



# **The legal aspects of the Kimberley Process**

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# Colophon

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## List of Acronyms

- CA: Community Authority
- CDIU: Centrale Dienst In- en Uitvoer
- CFSP: Common Foreign and Security Policy
- EC: European Community
- ECD: Economische Controle Dienst
- EU: European Union
- FIOD: Fiscale Inlichtingen- en Opsporings Dienst
- GATT: General Agreement on Tariffs and Trade
- KP: Kimberley Process
- KPCS: Kimberley Process Certification Scheme
- MFN: Most Favoured Nation
- MoU: Memorandum of Understanding
- NGO: Non Governmental Organization
- PPM: Processes and Production Methods
- TEC: Treaty Establishing the European Community
- TEU: Treaty on European Union
- UN: United Nations
- UNGA: United Nations General Assembly
- UNSC: United Nations Security Council
- WTO: World Trade Organisation

## Introduction

A meeting between governments, NGOs and diamond industry representatives in May 2000 in Kimberley, South Africa, was the start of a 3-year negotiating process that led to the establishment of the Kimberley Process Certification Scheme (KPCS).<sup>1</sup> The KPCS is an international diamond certification scheme aimed at preventing the trade in so-called 'conflict diamonds' whilst protecting the legitimate diamond trade. It was put into practice in January 2003 and has been endorsed by the United Nations General Assembly and the United Nations Security Council. Participants in the Kimberley Process are required to pass national laws establishing import and export control regimes to keep conflict diamonds out of the legitimate 'diamond pipeline'.

The approach that has been given to the problem of conflict diamonds presents an interesting example of political, economic and social developments in a globalising world. The Kimberley Process is a noteworthy multilateral endeavour seeking an economic-political solution to break the link between the trade in diamonds and gruesome wars in parts of Africa.

Given the interesting features of the Scheme's creation and its potential role in stopping and preventing both current and future conflict, it is worthwhile to investigate its legal foundations, the issues of its implementation in national legislation, and its relation to existing international trade law.

Such an analysis might indeed prove its particular worth in the wake of current efforts to devise a certification scheme for other resources than diamonds. As a recent proof that such an essentially political project is, perhaps still very tentatively, starting to occupy a place in the minds of key stakeholders, one can refer to Article 9 of the Pact on Security, Stability and Development in the Great Lakes Region, signed on 15 December 2006 by all members of the International Conference of the Great Lakes Region. The said article, titled 'Protocol Against the Illegal Exploitation of Natural Resources', states that "The Member States agree, in accordance with the Protocol Against the Illegal Exploitation of Natural Resources, to put in place regional rules and mechanisms for combating the illegal exploitation of natural resources which constitute a violation of the States' right of permanent sovereignty over their natural resources and which represent a serious source of insecurity, instability, tension and conflicts, and in particular: (...) c) To put in place a regional certification mechanism for the exploitation, monitoring and verification of natural resources within the Great Lakes Region."

The extent to which the KPCS can and will serve as a model for any such future certification mechanism, is a technical matter that will, for the most part, depend on the nature of the commodities that will be envisaged. But concerning the legal aspects of any commodity certification scheme to be created, the juridical meanders that led up to the KPCS, might prove to constitute an instructive precedent.

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<sup>1</sup> *Kimberley Process Certification Scheme*. Available at: <http://www.kimberleyprocess.com:8080/site/?name=kpcs> (last visited: February 2, 2006).

This paper will start with a discussion regarding the legal qualification of the KPCS as an instrument of international law. Chapter II subsequently treats the implementation process of legal instruments to stop the trade of conflict diamonds -UN sanctions and the KPCS- in the European Union (EU) and the Netherlands. The ensuing chapter contains an in-depth analysis of whether the diamond trade rules, stemming from the KPCS, can be found compatible with the rules of international trade as set by the World Trade Organisation (WTO).<sup>2</sup> Finally, the conclusion presents a summary of the (legal) issues pertaining to the Kimberley Process and discusses the possibilities to use the KPCS as a model for other international schemes to counter the illicit trade in conflict fuelling or illegally exploited commodities.

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<sup>2</sup> *Marrakesh Agreement Establishing the World Trade Organization*, April 15, 1994, the legal texts: the results of the Uruguay Round of multilateral trade negotiations, 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

## Chapter I: The 'legal' status of the Kimberley Process

The meetings that generated the Kimberley Process enjoyed no formal or diplomatic status, and no treaty documents were signed or ratified.<sup>3</sup> Amongst the participants were NGOs as well as representatives of the diamond industry, which are entities with no legislative authority at all. Many governments refused to employ the word 'agreement' in the draft documents that were being debated and government representatives went to the meetings with no mandate to 'approve' anything.<sup>4</sup>

Yet, the Kimberley Process accords fundamentally resembled any ordinary legislative process and the following account will demonstrate that the agreement can nevertheless be viewed upon as a legal instrument.

Questions one might ask oneself when legally assessing the Kimberley Process Certification Scheme are to what extent it can be classified as international law? Is it legally binding? And does this classification matter? To what degree will the signatories be obliged to comply with its contents?

### What type of international agreement?

The language used in formal documents is often indicative of their legal status. Terminology typically used to indicate an intention to enter into a formal treaty are words like 'shall', 'agree', 'undertake', 'rights', 'obligations' and 'enter into force'.<sup>5</sup> The KPCS text, however, makes use of less imperative phrasing such as 'participants recommend', 'are encouraged', 'should ensure', and 'should be established'.<sup>6</sup> This type of language, together 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)<sup>7</sup> and not a proper treaty.<sup>8</sup> A MoU has a less formal character, often setting out working arrangements within the framework of an international agreement. In terms of formality one could say that it is situated somewhere between a gentlemen's agreement and a general contract.

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<sup>3</sup> Daniel L. FELDMAN, 'Conflict diamonds, international trade regulation, and the nature of law' in: *U. Pa. J. Int'l Econ. Law*, Vol. 24:4, 2003, pp. 836 and 870.

<sup>4</sup> See: [http://www.phrusa.org/campaigns/sierra\\_leone/jewel\\_release082101.html](http://www.phrusa.org/campaigns/sierra_leone/jewel_release082101.html). (Last visited: December 8, 2005).

<sup>5</sup> See: Anthony AUST, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press, 2000, p. 20.

<sup>6</sup> See: 'Essential elements of an international scheme for certification for rough diamonds with a view to breaking the link between armed conflict and the trade in rough diamonds' in: *Kimberley Process Working Document*, nr 1/2002, March 20, 2002, [hereinafter KP Working Doc. 1/2002], Section I. Available at: <http://action.web.ca/home/pac/attach/March%202002%20Kimberley%20Process%20Working%20Document%20nr%201%20of%202002.doc>.

<sup>7</sup> See: "Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view." , AUST, p. 26.

<sup>8</sup> Nevertheless, there are different opinions on the requirements for constituting a legally binding treaty or a non-legally binding MoU. It is even argued by some whether there exists a difference between both types of agreement at all. See: Jan KLABBERS, *The Concept of Treaty in International Law*, The Hague, Kluwer Law International, Vol. 22, 1996. The author extensively discusses the notion and definition of 'treaty' and gives an account of the different views upheld by several other authors on international treaty law on determining the legal nature of an agreement.

Multilateral MoUs are mostly qualified as being 'soft law'<sup>9</sup> and, because a MoU is generally not regarded as legally binding, the question arises what kind of rights and obligations are generated for the signatories.

### Common legal force of a MoU

It remains rather unclear and it is publicly debated in literature as to what extent, e.g. the lapse of time<sup>10</sup>, the intention of the parties to be legally bound, the principle of good faith<sup>11</sup> and the 'doctrine of Estoppel'<sup>12</sup>, constitute a legally binding treaty or can grant legal effects to what are purportedly non-legally binding agreements.<sup>13</sup> Generally, the intention of the parties to be legally bound is seen as being conclusive. "Any agreement which is concluded in order to being adhered to (and good faith would require this to be true of each and every agreement) is by definition a legally binding agreement. One cannot escape the workings of the law by claiming that it was never meant to be a legal instrument".<sup>14</sup> This is a debated subject, however. Other commentators argue that a politically or morally binding agreement really cannot even exist unless it is expressly legally binding, regardless of the parties' intention.<sup>15</sup>

In any case, political agreements do engage the good faith of governments and, in addition, the general principle of 'pacta sunt servanda' ('agreements should be adhered to') is a crucial element of (international) law.<sup>16</sup> This entails that even if there usually are no legal consequences following the failure to implement a MoU - which can be considered to be its main weakness-, it does not mean that the matter

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<sup>9</sup> 'Soft law', as opposed to 'hard law', is often interpreted as being guidelines of conduct, operating in a hazy area between politics and law. It is seen as characteristic of especially international economic law and international environmental law. See: Peter MALANCZUK, *Akehurst's Modern Introduction to International Law*, Seventh revised edition, Oxford, Routledge, 1997, p.54. There is, however, no general agreement on what 'soft law' is, or indeed if it exists at all as a distinct source of law. AUST, p. 44.

<sup>10</sup> The amount of time elapsed between the initiation of treaty negotiations and the actual execution of the treaty's provisions by its participants, could, in some cases, be considered as indicative of the significance that parties attribute to the agreement they are constructing. In case of the Kimberley Process the lapse of time has -compared to many formal international treaties- been relatively short; it 'only' took about 3 years. This strengthens the belief that negotiating countries thought the KPCS to be important and that subsequent action was needed quickly.

<sup>11</sup> Agreements "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". *Vienna Convention on the Law of Treaties*, January 27, 1980, 1155 U.N.T.S. 331, art. 31(1), [hereinafter Vienna Convention]. The concept of 'good faith' is seen as one of the most important general principles of international law and implies that parties should always cooperate in terms of trust and confidence, whether while making an agreement or fulfilling an obligation stemming from that agreement. It is therefore not in itself a source of obligation, but merely a principle that informs and shapes the observance of existing rules of international law. See: Malcolm N. SHAW, *International law*, Fourth edition, Cambridge, Cambridge University Press, 1997, pp. 80-82.

<sup>12</sup> "Estoppel is a technical rule of the English law of evidence; when one party makes a statement of fact and another party takes some action in reliance on that statement, the courts will not allow the first party to deny the truth of his statement if the party who acted in reliance on the statement would suffer some detriment in the event of the statement being proved to be false". Peter MALANCZUK, p. 154. A very basic example: suppose that country A (creditor) informs country B (debtor) that its debt has been cancelled. If country B relies on this statement -and has spent all this 'extra' money on e.g. healthcare -, country A is 'estopped' from collecting that debt retroactively.

<sup>13</sup> See: KLABBERS, pp. 111-112

<sup>14</sup> Id. p. 249.

<sup>15</sup> Id. pp. 247-249.

<sup>16</sup> See: SHAW, pp. 80-81.



is not genuine or lawful, or that a state is free, politically or morally, to disrespect it.<sup>17</sup>

The KPCS Participants have never formally stated their ‘consent to be bound’<sup>18</sup> to the Kimberley document, which normally implies that an agreement is not legally binding in the conventional sense. It is most likely that the parties had not intended to create a scheme containing rules and obligations of too rigid a nature, and that for that reason they opted for the more flexible ‘MoU’ or ‘political agreement’. These options unquestionably allowed for more political leeway and swiftness, which is sometimes necessary as setting up an international agreement between more than 50 countries is not an easy feat. The Scheme was probably seen as a “dynamic effort and a framework for the future that seeks to reconcile competing priorities, rather than assessing it against a set of accountability measures”.<sup>19</sup> Although the KPCS negotiations had many of the hallmarks of a legislative process, using the same techniques and tools, it was not set up as a proper treaty in order to restrain its lawmaking role in the international field. Logically, some feared that without a legally binding treaty, complete with a monitoring and enforcement mechanism, “the KPCS would be no more binding than a nod and a handshake”.<sup>20</sup>

It is therefore surprising that this political agreement has nonetheless attained a certain force of law, with countries abiding by it and changing their behaviour to avoid violating its commands.

### **How the KPCS attained juridical force**

The KPCS, being a so-called ‘living agreement’<sup>21</sup>, has developed further since its adoption and appears to have gradually acquired a quasi-legal status, rendering the above-described discussion about the legal paraphernalia on the international level pretty much void of meaning. What matters at this point is that the participating countries have implemented the agreement in their domestic law and have thereby demonstrated a consent to be bound. On the national level the Scheme is now indeed seen as something very much legal.<sup>22</sup> On the international level, the document has wielded a surprisingly strong political influence, granting

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<sup>17</sup> See: AUST, p. 39.

