

This Land is My Land: Mending the Kimberley Process and Promoting Stability in Sub-Saharan Africa by Reinforcing Individual Property Rights

JOHN MICHAEL DURNOVICH[†]

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[†] B.A. Foreign Affairs, 2010, University of Virginia; J.D. expected May 2014, University of North Carolina School of Law. I would like to thank Nikul Patel, Susan Park, and my editing team for their assistance throughout the revision process as well as MacKenzie Smith, family, and friends for their support.

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I. Introduction: The Origins of a Brutal Diamond Trade

Few would guess the origin of the opulent diamond worn by Hillary Clinton at her husband's Presidential Ball.¹ The fine, four-carat gemstone hails from Former President Bill Clinton's stomping grounds—Arkansas.² In 1906, a farmer first stumbled upon diamonds in Murfreesboro, Arkansas, while working in his pigsty.³ Soon, what would become Hillary Clinton's diamond, like more than 100,000 others, had been unearthed in Arkansas.⁴ The Arkansas diamonds rivaled the color and clarity of the world's finest diamonds⁵ and tipped scales, with masses of over 40 carats

¹ See JANINE ROBERTS, *GLITTER & GREED* 99 (2003).

² See *id.* at 99-100.

³ See *id.*

⁴ See *id.* at 100; see also *Slow to Dig Diamonds: Arkansas Geologist Called Attention to Strata Years Ago*, N.Y. TIMES, August 5, 1907, at 7 (reporting on the discovery of diamonds in Pike County, Arkansas at a time at which only 140 had been uncovered) [hereinafter *Slow to Dig Diamonds*].

⁵ See *Good Diamonds in Arkansas: Prof. Schneider Reports That the Field is as Rich as Kimberley*, N.Y. TIMES, Nov. 25, 1907, at A1 (stating that Professor Philip Schneider, a Syracuse University geologist commissioned by the Department of Agriculture, "reports that the surface indications are that this territory will equal the famous Kimberley diamond fields in South Africa. The dirt, he reports, resembles in every respect the soil in and around the Kimberley diamond tracts in South Africa. 'There can be no doubt,' he adds, 'that genuine diamonds have been obtained from the Huddleston tract in [Arkansas]"); see also *Arkansas Diamonds Here: Maiden Lane Pronounces Them Fine Specimens of the Gem*, N.Y. TIMES, May 2, 1910, 8 ("Maiden Lane's [the early center of New York's diamond district] experts admitted that the Arkansas diamonds are equal to the best from South Africa or any other part of the world [T]he development of the Arkansas field had been proceeding cautiously up to this time, but . . . results have been so favorable thus far that a complete mining plant, similar to that of the De Beers Company, is about to be installed.").

in some instances.⁶

Yet, despite reports that the Arkansas diamond deposits could eclipse any known deposits in the world in both quality and quantity,⁷ major diamond players hesitated to introduce diamond production in the United States for fear of diluting the market and drawing attention to the atrocities of overseas diamond operations.⁸ Over the next half-century, every attempt to mine diamonds in Arkansas was frustrated by misfortune, botched buy-outs, and outright sabotage.⁹ Eventually, the State of Arkansas

⁶ The “Uncle Sam Diamond” was unearthed weighing in at 40.23 carats and is now owned by a diamond merchant in New York City. See ROBERTS, *supra* note 1, at 102.

⁷ The discovery of Arkansas diamonds also was a popular topic for editorials during its time. See, e.g., *The Diamonds of Arkansas*, N.Y. TIMES, Aug. 4, 1907, at 6 (“There are pure white diamonds, yellow ones, and brown ones. Perhaps the field may not turn out to be so very rich But the discovery of even a small diamond field within our own territory is an event of importance. There must be others.”).

⁸ See ROBERTS, *supra* note 1, at 99-110. Even before their actual discovery, the potential existence of diamonds in Arkansas was largely hushed. See *Slow to Dig Diamonds*, *supra* note 4, at 7 (“State Geologist Branner called attention years ago to the strata similarity and expressed the opinion that the presence of diamonds was indicated in that portion of Pike County, and yet this valuable opinion was absolutely ignored.”). However, even the early, primitive attempts at mining in Arkansas garnered negative publicity. See *Arkansas Diamond-Mad: Pike County Farmers Hiding Away Tons of Worthless Rock*, N.Y. TIMES, Sept. 3, 1907, at 6 (“In dozens of cases there are entire families, not one member of which has any idea of what a diamond is, except that it can be taken to the bank and traded for money, straggling over the hills day after day You can see on nearly any part of the hill section of Pike County parties of men and women, boys and girls, barefooted and bareheaded, scuttling through the brush with wooden pails and apron loads of rock that is not fit even for making good roads.”).

⁹ ROBERTS, *supra* note 1, at 99-113. For example, in 1911, Thomas Cochran, a J.P. Morgan partner with ties to major diamond companies, organized the purchase of a controlling interest in the Arkansas Diamond Company. Mr. Cochran immediately replaced the mine manager with S.H. Zimmerman, an associate of diamond magnate Ernest Oppenheimer of De Beers. As soon as Mr. Zimmerman gained control of operations, diamond production disintegrated to one hundredth of mine capacity, allowing Mr. Zimmerman to condemn the mine as “hopeless” and close operations. Yet, a subsequent investigation by the U.S. Justice Department found the mine rich with diamonds, leading it to conclude that Mr. Zimmerman’s “function appears to have been to sabotage the mine.” See *id.* at 102-03. Later, on January 13, 1919, Howard A. Millar’s Murfreesboro diamond mining operation was destroyed by a series of arsonist fires. Mr. Millar blamed the Diamond Syndicate, a major diamond mining company conglomerate discussed *supra*, after learning that the syndicate had hired a pilot to secretly take aerial photos of Mr. Millar’s mining operation earlier on the day of fire. See *id.* at 100. The arrival of the Great Depression cast the final nail in the coffin of the

purchased the land and formed a public park, which still to this day operates as a tourist attraction.¹⁰ The diamond industry's major players had successfully thwarted the threat of Arkansas diamonds attracting domestic scrutiny and diluting the diamond market. However, for an industry comprised of immensely powerful and monopolistic entities, the elimination of diamond production on American soil is only the tip of the iceberg.

De Beers may be the most recognized name in an industry pitching everlasting love, but its original charter ominously foreshadowed a much darker, conflict-ridden industry: it permitted the company to "maintain a standing army, and undertake warlike operations."¹¹ Operating under this charter, De Beers enjoyed a virtual monopoly over the diamond production industry by consistently controlling over eighty percent of the world's diamonds for nearly a century after its founding.¹² This exclusivity fostered an unparalleled level of trade secrecy that continues to infect the industry, permitting "the long-standing infection to go septic."¹³ The opaque industry has even developed its own means of dispute resolution to minimize outside influence and to maintain secrecy. As one scholar explains:

[D]iamond industry disputes are resolved not through the courts and not by the application of legal rules announced and enforced by the state. The diamond industry has systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members.¹⁴

As such, deeply engrained subterfuge has come to characterize the

Arkansas diamond industry. *See id.* at 105.

¹⁰ *See* Crater of Diamonds State Park, Murfreesboro, Ark., <http://www.craterofdiamondsstatepark.com/> (last visited Oct. 12, 2013).

¹¹ IAN SMILLIE, *BLOOD ON THE STONE* 35 (2010).

¹² *See id.* at 39.

¹³ *Id.* at 161.

¹⁴ Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 116 (1992) (concluding that "the transaction costs of entering into legally enforceable agreements cannot explain diamantaires' preference for extralegal agreements and . . . the norm of 'secrecy' that pervades the industry is at least a partial explanation for diamond dealers' preference for privately enforced agreements").

diamond trade.

Janine Roberts investigated the history of the diamond industry and discovered an illustrative dynamic: members of the pioneering diamond syndicate, namely De Beers, were largely responsible for the scarcity of diamonds.¹⁵ Ernest Oppenheimer, an early-20th century controller of De Beers,¹⁶ increased the value of diamonds by focusing on “buying up deposits, hiding deposits and limiting production.”¹⁷

These early diamond producers also exercised absolute control over the profitable and prolific mines of southern Africa.¹⁸ However, during the late 1920s, a number of alluvial¹⁹ diamond fields were discovered in South Africa, opening the profit-gates for countless entrepreneurial miners—a serious threat to the primary diamond producers’ stranglehold on the market.²⁰ In response, a cohort of major players in the diamond industry championed the Precious Stones Act of 1927,²¹ which prohibited the possession of unregistered diamonds in South Africa and provided that any such contraband would be seized and transferred to the London Diamond Syndicate, the market controlled by De Beers.²² These examples of trade-commandeering form part of the existing industry framework and help explain the difficulties facing today’s diamond trade.

¹⁵ See ROBERTS, *supra* note 1, at 83-97.

¹⁶ Cecil Rhodes formed De Beers in 1880 and focused on absorbing as many mines and companies as possible. Notably, despite devising the Rhodes Scholarship, Rhodes is said to have shown his domineering aspirations by once admitting, “I would annex the planets if I could.” Nevertheless, by 1929, Ernest Oppenheimer had wrested control of De Beers from Rhodes’s legacy. See SMILLIE, *supra* note 11, at 35-40.

¹⁷ *Id.* at 83.

¹⁸ See SMILLIE, *supra* note 11, at 39-43 (discussing De Beers’s sophisticated system of controlling the diamond industry that allowed it to “wield[] absolute control over all aspects of the rough diamond industry”).

¹⁹ Alluvial diamonds are those located near the earth’s surface that are more easily accessed without heavy mining machinery. See discussion *infra* notes 167-189.

²⁰ See, e.g., The Diamond Empire, PBS FRONTLINE 1994, available at http://www.youtube.com/watch?v=s4c1p_DMkIw.

²¹ Precious Stones Act No. 44 of 1927 (S. Afr.).

²² See ROBERTS, *supra* note 1, at 93.

II. Diamonds Finance the Bloodshed

The diamond industry's efforts to artificially inflate the prices of diamonds have had costly repercussions. Since the 1950s, the enormous value of rough diamonds has incited countless violent and bloody conflicts in Africa.²³

[D]iamonds fuelled some of the most brutal wars in Africa. More than three million people died as a result of these wars in the 1990s and the early 2000s; many more millions of lives have been damaged, and the existence of entire nations has been called into question.²⁴

Illicit diamonds have financed entire rebel movements. Indeed, the illicit diamond trade financed Angola's União Nacional para a Independência Total de Angola (UNITA) to the tune of \$700 million annually and Sierra Leone's Revolutionary United Front (RUF) with upwards of \$125 million annually.²⁵ The fungibility and enormous value of illicit diamonds simplified the corruption of African governments by serving as a conduit for the influx of cash that financed brutal civil wars.²⁶ The end of the Cold War worsened the issue because the diminished need for a strategic foothold on the African continent caused a withdrawal of foreign aid.²⁷ Many African governments turned to diamonds as an alternative source of revenue.²⁸

As death tolls rose throughout the 1990s, several human rights organizations recognized the need for action.²⁹ By the late 1990s, a stream of reports and exposés from non-governmental organizations (NGOs) illuminated the atrocities and condemned the diamond industry for causing the degradation.³⁰ Media frenzy

²³ See J. Andrew Grant, *The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds*, in HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING 159, 161 (Päivi Lujala & Siri Aas Rustad eds., 2012).

