agencies the names of individuals convicted of smuggling and the dates and locations of diamond confiscations;

- seek to integrate KPCS concerns with the development priorities of donor organizations and related efforts such as the Diamond Development Initiative (DDI) and anti-money laundering initiatives.

Other Issues for Attention

Participants should:

- conduct a feasibility study for a single internet portal for registering rough diamond imports and exports and where information about diamond parcels can occur in real time;

- investigate technological options that would obviate the need for paper certificates which are easy to falsify and are becoming the object of illegal activity themselves;
- assess, and where appropriate promote, technologies that increase the regime's effectiveness and integrity, for example laser technologies that mark diamonds at origin and/or profile rough diamonds;
- test technologies, invest in widespread adoption;
- obtain legal clarity as to the fact that Kimberley's provisions regarding import and export, even as among non-Parties, are consistent with World Trade Organization principles that generally prohibit restrictions on trade.

ABOUT THE AUTHOR

Pamela Wexler is an attorney with over twenty years experience creating and assessing regulatory, legal and policy regimes. Her technical expertise includes global environment and health, energy and development, and multilateral institutions and agreements. Among the international organizations Ms. Wexler has supported are the United Nations Environment Programme; the World Bank; the Intergovernmental Panel on Climate Change; the Global Environment Facility; the Multilateral Fund; NATO; and the World Health Organization. She has represented public and private sector clients before UN bodies and US federal agencies, and can bring together actors from the non-governmental community, multilateral institutions, private industry and academia. From 1998 until 2001, she chaired the American Bar Association's Committee on Climate Change and Sustainable Development.

ENDNOTES

¹ *Diamond Industry Annual Review: Sierra Leone, 2005* (Partnership Africa Canada and Network Movement for Justice and Development, February 2005).

² UNSCR 1459 (2003); UNGA 56/263 (2002) and UNGA 55/56 (2001).

³ For more about the development aspect of diamonds, see, *Rich Man, Poor Man: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa* (Global Witness and Partnership Africa Canada, 2004).

⁴ See, e.g. *International Narcotics Control Strategy Report* (US State Department, 1 March 2004) and *Report on Money Laundering Typologies* (Financial Action Task Force, 14 February 2003).

⁵ For more on how al Qaeda and other terrorist organizations have infiltrated diamond trading networks by taking advantage of illicit trading structures, weak government and trade regulations to raise funds for operatives and to launder significant sums of money, see, e.g., *For a Few Dollars More* (Global Witness, 2003).

⁶ *The Failure of Good Intentions: Fraud, Theft and Murder in the Brazilian Diamond Industry* (Partnership Africa Canada, May 2005). The Brazilian government wrote a letter to the KP chair attacking the PAC report as factually incorrect and meddlesome. This letter was placed on the KP website, along with PAC's response, which stood by the facts and reiterated PAC's position that much better controls were needed. In mid-February, the Brazilian police made several arrests and issued warrants for others, among them individuals named in the PAC report and an official from the department that manages the KPCS in Brazil.

⁷ A good illustration of how peer exchange can be used to promote best practices may be found in U.S. Environmental Protection Agency's plethora of voluntary partnership programs, available at www.epa.gov/partners/programs. Strategies include Partner summits, newsletters, listserves, demonstrations, and award ceremonies.

⁸ See "*Improving internal controls over alluvial diamond production*," Declaration adopted by the Moscow Plenary Meeting of the Kimberley Process (2005).

⁹ One example surfacing already is the trend in some producer countries towards developing cutting and polishing industries. Participants will need to begin considering how data reporting requirements might be strengthened in countries where these activities are mixed.

¹⁰ See KPCS Technical Document, Section IV, paragraph 8.

¹¹ In 2003, Kimberley also "suspended" the Central African Republic subsequent to a coup, despite the lack of any such mechanism in the technical document. A review visit and CAR's subsequent enactment of requisite legislation led to the country's reinstatement later that year, all conducted via an ad hoc, consultative process.

¹² In 2003 upon creation of the Participation Committee, several countries were "dropped from the list of Participants" for failing to meet minimum standards.

¹³ For purposes of illustration, all three elements of the peer review monitoring system have been lumped together here, despite the fact that there is considerable interest in making review visits themselves compulsory. Even if that comes to pass, it is not envisioned that Participants will reach agreement on the specific responsibilities to act on review visit findings. The fundamental question then is how Participants will seek to compel behaviors that are not explicitly mandatory but are nonetheless fundamental to credible operation.

¹⁴ See e.g., *Handbook for the International Treaties for the Protection of the Ozone Layer, 6th ed.* (UNEP: 2003).

¹⁵ Many documents available on the website remain undated.