<sup>18</sup> Art. 11 of the Vienna Convention: “The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.” None of these options appears to have been used by Participants when agreeing on the KPCS.

However, there are cases in which Judicial courts have demonstrated that the lack of a formal expression of consent to be bound, can be overcome. See: KLABBERS, p. 241.

<sup>19</sup> United States General Accounting Office (GAO), *Critical Issues Remain in Deterring Conflict Diamond Trade*, Report to Congressional Requesters (GAO-02-678), International Trade, June 2002. [hereinafter GAO report], p. 22. Available at: <http://www.gao.gov/new.items/d02678.pdf>.

<sup>20</sup> Tracey Michelle PRICE, ‘The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate’ in: *Minnesota Journal of Global Trade*, Vol. 12(1), 2003, p. 66.

<sup>21</sup> About ‘living agreements’: “Whether or not they resort to harder forms of enforcement such as binding dispute settlement, they often deepen over time creating a legislative enterprise capable of continuous improvement responsive to the parties’ needs and advancements”. *Id.* p. 68, citing: Jose E. ALVAREZ, ‘The new treaty makers’ in: *B.C. Int’l & Comp. L. Rev.*, Vol. 25, pp. 221-222.

<sup>22</sup> A good example would be the European Union who adopted Regulation no. 2368/2002 implementing the KPCS in the European Community. This will be discussed in more detail in the next chapter.

the KPCS a special status, thus making it more binding than most conventional treaties.<sup>23</sup>

The reason that the Participants are eager to adhere to the agreement probably lies with the typical nature of the world diamond trade.<sup>24</sup> Exclusion from the diamond trading system or obtaining a blemish on its reputation due to trade in illicit diamonds the KPCS, would simply be untenable for any diamond-producing country or diamond trader. In industry circles, such exclusion is often compared to excommunication by the church.<sup>25</sup> Concretely, the association of a country and its diamond industry with the trade in dirty diamonds, could be interpreted as unability or unwillingness to comply with the KPCS's minimum requirements and thus lead to a removal of the country from the scheme as a Participant or a denial of membership as an Applicant.<sup>26</sup> Since the KPCS prohibits trade in diamonds between Participants and non-Participants, the latter basically become pariahs in the world diamond trade. Therefore, the considerable negative consequences of non-compliance seem to make up for the scheme's lack of legal enforcement.

The legal strength of the KPCS, only providing a framework for what Participants should do to implement a system of national regulations, is of course fully dependent on the Participants' will to implement it in their domestic laws. However, the fact that they have eagerly done so thus far, demonstrates the binding character of the agreement.<sup>27</sup> Also the legal underpinning provided by the UN General Assembly Resolution 55/56<sup>28</sup> has been a strong encouragement for the Participants to carry on with their implementation.<sup>29</sup> Although the Kimberley

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<sup>23</sup> Telephone interview with "unofficial", at the External Relations Directorate-General of the European Commission on February 2, 2005.

<sup>24</sup> Diamonds are at the heart of a multinational, multibillion dollar industry that has prospered on tradition, elitism and secrecy for hundreds of years. The legal diamond commerce operates behind closed doors, on handshakes and trust, in a very cohesive trading system involving only a limited number of key players, diamond bourses and associations. A diamond is a carefully marketed product relying heavily on its image and reputation. Therefore the diamond industry has a serious interest in keeping that image untainted and in dissociating itself from conflict diamonds. See: PRICE, p. 29; and SHAXSON, p. 217.

<sup>25</sup> See: Daniel L. FELDMAN, 'Conflict diamonds, international trade regulation, and the nature of law' in: *U. Pa. J. Int'l Econ. Law*, Vol. 24:4, 2003, p. 866.

<sup>26</sup> Expulsion from the system is based on a negative result of a compliance assessment by special review missions sent to Participants. For the system of review missions, see: *KP Working Doc. 1/2002*, Section VI, 13. In this manner, countries such as the Central African Republic, the Republic of Congo (Brazzaville) and Lebanon have been visited and were (temporarily) expelled from the KPCS. See: *Other Facets*, No. 16, February 2005.

<sup>27</sup> Conversely, it was thought by some that a negative effect of the unclear international legal status of the KPCS could manifest itself at the very level of national implementation. Due to the non-compulsory nature of the Kimberley Process, the Participants could be inclined to nationally implement the KPCS requirements by "legal acts adopted at different levels of legislative power. Thus, the juridical force of these legal acts differs in the member states. Moreover, the internal legal systems of Participants do not correlate with each other. Such state of affairs results in different approaches to implementation of the minimum requirements of KPCS and its recommendations". Investment group Alrosa's response to the KPCS review final questionnaire, December 30, 2005, p.1.

Available at: [http://www.kimberleyprocess.com:8080/site/www\\_docs/related\\_docs1/review\\_kpcs-response\\_alrosa.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/related_docs1/review_kpcs-response_alrosa.pdf).

<sup>28</sup> *Resolution 55/56* "[Encouraged] the countries participating in the Kimberley Process to consider expanding the membership of the Process in order to allow all key states with a significant interest in the world diamond industry to participate in further meetings, and to move ahead with the intergovernmental negotiating process to develop detailed proposals for the envisaged international certification scheme for rough diamonds, in close collaboration with the diamond industry and taking into account the views of relevant elements of civil society". G.A. Res. 55/56, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/56 (2001). Available at: [http://www.kimberleyprocess.com:8080/site/www\\_docs/related\\_docs1/unga\\_final\\_text.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/related_docs1/unga_final_text.pdf).

<sup>29</sup> See: PRICE, pp. 34-36.

agreement has never been formally adopted by a Security Council resolution, thus missing a chance to be effectively included in the realm of enforceable international law, the issue of conflict diamonds has nevertheless been on the UN's agenda for a long time now and this does not go without significance in the international arena.

The KPCS is, in short, an interesting example of how a document with no formal legal force has nevertheless managed to obtain legal-like consequences in the course of its development. The case of the KPCS corroborates the view of several authors that law does not only develop out of the formal sources of its authority, but also to a great extent out of the activity that sustains it.<sup>30</sup> This indeed seems to be true for the Kimberley initiative, which has successfully mustered diamond trading countries' indispensable political willingness to put its non-compulsory rules into sustained practice. One could then contend that the moral force of practice has somehow engaged a certain sense of legal obligation among Participants, which in its turn has crystallised in the actual implementation of the KPCS in national legislation.

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<sup>30</sup> See: FELDMAN, p. 837-839. Citing Lon L. Fuller, 'The morality of law', 110-18 (rev. ed. 1969), p. 129.

## Chapter II: The Implementation of Legislation Concerning Conflict Diamonds in the European Union

### 2.1. Introduction

Besides for humanitarian motives, Europe's participation in the KPCS was deemed necessary and desirable for foreign and security policy reasons and economic considerations.<sup>31</sup> Europe is an important hub for diamonds, with London and Antwerp being two of the world's largest diamond trading centres, and these centres are sensitive to the effects conflict diamonds can have on the legitimate trade. The fact that 70 to 80% of global annual production passes through the European Community (EC), implies that tough EU regulation can have a huge impact on the trade in conflict diamonds.<sup>32</sup> Furthermore, participation in an international process to save the diamond trade from contamination by conflict diamonds is in line with the objectives of conflict management and conflict prevention defined by the conclusions of the Göteborg European Council.<sup>33</sup>

### 2.2. Implementation of UN Resolutions in the EU

The European Union's involvement in the battle against conflict diamonds started with the implementation of UN sanctions as enshrined in Security Council Resolutions 1173 (1998), 1176 (1998), 1295 (2000), 1306 (2000) and 1343 (2001). These resolutions prohibited the import of rough diamonds coming directly or indirectly from Sierra Leone or Angola, unless accompanied by certificates of origin, and all direct and indirect import of rough diamonds from Liberia, whether they originate in Liberia or not. According to article 25 of the UN Charter, Security Council resolutions are binding on UN member states and if they entail sanctions concerning the trade in diamonds (or weapons) with other countries, they will thus have consequences for European economic relations.

Most UN resolutions are implemented under the European Union's Common Foreign and Security Policy (CFSP, Pillar II of the EU decision-making structure) on

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<sup>31</sup> "The Commission is looking at this issue from the perspective of our obligations under international trade agreements. We are looking at the interests all member states have in maintaining a European Community as a vital economic force without internal borders. But we are of course also looking at the issue from the perspective of conflict solution and prevention". Quoting Mr. Anthonius de Vries, Economic and Financial Sanctions Co-ordinator, RELEX, European Commission. See: *EU Control of Diamond Imports from African Countries in Conflict*, Fatal Transactions Report of the European Union Expert Meeting, Amsterdam, September 25, 2001. Available at: <http://www.intermonoxfam.org/docs/ExpertMeeting20010925.pdf>.

<sup>32</sup> Peggy Jo DONAHUE, 'EU Plans Tough Conflict Diamond Rules' in: *Professional Jeweler*, August 8, 2002. See also: *EU implements Kimberley Scheme to block blood diamonds*, Brussels, December 20, 2002. Available at: [http://europa.eu.int/comm/external\\_relations/cpcm/cp/ip02\\_1955.htm](http://europa.eu.int/comm/external_relations/cpcm/cp/ip02_1955.htm).

<sup>33</sup> See: The Göteborg European Council of June 2001. It endorsed a programme for the prevention of violent conflicts, which states, *inter alia*, that the Member States and the Commission will tackle the illicit trade in high-value commodities, amongst others by identifying ways of breaking the link between rough diamonds and violent conflicts and supporting the Kimberley Process. Available at: [http://europa.eu.int/comm/gothenburg\\_council/index\\_en.htm](http://europa.eu.int/comm/gothenburg_council/index_en.htm).

behalf of its Member States so that not every country will implement the resolution individually.<sup>34</sup>

Article 301 of the Treaty establishing the European Community (TEC) stipulates that EU members can act upon a 'common position'<sup>35</sup> in order to interrupt or reduce economic relations with third countries within the scope of the CFSP.

A common position is a binding (political) instrument as foreseen by the Treaty on European Union (TEU) and adopted by the Council of Ministers (or 'Council') in order to harmonise EU Member States' national policies.<sup>36</sup> Consequently, "urgent measures"<sup>37</sup> can be taken by the Members under the TEC on, e.g., the implementation of UN resolutions. Economic restrictions are in nearly all cases based on a specific 'Regulation' and the Commission is then required to make a proposal for a 'Council Regulation', which the Council can subsequently adopt by a qualified majority.<sup>38</sup> In the case of the implementation of UN resolutions concerning conflict diamonds, the several adopted common positions let the urgent measures take shape as Council Regulations in order to avoid unfair competition among diamond trading Member States.<sup>39</sup> As some countries may or may not (timely) implement a UN embargo<sup>40</sup>, it is generally considered expedient to harmonise the necessary measures in the form of a Council Regulation because, once adopted, European Regulations are binding on Member States and are directly applicable in all Member States and to all EU citizens.<sup>41</sup>

Council Regulations were adopted quickly on all UN resolutions, implementing the necessary trade restrictions. Some examples: EU Council Regulation No 1705/98<sup>42</sup> implemented measures in accordance with UN resolutions 1173 (1998) and 1176

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<sup>34</sup> This practice probably has its origin in art. 11(1) of the Treaty on European Union (TEU), which states: "The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:.....to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter..."

Besides, much more can be done by Community legislation than Member States can do themselves individually.

<sup>35</sup> Art. 12 TEU: "The Union shall pursue the objectives set out in art. 11 by:...adopting Common Positions".

<sup>36</sup> Art. 15 TEU: "The Council shall adopt common positions. Common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions."

<sup>37</sup> Art. 301 TEC.

<sup>38</sup> See: [http://europa.eu.int/comm/external\\_relations/cfsp/sanctions/index.htm](http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm).

<sup>39</sup> See: e.g., Council Regulation (EC) No 1745/2000 of August 3, 2000 on the importation into the Community of rough diamonds from Sierra Leone, O.J. No. L200/21, 8.8.2000, p.1. The regulation states that: "...with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council..."