²⁴ SMILLIE, *supra* note 11, at 1.

²⁵ See Grant, *supra* note 23, at 162.

²⁶ See JOELLE BURBANK, *THE FUND FOR PEACE, THE EFFECT OF THE KIMBERLEY PROCESS ON GOVERNANCE, CORRUPTION & INTERNAL CONFLICT 1* (2006).

²⁷ *Id.*

²⁸ See *id.*

²⁹ See Grant, *supra* note 23, at 162.

³⁰ See GLOBAL WITNESS, *A ROUGH TRADE: THE ROLE OF COMPANIES AND GOVERNMENTS IN THE ANGOLAN CONFLICT* (1998) [hereinafter *A ROUGH TRADE*]

soon ensued,³¹ and attention continued to grow with the release of major Hollywood films such as *Die Another Day*³² and *Blood Diamond*.³³ In 2000, the United Nations (UN) took its first steps in response by establishing an expert panel to monitor the illicit diamond trade.³⁴

The diamond industry, however, remained unfazed. Despite the public outcry, Nicky Oppenheimer, Chairman of De Beers, brazenly endorsed the manipulative nature of the diamond market in a 1999 address at the Harvard Business School Global Alumni Conference:

I am chairman of De Beers, a company that likes to think of itself as the world's best known and longest running monopoly. We set out, as a matter of policy, to break the commandments of Mr. Sherman. We make no pretense that we are not seeking to manage the diamond market, to control supply, to manage prices, and to act collusively with our partners in the business.³⁵

(identifying diamond companies' relationships with rebel groups and corrupt governments in Angola); IAN SMILLIE, LANSANA GBERIE & RALPH HAZLETON, PARTNERSHIP AFRICA CANADA, *THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY* (2000) (identifying diamond companies' relationships with rebel groups and corrupt governments in Sierra Leone).

³¹ *The BBC, the New York Times, the Washington Post, and Vanity Fair* were among the media outlets that published articles based on the NGO reports. See Grant, *supra* note 23, at 162.

³² *DIE ANOTHER DAY* (MGM 2002) (featuring a James Bond mission to sever the link between a terrorist organization and a diamond mogul).

³³ *BLOOD DIAMOND* (Warner Bros. Pictures 2006) (contrasting the struggles of an activist, a diamond smuggler, and an enslaved diamond miner in Sierra Leone in the late-1990s).

³⁴ See *id.* at 163.

³⁵ Nicky Oppenheimer, Chairman, De Beers, Address at the Harvard Business School Global Alumni Conference (March 1999), in DEBORA L. SPAR, *MANAGING INTERNATIONAL TRADE AND INVESTMENT: CASEBOOK 220-23* (2003). Note, however, that this single quotation may paint an unfair depiction of Oppenheimer's overall willingness to engage the KP. In 2003, Oppenheimer acknowledged that the diamond industry's support of the KPCS is critical to the redevelopment of post-conflict regions: "To achieve this goal we need to engage with these countries, encouraging a return to good governance, the rule of law, and sound fiscal policy in exchange for benign investment." Nicky Oppenheimer, Chairman, De Beers, *Royalty Bill Could Jeopardize KP*, Remarks at Kimberley Process Plenary Session Dinner in South Africa, (Apr. 29, 2003), in Sheryl Katz, *Oppenheimer Upset Over New 8% SA Royalty Tax*, RAPAPORTDIAMONDS (Apr. 30, 2003, 9:05 AM); accord Andrew Bone, *The Kimberley Process Certification System: The Primary Safeguard for the Diamond Industry*, in

Oppenheimer's audacious mantra was indicative of an industry, which, at the time of his speech, was "infected by smuggling, tax invasion, money laundering, sanction-busting, war and state collapse."³⁶ Even this formal industry was operating on the periphery of any authority by relying on "social ostracism or reputational damage" to maintain stability.³⁷ Meanwhile, an estimated twenty-five percent of the world's total diamond trade, representing upwards of \$2 billion annually, was completely illicit.³⁸ The artificially inflated value of diamonds fueled mercenaries, warlords, and rebel groups, allowing them to wreak havoc and wage merciless wars in Africa—an estimated 3.7 million people have lost their lives as result.³⁹ The stage was set for an international response.

III. The Kimberley Process as a Starting Point

After a dozen fruitless meetings, a discordant group of NGOs, politicians, state officials, and diamond industry executives convened in Interlaken, Switzerland, to approve an agreement to end the trade of conflict diamonds.⁴⁰ The Kimberley Process (KP) that resulted sought to eliminate the production and trade of "conflict diamonds" by establishing an international certification scheme for rough diamonds.⁴¹ In 2002, the KP, a coalition of diamond-producing countries, members of the diamond trade, and civil organizations,⁴² formulated the Kimberley Process

HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING, *supra* note 23, at 193 (quoting Oppenheimer and highlighting need for industry collaboration).

³⁶ SMILLIE, *supra* note 11, at 17.

³⁷ Bernstein, *supra* note 14, at 133.

³⁸ See SMILLIE, *supra* note 11, at 17.

³⁹ GLOBAL WITNESS, FOR A FEW DOLLAR\$ MORE: HOW AL QAEDA MOVED INTO THE DIAMOND TRADE 8 (2003) [hereinafter For a Few Dollar\$ More].

⁴⁰ See SMILLIE, *supra* note 11, at 177-92 (describing the motley mix of attendees as "ironic" due to their vastly different priorities and concerns); see also Jan Erik Wetzel, *Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in 'Conflict Diamonds'*, in INTERNATIONAL LAW AND ARMED CONFLICT 161, 168-69 (Noëlle Quénavet & Shilan Shal-Davis eds., 2010) (discussing various predecessor efforts to create industrial self-regulation measures, including the establishment of the World Diamond Council).

⁴¹ The Kimberley Process, <http://www.kimberleyprocess.com/en/about> (last visited Nov. 19, 2013).

⁴² The enormous role of NGOs in focusing global attention on the diamond

Certification Scheme (KPCS). Currently, “the KP has 51 participants,⁴³ representing 77 countries . . . [which] account for approximately 99.8% of the global production of diamonds.”⁴⁴ States may join the KP by demonstrating adherence to the primary goals of KP through domestic regulation of the production and trade of conflict diamonds.⁴⁵ The KP promotes compliance by asking participants to trade diamonds only with other participating members.⁴⁶ Essentially, the KP asks participants to monitor mining and trading of rough diamonds within their borders and to attach KPCS certificates to all rough diamonds prior to importation or exportation.⁴⁷

Since its implementation, the KPCS has had several positive effects on diamond-producing countries. For instance, the KPCS allows importing countries to increase revenues from export taxes and leads some private actors to increase their supply chain transparency.⁴⁸ Many scholars guardedly agree that the KPCS also contributes to post-conflict peace building.⁴⁹

industry’s maladies and the forming the KP cannot be understated. Notable activist organizations included Global Witness, Partnership Africa Canada, Amnesty International, Oxfam, World Vision, Fatal Transactions in Europe, ActionAid, and Human Rights Watch. See SMILLIE, *supra*, note 11, at 176.

⁴³ KPCS uses the term “participant” rather than “member,” which is indicative of the organization’s forceless nature. See The Kimberley Process, <http://www.kimberleyprocess.com/en/participants> (last visited Nov. 19, 2013).

⁴⁴ *Id.* (emphasis added).

⁴⁵ See Grant, *supra* note 23, at 163.

⁴⁶ See Interlaken Declaration on Kimberley Process Certification Scheme for Rough Diamonds, Nov. 5, 2002, available at <http://www.kimberleyprocess.com/en/kpcs-core-document>; see also Kimberley Process Certification Scheme, Nov. 5, 2002, [www.worlddiamondcouncil.org/download/resources/documents/Interlaken%20Declaration%20\(5-11-2002\).pdf](http://www.worlddiamondcouncil.org/download/resources/documents/Interlaken%20Declaration%20(5-11-2002).pdf).

⁴⁷ The KPCS also contains a series of additional internal control functions, such as requiring participants to designate importing and exporting authorities, requiring all diamond shipments be contained in tamper-resistant containers, maintain relevant data regarding trade of diamonds. KP participants create and produce their own certificates. See Kimberley Process Certification Scheme, available at <http://www.kimberleyprocess.com/node/1122>.

⁴⁸ See Harrison Mitchell, *A More Formal Engagement: A Constructive Critique of Certification as a Means of Preventing Conflict and Building Peace*, in HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING, *supra* note 23, at 197.

⁴⁹ See, e.g., Wetzel, *supra* note 40, at 161 (“While not perfect, [the KP] is a good example of how to address the economic basis of a conflict in order to influence the decision-making process of the relevant warring stakeholders.”); SMILLIE, *supra* note 11,

However, there is no real means of enforcing the KPCS. Rather, the system relies upon the respective parties to enforce the KPCS's policies and requirements domestically.⁵⁰ Participants then are expected to report back to the KP secretariat on a quarterly basis with statistics on intrastate diamond production and foreign diamond trade at their borders.⁵¹ Producing countries are also encouraged to ensure all diamonds are produced from licensed mines.⁵² However, the licensing of diamond mines has been largely nonexistent in most diamond-producing African states.⁵³ Violations, although scarcely discovered, typically result in the seizure of the shipment without further repercussions.⁵⁴ According to a survey of participants, half of all participants admit to having violated the KPCS since its implementation in 2003.⁵⁵ Beyond the litany of practical hurdles that continuously undercut implementation, the KPCS has also encountered legal obstacles.

at 190 (posturing that, although “[t]he system was not perfect[,]” the KP “ma[de] it more difficult in a hitherto unregulated industry, to exchange stolen diamonds for weapons”); Grant, *supra* note 23, at 176 (“Although the KP has experienced a great deal of success over the past decade, it faces a number of challenges.”); Clive Wright, *The Kimberley Process Certification Scheme: A Model Negotiation?*, in HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING, *supra* note 23, 159, 185-86 (“[The KPCS] has gone a long way toward ending the scourge of the so-called blood diamond . . . [but it] is not a perfect agreement.”).

⁵⁰ See Grant, *supra* note 23, at 164. The United States implements the KP through the Clean Diamond Trade Act of 2003, Pub. L. No. 108-19, 117 Stat. 631 (2003), as discussed in Part III.

⁵¹ In 2011, reports indicated that participants issued 53,962 KP importation certificates and 54,585 exportation certificates, accounting for over \$14 trillion in diamonds produced. See Kimberley Process, Rough Diamond Statistics, Annual Global Summary: 2011 Production, Imports, Exports and KPC Counts (2011), available at https://kimberleyprocessstatistics.org/static/pdfs/public_statistics/2011/2011GlobalSummary.pdf.

⁵² See Kimberley Process Certification Scheme, Nov. 5, 2002, Annex II, ¶¶ 9-10, available at <http://www.kimberleyprocess.com/en/kpcs-core-document>.

⁵³ See *infra* notes 222-243 (explaining how conceptions of property rights in African countries differ from traditional western property rights principles, thereby indicating why licensing has been difficult to implement).

⁵⁴ See Grant, *supra* note 23, at 164.

⁵⁵ See *id.*

IV. Moving On: Abandoning the GATT Debate

During the drafting of the KPCS, the United States expressed concerns about whether the system would comply with the General Agreement on Tariffs and Trade (GATT),⁵⁶ which is a World Trade Organization (WTO)⁵⁷ obligation.⁵⁸ GATT, which was formed to encourage equitable and open international trade,⁵⁹ prohibits members of WTO from restricting trade to fellow members under Article XI.⁶⁰ Thus, Article XI and the KPCS requirements appear facially inconsistent. In 2003, in response to concerns that the legality of the KPCS could be challenged under GATT, the WTO granted a temporary waiver of GATT obligations to eleven member states, including the United States.⁶¹ In 2006, the waiver was extended for an additional six years.⁶² Just prior to its expiration on December 31, 2012, the waiver was

⁵⁶ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁵⁷ The United States is one of 157 members of the WTO, which:

is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business.

World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Oct. 11, 2013).

⁵⁸ See Wetzel, *supra* note 40, at 171.

⁵⁹ See GATT, *supra* note 56, preamble.

⁶⁰ See *id.* art. XI (“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importations of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”).

⁶¹ See Council for Trade in Goods, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, G/C/W/432/Rev.1 (Feb. 24, 2003) (granting waiver to Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, and United States).

⁶² See Council for Trade in Goods, *Extension of Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, G/C/W/559/Rev.1 (Nov. 17, 2006) (granting waiver to Australia, Botswana, Brazil, Canada, Croatia, India, Israel, Japan, Korea, Malaysia, Mauritius, Mexico, Norway, Philippines, Sierra Leone, Chinese Taipei, Thailand, United Arab Emirates, United States, and Venezuela).

extended for yet another six years and expanded to incorporate Russia.⁶³ The WTO's approach of repeatedly granting waivers has created unnecessary suspense prior to each expiration date and, as result, sparked a chorus of scholarly debate regarding KPCS's legality.⁶⁴ In any event, these waivers and prospective future waivers are superfluous because the KPCS is exempt from GATT.

Despite clear, compelling arguments that the KPCS satisfies an exception to GATT requirements, scholars continue to debate the issue; yet, there is no sense in belaboring the point.⁶⁵ Three GATT exceptions justify a continuation of the KPCS waiver.⁶⁶ (1) the exception for the protection of "human, animal or plant life or health" under Article XX(b);⁶⁷ (2) the public morals exception of Article XX(a);⁶⁸ and (3) the security exception under Article XXI.⁶⁹

⁶³ See Council for Trade in Goods, *Extension of Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, G/C/W/675/Rev.2 (Dec. 11, 2012) (granting waiver to Australia, Botswana, Brazil, Canada, Croatia, European Union, India, Israel, Japan, Korea, Mexico, New Zealand, Norway, Philippines, Russian Federation, Singapore, Chinese Taipei, Thailand, Turkey, United States, and Bolivarian Republic of Venezuela).

⁶⁴ See, e.g., Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds,"* 24 MICH. J. INT'L L. 1177 (2003) (arguing that the WTO waiver excluding restrictions between KP participants is unnecessary and possibly detrimental to international negotiations); Tracey Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1 (2003) (concluding that the KP's universality requirement does not violate WTO obligations); Karen E. Woody, *Diamonds on the Souls of Her Shoes: The Kimberley Process and the Morality Exception to WTO Restrictions*, 22 CONN. J. INT'L L. 335 (2007) (analyzing the validity of the KP waivers under WTO obligations).

⁶⁵ See Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 729-30 (1998).

⁶⁶ The *chapeau* of the Article XX presents a preliminary inquiry: Can the regulation be deemed discriminatory? However, because the KP is a voluntary multilateral agreement and available to any willing entity, this preliminary inquiry is satisfied. See Wetzel, *supra* note 40, at 172; see also Price *supra* note 64, at 55; accord Pauwelyn, *supra* note 64, at 1177.

⁶⁷ GATT, *supra* note 56, art. XX(b) (providing that so long as measures are not applied in a manner which is "arbitrary or unjustifiable[.]" members may take measures "necessary to protect human, animal or plant life or health").

⁶⁸ *Id.* art. XX(a) (providing that so long as measures are not applied in a manner which is "arbitrary or unjustifiable[.]" members may take measures "necessary to protect public morals").

⁶⁹ *Id.* art. XXI (stating that members may take "any action which it considers

A. *Article XX(b)'s Exception for the Protection of "Human, Animal or Plant Life or Health" Applies to the KPCS*

The KP is justifiable as necessary to protect human life under Article XX(b). The inescapable link between illicit diamonds and bloodshed is well-documented.⁷⁰ Moreover, the UN's recognition of the link and subsequent endorsement of the KP demonstrates the legitimacy of the KPCS as a plausible response to the atrocities.⁷¹ Therefore, "[e]ven if the KP were determined to be inconsistent with GATT Article XI, or another provision, the implementing legislation of Participants would qualify as a general exception under Article XX(b) of the GATT."⁷²

However, it is worth noting that the KPCS regulates the trade of *rough* diamonds, which encompasses more than *conflict* diamonds.⁷³ Thus, the KPCS is arguably overinclusive and not sufficiently tailored to qualify as necessary to protect human life under Article XX(b).⁷⁴ As such, some scholars suggest the morality exception under Article XX(a) as a more appropriate defense.⁷⁵

B. *Article XX(a)'s Morality Exception Applies to the KPCS*

An interpretation of jurisprudence arising from challenges to other GATT exceptions suggests that the morality exception may cover issues regarding "slavery, weapons, narcotics, liquor, pornography, religion, compulsory labor, and animal welfare."⁷⁶

necessary for the protection of its essential security interests").

⁷⁰ See reports and exposés by NGOs and media outlets, discussed *supra* note 42.

⁷¹ See Price, *supra* note 64, at 53.

⁷² *Id.*

⁷³ See Kimberley Process Certification Scheme, *supra* note 46, sec. III ("Each Participant should . . . ensure that no shipment of rough diamonds is imported from or exported to a non-Participant."). See generally Paul Armstrong, *What are 'Conflict Diamonds?'*, CNN (Dec. 5, 2011), http://articles.cnn.com/2011-12-05/africa/world_africa_conflict-diamonds-explainer_1_world-diamond-council-marange-conflict-diamonds?s=PM:AFRICA (comparing conflict diamonds, which are those "illegally traded to fund conflict in war-torn areas, particularly in central and western Africa[,] with rough diamonds, which are diamonds that "have recently been extracted and not yet cut").

⁷⁴ See Kimberley Process Certification Scheme, *supra* note 46, sec. III.

⁷⁵ See, e.g., Woody, *supra* note 64, at 353-55.

⁷⁶ See Charnovitz, *supra* note 65, at 729-30.

Since GATT's inception in 1947, no WTO member has challenged an import ban based on the morality exception.⁷⁷

In the GATT context, there is a distinction between goods that are considered intrinsically immoral (*e.g.*, child pornography) and goods that are produced by immoral means (*e.g.*, textiles produced by child labor or slavery).⁷⁸ The regulation of rough diamonds is more akin to the regulation of products produced by child labor: the means of production are deleterious, while the product—diamond—is not intrinsically immoral. Yet, restrictions on products produced by child labor are far more narrowly tailored as they apply *only* to products directly produced by children, whereas the regulation of rough diamonds applies to both conflict diamonds and legitimately produced rough diamonds.⁷⁹ Nevertheless, given the depth of support for regulating diamonds, the lack of viable alternatives, and the extensive empirical data tying conflict diamonds to human rights violations, “it is unlikely the exception based on a morality determination that challenges restrictive legislation made in compliance with the KP will be challenged.”⁸⁰

C. Article XXI's Security Exception Applies to the KPCS

Lastly, KPCS is justifiable under the security exception of Article XXI. Although the security exception is rarely invoked, the KPCS “fits squarely within the good-faith meaning of Article XXI.”⁸¹ The exception permits the regulation of goods that either “directly or indirectly . . . [supply] a military establishment.”⁸² The evidence of illicit diamonds funding militant organizations throughout sub-Saharan Africa is staggering.⁸³ In Angola, for

⁷⁷ *Id.* at 731.

⁷⁸ See Woody, *supra* note 64, at 353-54.

⁷⁹ See *id.*

⁸⁰ *Id.* at 354.

⁸¹ Price, *supra* note 64, at 60.

⁸² GATT, *supra* note 56, art. XXI (b)(ii).

⁸³ See A ROUGH TRADE, *supra* note 30, at 4 (“Between 1992 and 1998 UNITA obtained an estimated minimum revenue of US\$3.72 billion from diamond sales.”); see also *id.* (“In 1995 Angola’s total diamond output raised about US\$700 million, according to industry sources, of which only US\$147 million was accounted for by legal sales . . . most of the rest was mined by UNITA and smuggled out unofficially.”) (quoting ECONOMIST INTELLIGENCE UNIT, COUNTRY REPORT, 4TH QUARTER (1996)); CHRISTIAN

example, the UNITA was known to net over \$1 million on diamond exports in a single day.⁸⁴

In addition, soon after the terrorist attacks of September 11, 2001, reports indicated that the terrorist organization al-Qaeda⁸⁵ was heavily funded by the illicit diamond trade; in the three years leading up to the September 11 attacks, al-Qaeda's illicit diamond profits may have reached tens of millions of dollars.⁸⁶ In fact, al-Qaeda and various other known terrorist organizations, such as Hezbollah,⁸⁷ have been reaping millions of dollars in the illicit diamond trade for decades.⁸⁸ Global Witness, an NGO, called upon the KP to address terrorist financing after concluding that the diamond industry and governments had concealed the connections between illicit diamonds and terrorism for decades.⁸⁹ Some research indicates that the illicit diamond trade continues to be a primary source of funding for major terrorist organizations.⁹⁰

Furthermore, the UN consistently incorporates and supports the KP in its work, and Article XXI recognizes compliance with international security obligations pursuant to UN membership as grounds for the exception.⁹¹ As such, there is a strong empirical basis for permitting KPCS under the Article XXI exception.⁹² In

DIETRICH, PARTNERSHIP AFRICA CANADA, *HARD CURRENCY: THE CRIMINALIZED DIAMOND ECONOMY OF THE DEMOCRATIC REPUBLIC OF CONGO AND ITS NEIGHBOURS* (2002) (linking civil wars in Central Africa to the massive illicit trade in conflict diamonds).

⁸⁴ See SMILLIE, *supra* note 11, at 66; *see also supra* notes 23-39.

⁸⁵ See Douglas Farah, *Al Qaeda Cash Tied to Diamond Trade: Sale of Gems from Sierra Leone Rebels Raised Millions*, *Sources Say*, WASH. POST, Nov. 2, 2001, at A1.