<sup>40</sup> Although UN resolutions require member states to "act strictly in accordance with the provisions of [UN resolutions] notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into", several European countries had not been that eager to forego their obligation under the EC Treaty not to obstruct the free movement of goods within the EU, hence preventing them to perform extensive border checks. See: *Conflict diamonds: crossing European borders? A case study of Belgium, the United Kingdom and the Netherlands*, Amsterdam, NIZA/ Fatal Transactions and SOMO (institute for multinational research), August 2001 [hereinafter NIZA/SOMO].

Available at: <http://www.niza.nl/docs/200301211132143514.pdf>

<sup>41</sup> Art. 249 TEC: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

<sup>42</sup> Council Regulation (EC) No 1705/98 of July 28, 1998, OJ L215, August 1, 1998, p.1. "Concerning the interruption of certain economic relations with Angola in order to induce the "União Nacional para a Independência Total de Angola" (UNITA) to fulfil its obligations in the peace process, and repealing Council Regulation (EC) No 2229/97".

Available at: [http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l\\_215/l\\_21519980801en00010011.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_215/l_21519980801en00010011.pdf).

(1998). UN resolution 1306 (2000) on Sierra Leone was implemented by Council Regulation No 1745/2000 and Council Regulation No 1318/2002<sup>43</sup> was subsequently adopted to implement Resolutions 1343 (2001) and 1408 (2002).

Each EU country is then responsible for establishing mechanisms to enforce the regulations and to punish non-compliance. Within the EU, customs operations are the responsibility of each of the Member States themselves.

Yet, the effectiveness of the measures taken subsequent to the UN resolutions varied greatly among European Member States. Apparently, by 2001 only Belgium had satisfactory regulation and border checks in place to avoid conflict diamond entry.<sup>44</sup>

## 2.3. Implementing the KPCS

After Council Regulation 1745/2000 had been extended by Regulation 303/2002<sup>45</sup>, it was felt that the existing measures would have to be enhanced by effective controls of the international trade in rough diamonds.<sup>46</sup>

Because the adopted EU Resolutions only applied to trade relations with non-EU members<sup>47</sup>, the UN resolutions' requirement to not indirectly import diamonds from Angola, Sierra Leone, and Liberia could not be implemented properly and thus a loophole regarding imports and exports within the Community market had not been eliminated. As the EU Treaty prescribes countries to refrain from taking measures that impede the free movement of goods within the EU<sup>48</sup>, several countries had not taken extra inspection measures on diamonds imported from other Member States, but actually originating in 'sensitive' African countries.<sup>49</sup>

Sanction busting and diamond smuggling practices had accordingly highlighted the need for certificates of origin for all rough diamonds.

Subjecting European trade in rough diamonds to a certification scheme concerns both the free movement of goods and the common commercial policy. Based on the European Community's exclusive competence in such matters and regarding its legal personality<sup>50</sup>, the Community is apt and able to function as a single Participant

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<sup>43</sup> Council Regulation (EC) No 1318/2002 of July 22, 2002, OJ L 194, July 23, 2002, pp. 1-4, Concerning certain restrictive measures in respect of Liberia.

<sup>44</sup> See: NIZA/SOMO. According to this report, the UK and especially the Netherlands were lacking implementation capacity and transparency regarding the measures that were taken.

<sup>45</sup> Council Regulation (EC) No 303/2002 of February 17, 2002, OJ L 47/8, February 19, 2002, Prohibition on the Importation into the Community of Rough Diamonds from Sierra Leone.

<sup>46</sup> See: Council regulation (EC) No 2368/2002 of December 20, 2002, OJ L 358/28, December 31, 2002, implementing the Kimberley Process certification scheme for the international trade in rough diamonds [hereinafter Council Regulation 2368/2002].

Available at: [http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l\\_358/l\\_35820021231en00280048.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_358/l_35820021231en00280048.pdf).

<sup>47</sup> See for example Council Regulation No 1745/2000, where art. 1 refers to the prohibition of importation of rough diamonds from Sierra Leone *into the territory of the Community*, and does not mention import and export between Member States themselves.

<sup>48</sup> Part three, Title I *Community Policies; Free Movement of Goods* of the EC Treaty.

<sup>49</sup> "The Council had never adopted a Regulation compelling member states to strictly monitor and inspect rough diamonds imported from the so-called 'sensitive' African countries, which are countries suspected of indirectly importing conflict diamonds". NIZA/SOMO, pp. 9-10.

<sup>50</sup> Art. 281 of the EC Treaty confers legal personality on the European Community, enabling it to participate in international treaties and negotiations.

in the Kimberley Process.<sup>51</sup> For the purposes of the scheme, the Community is to be considered a single entity without internal borders.<sup>52</sup>

Before the KPCS plenary meeting in Luanda, Angola, (October 29 - November 1, 2001) the Council had authorised the Commission to negotiate an agreement establishing an international certification scheme for rough diamonds and to conduct these negotiations on behalf of the European Community. Individual European countries would thus not hold their own negotiating positions.<sup>53</sup> As defined by the common commercial policy, the Commission has the exclusive right to submit proposals related to trade negotiations and trade policies.<sup>54</sup>

The Kimberley Process only sets out a basic framework and, assuming good faith, relies upon Participants to implement effective legislation. Encouraged by the conclusions of the Göteborg European Council of 2001 and pursuant to a Commission's proposal<sup>55</sup> the KPCS was finally implemented by Council Regulation 2368/2002 on the 20<sup>th</sup> of December 2002, setting up a Community system of certification and import and export controls for rough diamonds.<sup>56</sup> The Regulation particularly considers Article 133 of the EC Treaty, which bases the common commercial policy on uniform principles concerning, among others, the conclusion of trade agreements (such as the KPCS).<sup>57</sup>

## 2.4. The Community system

The Regulation displays a set of controls and a system of certification based on, and improving, control mechanisms that already existed in some Member States (especially the United Kingdom and Belgium), subsequently creating a system that applies uniformly throughout the EU.<sup>58</sup> The certification scheme was meant to make an end to the legality of plain 'declarations of provenance' for imports of rough

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<sup>51</sup> See: *Proposal for a Council Regulation implementing the Kimberley Process certification scheme for the international trade in rough diamonds*, Commission of the European Communities, Brussels, August 8, 2002 COM(2002) 455 final 2002/0199 (ACC), p.2 [hereinafter Proposal for Council Regulation KP]. Available at: [http://europa.eu.int/comm/external\\_relations/cpcm/cp/doc/com02\\_455\\_en.pdf](http://europa.eu.int/comm/external_relations/cpcm/cp/doc/com02_455_en.pdf);

See also Council Regulation 2368/2002, art. 21(1).

<sup>52</sup> See: Council Regulation 2368/2002, art. 1.

<sup>53</sup> Ingrid J. TAMM, 'Diamonds in Peace and War: Severing the Conflict-Diamond Connection' in: *World Peace Foundation Report 30*; WPF Program on intrastate conflict, Cambridge, Massachusetts, CARR Center for Human Rights Policy, 2002, p. 28.

Available at: <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/WPF-Tamm%20Diamond%20Report.pdf>.

<sup>54</sup> Art. 133 (2) EC Treaty. 'The Commission shall submit proposals to the Council for implementing the common commercial policy'. See also NIZA /SOMO, p. 10.

<sup>55</sup> See: 'Proposal for Council Regulation KP'

Commission proposals have their legal basis in art. 133 (2) EC Treaty.

<sup>56</sup> See: Council Regulation 2368/2002. The Regulation is now supplemented by a series of subsequent amendments, which list other participants, diamond bourses, community authorities and additional amendments.

Available at: [http://www.kimberleyprocess.com:8080/site/www\\_docs/press1/summary\\_of\\_rv\\_ec.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/press1/summary_of_rv_ec.pdf)

<sup>57</sup> Art. 133 TEC states: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements...".

<sup>58</sup> See: Proposal for Council Regulation KP.

diamonds that, under the GATT system of free trade, made it easy for illicit and conflict diamonds to enter the legal trade.<sup>59</sup>

#### 2.4.1. Community Authorities

The intention of the Community system is not to stop the trade of conflict diamonds between the different European countries, but to prevent conflict diamonds coming into Europe in the first place.<sup>60</sup> Therefore, all European Member States are instructed to only import and export rough diamonds via a designated 'Community Authority' (CA) that has met conditions agreed with the Commission. The EU country serving as an entry point (CA) is responsible for fully monitoring and inspecting diamond import, verifying KPCS certificates, and issuing and validating uniform Community certificates. The same principle applies to exports from the Community.<sup>61</sup>

A reason for establishing specialized CAs is that previously the checking of diamond imports had not been done just as extensively in every Member State; conflict diamonds would thus have an easy way into the EC when imported through a member with inadequate border controls. Currently there are four competent CAs: based in the United Kingdom, Belgium, Germany and the Czech Republic.<sup>62</sup> Rough diamonds can however enter the EC through any port of entry in the 25 member states, but if goods arrive in countries where there is no CA they must be declared and put on a customs transit system for submission to a CA in another Member State.<sup>63</sup>

#### 2.4.2. Industry self-regulation in Europe

The KPCS is an agreement between states and the certification requirements apply to international trade only. As already noted, because the European Community is a single market, it is seen as one Participant: a single entity without internal borders.<sup>64</sup> This means that the KPCS does not apply to trade between EU Members.<sup>65</sup> Moreover, if the KPCS had been applicable between EU Members, its regulations would almost certainly have contravened established free trade provisions of the European Community. The EC is an internal market characterised by the abolition of obstacles to the free movement of goods between Member States, and this entails a prohibition to subject the trade of rough diamonds

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<sup>59</sup> *Implementing Kimberley: Stopping the blood diamond trade to Europe*, Report of the European Union Expert Meeting, Oxfam International, NIZA, Fatal Transactions March 7, 2002, p. 9 [hereinafter *Implementing Kimberley*].

<sup>60</sup> *Id.*, p. 7.

<sup>61</sup> See: *Implementing the KPCS inside the EC/EU*.

Available at: [http://europa.eu.int/comm/external\\_relations/kimb/intro/implement.htm](http://europa.eu.int/comm/external_relations/kimb/intro/implement.htm).

<sup>62</sup> See: *Conflictdiamanten: Kimberley certificeringssysteem*, s' Gravenhage, Ministerie van Financiën, Douanenuws, October 3, 2005. Available at: <http://www.minfin.nl> (Last visited: 16-12-2005).

<sup>63</sup> See: *Summary report of the review visit of the Kimberley Process to the European Community*, November 8-12, 2004 [hereinafter *Review visit European Community*].

Available at: [http://www.kimberleyprocess.com:8080/site/www\\_docs/press1/summary\\_of\\_rv\\_ec.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/press1/summary_of_rv_ec.pdf).

<sup>64</sup> See: Council Regulation 2368/2002, art. 1.

<sup>65</sup> F. WEYZIG, *The Kimberley Process Certification Scheme one year ahead: state of affairs in the EU-Executive summary and recommendations*, Amsterdam, SOMO, NIZA, Fatal Transactions, September 2004, p.10 [hereinafter *The KPCS one year ahead*].

KPCS regulations do however apply in the trade between EU Members in the sense that internal controls must be administered just as in any Participant under KPCS jurisdiction.



between EU countries to customs procedures such as inspections or certification requirements.<sup>66</sup>

Therefore, hypothetically, if there are no internal controls beyond the CA entry points and no border controls in the market place within the European Community, smuggling of diamonds into the Community could increase significantly.<sup>67</sup> This is because, once smuggled into a European country, diamonds would find themselves inside the borderless and inspection-less sphere that is the European Community and would therefore be presumed to be legal. Diamonds that are traded across borders within the EC are generally mixed with diamonds from other origins and as a result the source of the stones becomes harder to trace with each transaction. Hence, once inside, illicit diamonds would effectively be laundered and become 'legal'.