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*; *see also* For a Few Dollar\$ More, *supra* note 39, at 20. The Global Witness report also reasons that al Qaeda likely gained an understanding of gemstone trading while battling the Soviets in Afghanistan during the 1980s; gemstones were often traded by both sides during the conflict. *See id.* at 14.

⁸⁹ *See* For a Few Dollar\$ More, *supra* note 39, at 27.

⁹⁰ *See, e.g.,* SMILLIE, *supra*, note 11, at 133-46 (describing a long-standing and deeply entrenched network of arms dealers, terrorists, and rebel groups).

⁹¹ *See* GATT, *supra* note 56, art. XXI(c) (stating that the Agreement shall not "prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security").

⁹² *See supra* note 91 and accompanying text.

fact, during early KP negotiations, the European Commission and Switzerland both argued that Article XXI eliminated the need for any waiver of GATT obligations.⁹³

As result, the argument for abandoning the GATT debate is dynamic and sound, and “the general conclusion is that the waiver was only declaratory.”⁹⁴ The widespread support for rough diamond regulation, the applicability of multiple GATT exceptions, and the apparent willingness of the WTO to grant a (superfluous) waiver of GATT demonstrate the gratuitous nature of KP legality debates.⁹⁵ Accordingly, concerns over WTO compliance must not impede the development of a more effective response to the illicit diamond trade.

V. Shortcomings of the Kimberley Process

Although the KPCS's legality is on firm-footing, the KP is failing to effectively promote stability in Africa's diamond regions. In June 2009, Ian Smillie of Partnership Africa Canada (PAC), a KP civil representative who was instrumental in its creation, resigned, stating he “[could] no longer in good faith contribute to a pretense that failure is success.”⁹⁶ In 2010, Dr. André A. D. Jackson, Chairman of the African Diamond Council (ADC) and another key architect of the KP, announced the ADC's withdrawal, because the KP “routinely facilitated corruption in Africa's diamond industry and . . . the existing system encourages brutal human rights violations by continuing to certify and disguise illicit diamonds.”⁹⁷ A year later, Global Witness, another founding member of the KP, also abandoned it, citing the KP's “refusal to evolve and address the clear links between diamonds, violence and tyranny” and lamenting that “most of the governments that run the scheme continue to show no interest in

⁹³ See Wetzel, *supra* note 40, at 172.

⁹⁴ *Id.* at 173.

⁹⁵ See *supra* note 49, 61-69 and accompanying text.

⁹⁶ *Credibility of Kimberley Process on the Line, Says NGOs*, IRIN (June 22, 2009), <http://www.irinnews.org/Report/84949/GLOBAL-Credibility-of-Kimberley-Process-on-the-line-say-NGOs> (quoting Ian Smillie's June 19, 2009 resignation letter).

⁹⁷ Press Release, African Diamond Council, African Diamond Council States Position On Kimberley Process (June 21, 2010), *available at* <http://www.i-newswire.com/ReleasePrint/44392>.

reform.”⁹⁸

The increasingly massive costs of waging a largely ineffective war on the illicit diamond trade fueled the discontent. As Smillie points out:

The cost of dealing with the diamond wars has been enormous. UNMIL, the UN peacekeeping force that was established in Liberia in 2003, grew to absorb a budget of \$560 million in 2009-10. The peacekeeping force in Sierra Leone cost \$2.8 billion by the time it ended operations in 2005. The annual cost of the peacekeeping force in Côte d’Ivoire was half a billion dollars a year in 2009-10, and in the Democratic Republic of Congo, MONUC was running a \$1.35 billion dollar 12-month budget over the same period At something between \$2.3 and \$4 billion a year, not counting the peacekeeping efforts in Angola, it has taken a great deal of money and troops to control the fires that were fuelled by diamonds.⁹⁹

The KPCS’s overly accommodating and timid founding document is partly to blame for the KP’s weaknesses.¹⁰⁰ The underlying purpose of the KPCS yielded to individual interests; most weaknesses “were deliberate efforts to limit the cost and possible intrusion of the KP into national regulatory systems and the international diamond trade.”¹⁰¹ As a result, the KPCS suffers from a host of defects that must be addressed, including: (1) its lack of any means to enforce its provisions; (2) its character as a non-binding, voluntary arrangement that is easily disregarded; (3) its illogical voting system that hinders KP progress; and (4) its reliance on ill-equipped, post-conflict states to enforce the KPCS through domestic legislation is an idealistic fool’s errand.

⁹⁸ Press Release, Global Witness, Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable (Dec. 5, 2011), *available at* <http://www.globalwitness.org/sites/default/files/library/KPexity.pdf>.

⁹⁹ SMILLIE, *supra* note 11, at 195-96.

¹⁰⁰ See IAN SMILLIE, DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT, ASSESSMENT OF THE KIMBERLEY PROCESS IN ENHANCING FORMALIZATION AND CERTIFICATION IN THE DIAMOND INDUSTRY—PROBLEMS AND OPPORTUNITIES 1 (2011) [hereinafter PROBLEMS AND OPPORTUNITIES].

¹⁰¹ *Id.*

A. *The KP Lacks Any Real Means of Enforcing the KPCS*

The KP is not a true international organization as it lacks a permanent body.¹⁰² The customs officials of volunteer member states, who are poorly paid, scarce, and easily corrupted, are responsible for enforcing the domestic policies implementing the KPCS.¹⁰³ Therefore, those tasked with ground-level enforcement are often unable to do so.

States must also consent to monitoring of domestic procedures, leaving the current peer review mechanism without real authority.¹⁰⁴ For example, in 2008, Venezuela simply refused to permit a review of its diamond production after failing to produce any of the “required” data since 2005.¹⁰⁵ In outright mockery of the KP, Venezuela declared that it would remain a member of KP, but would forego the KPCS requirements for a couple years.¹⁰⁶ As one scholar argues:

Venezuela, a country that annually produces an estimated 150,000 carats of diamonds, has officially exported none since January 2005. Although it is a member of the [KPCS] for controlling rough diamonds, it has essentially dropped off the KPCS radar Venezuela should be expelled from the KPCS if the Kimberley Process wishes to maintain any semblance of order and integrity.¹⁰⁷

Despite Venezuela’s apparent indifference to the KPCS, the country received no penalty and remains a member of the KP.¹⁰⁸

¹⁰² See Interlaken Declaration on Kimberley Process Certification Scheme for Rough Diamonds, *supra* note 46.

¹⁰³ See Wetzel, *supra* note 40, at 174.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 175.

¹⁰⁶ See *id.*; accord SMILLIE, *supra* note 11, at 200 (describing a later KP visit to Venezuela which revealed “that nothing had changed. [B]latant illegal [diamond] traffic . . . continued. [Yet,] [t]he [KP] sat on its hands, effectively ignoring diamond smuggling. Incredibly, the institution that had been designed to halt diamond smuggling was now condoning it”).

¹⁰⁷ THE DIAMONDS AND HUMAN SECURITY PROJECT, PARTNERSHIP AFRICA CANADA, THE LOST WORLD: DIAMOND MINING AND SMUGGLING IN VENEZUELA 1 (2006) (describing how a change in ministerial duties left a vacancy for signing KPCS certificates, yet “[i]n the 18 months since, no one in Venezuela’s government has seemingly had the will or interest to change two words on the appropriate government document and put it in front of a minister to be signed”).

¹⁰⁸ See *id.*

Even when peer reviews did proceed, they were often ineffective. In 2008, a KP peer review team visited Guinea, which had just reported a highly suspicious 600-percent increase in diamond production.¹⁰⁹ Concerns were heightened because Guinea borders Côte d'Ivoire's rebel-controlled diamond mines¹¹⁰ and because numerous reports document the ease of smuggling diamonds from Guinea.¹¹¹ Yet, despite the telltale signs of a sizeable illicit diamond trade, the KP peer review team stayed for two hours before departing the country.¹¹² The team then took eleven months to produce a meager report that could not support sanctions.¹¹³ Like Venezuela, Guinea remained a member of the KP. The review delicately concluded, "Guinea could take steps to improve compliance with the [KPCS]."¹¹⁴

Only a few months after the KP review team left Guinea, the KP faced another test when Zimbabwean soldiers gunned down as many as 200 diamond miners near the Mozambique border.¹¹⁵ The massacre, an apparent attempt by the Zimbabwe Air Force to curb unapproved diamond trading, eventually produced another KP review.¹¹⁶ Despite generating extensive evidence of human rights abuse and KPCS noncompliance, the KP review generated a recommendation that Zimbabwe be provided with technical assistance and guidance.¹¹⁷

As Venezuela, Guinea, and Zimbabwe's disregarded transgressions indicate, the absence of enforcement leaves the

¹⁰⁹ See SMILLIE, *supra* note 11, at 199.

¹¹⁰ See *id.*

¹¹¹ See PARTNERSHIP AFRICA CANADA ET AL., REPORT TO THE 2010 KPCS PLENARY, DIAMONDS WITHOUT BORDERS: AN ASSESSMENT OF THE CHALLENGES OF IMPLEMENTING AND ENFORCING THE KIMBERLEY PROCESS CERTIFICATION SYSTEM (2010) ("A range of actors in Guinea's diamond industry informed the UN Group of Experts that they were easily able to 'insert diamonds into the market in Guinea and export them legally with a Guinean KP certificate.' Guinean officials also informed the UN Group of Experts 'that the country lacks an effective system of warranties . . . [,] does not have inspectors at mining sites and has porous borders.'").

¹¹² See SMILLIE, *supra* note 11, at 199.

¹¹³ See *id.*

¹¹⁴ See KIMBERLEY PROCESS, ADMINISTRATIVE DECISION ON GUINEA (Nov. 6, 2009), <http://www.kimberleyprocess.com/en/2009-administrative-decision-guinea>.

¹¹⁵ See SMILLIE, *supra* note 11, at 201.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

KPCS ripe for abuse and neglect. Accordingly, in order to permit true progress, the means of enforcement must be revamped. Members should face a simple choice: either comply with regulations and enjoy the benefits of membership or leave.

B. Nonbinding “Soft Law” Is Inherently Weak

The KPCS’s chosen language also contributes to its impotency. Like a “corporate social responsibility” initiative, KPCS membership is voluntary and regulatory measures are only recommendations.¹¹⁸ The product of these components is a non-binding, voluntary agreement—not an international treaty.¹¹⁹ This irresolute dynamic indulges noncompliance and facilitates distancing from the underlying goals of the KP.¹²⁰

Compare, for example, the Financial Action Task Force on Money Laundering (FATF). The FATF is an inter-governmental organization that issues standards to participant countries to combat money laundering and terrorist financing.¹²¹ Although the FATF lacks international legal authority over its members, it ensures compliance with its measures by expelling any member in noncompliance.¹²² The FATF’s framework also provides beneficial features such as (1) early warnings to allow members to address compliance issues; (2) increased transparency, making all assessments fully public; and (3) retaining independent experts to perform the assessments.¹²³ Additionally, the FATF’s efficiency in quickly processing assessments and issuing sanctions further bolsters its credibility and efficacy.¹²⁴

¹¹⁸ See Wetzel, *supra* note 40, at 175.

¹¹⁹ See *id.*

¹²⁰ See THE WORLD BANK, NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS 222 (Ian Bannon & Paul Collier eds., 2003) (concluding that voluntary instruments “frequently lack accountability through independent auditing and enforcement [and] are also unlikely to act as a deterrent, unless clearly linked to market incentives”) [hereinafter OPTIONS AND ACTIONS].

¹²¹ See FINANCIAL ACTION TASK FORCE, AN INTRODUCTION TO FATF AND ITS WORK 2 (2010).

¹²² See Laurel S. Terry, *An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance*, 2010 J. PROF. LAW. 3, 5-9 (2010).

¹²³ See Navin Beekarry, *The International Anti-Money Laundering and Combatting the Financing of Terrorism Regulation Strategy: A Critical Analysis of Compliance Determinants in International Law*, 31 NW. J. INT’L L. & BUS. 137, 155-79 (2011).

¹²⁴ See *id.* at 187.

If the KP is to effect lasting change, it too must enforce compliance. An independent monitoring body must be established.¹²⁵ Members should be expelled for noncompliance. Review visits must be mandatory and responsive.¹²⁶ The currently gossamer structure could solidify by engaging with the UN and evolving into an international organization capable of implementing sanctions.¹²⁷ Additionally, the creation of a private right of action permitting individual members to challenge non-compliant members would incentivize compliance and ease trepidation associated with joining a more forceful agreement.¹²⁸

C. A Nonsensical Veto Arrangement Retards KP Progress

The KP requires unanimity for all measures; thus, “generally no vote is taken on contentious issues.”¹²⁹ This “one man-one veto arrangement” cripples the KP’s progress.¹³⁰ In fact, the KP has only sanctioned one member,¹³¹ and “[s]ince then, the KP’s requirement for 100% consensus on *all* decisions has meant that no punitive action could be taken, even in the most obvious cases of non-compliance.”¹³²

Moreover, the veto arrangement permits members to selectively omit information from reports to the UN General Assembly.¹³³ The effect of this reporting oddity is notoriously exemplified by the 2009 Annual Report to the UN General

¹²⁵ See *supra* note 123 and accompanying note (suggesting that if KP is to work just as effectively as FATF, a monitoring body should be established).

¹²⁶ See WORLD DIAMOND COUNCIL, *THE KIMBERLEY PROCESS CERTIFICATION SCHEME THIRD-YEAR REVIEW* (2006) (noting the importance of review visits).

¹²⁷ See *supra* note 124 and accompanying note (implying that the ability to issue sanctions bolsters credibility).

¹²⁸ See Julie L. Fishman, *Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem*, 13 U. MIAMI BUS. L. REV. 217, 235 (2005).

¹²⁹ See Wetzel, *supra* note 40, at 176.

¹³⁰ SMILLIE, *supra* note 11, at 197-98.

¹³¹ In 2004, the peer review system revealed a major influx of diamonds in the Republic of Congo. The Republic of Congo borders the Democratic Republic of Congo, a major source of conflict diamonds. When the Republic of Congo failed to provide any justification for its voluminous exports, KP members unanimously voted to suspend it. See SMILLIE, *supra* note 11, at 199.

¹³² PROBLEMS AND OPPORTUNITIES, *supra* note 100, at 2.

¹³³ See SMILLIE, *supra* note 11, at 201.

Assembly, which failed to acknowledge the target year's disastrous affairs in Venezuela and Zimbabwe after the two member-countries vetoed any mention of their respective failures.¹³⁴

The KP's systemic inability to discipline members engaging in egregious noncompliance also exacerbates the frustration of KP members.¹³⁵ A battalion of commentators argue that the current veto arrangement must be replaced by a workable voting system.¹³⁶ A majority voting system would help breathe new life into the KPCS by providing it with the teeth it desperately needs.

D. Domestic Controls are Unreliable

While states with relatively stable infrastructures, such as the United States,¹³⁷ may implement the KPCS with ease, underdeveloped states and those emerging from conflict may struggle to do so.¹³⁸ Currently, the KP relies upon standard intercessional consultations with wayward members that are simply perfunctory.¹³⁹ This effectively condones known violations and, moreover, allows the dereliction to become endemic.¹⁴⁰

In addition to the abovementioned incidents in Guinea, Venezuela, and Zimbabwe,¹⁴¹ Côte d'Ivoire, due to political

¹³⁴ See *id.* at 201-02 ("The one man-one veto arrangement meant that only good news would be taken to the General Assembly.").

¹³⁵ See Grant, *supra* note 23, at 176 (discussing the noncompliance of Venezuela and Zimbabwe); see also discussion *infra* Part V.D.

¹³⁶ See Grant, *supra* note 23, at 176 ("Because it operates by consensus, the KP has been unable to act swiftly when the need arose . . ."); see also SMILLIE, *supra* note 11, at 203 ("[The KP] needs to end its nonsensical veto arrangement and replace it with a voting system."); Bone, *supra* note 35, at 192 (calling for "[a] move away from consensus to a system of majority voting . . . [to avoid] inertia and politicization . . ."); Wetzel, *supra* note 40, at 176.

¹³⁷ The United States passed the Clean Diamond Trade Act following the 2003 waiver of GATT. The Act enforces the provisions of the KPCS with the threat of civil and criminal penalties. See Clean Diamond Trade Act, 19 U.S.C. § 3901 (2003).

¹³⁸ For example, in Liberia, only 6/100 of border crossing points are manned by authorities. See KIMBERLEY PROCESS, DECLARATION ADOPTED BY THE MOSCOW PLENARY MEETING, IMPROVING INTERNAL CONTROLS OVER ALLUVIAL DIAMOND PRODUCTION (Nov. 16, 2005), <http://www.kimberleyprocess.com/en/2005-administrative-decision-moscow-declaration-alluvial-diamond-production>.

¹³⁹ See Grant, *supra* note 23, at 176.

¹⁴⁰ See *id.*

¹⁴¹ See discussion *supra* notes 102-136.

turmoil, is policed by untrained, underfunded, and inexperienced law enforcement.¹⁴² Since 2002, Côte d'Ivoire has banned the exportation of diamonds.¹⁴³ Nevertheless, due to ongoing political and civil instability, Côte d'Ivoire diamonds continue to flood into neighboring countries.¹⁴⁴ Ground-level implementation efforts are simply nonexistent due to the lack of any governance in diamond-mining areas of Côte d'Ivoire.¹⁴⁵ Indeed, the Côte d'Ivoire government is still reliant upon UN peacekeepers and French military troops to support rebuilding the nation's infrastructure.¹⁴⁶

However, regions in conflict are not alone in their toil to enforce KPCS measures. Liberia, despite maintaining stability since 2005,¹⁴⁷ continues to see massive amounts of illicit diamond exports; only six of the 100 border entry points are even manned.¹⁴⁸ Liberia's and Côte d'Ivoire's combined lack of enforcement, and the resulting spread of illicit diamonds, is the product of nations ill-suited to implement their own legislative KPCS initiatives.¹⁴⁹ Such actions, or more commonly inactions, are products of a system that delegates enforcement to regions that "lack resources, capacity, and political will" necessary for enforcement.¹⁵⁰ The KP, therefore, desperately needs a more reliable means of implementing, enforcing, and controlling the KPCS.

¹⁴² See BURBANK, *supra* note 26, at 3.

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 4.

¹⁴⁵ See *id.* at 3.

¹⁴⁶ See CENTRAL INTELLIGENCE AGENCY, CIA WORLD FACTBOOK 2013, CÔTE D'IVOIRE, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/iv.html> (last visited Nov. 19, 2013).

¹⁴⁷ See CENTRAL INTELLIGENCE AGENCY, CIA WORLD FACTBOOK 2013, LIBERIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/li.html> (last visited Nov. 19, 2013).

¹⁴⁸ See Bocar Thiam, Panelist, Best Practices and Lessons Learned in Regards to ASM Formalization (June 8, 2012), in NOTES ON THE PROCEEDINGS, June 2012, at 8 [hereinafter NOTES ON THE PROCEEDINGS].

¹⁴⁹ See BURBANK, *supra* note 26, at 3-4.

¹⁵⁰ See Mitchell, *supra* note 48, at 195.

VI. Addressing Underlying Design Defects

Ian Smillie, one of the frustrated architects of the KP, forlornly branded the KP an “ineffective circus.”¹⁵¹ Nevertheless, Mr. Smillie maintains that not all hope is lost.¹⁵² However, to accomplish its purpose, the KP must first address the underlying design flaws that belie its authority and impede its progress.¹⁵³ This requires reorganization with a refocused commitment to its fundamental purpose, a permanent review structure, the ability to enforce sanctions, and a viable voting structure.¹⁵⁴ One potential avenue for addressing these concerns would be for the KP to link itself to other, already-established regulatory frameworks.

The Extractive Industries Transparency Initiative (EITI), for example, boasts a coalition of private companies, NGOs, and governments that oversees and enforces a global standard for the extraction of oil, gas, and minerals.¹⁵⁵ Like the KP, the EITI is implemented by the member-states; however, unlike the KP, the EITI's board operates at the international level and ensures domestic compliance.¹⁵⁶ The EITI, although voluntary, obligates membership reporting and then systematically authenticates the reports.¹⁵⁷ In other words, membership is contingent upon full compliance with EITI standards.¹⁵⁸ Some commentators have even called for an international forum to explore the prospect of integrating EITI and the KP.¹⁵⁹ At a minimum, the EITI, like the

¹⁵¹ SMILLIE, *supra* note 11, at 202.

¹⁵² See generally PROBLEMS AND OPPORTUNITIES, *supra* note 100 (analyzing inconsistencies and defects in the KP and identifying recent mineral regulatory initiatives as possible partners to the KP).

¹⁵³ See *id.* at 1 (suggesting the need to address design issues).

¹⁵⁴ See, e.g., *id.* at 1-3 (noting areas of improvement such as the ability to enforce sanctions).

¹⁵⁵ See EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, EITI RULES, 2011 EDITION 35 (Apr. 4, 2011), available at <http://eiti.org/document/rules>.

¹⁵⁶ See Eddie Rich & T. Negbalee Warner, *Addressing the Roots of Liberia's Conflict Through the Extractive Industries Transparency Initiative*, in HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING, *supra* note 23, at 201.

¹⁵⁷ See EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, *supra* note 155, at 35.

¹⁵⁸ *Id.*

¹⁵⁹ See Bernard Taylor, Panelist, Going into Action (June 8, 2012), in NOTES ON THE PROCEEDINGS, *supra* note 148; Alfred Brownell, Panelist, Diamond Revenue Transparency and Accountability Mechanisms for Mining Communities' Beneficiation from Revenues (June 8, 2012), in NOTES ON THE PROCEEDINGS, *supra* note 148; accord

FATF,¹⁶⁰ presents a model for increasing efficacy of an international framework. The KP should strive to develop a similar framework applicable to the KPCS.