To tackle this problem, the European diamond industry established a 'system of self-regulation/system of warranties'<sup>68</sup>, which applies to both international and national transactions within the EC.<sup>69</sup> The difference here with the self-regulation system of other KPCS Participants is that under EU regulation all exporting companies can make use of a 'fast-track approach' for issuing certificates if they are members of a listed diamond bourse with a certain self-regulation system, whereby a signed declaration by the exporter on the lawful import may be accepted as conclusive evidence. In contrast, if exporting companies are not members of such a bourse, they must be able to demonstrate that the diamonds were clean when first imported into the EU. This means a reversed burden of proof, which should provide for extra circumspection and awareness among those companies when importing diamonds. In general, a KPCS review mission found the EC regulations, institutional framework and its implementation of the KPCS to meet or exceed the minimum KPCS standards and to be an excellent model for other Participants.<sup>70</sup>

### **2.4.3. Compliance with the Community system**

The European Commission, as the Community's representative, ensures compliance with the obligations arising from the Regulation throughout the Community. The Commission is responsible for the exchange of information on trade among KPCS Participants, and it collaborates in monitoring activities and dispute settlement. It also works with the CAs to guarantee effective implementation of the provisions in the Regulation on self-regulation of the diamond

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<sup>66</sup> See: Art. 3(1)(a) and (c) TEC; referring to Community activities entailing the prohibition of customs duties, quantitative restrictions and measures having equivalent effect, on the import and export of goods, and refers to an internal market without obstacles to the free movement of goods. In this respect also articles 2, 10, 14, and title II of TEC are important.

<sup>67</sup> *Implementing Kimberley: Stopping the blood diamond trade to Europe*, p. 10.

<sup>68</sup> The voluntary 'system of industry self-regulation' provides for a chain of warranties intended for national controls of the diamond industry. The industry offered to regulate itself in order to prevent excessive government interference. Because the KPCS only applies to cross-border trade, the system of self-regulation is considered to be a necessary supplement. It consists of internal control mechanisms and is underpinned by internal penalties set by the industry itself. The system should enable diamond dealers who buy validated, certified diamond packets from diamond importers to have a legal basis for issuing a warranty to their customers, stating that the diamonds sold are conflict-free.

See: <http://www.worlddiamondcouncil.com/wdcbk.pdf>.

<sup>69</sup> See: Council Regulation 2368/2002.

<sup>70</sup> See: Review visit European Community.

industry, and can legally recognise industry organisations that have established a system of warranties for implementing the KPCS.<sup>71</sup>

## 2.5. Regulation on conflict diamonds in the Netherlands

As a member of the European Community, the Netherlands are also subject to Council Regulation 2368/2002 implementing the Kimberley Process, and are represented by the European Commission in negotiations. Trade statistics for the Netherlands show that the country is importing and exporting relatively small amounts of rough diamonds. Most rough diamonds are not imported directly from the countries in which they are mined but from other EU countries, which made it more difficult to ensure that Dutch diamond import did not contain conflict diamonds before the introduction of the KPCS.<sup>72</sup> Although the Netherlands are not a big player in the international diamond trade, it is nevertheless interesting to see how they have dealt with the requirements stemming from the UN sanctions and the Kimberley Process. We will therefore briefly analyse the Dutch execution of measures regarding conflict diamonds as an example of national implementation in EU Member States.

Because the Netherlands had been in the UN Security Council during 1999-2000, it had also been directly involved with the call for sanctions on conflict diamonds and the issue of implementing these measures by all UN members. In the Netherlands, it is the Ministry of Foreign Affairs that coordinates relations with both the UN and the EU regarding UN resolutions on conflict diamonds. When necessary, the Ministry of Foreign Affairs will work together with other ministries in dealing with the subject.<sup>73</sup> Once the EU has adopted a Regulation to implement UN sanctions, it will be directly applicable in the Netherlands and does not have to be transposed into Dutch law. The Ministry of Foreign Affairs becomes responsible for ensuring that violation of EU regulations and UN sanctions are punishable under Dutch national law.<sup>74</sup> This can be done through the Dutch Sanctions Law (*Sanctiewet 1977*).<sup>75</sup> This way no new laws have to be submitted to Parliament every time a sanction needs to be implemented. Article 2(2) of the Sanctions Law gives the Minister of Foreign Affairs competence to decide on a 'ministerial sanctions regulation' in case of execution of obligations stemming from UN resolutions and EU regulations.<sup>76</sup> Unlike some other European countries, the Netherlands do not usually take direct action on UN resolutions, the policy is rather to wait for EC-implementation before enacting UN resolutions.<sup>77</sup> When a UN sanction becomes known, the Dutch

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<sup>71</sup> See: [http://europa.eu.int/comm/external\\_relations/kimb/intro/implement.htm](http://europa.eu.int/comm/external_relations/kimb/intro/implement.htm)

<sup>72</sup> NIZA/SOMO, pp. 17-18.

<sup>73</sup> *Id.* p. 27.

<sup>74</sup> See: Council Regulation 1745/2000, art. 5. As is required by the Council regulations that each member state will determine the sanctions to be imposed where the Regulation is infringed.

<sup>75</sup> See: *Sanctiewet 1977*. Available at: <http://wetten.overheid.nl/cgi-bin/sessioned/browsercheck/continuation=10673-002/session=350716614299022/action=javascript-result/javascript=yes>

<sup>76</sup> Dr. Wim VOERMANS and Prof. dr. Philip EIJLANDER, *Onderzoek kwaliteit van ministeriële regelingen*, Centrum voor wetgevingsvraagstukken, Katholieke Universiteit Brabant, Onderzoek in opdracht van het WODC van het Ministerie van Justitie; Sanctieregeling Sierra Leone, Stort. November 14, 2000, nr. 211, p. 8', Tilburg, February 2002. Available at: <http://www.justitie.nl/>.

<sup>77</sup> As stated by Mr. Wim KEIZER, Origin and Customs Affairs, of the Dutch Ministry of Economic Affairs. *EU Control of Diamond Imports from African Countries in Conflict*, Fatal Transactions Report of the European Union Expert Meeting, Amsterdam, September 25, 2001. Available at: <http://www.intermonoxfam.org/docs/ExpertMeeting20010925.pdf>.

standard procedure is to first look into the consequences of these sanctions for the Netherlands before making regulations to implement sanctions.<sup>78</sup>

The Ministry of Economic Affairs is generally the competent authority on internal economic affairs related to UN sanctions. It is, however, rather unclear whether it also has the responsibility for sanctions regarding the diamond trade and the Kimberley Process.<sup>79</sup> The execution of customs controls and the issuing of export permits concerning goods that fall under UN sanctions is being handled by the Central Customs Department (*Douane/Centrale Dienst In- en Uitvoer*: CDIU), which formally falls under the Ministry of Finance.<sup>80</sup> The implementation of customs and border control mechanisms, as well as the detection of economic crimes is the responsibility of the Economic Inspection Service (*Economische Controle Dienst*: ECD).<sup>81</sup> The FIOD/ECD can be instructed by the Ministry of Foreign Affairs to look for violations of UN sanctions and EU regulations.<sup>82</sup> In addition, the National Tax Service (*Rijksbelastingdienst*), part of the Ministry of Finance that is responsible for customs, also has a supervisory function with regard to the implementation of sanctions. The fiscal department of this ministry instructs the customs service as to what steps it must take to implement EU regulations and UN sanctions, including details on what products and trade activities are forbidden for import and export.<sup>83</sup>

In order to put Council Regulation 2368/2002 into practice and adapt it to Dutch national regulations, the *Sanctieregeling conflictdiamanten* (Sanctions regulation on conflict diamonds) was adopted in 2003. Through the *Sanctieregeling* Dutch customs officials are instructed to make sure that the provisions of Regulation 2368/2002 are fully complied with. In case of a situation that is inconsistent with the Regulation, or in case of doubt, the Department Reporting and Selection (*Melding & Selectie*) of the FIOD/ECD must be contacted.<sup>84</sup>

Just like most European Member States the Netherlands decided not to apply for being a European entry point, so Dutch exporters who want to export rough diamonds have to turn to one of the four established CAs. Diamonds can only be

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<sup>78</sup> NIZA/SOMO, p. 27.

<sup>79</sup> Telephone interview with Mr. H. Hemmes, Policy staff member, Ministry of Economic Affairs, on December 28, 2005, stating that the Ministry is somewhat “in between”, regarding responsibility and authority on the subject of conflict diamond regulation in the Netherlands. Apparently there is no Ministry or other institution that actually considers itself as the competent authority to deal with the subject.

<sup>80</sup> NIZA/SOMO, p. 28;

A telephone interview with one of the CDIU officials (“anonymous”) on December 28, 2005, showed, however, that they are ill informed on the subject on conflict diamonds and that there is no clarity about the CDIU’s responsibilities and tasks regarding the matter.

<sup>81</sup> In 1999 the ECD merged with the FIOD (Fiscal Intelligence- and Detection Service) and is called FIOD/ECD, which now falls under the Ministry of Finance.

See: [http://www.belastingdienst.nl/corpinfo/fs/fiod/fr\\_fiod\\_corp0.html](http://www.belastingdienst.nl/corpinfo/fs/fiod/fr_fiod_corp0.html) (Last visited January 17, 2006);

Officials at the FIOD/ECD are nevertheless hardly aware of the regulations on diamonds and were reluctant to provide information. This makes it hard to tell whether any incidents have yet occurred regarding conflict diamonds. Telephone interview with “anonymous” at the FIOD/ECD, December 28, 2005.

<sup>82</sup> See: [http://www.aivd.nl/contents/pages/3717/brochure\\_proliferatie\\_massavernietigingswapens.pdf](http://www.aivd.nl/contents/pages/3717/brochure_proliferatie_massavernietigingswapens.pdf).

<sup>83</sup> NIZA/SOMO, pp. 27-29.

<sup>84</sup> *Sanctieregeling conflictdiamanten 2003*, Stcrt. 2003, no 39, February 25, 2003, book NFD-IB number 40.14.01. ‘Telefaxbericht Directoraat- Generaal Belastingdienst’, No: BCPP 2005/1203 M, ‘s-Gravenhage, May 19, 2005.

Available at:

[http://www.minfin.nl/default.asp?CMS\\_TCP=tcpAsset&id=MFCWD6669DA879FA946129E719D4B1F0474B8X5X33296X74](http://www.minfin.nl/default.asp?CMS_TCP=tcpAsset&id=MFCWD6669DA879FA946129E719D4B1F0474B8X5X33296X74).

brought in the European Community's 'free circulation' if they are checked by a CA, which is authorised to grant a Community certificate.<sup>85</sup>

### **Unawareness in the Netherlands**

However, since the adoption of the UN sanctions only few people within the Dutch authorities seem to have been aware of the implementation of UN sanctions on diamond trade.<sup>86</sup> In practice, many government officials and customs officers are also ill informed about the Kimberley Process measures and their consequences for the national regulation of rough diamond import, export and transit to a Community Authority.<sup>87</sup> This seems to indicate a lack of capacity on behalf of the Dutch authorities to properly deal with the trade of rough diamonds.

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<sup>85</sup> *In- en uitvoerregeling voor ruwe diamanten als gevolg van het Kimberleyproces*, Ministerie van Economische Zaken, January 24, 2003.  
Available at: [http://www.niza.nl/uploads/minez\\_nl20030124.pdf?&username=guest@niza.nl&password=9999&groups=NIZA](http://www.niza.nl/uploads/minez_nl20030124.pdf?&username=guest@niza.nl&password=9999&groups=NIZA).

<sup>86</sup> NIZA/SOMO, p. 21.

<sup>87</sup> Conclusion from interviews with officials from the Ministries of Foreign Affairs, Economic Affairs and Finance, as well as the FIOD/ECD, the CDIU, the Landelijke Informatielijn Douane, Douane Schiphol and the Economische Voorlichtingsdienst on 27, 28 and 29 December, 2005.

# Chapter III: Kimberley Process Compatibility with International Trade Law

## 3.1. Introduction

Before the adoption of the Interlaken Declaration<sup>88</sup> there had been much debate among Participants about whether the KPCS might be considered as trade-restrictive under the disciplines of the trade agreements administered by the World Trade Organisation (WTO) and centred around the General Agreement on Tariffs and Trade (GATT).<sup>89</sup> Despite the KPCS' legal underpinning provided by UN endorsement, it was nonetheless believed that the KPCS might be inconsistent with WTO mores that are often seen as "insurmountable hurdles".<sup>90</sup> During the negotiations of the Kimberley scheme it was even deemed necessary to create a special working group on WTO compliance issues.<sup>91</sup>

Disputes can potentially be initiated by WTO Members who do not participate in the Kimberley Process and feel that they are hampered in trade due to a KPCS trade measure. Even a country not directly affected by such a trade restriction might arguably mount a challenge fearing that the scheme will become too universal and push the non-Participant completely off the world diamond market.