Alternatively, amending the Dodd-Frank Act¹⁶¹ to include diamonds would escalate pressure for a KP reform.¹⁶² On August 22, 2012, the Securities and Exchange Commission (SEC) finalized measures to enforce an innocuous provision of the Dodd-Frank Act that requires entities to disclose any trade in conflict minerals.¹⁶³ Although the Act's definition of "conflict materials" covers tantalum, columbite, tungsten, wolframite, and other minerals, it conspicuously overlooks diamonds.¹⁶⁴ The oversight is due to Congress's misplaced assumption that the KP was already addressing the trade of conflict diamonds.¹⁶⁵ Given the existing regulatory framework and experience of the SEC, KP objectives could be advanced by amending the Dodd-Frank Act to include conflict diamonds, or by using the regulation as evidence for the need of KP reform.¹⁶⁶

VII. The Illicit Stream of Alluvial Diamonds

Beyond addressing design and enforcement defects, the KP must refocus its efforts to curb the trade of illicit diamonds. For decades, much of the criticism of the diamond industry has focused on the role of major corporations and excavation companies.¹⁶⁷ In addition, pop culture has consistently

Wetzel, *supra* note 40, at 179.

¹⁶⁰ See discussion *supra* notes 118-128.

¹⁶¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank].

¹⁶² PROBLEMS AND OPPORTUNITIES, *supra* note 100, at 5 ("The threat that this might become a requirement through the addition of diamonds to the Dodd-Frank Act might persuade the [KP] to take the action that has so long been missing . . .").

¹⁶³ See Obiamaka P. Madubuko & Adam M. Taylor, *New SEC Rules Target Conflict Materials*, CFO (Aug. 28, 2012), ww2.cfo.com/supply-chain/2012/08/new-sec-rules-target-conflict-minerals-supply-chains/; Nick Elliott, *Conflict Minerals Rules Could Reverberate Through Supply Chain*, THE WALL ST. J.: CORRUPTION CURRENTS (Sept. 14, 2012, 9:01 AM), available at <http://blogs.wsj.com/corruption-currents/2012/09/14/conflict-minerals-rules-could-reverberate-through-supply-chain/>.

¹⁶⁴ See Dodd-Frank, *supra* note 161, § 1502(4), 124 Stat. 2218 (2010).

¹⁶⁵ See PROBLEMS AND OPPORTUNITIES, *supra* note 100, at 5.

¹⁶⁶ See *id.*

¹⁶⁷ See generally ROBERTS, *supra* note 1 (explaining how diamond merchants and

exacerbated the isolated public perception that the diamond industry revolves around the uncovering of large, priceless diamonds.¹⁶⁸ However, in some regions, ninety-nine percent of diamonds produced are classified as alluvial.¹⁶⁹ Moreover, the vast majority of the illicit diamond trade does not arise from large-scale diamond operations producing weighty gems; rather, conflict diamonds “are almost exclusively ‘alluvial’ diamonds.”¹⁷⁰ To avoid becoming obsolete, the KP must refocus its efforts to effectively address the root problem: alluvial diamonds.

Alluvial diamonds are formed under the same processes as any diamond, but, unlike those unearthed at major mining operations, alluvial diamonds are located near the earth’s surface.¹⁷¹ Over time, whether by natural erosion or the movement of glaciers, the kimerlite¹⁷² pipes containing diamonds deteriorate and become exposed.¹⁷³ The alluvial diamonds are then easily accessible without heavy equipment, which permits countless individuals to engage in small-scale mining with little capital expenditure.¹⁷⁴

Despite their abundance, these small-scale miners are generally defenseless and vulnerable to exploitation.¹⁷⁵ Indeed,

corporations reap billions of dollars of profits from major mining operations); SMILLIE, *supra* note 11 (describing the diamond production industry as the “great diamond cartel” and denouncing the relentless pursuit of diamond profits).

¹⁶⁸ See generally F. SCOTT FITZGERALD, *THE DIAMOND AS BIG AS THE RITZ* (Juniper Grove 2008) (1922) (chronicling the discovery of a mountain consisting of one giant diamond); MARILYN MONROE, *DIAMONDS ARE A GIRL’S BEST FRIEND* (Varese Records 2001) (1953) (“A kiss on the hand may be quite continental, but diamonds are a girl’s best friend.”); FABOLOUS, *DIAMONDS* (Def Jam Records 2007) (“They should call me Carrot Jeter, maybe Canary Bonds.”); *Blood Diamond* (Warner Bros. Pictures 2006) (portraying an enslaved miner who unearths an enormous pink diamond in a Sierra Leone diamond mine).

¹⁶⁹ See Paolo de Sa, Panel Chair, Opportunities and Constraints for Enhancing the Development Potential from ASM: Views from Diamond Producing Countries (June 8, 2012), in *NOTES ON THE PROCEEDINGS*, *supra* note 148, at 2.

¹⁷⁰ SMILLIE, *supra*, note 11, at 28.

¹⁷¹ See *id.*

¹⁷² “[A]n agglomerate biotite-peridotite that occurs in pipes especially in southern Africa and that often contains diamonds.” *Kimberlite*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/kimberlite> (last visited Oct. 13, 2013).

¹⁷³ SMILLIE, *supra*, note 11, at 28.

¹⁷⁴ See *id.* at 203 (“[T]he number of artisanal miners is enormous.”).

¹⁷⁵ See Paul Collier & Anke Hoeffler, *High-Value Natural Resources, Development, and Conflict: Channels of Causation*, in *HIGH-VALUE NATURAL*

“[s]ocial violence of every sort is rampant in mining towns and at the digging sites Child labour is common, and most of the miners, living completely outside the formal economy, are vulnerable to just about every kind of predator.”¹⁷⁶ Accordingly, the small-scale miners, or artisan miners, are forced to accept any price from “middlemen who dominate the diamond marketing chain” and enjoy grossly disproportionate bargaining power.¹⁷⁷

Aside from the ever-present danger of extortion, small-scale miners are often ill-equipped and poorly trained, making small-scale mining an inherently dangerous process.¹⁷⁸ As a result, small-scale, alluvial diamond operations are plagued by an estimated ninety times higher accident rate than large-scale mining operations.¹⁷⁹ The Faustian pact that emerges promises an infinitesimally small chance at riches in exchange for an extraordinarily high probability of theft, serious injury, or death.¹⁸⁰ Nevertheless, the expansion of alluvial diamond mining is unyielding and generally anarchic.¹⁸¹

The relentless growth of diamond mining is partially due to the fact that diamonds are a highly fungible commodity; diamonds are valuable, easily concealed, and highly transportable.¹⁸² As a result, “[v]irtually all of these [illicit] diamonds eventually find their way into the legitimate trade.”¹⁸³ The informal and chaotic alluvial diamond industry exists beyond the reaches of the KP, despite its integral role in sustaining civil unrest and financing

RESOURCES AND POST-CONFLICT PEACEBUILDING, *supra* note 23, at 297, 302.

¹⁷⁶ SMILLIE, *supra*, note 11, at 203.

¹⁷⁷ See U.S. AGENCY FOR INT’L DEV., PROPERTY RIGHTS AND ARTISANAL DIAMOND DEVELOPMENT PILOT PROGRAM, CENTRAL AFRICAN REPUBLIC, YEAR ONE PROGRESS REPORT 1 (2008) [hereinafter PRADD YEAR ONE].

¹⁷⁸ See Saleem Ali, Panelist, Best Practices and Lessons Learned in Building Collaborative Relationships Between Artisanal Miners and Commercial-scale Mining Enterprises (June 8, 2012), in NOTES ON THE PROCEEDINGS, *supra* note 148, at 8.

¹⁷⁹ See *id.*

¹⁸⁰ See DIETRICH, *supra* note 83, at 6-7.

¹⁸¹ See PRADD YEAR ONE, *supra* note 177, at 18.

¹⁸² See BURBANK, *supra* note 26, at 1.

¹⁸³ U.N. Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), ¶ 19, in relation to Sierra Leone, Rep., transmitted by letter dated Dec. 19, 2000 from the Chairman of the Security Council Comm. established pursuant to resolution 1132 (1997) concerning Sierra Leone addressed to the President of the Security Council, para. 146, U.N. Doc. S/2000/1195 (Dec. 20, 2000).

bloodshed.¹⁸⁴

Unlike copper, cobalt and oil that must be mined on an industrial scale, requiring substantial investment and stability at the mine site, alluvial diamonds can be mined in war zones with little or no technology. They can be mined in militarily unstable terrain that regularly changes hands between belligerents. Diamonds have a relatively constant and internationally recognized price, and they have a higher value-to-weight ratio than almost any other substance. Diamonds are one of the most easily obtained, most easily transported forms of hard currency, for state and non-state actors alike. Inadequate controls in neighbouring transit countries . . . along with secrecy within the industry, make diamonds—licit or illicit—easy to sell.¹⁸⁵

Even those diamonds that eventually receive documentation often exchange hands several times before reaching the purview of the KP.¹⁸⁶ Many more receive forged documentation along the way.¹⁸⁷ Custom authorities, who are tasked with implementing the KP documentation on the ground, are generally unable to identify the originating source of an alluvial diamond.¹⁸⁸ As result, the current procedure for regulating the trade of diamonds “perpetuates exploitation and manipulation by unscrupulous middlemen, and increases the potential for these diamonds to fuel future conflict.”¹⁸⁹

VIII. Fostering Capitalism through Property Law

Many of the most active diamond producing states are incapable of efficiently implementing KPCS measures.¹⁹⁰ The regions producing vast amounts of alluvial diamonds are often under rebel control, overlooked by overburdened authorities, or exploited by corruption.¹⁹¹ Meanwhile, the vast majority of the illicit diamond trade is shifting to non-state actors: small-scale

¹⁸⁴ See BURBANK, *supra* note 26, at 3.

¹⁸⁵ DIETRICH, *supra* note 83, at 2.

¹⁸⁶ See Mitchell, *supra* note 48, at 196.

¹⁸⁷ See *id.*

¹⁸⁸ See PRADD YEAR ONE, *supra* note 177, at 18.

¹⁸⁹ *Id.* at 1.

¹⁹⁰ See BURBANK, *supra* note 26, at 3-4.

¹⁹¹ See *id.* at 4.

alluvial miners.¹⁹² Accordingly, the KP should shift the KPCS focus from ineffective state actors to the individual miners.¹⁹³ This methodology, notably, appears to call for individual self-regulation.¹⁹⁴ Yet, the KP can work to incentivize implementation of KPCS measures by fostering a vehicle for miners to benefit.¹⁹⁵ The primary avenue to systematically incentivize KPCS implementation is the reinforcement individual property rights.

A. *Incentivizing Participation in the Legal Market*

Peruvian economist Hernando de Soto Polar (de Soto) is well-known for his theory that the key to producing a strong market economy is the development of a workable system for documenting and enforcing private property rights.¹⁹⁶ His seminal work *The Mystery of Capital*¹⁹⁷ theorizes that the absence of adequately recorded land ownership rights precludes economic development because individual assets “cannot readily be turned into capital, cannot be traded outside of narrow local circles where people know and trust each other, cannot be used as collateral for a loan, and cannot be used as a share against an investment.”¹⁹⁸ De Soto is not alone: “[f]or decades, economists and development specialists have argued that secured property rights are a precondition for vibrant economic growth.”¹⁹⁹ The absence of a uniform understanding of ownership prevents would-be entrepreneurs from utilizing any assets they may have; the risk of

¹⁹² See DIETRICH, *supra* note 83, at 7.