Some countries therefore wanted to make the KPCS agreement 'WTO-proof', scrubbing the working document<sup>92</sup> of language that would lead the agreement into contradiction with the WTO.<sup>93</sup> Others feared this concern would weaken the negotiation of a full-bodied and effective international certification scheme.<sup>94</sup> As a result, the delegates made it relatively easy for a nation to participate in the KPCS by deciding that the proposed system should be open to all countries, with almost no entry requirements.<sup>95</sup> This way, one avoided that countries would feel barred from participation in the scheme, hence reducing the risk of the KPCS being stigmatised as

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<sup>88</sup> With the 'Interlaken Declaration' the Participants announced their agreement on the KPCS. This was done on November 5, 2002, at Interlaken, Switzerland. See: *Interlaken Declaration on the Kimberley Process Certification Scheme for Rough Diamonds*, November 5, 2002. [hereinafter Interlaken Declaration]. Available at: <http://www.info.gov.za/speeches/2002/02112112461002.htm>.

<sup>89</sup> *NGO Report on the Ottawa Kimberley Process Meeting*, Partnership Africa Canada, March 20, 2002. [hereinafter NGO report Ottawa meeting]. Available at: <http://www.globalpolicy.org/security/issues/diamond/2002/0320ngorep.htm> (Last visited: January 7, 2006).

<sup>90</sup> *Implementing Kimberley*, p.11.

<sup>91</sup> See: *Kimberley Process Meeting, Ottawa Final Communiqué*, 18 to 20 March 2002.

Available at: [http://www.kimberleyprocess.com:8080/site/www\\_docs/plenary\\_meetings12/final\\_communique%2c\\_ottawa\\_2002.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/plenary_meetings12/final_communique%2c_ottawa_2002.pdf). (last visited: 4-1-2006).

<sup>92</sup> To make sure that every participant knew what to undertake and what standards to follow in certification and implementing required national legislation, all the elements of the KPCS were outlined in a final 'Kimberley Process Working Document'. See: *Essential elements of an international scheme for certification for rough diamonds with a view to breaking the link between armed conflict and the trade in rough diamonds*, Kimberley Process Working Document nr 1/2002, March 20, 2002 [hereinafter KP Working Doc. 1/2002]. Available at: <http://action.web.ca/home/pac/attach/March%202002%20Kimberley%20Process%20Working%20Document%20nr%201%20of%202002.doc>.

<sup>93</sup> TAMM, p. 31.

<sup>94</sup> PRICE, p. 6.

<sup>95</sup> This approach has changed now, however, and entry requirements have firmed up considerably. Countries applying for KPCS membership, such as Bangladesh and Lebanon recently, have had to make quite an effort to comply with KPCS minimum requirements. Correspondence with Ian Smillie on April 25, 2006.

trade discrimination. On the other hand, many countries probably thought that the security provisions in the GATT<sup>96</sup> would safeguard the KPCS system from challenge anyway and that there would thus be no need for a display of overscrupulousness that could water down the initiative.<sup>97</sup>

Despite these considerations, on May 15, 2003, the WTO General Council decided on the adoption of a waiver which was requested<sup>98</sup> by several WTO members seeking a 'green light' for KPCS trade measures.<sup>99</sup> A waiver is a decision of the WTO Ministerial Conference, granted only in case of "exceptional circumstances", in order to waive an obligation imposed on a member by the WTO agreements.<sup>100</sup> The waiver explicitly allows countries to enact trade restrictions and prohibitions that seem, at first sight, inconsistent with general WTO rules.<sup>101</sup>

This Chapter will further discuss which GATT articles are potentially violated due to Kimberley restrictions, the ways in which these violations could possibly be overcome and the reasons why the WTO finally opted for this rather exceptional waiver decision that only concerns restrictions against non-Kimberley Process Participants.

### 3.2. Possible violations of WTO rules

The certification scheme developed in the Kimberley Process only provides guidance to the Participants on how to implement the scheme at the national level. Therefore, the scheme as such does not constitute a trade restriction in WTO terms and the question of WTO conformity only rises at the level of national implementation.<sup>102</sup> Only when KPCS provisions are converted into national legal rules and are accordingly executed as a Participant's national trade policy, another country could feel restricted in trade by its fellow WTO Member and call the WTO's dispute settlement system into action.

The KPCS targets the procedures for diamond mining, exporting, and importing. It requires the use of certificates according to the prescribed process and procedure, the certification of diamond mines, and the maintenance of security standards for prospecting and mining companies.<sup>103</sup> Such measures have a restrictive effect on

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<sup>96</sup> General Agreement on Tariffs and Trade 1994, April, 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, the legal texts: the results of the Uruguay Round of multilateral trade negotiations, 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

<sup>97</sup> See: *NGO report Ottawa meeting*.

<sup>98</sup> The "Understanding in respect of Waivers of obligations under the GATT 1994" states that a request for a waiver shall describe: the measures which a member proposes to take; the specific policy objectives which the Member seeks to pursue; and the reasons which prevent the Member from achieving its policy objectives by measures consistent with GATT 1994.

<sup>99</sup> *Waiver concerning Kimberley Process Certification Scheme for rough diamonds*, WTO general Council, WT/L/518, decision of May 15, 2003 [hereinafter Waiver decision]. Available at: <http://docsonline.wto.org> (last visited: March 18, 2005).

<sup>100</sup> Art. IX, paragraphs 3 and 4 of the WTO Agreement.

<sup>101</sup> The waiver runs until 31 December 2006 and excuses WTO members listed in an annex to the Waiver Decision for violations of certain articles of the GATT concerning measures "necessary to prohibit the export and import of rough diamonds to and from non-Participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme". Waiver decision, art. 1.

<sup>102</sup> It is well established that only governmental measures fall within the ambit of the WTO. See: *Japan – Measures Affecting Consumer Photographic Film and Paper*, Panel Report, WT/DS44/R, March 31, 1998, para. 10.56. Measures taken by the industry under its system of self-regulation are therefore not under purview of the WTO.

<sup>103</sup> *KP Working Doc. 1/2002*, Section IV, and paragraphs 9 and 10 at Annex II.

international trade and thus potentially infringe on GATT provisions. In order to accommodate all WTO Members' concerns, a paragraph was added to the waiver, noting that "this Decision does not prejudice the consistency of domestic measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions, and that the waiver is granted for reasons of legal certainty".<sup>104</sup>

Although the waiver grants 'legal certainty' now, it is still worthwhile examining how the KPCS licensing system might have been treated under WTO rules should a dispute have arisen. Therefore, we will now have a closer look at the GATT articles I:1, XI:1 and XIII:1, mentioned in the waiver decision, as well as other GATT articles that could be violated by a KPCS-like certification scheme.

### 3.2.1 Article I:1 GATT 1994

Article I:1 prescribes the general and fundamental most-favoured-nation (MFN) treatment.<sup>105</sup> This principle prohibits a country to discriminate between other countries on a non-product related basis, i.e. to discriminate because of "nationality" or the "national origin or destination" among "like products", as such practice distorts the free market. A key KPCS provision with regard to the question of article I conformity is: "Each Participant should ensure that no shipment of rough diamonds is imported from or exported to a non-Participant".<sup>106</sup> This means that trade between Participants is restricted to certified non-conflict diamonds only and that all non-Participants are banned from the rough diamond trade, and are thus discriminated in trade.

To determine whether there is a violation of the MFN obligation a three-question test must be done with regard to the wording of Art. I:1:

- A. Is the measure at issue a trade "advantage" of the kind covered by Article I:1?;
- B. Can the products concerned be classified as "like products"?, and;
- C. Was the advantage granted "immediately and unconditionally" to all like products concerned?<sup>107</sup>

A) Answering the first question we can assert that KPCS Participants are indeed granted a trade advantage as opposed to non-Participants. The KPCS "rules and formalities in connection with importation and exportation"<sup>108</sup> essentially amount to a ban on trade with non-Participants, who are therefore disadvantaged in a global diamond trade principally governed by the Kimberley Process.

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<sup>104</sup> See: *Waiver decision*. See: also 'WTO goods council approves Kimberley Process waiver' in: *Bridges Weekly* February 27, 2003. Available at: <http://www.ictsd.org/weekly/03-02-27/story3.htm>. (last visited: March 19, 2005).

<sup>105</sup> Art. I:1 GATT 1994: "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". [emphasis added].

<sup>106</sup> *KP Working Doc. 1/2002*, Section III (c).

<sup>107</sup> P. VAN DEN BOSSCHE, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge, Cambridge University Press, 2005, p. 312.

<sup>108</sup> Art. I:1 GATT 1994. The "rules and formalities" are in this case the requirements that the KP Working Doc. 1/2002 displays in sections III and IV regarding the import of rough diamonds.

B) As for the second question we must keep in mind that the MFN treatment obligation only applies to “like products”, meaning that only products that are not ‘like’ may be treated differently. The question in this case is thus whether rough diamonds coming from a KPCS Participant can be considered ‘like’ rough diamonds from a non-participating country. Alternatively, is it allowed to discriminate between rough diamonds based on a presumed relation with terrorism and conflict? Can ‘normal’ diamonds be considered to be ‘like’ conflict diamonds? What is the relevant distinguishing characteristic of the product?

## **Likeness**

The concept of ‘likeness’ is actually very broad and is one the most difficult issues in international trade law, but there are some criteria that have generally been used by GATT panels to determine whether products are ‘like’. This includes looking at the qualities or characteristics of the products and the question from whose perspective ‘likeness’ should be judged.<sup>109</sup> If ‘likeness’ were to be judged from the point of view of concerned NGOs and a diamond consuming, horrified civil society, conflict diamonds would certainly not be considered ‘like’ ‘clean’ diamonds. On the other hand, the question remains whether the qualities and characteristics of one type of diamond differ sufficiently from the other to be classified as an ‘unlike’ product. Must there be significant physical differences or are there other characteristics that could form the basis for differentiating ‘dirty’ from ‘clean’ diamonds?

## **Processes and Production Methods**

Within the context of this discussion, it is interesting to have a look at the use of criteria linked to the ‘Processes and Production Methods’ (PPMs) of a product. WTO obligations are often interpreted as prohibiting trade restrictions directed at the PPMs, implying that products may not be differentiated based on the way they were produced or processed.<sup>110</sup> The preferred criterion is thus what products are, not how they are made.

Concerning the subject of differentiating between ‘clean’ and conflict diamonds as is the purpose of the KPCS, it is not that easy to determine whether the KPCS provisions are directed towards the PPMs of rough diamonds or not. The difficulty is that trade restrictions on rough diamonds relate to features that are further removed from the physical characteristics of the product itself and can therefore not be classified as ‘traditional’ PPMs.<sup>111</sup> Of course, rough diamonds originating from certain regions are banned, primarily, because of those who mine and sell them (rebel movements and their allies) and because of what their subsequent purpose is (to finance brutal conflicts and insurrections). Conflict diamonds are also seen as detrimental because their extraction and distribution go hand in hand with severe human rights violations such as slave-like labour conditions. These inhumane extraction practices could therefore effectively be qualified as a method of production

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<sup>109</sup> VAN DEN BOSSCHE, p. 75.

<sup>110</sup> PRICE, p. 50.

<sup>111</sup> Traditional, or ‘normal’, PPMs are methods of processing and producing that leave some physical trace in the final product. Joost PAUWELYN, ‘WTO compassion or superiority complex?: what to make of the WTO waiver for “conflict diamonds” in: *Michigan Journal of International Law*, Vol. 24, Summer 2003, p.7.



and thus a PPM.<sup>112</sup> In addition, the production itself is illegal according to the national laws of the war-torn African countries. Illegal armed factions, rebelling against legitimate governments, are extracting resources without a permit and without paying appropriate taxes.

WTO Members agree that countries are allowed to set criteria for the way products are produced in other countries<sup>113</sup>, but only if their production method leaves a trace in the final product.<sup>114</sup> They however disagree over the WTO consistency of measures based on so-called ‘non-product related PPMs’ (or ‘unincorporated PPMs’)<sup>115</sup>, i.e. PPMs that do not have a physical impact on the final product put on the market.<sup>116</sup> Referring to our case, it is clear that conflict diamonds do not change physically during their illicit ‘production’ -after all, they do not become literally blood-stained-, and therefore the way they are extracted would be a case of non-product related PPMs.