¹⁹³ See *supra* note 192 and accompanying text.

¹⁹⁴ See *supra* notes 118-119 and accompanying text (implying that state actors would need to self-regulate because “KPCS membership and regulatory measures are only recommendations;” thus, it follows that when the focus is individual miners, miners are called to self-regulate).

¹⁹⁵ See *infra* note 217 and accompanying text (arguing the need to focus on incentive-based approach).

¹⁹⁶ De Soto’s recognitions include: *Time* magazine naming him one of the top five leading Latin American innovators of the century; *Forbes* magazine labeling him one of the fifteen innovators “who will re-invent your future;” and *The Economist* labeling his institute as one of the top two think tanks in the world. *Hernando de Soto’s Biography*, CATO INST., <http://www.cato.org/special/friedman/desoto/index.html> (last visited Nov. 19, 2012).

¹⁹⁷ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000).

¹⁹⁸ *Id.* at 6.

¹⁹⁹ SANDRA F. JOIREMAN, *WHERE THERE IS NO GOVERNMENT* 8 (2011).

ownership being challenged makes investment too risky.²⁰⁰ As a result, a “new class of entrepreneurs with their own legal arrangements” create extralegal markets.²⁰¹ One such extralegal market is the illicit diamond trade.²⁰² As one economist reasoned:

This is the old Hobbesian problem: When most people obey the law, the government can enforce it effectively and (relatively) cheaply against the few individuals who break it. But when obedience breaks down on a large enough scale, no authority is strong enough to police everyone. In such a setting, with enforcement becoming less and less effective, individuals have an incentive to follow their own interests, regardless of any paper constraints.²⁰³

The illicit diamond trade exemplifies a lapse of authority producing counterproductive incentives.²⁰⁴ The KP could effectively address the trade of illicit alluvial diamonds by incentivizing participation in the legal market.

To begin, the fallacy that only money begets money must be dispelled. Rather, the productive utilization of assets permits earnings.²⁰⁵ Assets derive value from social consensus about their potential legal uses.²⁰⁶ For example, in many regions from which conflict diamonds originate, a house may be little more than a shelter.²⁰⁷ However, if formal property rights are recognized by society, the house becomes a fungible asset.²⁰⁸ In the United States, documented and defined property rights allow a mortgage

²⁰⁰ See DE SOTO, *supra* note 197, at 6.

²⁰¹ *Id.* at 74.

²⁰² See DIETRICH, *supra* note 83, at 7.

²⁰³ Andrzej Rapaczynski, *The Roles of the State and the Market in Establishing Property Rights*, 10 J. ECON. PERSP. 87, 88 (1996).

²⁰⁴ See Jeffrey Frankel, *The Natural Resource Curse: A Survey* 13 (Harvard Kennedy Sch. Faculty Research Working Paper Series, RWP10-005, 2010) (“Where a valuable resource such as oil or diamonds is there for the taking, rather than requiring substantial inputs of labor and capital investment, factions are more likely to fight over it.”); accord DIETRICH, *supra* note 83, at 4 (“Informal commerce sustains the Congolese population, which has simply retreated from state predation. The formal economy of the country had ceased to function by the late 1980s.”).

²⁰⁵ DE SOTO, *supra* note 197, at 64 (“Money does not earn money. You need a property right before you can make money.”).

²⁰⁶ See *id.* at 157.

²⁰⁷ See DIETRICH, *supra* note 83, at 4.

²⁰⁸ See DE SOTO, *supra* note 197, at 6.

on an entrepreneur's house to be a critical resource for new business development.²⁰⁹ This potential in capital has a positive reciprocal effect—creating a vested interest in maintaining the status quo.²¹⁰ The same concept applies equally to mine ownership. In essence, “[c]learly defined and enforced property rights promote economic development and reduce violence.”²¹¹

Alternatively, without enforceable private property rights, “no matter how many assets [people] accumulate or how hard they work, most people will not be able to prosper.”²¹² For example, de Soto studied the economy of Port-au-Prince, Haiti during the 1990s and discovered extreme poverty and an “impenetrable wall” preventing the majority of the surging urban population from obtaining legal housing, engaging in formal business, or finding legal employment.²¹³ This wall blocked two-thirds of the two million Haitians from prospering despite their control of over \$5.2 billion worth of tangible assets.²¹⁴ The barrier, however, persisted because the assets were “dead capital”—unusable due to the absence of clear ownership.²¹⁵ Dead capital directly results from the absence of private property rights.²¹⁶

Many diamond-producing areas also face substantial obstacles that have stalled economic development. Particularly within the artisanal mining sector, which is highly informal, entrepreneurialism is stifled by a failure to create an infrastructure for incentive.²¹⁷ The failure stems primarily from inadequate

²⁰⁹ *See id.*

²¹⁰ *See id.* at 8.

²¹¹ JOIREMAN, *supra* note 199, at 153.

²¹² DE SOTO, *supra* note 197, at 159.

²¹³ *See id.* at 18.

²¹⁴ De Soto calculates the value of “dead capital” through an algorithm that operates, in part, by assigning values to informal urban dwellings and attributing it to its possessors. *See id.* at 253.

²¹⁵ *See id.* at 6-7.

²¹⁶ *See id.* at 6.

²¹⁷ *See* Steven Van Bockstael, Panelist, Best Practices and Lessons Learned in Regards to ASM Formalization (June 8, 2012), in NOTES ON THE PROCEEDINGS, *supra* note 148, at 5 (“[Alluvial mining] is driven by poverty, deagrarianization and multiplex livelihoods. To increase the registration amount of formalized miners, there needs to be a switch from an enforcement-based approach to an incentive-based approach.”).

enforcement of private property rights.²¹⁸ Accordingly, any effort to develop a formal business enterprise inevitably will fail because the underlying assets are dead capital.²¹⁹ The ultimate effect is that, “[i]f the law does not help them, then they will help themselves outside the law.”²²⁰ As such, to minimize extralegal market participation, “states should devote serious attention and resources to the enforcement of . . . property laws” in alluvial diamond producing areas.²²¹

B. “[P]roperty Rights that Are Not Enforceable Do Not Exist”²²²

Secure property is not a luxury; it is a basic human right.²²³ However, the right is reduced to rhetoric without a means of enforcement.²²⁴ Currently, no international forum exists which allows individuals in post-conflict African states to invoke property rights, but “there is a clear trend toward recognizing an internationally enforceable right to property.”²²⁵

²¹⁸ See Corene Crossin, Gavin Hayman, & Simon Taylor, *Where Did It Come From? Commodity Tracking Systems*, in *OPTIONS AND ACTIONS*, *supra* note 120, at 97, 119 (discussing the benefits of a “reform of property rights to devolve management of resources to local communities with a vested interest in their long-term security”); see also Gregory Myers, Panel Chair, Going into Action (June 8, 2012), in *NOTES ON THE PROCEEDINGS*, *supra* note 148, at 8 (“Communities have low incentives to formalize or mine responsibility.”).

²¹⁹ See DE SOTO, *supra* note 197, at 6.

²²⁰ *Id.* at 168.

²²¹ JOIREMAN, *supra* note 199, at 163.

²²² *Id.* at 25.

²²³ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 17, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to own property alone as well as in association with others [and] shall [not] be arbitrarily deprived of his property.”); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. XXIII, OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948), available at <http://cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm> (“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”); Organization of African Unity, African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) (“The right to property shall be guaranteed.”).

²²⁴ See JOHN G. SPRANKLING, RAYMOND R. COLETTA, & M.C. MIROW, *GLOBAL ISSUES IN PROPERTY LAW* 12 (2006).

²²⁵ *Id.*

Admittedly, transforming any system of private property ownership is a formidable goal. This is especially true in Africa, where there are competing ideas about the meaning of property.²²⁶ Traditionally, the community owned most African land, and individuals could possess a “usufruct,” which only allowed the individual to occupy and enjoy the land at a peripheral level.²²⁷ Thus, individuals were entitled only to their own creations, whereas anyone in the community could take and utilize the land’s natural fruits.²²⁸ Any ownership interests that might develop were acknowledged by “visible, symbolic acts,” such as the cultivation of crops or the construction of a house.²²⁹

During British colonial rule in Africa, a quasi-customary property law system developed that eroded already-delicate individual property rights and shifted power to select local leaders.²³⁰ The system had lasting effects in creating a mammoth wealth gap and isolated pockets of power and fortune.²³¹ Today, in most diamond-producing regions, “[m]any have poorly defined property rights, an artifact of the colonial era . . . , [and] many people who use or possess land have no legal proof that it is theirs.”²³²

C. Staking a Claim: Property Rights and Artisanal Diamond Development

As early as 2000, the United States Agency for International Development recognized the role of property rights in the illicit diamond trade and initiated the Property Rights and Artisanal

²²⁶ See JOIREMAN, *supra* note 199, at 7.

²²⁷ SPRANKLING, COLETTA, & MIROW, *supra* note 224, at 59.

²²⁸ See *id.*

²²⁹ *Id.* at 105.

²³⁰ Under the strategy of indirect rule, the British colonial administration selected and empowered local leaders to carry out British objectives. See JOIREMAN, *supra* note 199, at 28.

²³¹ See *id.* at 27-47.

²³² *Id.* at 9. This dynamic, however, is not present in all sub-Saharan African states. In Ethiopia, for example, a comprehensive, modernized land tenure arrangement developed following the 1974 revolution. Today, a unified system of property rights and a formalized legal system has greatly extended the benefits of private property ownership. See *id.* at 37-39.

Diamond Development program (PRADD).²³³ The key focus of PRADD, which was first implemented in 2007, was to “demonstrate that by strengthening *property rights*: (1) Alluvial diamonds will be brought into the formal chain of custody; and (2) local benefits from production and marketing of alluvial diamonds will increase.”²³⁴

PRADD’s first year of operation confirmed that property rights need to be reinforced to control the anarchic expansion of illicit alluvial diamond mining.²³⁵ The program issued a report outlining its first operations, which bolstered the concern that legal systems composed of poorly-defined, insecure property rights are pervasive in alluvial diamond-mining regions:

All participants claim to be the property owners of the mines they manage. Property rights were established by: Discovery of diamonds (54%), inheritance (41%), purchase (5%), and allocation by village chief (1%). Property right claims were considered validated through local recognition of invested labor (70%), verbal agreements with neighbors (21%), and the discovery of diamonds (9%). The majority (95%) of participants approve of the development of a public property rights registry. Nineteen participants (14%) stated that their claim was disputed by other parties ranging from smallholder agriculturalists to international mining companies.²³⁶

The majority of participants, though claiming to own their mines, also claim to be without any savings.²³⁷ Though this dynamic appears contradictory, the concepts of ownership and assets may be mutually exclusive where the assets are “dead capital.”²³⁸ As a result, control of a mine currently does not translate to any ability to profit from its ownership.²³⁹

Furthermore, property rights cannot be sufficiently established by mere recognition of possession by neighbors. Enforcement by community recognition is quickly becoming obsolete: “as

²³³ See PRADD YEAR ONE, *supra* note 177, at iii.