So if we would be allowed to judge a product by its unincorporated PPM, ‘conflict diamonds’ would be ‘unlike’ ‘clean diamonds’ and consequently the KPCS could benefit from an assumption of consistency with Art. I:1.

Still, PPMs remain a thorny issue under current WTO law, especially if they do not affect the physical characteristics of the product.<sup>117</sup> Some commentators allege that the contemporary WTO stance on PPMs is to automatically rule out any discrimination in trade “based on the way in which products are manufactured, caught or harvested”.<sup>118</sup>

A difficulty with PPM measures is that they are often seen as an imperialistic tool used by (often developed) countries to exert their values and non-product related standards upon other (mostly developing) countries. It must, however, be remembered that the

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<sup>112</sup> In this light, the KPCS fits well within market trends showing an emerging new role of PPMs: differentiation of organic and “fair-trade” production, consumer rejection of genetically modified food, boycotts of so-called “unsustainable” corporate practices, etc. See: Monica ARAYA, *WTO negotiations on environmental goods and services: maximizing opportunities?*, Global Environment & Trade Study (GETS), Yale Centre for Environmental Law & Policy, June 2003, p. 2.

Available at: <http://www.ong-omcmexico.org.mx/WebPage/web/doctos/GETS4.pdf>.

<sup>113</sup> In the Shrimp-Turtle case of 1998, the Appellate Body made clear that under WTO rules, countries have the right to take trade action to protect the environment (in particular, human, animal or plant life and health, and endangered species and exhaustible resources). The WTO does not have to “allow” them this right. The measures should however not be unnecessarily discriminatory. See: *WTO Appellate Body Report on US Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, October 12, 1998 [hereinafter Shrimp-Turtle case].

<sup>114</sup> WTO Secretariat, *Trade and Environment at the WTO: Background Paper*, p. 17 [hereinafter WTO Background Paper]. Available at: [http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_backgrnd\\_e/trade\\_env\\_e.pdf](http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/trade_env_e.pdf).

<sup>115</sup> See: Id. Many developing countries argue that measures that discriminate between products based on unincorporated PPMs, such as some eco-labels, should be considered WTO inconsistent.

<sup>116</sup> Peter VAN DEN BOSSCHE, Denise PRÉVOST and Mariëlle MATTHEE, *WTO Rules on Technical Barriers to Trade*, Maastricht, Maastricht Faculty of Law Working Paper 2005/6, October 2005. p. 6. [hereinafter Maastricht Faculty of Law Working Paper].

<sup>117</sup> VAN DEN BOSSCHE, p. 316.

<sup>118</sup> Duncan BRACK, *WTO implications of an international timber licensing scheme*, Sustainable Development Programme, London, Royal Institute of International Affairs, March 12, 2003, p. 6. Available at: [http://www.riia.org/pdf/briefing\\_papers/Licensing%20and%20WTO%20Brack%202003.pdf](http://www.riia.org/pdf/briefing_papers/Licensing%20and%20WTO%20Brack%202003.pdf);

In the case ‘Tuna-Dolphin (Mexico)’ the GATT panel noted, *inter alia*, that “Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product...”, implying that tuna caught with special nets that would protect dolphins from being caught as well, was nevertheless considered to be ‘like’ tuna caught without those protective nets, entailing that that the expression ‘like products’ pertains to products’ physical characteristics and that how they are produced or harvested is not relevant. *United States – Restrictions on Imports of Tuna*, GATT Panel Report, DS21/R, DS21/R, September 3, 1991, unadopted, BISD 39S/155, [hereinafter Tuna-Dolphin (Mexico)], para. 5.15.

KPCS is not a unilateral, protectionist measure, but an initiative of developing countries seeking the cooperation of the international community.<sup>119</sup>

A deeper discussion and analysis on 'product versus process'<sup>120</sup> concerning (conflict) diamonds would lie beyond the scope of this paper.<sup>121</sup> It should however be noted, that due to the lack of WTO case law on this specific subject,<sup>122</sup> it is hard to draw firm conclusions regarding the 'likeness' of conflict and 'clean' diamonds.

C) Article I:1 requires that any advantage granted to one country must be granted "immediately" and "unconditionally" to all WTO members.

The problem with the KPCS is that it cannot function without a prohibition on trade with non-Participants, and is therefore likely to discriminate these WTO members as they are not granted the "unconditional" advantage of participation in the world diamond trade under the KPCS system. Despite the fact that participation "is open on a global, non-discriminatory basis to all Applicants willing and able to fulfil the requirements of the scheme"<sup>123</sup>, not all WTO members have agreed to be KPCS Participants<sup>124</sup> and, consequently, the prerequisite of universal implementation is not met.<sup>125</sup>

### 3.2.2. Article III GATT 1994

GATT article III (National Treatment on Internal Taxation and Regulation) prohibits discrimination between 'like' imported and domestic products. The broad fundamental purpose of this article is to ensure that internal tax and regulatory measures are not

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<sup>119</sup> PRICE, p. 50.

<sup>120</sup> This issue stems from the 'Tuna-Dolphin (Mexico)' case and entails that under WTO rules a distinction must be made between a measure (such as a tax or labelling requirement) that applies to an internationally traded product, and one that applies to a process (i.e. the way a product is made). It is easier to apply a measure to a product, but it is not always easy to determine exactly what processes were used to make the products. Products are 'objective'. Processes, however, are too 'subjective' for the WTO, which favours clear-cut rules. See: *Product v. Process issue*. Available at: [http://www.wto.org/English/tratop\\_e/envir\\_e/cte03\\_e.htm#productvprocess](http://www.wto.org/English/tratop_e/envir_e/cte03_e.htm#productvprocess).

<sup>121</sup> In this respect I will also refrain from an investigation on whether the KPCS is consistent with the Agreement on Technical Barriers to Trade (TBT), which does not fall under the GATT but is a separate WTO arrangement. In order to benefit from a presumption of TBT consistency, the restrictions implemented in accordance with the KPCS must be qualified as "technical regulations". Therefore it is required that these trade restrictions lay down "product characteristics or their related Process and Production Methods" and, as this remains an open issue, I will not engage in an analysis on TBT compatibility at this point.

"The extent to which the [TBT agreement] applies to labels based on processes (instead of the characteristics of the products themselves) is unclear, and has been the subject of some discussion both in the CTE and the Committee on Technical Barriers to Trade, which administers the TBT Agreement". Available at: [http://www.wto.org/english/tratop\\_e/envir\\_e/cte03\\_e.htm#productvprocess](http://www.wto.org/english/tratop_e/envir_e/cte03_e.htm#productvprocess)

<sup>122</sup> The WTO dispute settlement system does not produce rulings in the abstract, it acts only when a complaint is raised. So far, no dispute between WTO members has risen with relation to the Kimberly Process and conflict diamonds.

<sup>123</sup> *KP Working Doc. 1/2002*, Section VI.

In this respect it is also important to consider the 'Shrimp-Turtle' case, from which could be concluded that the negotiation of an international consensus agreement (such as the KPCS) that is open for signature by all countries is presumptively non-discriminatory. See: Shrimp-Turtle case.

<sup>124</sup> In addition to countries who are not able to fulfil the requirements of the Scheme there are also countries that might have implemented KPCS-like minimum requirements but fail to become KPCS signatories. See: PRICE, p. 55.

<sup>125</sup> The so-called 'universality requirement'; In order to be most effective, all states and/or regional economic integration organisations should participate in the KPCS, making it universal.

applied to imported or domestic products so as to grant protection to domestic production.<sup>126</sup>

Article III applies to internal measures only, not to border measures.<sup>127</sup> The article is therefore not violated because the KPCS merely requests Participants to implement measures with regard to import and export, and not regarding the internal trade. The imported diamonds are not treated differently from domestic diamonds once they have crossed the border. If there were to be an additional requirement on imported diamonds to show certification at the point of sale, then there would be a violation of Article III because there would be no such requirement for domestic diamonds. However, KPCS measures are not intended to grant protection to domestic production.

### **3.2.3 Article VIII GATT 1994 and Agreement on Import Licensing Procedures**

According to article VIII:1(c), the formalities and documentation requirements for imports and exports should be kept to a minimum in order to facilitate trade. In some cases, however, Members may require importers or exporters to obtain licenses, e.g. in order to implement a certification scheme.<sup>128</sup> The Agreement on Import Licensing Procedures lays down rules for adopting and implementing national procedures for issuing import licences. Nothing in the certification scheme enclosed in the Kimberley Process requires the adoption of measures that prima facie are inconsistent with article VIII or the Agreement on Import Licensing Procedures.<sup>129</sup>

### **3.2.4 Article XI:1 GATT 1994**

Article XI (General prohibition on quantitative restrictions) outlines the basic GATT philosophy in respect of trade restrictions. Article XI:1 prohibits WTO Members from employing import or export bans or restrictions, “other than duties, taxes or other charges”, against the products of any other member.<sup>130</sup> KPCS requirements would, once enacted by a WTO member for trade between Participants, almost certainly violate the article XI:1 prohibition because the Scheme’s objective is to ban all trade in a certain type of diamonds, namely non-certified rough diamonds. Asking for a certificate and other requirements at the border is a restriction on import, both for Participants<sup>131</sup> as well as for non-Participants.

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<sup>126</sup> See: *Japan - Alcoholic Beverages II*, Arbitration under Article 21.3(c) of the DSU, WT/DS8/15, WT/DS10/15, WT/DS11/13, Panel Report, February 14, 1997.

<sup>127</sup> See: VAN DEN BOSSCHE, p. 329.

<sup>128</sup> Art. VIII:4 (f) GATT 1994.

<sup>129</sup> *Kimberley Process Workshop on WTO Conformity*, Chairman’s Non-Paper, 15-17 February 2002 (Revised version, March 14, 2002) [hereinafter *Workshop on WTO conformity*].

Available at: [http://www.kimberleyprocess.com:8080/site/www\\_docs/related\\_docs1/wto\\_conformity\\_paper.pdf](http://www.kimberleyprocess.com:8080/site/www_docs/related_docs1/wto_conformity_paper.pdf).

<sup>130</sup> Art. XI:1 GATT 1994: “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 parties”.

<sup>131</sup> However, it is quite unthinkable that one of the same KPCS Participants would mount a WTO challenge, based on trade impairment, regarding a voluntary measure to which it has itself agreed.

There are a number of exceptions to the prohibition on quantitative restrictions listed in article XI:2 but a closer look at their wording<sup>132</sup> and intention shows that they do not apply to our case.

On the other hand, it could also be argued that because article XI applies to bans and restrictions enacted by “any party”, the applicability of the article is limited to the actions of one or another Member, but not to a multilateral, UN backed initiative such as the KPCS.<sup>133</sup>

### 3.2.5 Article XIII:1 GATT 1994

Article XIII:1 establishes the more specific obligation of non-discrimination with regard to the application of prohibitions and quantitative restrictions for cases where they are exceptionally allowed.<sup>134</sup> This means that if KPCS Participants employ quantitative restrictions (which will now be allowed because of the waiver) they must do so in a non-discriminatory way. Because we have seen that KPCS provisions nonetheless discriminate between WTO Members, article XIII:1 will be violated as well.

## 3.3 Possible ways of justification for the KPCS restrictions

Now that we have established that the trade restrictions called for under the KPCS are seemingly inconsistent with WTO law, it can be determined whether these trade measures fit within the exceptions enclosed in the GATT. As noted above, many countries participating in the Kimberley negotiations did not even see the need for a waiver because it was thought that the general and security provisions in the GATT articles XX and XXI would safeguard the KPCS system from challenge.<sup>135</sup> In any case, it seems hard to imagine that in the realm of international trade there would be no room for exceptions pertaining to humanitarian and security purposes. Of course

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<sup>132</sup> Art. XI:2 GATT 1994: “The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
  - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
  - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
  - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible”.

<sup>133</sup> This argument is brought up by Tracey Michelle PRICE. See: PRICE, pp. 52-53.

<sup>134</sup> Art. XIII:1 GATT 1994 *Non-discriminatory Administration of Quantitative Restrictions*: “No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.”

<sup>135</sup> See: ‘WTO Goods Council approves Kimberley Process Waiver’ in: *Bridges weekly main page*, Volume 7, Number 7, February 25, 2003. At: <http://www.ictsd.org/weekly/03-02-27/story3.htm>.

there should always be a good reason and motivation for those exceptions, in par with the WTO principles of transparency, stability, negotiation and predictability.<sup>136</sup>

### 3.3.1 Article XXI GATT 1994

The security exceptions of article XXI have a broad scope and embody the concept of sovereignty, respecting the right of all nations to protect themselves from external threats.<sup>137</sup> In the context of a ban on conflict diamonds, the following sections of article XXI are worthwhile looking at:

Article XXI (c) states: "Nothing in this Agreement shall be construed ... (c) to prevent any WTO member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".<sup>138</sup> The UN has been dealing with the issue of conflict diamonds since 1998<sup>139</sup> and its embargoes are legally binding. Trade restrictions imposed by the Security Council prevail over any other international agreement, including the WTO treaty.<sup>140</sup> Furthermore, the phrase "any action" includes all kind of trade measures, which gives a broad purport to the article.

However, it is not clear whether only UNSC resolutions or also recommendations of the General Assembly<sup>141</sup>, which has explicitly supported the KPCS in GA Resolution 55/56, can lead to obligations in the meaning of article XXI(c).<sup>142</sup>

In addition, Kimberley trade restrictions could also be justified under article XXI (b)(ii) and (iii). Article XXI (b) allows a Member to take measures "which it considers necessary for the protection of its essential security interests".<sup>143</sup> The consistency of this article with the case of banning trade in conflict diamonds must nevertheless be analysed carefully because its wording entails ample discretionary power for individual governments.<sup>144</sup>

Paragraph (ii) of this article covers any action related to the traffic of goods that could potentially contribute to war. A plausible argument here is that diamonds are used extensively by rebel movements to generate funds for their military activities and, conversely, wars have raged over the control of diamond-rich regions.

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<sup>136</sup> See: *Understanding the WTO: Principles of the trading system*.

Available at: [http://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact2_e.htm)

<sup>137</sup> PRICE, p. 60.

<sup>138</sup> Art. XXI(c) GATT 1994.

<sup>139</sup> SC Resolution 1173 (1998) was the first resolution on the subject of conflict diamonds.

<sup>140</sup> Art. 103 of the UN Charter, stating the pre-eminence of obligations under the UN Charter. Charter of the United Nations, San Francisco, June 26, 1945 (Trb. 1979 Nr. 37) [hereinafter UN Charter].

<sup>141</sup> Also the General Assembly can make recommendations on "the general principles of co-operation in the maintenance of international peace and security". Art. 11 UN Charter.

<sup>142</sup> Workshop on WTO conformity, p. 4.

<sup>143</sup> Art. XXI GATT 1994: "... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations;..."

<sup>144</sup> The words "considers necessary" and "essential" give Art. XXI a broad tenor, making it susceptible to abuse as it can be difficult to draw a clear line between national security and political purposes. John H. JACKSON, 'World Trade and the Law of GATT' in: *Lexis Law Pub*, June, 1969, pp. 748-752.

Paragraph (iii) covers action “taken in time of war or other emergency in international relations”. The fact that the trade of conflict diamonds seriously affects peace and security in certain African regions and that it might be linked to international terrorism, emboldens the argument that a ban on conflict diamonds is compatible with this paragraph, and actually with the whole article XXI (b).

### 3.3.2 Article XX GATT 1994

Should the applicability of article XXI be denied, then the licensing system could perhaps be ‘saved’ by the general exceptions of GATT article XX (a), (b) and (d).<sup>145</sup> The scope of this provision is, however, limited by its introductory clause (‘chapeau’), which particularly prohibits “arbitrary or unjustifiable discrimination<sup>146</sup> where the same conditions prevail<sup>147</sup>” and “disguised restriction on international trade”.<sup>148</sup> In addition, the measures that this article excuses must be “necessary”, meaning that there is no alternative measure less inconsistent with GATT available.<sup>149</sup> With these wordings the chapeau basically asks the WTO Members to act in accordance with the international principle of good faith. Good faith, trust and honesty are necessary when appealing to article XX because it principally gives WTO Members broad discretion when deciding on its applicability.

When invoking article XX (a), it must be demonstrated that the measures at issue are “necessary to protect public morals”. Although seemingly far-fetched, it could be argued that national and global public morality is shocked because the precious gems sponsor gruesome wars and gross human rights violations. The tremendous international involvement -United Nations endorsement and participation of all major diamond-trading countries in the world- is testimony to this global indignation.

The article XX (b) defence is probably more difficult to uphold as the “human life or health” that would then be “protected” by measures ensuing the KPCS is located

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<sup>145</sup> Art. XX GATT 1994: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Art. II and Art. XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;”.

<sup>146</sup> In this context see: *United States - Import Prohibition Of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, Adopted by Dispute Settlement Body, November 21, 2001. Following this report it can be concluded that a possible way to avoid “arbitrary and unjustifiable discrimination” is to provide all exporting countries similar opportunities to negotiate an international multilateral agreement [which would be the KPCS in our case], in stead of requiring the exporting state to follow a non-consensual exact regime. The regulating state need not actually reach agreement with other states, but must make “serious good faith efforts” to negotiate;

For additional argumentation, see: PRICE, pp. 56-58.

<sup>147</sup> Under the KPCS system, countries where the same conditions prevail will be treated in the same way: Countries where there is insufficient regulatory infrastructure to comply with KPCS minimum requirements (and/or where there is rebel activity and conflict), are excluded from the KPCS. Countries that do comply with KPCS requirements are allowed to trade diamonds under the KPCS. Where the same conditions prevail, the same treatment will thus be given.

<sup>148</sup> An interpretation of these words has been given in several WTO dispute settlement institutions. See for example: *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, Report of the Panel, April 5, 2001, pp. 448-450. (With reference to other decisions).

<sup>149</sup> Workshop on WTO conformity, p. 6.

outside of the territory of the regulating country, namely, in a conflict-torn country in Africa. Normally these measures are considered to be applicable only when the country taking the measures tries to “protect human, animal or plant life or health” within its own borders –e.g. US bans on the import of a certain product because it contains asbestos-, and not in a foreign country. If the regulating country’s measure nonetheless seeks to protect humans, plants or animals in the foreign country, a problem relating to the issue of ‘extra-territoriality’ or ‘extra-jurisdictionality’ would arise.<sup>150</sup>

Furthermore, it is rather questionable if article XX even covers trade measures that are potentially directed towards PPMs of diamonds.<sup>151</sup>

Another case could perhaps be made under article XX (d), claiming that the “laws or regulations....not inconsistent with the provisions of this agreement” that need to be complied with are those of the (African) exporting countries. The traffic in conflict diamonds presumably counters the national laws on resource extraction, processing and exportation. It could therefore be argued that the KPCS seeks compliance with these national laws and regulations, “including those relating to customs enforcement”. It is however uncertain to what extent the issue of ‘extra-territoriality’ would also come into play in this case.

In the end it all depends on how the GATT/WTO dispute settlement institutions would interpret the terms of the exception provisions. Unfortunately, there is no case law that could more specifically sustain the above-mentioned arguments under articles XX and XXI vis-à-vis the KPCS.<sup>152</sup>

### 3.4 The decision for a waiver

In paragraph 3 of the Interlaken Declaration, the Participants declare: “We will ensure that the measures taken to implement the Kimberley Process Certification Scheme for rough diamonds will be consistent with international trade rules”.<sup>153</sup> Asking for a WTO waiver accordingly seems to be part of the fulfilment of this promise.<sup>154</sup>

Although it is highly unlikely that the exceptions of GATT articles XX and XXI would not be applicable to the case of a multilateral certification system set out to resolve trans-boundary disputes, some WTO Members nevertheless wanted to have absolute

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<sup>150</sup> In the Tuna-Dolphin (Mexico) case, the Panel found that the US measures did not qualify for an exemption under art. XX because the article did not permit the protection of animals outside the territory of the state adopting the measure.

Conversely, in the other Tuna-Dolphin case (‘Tuna-Dolphin (EEC)’) the panel in left open the possibility that art. XX could permit the protection of animals *extraterritorially*. See: *United States – Restrictions on Imports of Tuna*, DS29/R, GATT Panel Report, June 16, 1994, (unadopted).

The validity of extra-territoriality therefore remains rather vague, but if we would want to invoke art. XX (b) regarding conflict diamonds, it would in any case be necessary to discover a relevant “nexus” between the illicit, odious extraction and trade in diamonds in an exporting country on the one hand, and the affected “human life and health” in the importing country on the other hand.

<sup>151</sup> PAUWELYN (2003), p. 7.

<sup>152</sup> Workshop on WTO conformity, p. 6.

<sup>153</sup> *Interlaken Declaration*.

<sup>154</sup> PAUWELYN (2003), p. 12.

certainty on WTO compliance once the KPCS was in place.<sup>155</sup> The extra assurance was ultimately reached through a waiver.<sup>156</sup>

The waiver nonetheless leaves open the possibility for a WTO Member to bring before the WTO General Council potential future concerns related to “any benefit accruing...under the GATT 1994” that is “impaired unduly,” as well as concerns regarding a Member’s potential claim that the KPCS measures are being “applied inconsistently.” The waiver also assures that it “shall not preclude the right of affected Members to have recourse to Articles XXII (Consultation) and XXIII (Nullification or Impairment) of the GATT 1994.”<sup>157</sup>

The interesting part is, however, that the waiver only speaks of trade with non-Participants. It can therefore be assumed that restrictions between Kimberley Participants were thought to be safe for WTO principles. The next paragraphs will try to explain the reasons that could have caused the waiver decision to be applicable to non-Participants only.

### **3.4.1 The WTO treaty as a basis for WTO compliance**

Apparently, the WTO Members deemed the Kimberley restrictions against Participants to be already justified under WTO rules and to subsequently not require a waiver. Trade is nonetheless restricted by the KPCS for both non-Participants and Participants.<sup>158</sup> What makes trade impairment for non-Participants so different that it does need a waiver?

The applicability of GATT articles XX and XXI should actually not depend on whether a WTO member is also a KPCS Participant or not. The decisive factors should have to do with the wording of the articles and the nature of origin of the diamonds in question and not with the existence of an international agreement between two trading partners. Therefore, irrespective of a waiver, articles XX and XXI GATT justify restrictions on non-Participants just as much as they would justify restrictions on Participants.<sup>159</sup> If WTO members really wanted to provide full legal certainty with a waiver, then why did they not provide this certainty regarding restrictions between Participants as well?<sup>160</sup>

### **3.4.2 The Interlaken Declaration as a basis for WTO compliance**

Possibly the WTO sometimes considers a non-WTO treaty in itself, as in this case the Interlaken Declaration<sup>161</sup>, to be a sufficient justification for any WTO violation.<sup>162</sup> This

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<sup>155</sup> Correspondence with Ian Smillie, April 25, 2006.

<sup>156</sup> The act of granting a waiver, however, does not automatically imply “that a measure benefiting from the waiver otherwise, violates the WTO treaty”. It is merely used to alter the nature of the measure from ‘illegal’ to ‘legal’. *Id.*, p. 3

<sup>157</sup> *Waiver decision*.

<sup>158</sup> Trade between Participants is only allowed when an adequate certificate can be furnished, and trade with non-Participants is not allowed at all.

<sup>159</sup> PAUWELYN (2003), p. 8.

<sup>160</sup> *Id.* p. 10.

<sup>161</sup> Because the ‘Interlaken Declaration’ is the document in which Participants agreed on the implementation of the certification scheme as developed in the Kimberley Process, it could be regarded as the Kimberley ‘contract’.

<sup>162</sup> For argumentation see: the Shrimp-Turtle case, *supra* note 285, para. 7.55. The Panel stated here that the “negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system.”



way the Interlaken Declaration, agreed upon by both disputing Participants, could be invoked as an independent defence before a WTO panel for justification of those violations.<sup>163</sup> The WTO rules can in this line of reasoning be disregarded by the panel and a Participant cannot revert to them if he wants to sue another Participant after having first agreed to trade restrictions in the KPCS.

Logically, the restrictions already explicitly accepted by the KPCS Participants in the Interlaken Declaration would not need to be re-accepted by a waiver, unlike in the case of restrictions against a non-Participant. In this fashion, the Interlaken Declaration offers an excuse only for restrictions on Participants and can be seen as a form of 'contracting out' of the WTO.

Nonetheless, a peculiarity concerning this 'contracting out' of the WTO can be found in paragraph 3 of the Interlaken Declaration which states that implementation "will be consistent with international trade rules".<sup>164</sup> This statement would not be necessary if the parties intended to 'contract out' of the WTO treaty, so presumably this paragraph was just intended to appease non-Participants which would be affected by the restrictions not agreed upon by both parties in a WTO dispute.<sup>165</sup>

Another possible problem here is the unclear 'legal' nature of the Kimberley Process. A non-legal status would make it questionable whether the Scheme should prevail over an earlier and more general WTO treaty. But as we have argued earlier, the KPCS does have strong political backing and the fact that Participants have agreed to the Scheme in the first place, grants its Participants certain rights that could do well when scrutinised before a WTO panel.

### **3.4.3 Conclusion; the effect of the decision for a waiver**

The WTO waiver only applies to trade restrictions between KPCS Participants and non-KPCS Participants. As we have seen, there were two possible reasons why the waiver does not apply to restrictions between Participants; 1) certain WTO rules (Art. XX and XXI GATT) provide justification of those restrictions, and; 2) the Interlaken Declaration would excuse WTO violations between KPCS Participants.

The first reason could not really have triggered a waiver decision because it actually leaves equal legal certainty for both Participants and non-Participants. The second reason, however, might have carried more weight, which would explain the limited scope of the waiver and could be an important indication of WTO members recognising the independent value of the Kimberley Process as a non-WTO instrument before a WTO panel.<sup>166</sup>

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<sup>163</sup> See: Joost PAUWELYN, 'The role of Public International Law in the WTO: How Far Can We Go?' in: *American Journal of International Law*, Vol. 95, 2001. The author argues that WTO panels should be permitted to refer to non-WTO treaties as an excuse not to conform to WTO rules when adhering to 3 criteria: "1) the non-WTO instrument was agreed upon by both disputing parties; 2) the restriction does not affect the rights and obligations of third parties; and; 3) the subsequent international agreement can be said to prevail over the WTO treaty either as the later in time or the more specific norm dealing with the particular facts."

<sup>164</sup> *Interlaken Declaration*, paragraph 3.

<sup>165</sup> PAUWELYN (2003), p. 12.

<sup>166</sup> PAUWELYN (2003), p. 12.

Unfortunately, the waiver does not provide for full “legal certainty” as it was supposed to do. Firstly, although it seems very logical that restrictions between Participants should survive scrutiny before a WTO panel, this is nowhere explicitly guaranteed, it is merely presumed.<sup>167</sup> Secondly, even with respect to trade with non-Participants there is no legal certainty either because the waiver only applies to restrictions imposed by Participants that have put their name in the Annex to the waiver.<sup>168</sup> This means that a non-Participant could nevertheless mount a WTO challenge in case it finds itself impaired in trade by a Participant that has not subscribed to the waiver. Only few countries have added their names to the Annex and the reason probably lies within the fact that there was a lot of disagreement concerning the necessity of a waiver. Many Participants believed the GATT articles XX and XXI to cover issues such as the Kimberley Process and did not want to give the WTO *de facto* authority over the matter.<sup>169</sup>

Joost Pauwelyn, an expert of international economic law, argues that the WTO risks sending out two wrong signals by granting a waiver.<sup>170</sup> The first one is that the waiver seems to entail that without it, trade restrictions on rough diamonds would be inconsistent with WTO rules. This was to a great extent the reason why many countries did not want to ask the WTO for a waiver in the first place, as they did not want to give it *de facto* authority on the matter.<sup>171</sup> However, this supposed inconsistency hardly bears any ground because, as we have seen earlier in this chapter, the WTO provisions themselves are convincingly able to justify restrictions on both Kimberley Participants and non-Participants. An unfortunate side-effect of the waiver could nevertheless be a hindrance to the further development of GATT exceptions in the field of Humanitarian Law, caused by a presumption of illegality raised by the waiver.

The second wrong signal implied in the waiver is that it seems that everything that is concluded outside of the WTO realm must still be reconfirmed in the WTO quarters themselves for it to have any value before WTO organs. This way it looks as if other multilateral instruments can never enhance or surpass the ‘superior’ WTO treaty.

WTO members should instead be able to give preference to negotiated treaties outside of the WTO when sufficiently important, as long as they do not affect the rights and obligations of others in doing so. Fortunately, in not applying the waiver to restrictions between KPCS Participants, the WTO appears to recognise that external instruments of international law are sufficient to surmount problems with WTO compatibility.<sup>172</sup>

This waiver does not appear to be the best option to guarantee complete legal certainty. It would maybe have been better to include an explicit statement in the Interlaken Declaration in which the Participants assert that in case of conflict with WTO provisions the Kimberley Scheme prevails, in accordance to the general rules in

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<sup>167</sup> *Id.*, pp. 11-12.

<sup>168</sup> On May 15, 2003 only the following 11 countries had done so: Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, United States. See: *Waiver decision, Annex*.

<sup>169</sup> Communication with Ian Smillie, April 25, 2006 and; *Bridges weekly*, February 25, 2003.

<sup>170</sup> PAUWELYN (2003), pp. 13-14.

<sup>171</sup> Correspondence with Ian Smillie, April 25, 2006.

<sup>172</sup> PAUWELYN (2003), pp. 13-14.

the Vienna Convention.<sup>173</sup> Such a clause would logically only work between Participants though. A good alternative to the waiver would have been for WTO members to adopt a solid and commanding interpretation of GATT articles XX and XXI stating, for example, that the measures enacted by Participants to comply with the KPCS will be presumed to fall under the exception of these articles. Such a decision would then cover restrictions between Participants as well as against non-Participants.

Concludingly, one could state that a better approach offering more legal certainty for trade restrictions concerning blood diamonds could have been chosen by the WTO, but that the waiver decision nevertheless is a good sign that the WTO does not only care about free trade, but also about humanitarian and social issues as they are expressed in instruments negotiated outside the WTO.<sup>174</sup>

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<sup>173</sup> See: *Vienna Convention*. If a conflict between two treaties arises then parties must adhere to two basic rules partly codified in article 30 of the Vienna Convention on the Law of Treaties; 1) the later treaty will have primacy over the older one, and; 2) the more specific treaty will have primacy over the more general one.

<sup>174</sup> PAUWELYN (2003), pp. 15-17.

## Conclusion

The workings of the Kimberley Process have touched upon quite a few interactive and contrasting fields of international law (including human rights law, humanitarian law, criminal law, treaty law, trade law, etc.) as well as national law pertaining to implementation and enforcement. Different aspects of what global community players consider to be 'law' and 'right' had to be brought together by politics and diplomacy, forging an agreement to which many countries subsequently did not want to be too closely bound and, consequently, be held liable in case of non-compliance. However, even if the parties' initial aim was to constitute a preferably political agreement, the Kimberley impetus has developed the kind of legitimate status that 'typical' international treaties enjoy. Participants feel compelled to cooperate with the scheme, they want to be a part of it, and fear the consequences of non-compliance, even if no proper legal basis for sanctioning exists. The fact that the KPCS impetus has received such a broad following, gives it somewhat of a legal authority, making it difficult for diamond trading countries not to join the voluntary scheme.

Regarding the process of its implementation, the Kimberley protocol has logically strived to make the legislative and logistic steps for its Participants as minimal as possible, without losing resilience however. The key diamond-trading European Community, presenting itself as a single Participant, effectively succeeded to make the KPCS a part of its Member States' national systems through a routine of legislative measures under its EU Common Foreign and Security Policy. In setting up a Community system the EU had to successfully establish, on the one hand, an effective control of its external borders and, at the same time, preserve its structure of internal free trade.

The earlier implementation of United Nations resolutions, sanctioning the trade in conflict diamonds, had already given the Member States a preview on alternative diamond trade regulation in the EU. Unfortunately, UN sanctions were not sufficient to overcome loopholes in the global trading system and not every country had implemented effective and harmonised control mechanisms. The latter is demonstrated by our case study on the Netherlands where, though the situation improved after the introduction of the Community system, there still appears to be a lack of information on Kimberley Process measures and pertaining national regulation of diamond import and export.

The rules of International Trade, upheld by the World Trade Organisation, could have been a hindrance for a new system that tried to alter the way in which diamonds are traded internationally, even if it were to serve a 'noble' cause. It should be noted, however, that the KPCS as such does not constitute a trade restriction in WTO terms, but rather the execution of its provisions by KPCS Participants that are also a member to the WTO. On the other hand, because the Kimberley Process is supported by the United Nations -an even more encompassing organisation of which all WTO countries are a member- and the giant diamond industry, it is highly unlikely that there would be no room for a continuously growing process trying to reconcile humanitarian and security concerns with economic concerns through a better control of the trade in diamonds. In fact, the same WTO agreement provides for exemption clauses, which would seem to be perfectly applicable for cases like that of blood diamonds. This being the case has unfortunately never been acknowledged by the WTO and, rather

oddly, its Council instead decided to issue a waiver, expressly giving its members 'permission' to go ahead with their trade-restricting measures vis-à-vis non-KPCS Participants. Still, with its waiver decision the WTO indirectly recognised that the Kimberley document stands as a significant, autonomous agreement in which almost all diamond-trading WTO members have decided to adhere to alternative rules governing the trade in a potentially pernicious product. In short, the WTO has shown that humanitarian issues and peace and stability are not automatically superseded by the values of trade liberalisation.

The international scheme of certification as developed by the Kimberley Process could feasibly serve as an important precedent for other globally craved commodities that have the potential to initiate and fuel conflict. Just like diamonds, natural resources such as gold, coltan, cobalt, copper, uranium, platinum, timber and even coffee, have since long been a driving force for conflict and illegal exploitation, a phenomenon that is most strikingly epitomised in the Democratic Republic of the Congo, allegedly the most resource-rich country in the world.

But how practical would a global licensing system be for, say, copper? Although there are obvious parallels to be drawn between the KPCS and actions that would exclude illegally exploited copper from legal markets, there are also notable differences:

One of the reasons that the KPCS is so successful is the fact that diamonds are small in size and immense in value, which makes them easy to transport in small and secured containers. This would, in contrast, be more difficult for large shipments of copper, or even worse, timber.

The international diamond trade is operated by a close-knit and consolidated industry that can therefore, without too much trouble, be united in a concerted effort to regulate trade, considering it has special interests in avoiding a blemish on a product which it markets as a symbol of love.

The countries that import and export diamonds on a relevant scale have all joined the Kimberley Process, accounting for approximately 98% of the world diamond trade between 46 Participants.<sup>175</sup> Conversely, establishing an inclusive protocol for the trade in copper, timber or coffee, probably means having to align all nations in the world.

Diamonds are a product with a rather limited application. They are mainly used for well-defined industrial purposes and for the production of jewellery. Timber, copper, cobalt, etc. are used much more universally.

The problem regarding conflict diamonds enjoys broad international acknowledgement and the effort to stem their trade has even received explicit UN support through resolutions from the General Assembly and the Security Council, giving the KPCS a broad political purport and legitimacy. UN endorsement was obviously provided because of an unambiguous link between the trade in diamonds and rebel movements in Sierra Leone, Angola and the DRC.

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<sup>175</sup> For precise numbers, see: <http://www.kimberleyprocess.com> (last visited: October 3, 2006).

Taking into consideration the characteristics of specific commodities and the structure of their trade on the international market, we could reason that a KPCS-like system would probably only work for resources with significant similarities to diamonds. This would mean commodities that: are highly valuable and easily portable – and therefore easily smuggled; are not produced in many countries; do not have a universal application; and where a linkage could be found between their trade and regional conflict or, perhaps more convincingly in the current world order, international terrorism. Gold and platinum group metals would hence seem to be the best candidates.

The actual setting up of a complementary legal framework is, as we have demonstrated, not an insurmountable problem. The decisive element for such an endeavour is political willingness on the international scene. As long as the project enjoys broad stakeholder buy-in, a strong case can be made concerning its legitimacy under international public law. Participants are principally required to adopt a common standard concerning the legal authentication of a certain natural resource and implement necessary control mechanisms in their national laws.

Inconsistency with the WTO should not be that hard to circumvent, it depends on how a scheme that tries to stop trade in e.g. 'conflict gold' is designed and motivated. WTO rules are less likely to be challenged when: the targeted product is more narrowly specified (exactly what type of gold, from which area?); other, less trade-disruptive measures have been tried but did not work; the system strives to be as multilateral as possible; regulations are less compulsory (although this is likely to negatively influence the scheme's effectiveness).