²³⁴ *Id.* (emphasis in original).

²³⁵ See *id.* at vi.

²³⁶ *Id.* at 7.

²³⁷ See *id.* at 8.

²³⁸ See DE SOTO, *supra* note 197, at 16.

²³⁹ See PRADD YEAR ONE, *supra* note 177, at 8.

communities [become] larger and more complex, and interaction between the community and strangers more frequent, these symbolic acts [lose] much of their value.”²⁴⁰ In diamond-mining areas, the interaction with outsiders is increasingly common and complex, which furthers the need for a legitimate system of property rights.²⁴¹

Moreover, PRADD’s report made clear that incentives to participate in the legal market are paramount to effectively regulating alluvial diamonds:

Without the proper incentives (secure property rights, fair market prices), and in the absence of clear enforcement regulations and implementation, there is little incentive for the artisans and communities on whose land diamond mines occur to provide better control and governance over these resources. The present system perpetuates exploitation and manipulation by unscrupulous middlemen, and increases the potential for these diamonds to fuel future conflict, or become the focus of future land grabbing and environmental degradation.²⁴²

The KP recognized the problem, as well as PRADD’s response, and acknowledged that these “effective internal controls in alluvial mining areas are crucial to the overall effectiveness of the [KPCS] in preventing conflict diamonds from entering the legitimate diamond trade.”²⁴³

While PRADD’s emphasis on incentivizing participation in the legal diamond trade by establishing clear and consistent mine ownership claims is critical to the success of the KPCS, PRADD will not be sufficient in itself. However, by utilizing and integrating the PRADD methodology into the KPCS, the KP can effectively address alluvial diamond mining by assigning individual mine-origin information “tags” to property owners and incorporating those tags into the KPCS.

²⁴⁰ SPRANKLING, COLETTA, & MIROW, *supra* note 225, at 105.

²⁴¹ Indeed, alluvial diamond miners are seeing increasing contact with a variety of actors, including mercenaries of multi-national private military and security companies (PMCs). See Mathew Kincade III, Note, *The Private Military Company Complex in Central and Southern Africa: The Problematic Application of International Humanitarian Law*, 12 WASH. U. GLOB. STUD. L. REV. 205, 217 (2013).

²⁴² See PRADD YEAR ONE, *supra* note 177, at 1.

²⁴³ KIMBERLEY PROCESS, *supra* note 138, at 1.

IX. Practical Obstacles to Systematically Defining Property Rights

As of May 2012, PRADD had formalized and registered individual property claims to 2,849 alluvial diamond mines in the Central African Republic alone.²⁴⁴ The work improved the alluvial diamond chain of custody and created corresponding incentives to join the legal market.²⁴⁵ As such, legal diamond sales in regions implementing PRADD systems have skyrocketed to nearly 4.5 times of what they were before PRADD's implementation,²⁴⁶ and average household incomes in PRADD areas have increased nine-fold in one year.²⁴⁷

PRADD's successes have also reached beyond the diamond trade. In another example of incentivizing entrepreneurship, reinforced property rights allowed former miners to convert destitute mines into legitimate, sustainable fish-farming operations, increasing the number of fish-farms in the Central African Republic from 18 to 580.²⁴⁸ In addition, property owners have converted hundreds of other exhausted mines into vegetable gardens or fruit tree orchards, and many former miners now earn more income than they earned mining diamonds.²⁴⁹

PRADD's efforts to reinforce individual property rights had a substantial, positive impact on the area by transforming formerly dead capital into usable capital. But what are the costs of implementation?

²⁴⁴ U.S. AGENCY FOR INT'L DEV., PROPERTY RIGHTS AND ARTISANAL DIAMOND DEVELOPMENT, USAID PROGRAM BRIEF 1-2 (2012) [hereinafter PRADD PROGRAM BRIEF].

²⁴⁵ See Sébastien Pennes, Panelist, Knowledge-building and Financing for Efficient ASM (June 8, 2012), in NOTES ON THE PROCEEDINGS, *supra* note 148, at 4.

²⁴⁶ *Id.*

²⁴⁷ See PRADD PROGRAM BRIEF, *supra* note 244, at 1.

²⁴⁸ See Terah De Jon, Panelist, Best Practices and Lessons Learned in Preventing Environmental Damage to, and Facilitating Rehabilitation of, Artisanal Diamond Sites (June 8, 2012), in NOTES ON THE PROCEEDINGS, *supra* note 148, at 4.

²⁴⁹ See PRADD PROGRAM BRIEF, *supra* note 244, at 2.

A. *Cost-Efficient Property Registry Is Possible with the Utilization of Existing Technology.*

KP observers have noted that “[f]ormalization [of the alluvial diamond mining industry] is too costly, but informality costs miners even more money than formality because of harassment and informal taxation.”²⁵⁰ Undeniably, creating and implementing an effective commodity-tracking system,²⁵¹ like PRADD’s property registry, can be costly.²⁵² However, by utilizing accessible technology and maintaining a manageable plan, a PRADD-based system offers a feasible, cost-effective means of reinforcing property rights.

Unlike many suggested means of monitoring the illicit alluvial diamond trade that focus on the diamond as a *commodity* in a top-to-bottom approach, a mapped property rights registry focuses on the *means* of production from a bottom-to-top perspective. An example of the former is Gemprint, a sophisticated technology that records and identifies the unique arrangement and relation of facets in a diamond.²⁵³ The technology, however, is prohibitively expensive and would be largely ineffective in the alluvial diamond trade because its application is limited to polished diamonds.²⁵⁴ Moreover, not only would such systems require an extensive database from which custom officials could compare and identify diamonds, the technology is also novel and complex—making it a frightening prospect for KP, which once “spent hours at one meeting debating whether a [KPCS] certificate should be in

²⁵⁰ Dorothee Gizenga, Panelist, Best Practices and Lessons Learned in Regards to ASM Formalization, in NOTES ON THE PROCEEDINGS, *supra* note 148, at 6.

²⁵¹ Commodity-tracking systems provide a means to gain information, regulate, and control trade in specific commodities. While the methodologies vary widely depending on the targeted commodities, common traits of a successful system include: “common definitions and reporting requirements, efficient reporting structure and effective information exchange, commodity labeling and audited chain-of-custody arrangements, effective compliance and enforcement measures, and capacity building.” Corene Crossin, Gavin Hayman & Simon Taylor, *Where Did It Come From? Commodity Tracking Systems*, in OPTIONS AND ACTIONS, *supra* note 120, at 98.

²⁵² *See id.* at 120-23 (comparing costs of ten CTS systems utilizing different technological means to monitor timber production).

²⁵³ GEMPRINT, <http://www.gemprint.com> (last visited Oct. 10 2012). Diamonds, like human fingerprints, are unique, making the Gemprint identification method similar to fingerprinting. *See id.*

²⁵⁴ *See* SMILLIE, *supra* note 11, at 181.

landscape or portrait format”²⁵⁵

Alternatively, a system that focuses on the *means* of production from a bottom-to-top perspective, like PRADD, is cost-efficient and relatively simple. PRADD began by investigating current mine control and ownership²⁵⁶ and then worked to develop a geo-referenced property rights claim registry.²⁵⁷ Next, PRADD assigned identifications to each mine that could be attached to any diamond discovered there.²⁵⁸ Meanwhile, PRADD worked to inform the miners by various means: (1) publicizing its intentions through local radio, television, and press to raise awareness; (2) holding various training sessions to teach diamond valuation, discuss the legal implications of property ownership, and explain the relationship between the miners and other actors in the industry; (3) increasing miners’ access to and understanding of property rights information; and (4) collaborating with other stakeholders, such as diamond collectors, local authorities, and state authorities, to reinforce PRADD efforts.²⁵⁹ Ultimately, this bottom-to-top approach formalized the means of diamond production.

B. The Simplicity of a Geo-Referenced Property Rights Claim Registry

In many areas affected by the illicit alluvial diamond trade, there are few, if any, formal systems for registering and accessing information on land titles or property division.²⁶⁰ Therefore, PRADD resourcefully utilized an alternative source of land data—satellite imagery.²⁶¹ The United States Geological Survey provides PRADD with high-resolution satellite imagery.²⁶² Using this imagery, PRADD’s staff identifies small-scale mining operations and investigates ownership through partnerships in

²⁵⁵ *Id.* at 182.

²⁵⁶ See PRADD YEAR ONE, *supra* note 177, at 11.

²⁵⁷ See discussion *infra* notes 260-270

²⁵⁸ See PRADD YEAR ONE, *supra* note 177, at 11.

²⁵⁹ *Id.* at 13-14.

²⁶⁰ See discussion *supra* notes 56-94.

²⁶¹ See PRADD YEAR ONE, *supra* note 177, at 11-14.

²⁶² See *id.* at 13.

local communities.²⁶³ Once a consensus regarding mine ownership is reached, PRADD plots the exact location on a geographic information system (GIS).²⁶⁴ Meanwhile, a unique identification code is assigned to the mine and owner, which can then be recorded on the government-issued KPCS certificates.²⁶⁵ The result is the first geo-referenced property rights registry that gives miners a legitimate source to identify and defend their property holdings.²⁶⁶

Accessibility to the information is unparalleled because institutions and miners alike can use Google Earth²⁶⁷ to monitor mining areas.²⁶⁸ PRADD increases the effectiveness by conducting awareness-raising seminars and training sessions, as well as incorporating local institutions as representatives for enforcement of the registry.²⁶⁹ Potentially, PRADD could be extended into a uniform property rights registry, which has had considerable success in other nations.²⁷⁰

C. Aligning Interests to Finance Extended Implementation

The KP's collaborative structure places it in the unique position to advance a PRADD-based system and incentivize legal economic activity by aligning state, corporate, and individual interests. Individuals gain from legal certainty, economic opportunity, and community stability.²⁷¹ Corporations also favor investing in sovereign, secure partners and gain from increased stability.²⁷² Moreover, increasing economic growth rates diminish

²⁶³ See *id.* at v.

²⁶⁴ See *id.* at 11.

²⁶⁵ See *id.* at 9.

²⁶⁶ See *id.* at 3 (Figure 1.1).

²⁶⁷ Google Earth is a virtual geographical information program that allows users to utilize satellite imagery and aerial photography to view Earth. See GOOGLE EARTH, <http://www.google.com/earth/learn/> (last visited Feb. 24, 2013).

²⁶⁸ Pete Chirico, Panelist, Knowledge-Building and Financing for Efficient ASM (June 8, 2012), in NOTES ON THE PROCEEDINGS, *supra* note 148, at 4.

²⁶⁹ See PRADD YEAR ONE, *supra* note 177, at 9.

²⁷⁰ See, e.g., SPRANKLING, COLETTA, & MIROW, *supra* note 225, at 116 (discussing Her Majesty's Land Registry, the national land sale system in England and Wales).

²⁷¹ See discussion *supra* 190-202.

²⁷² For example, De Beers already engages in a 50/50 profit sharing plan with Botswana and Namibia in order to help finance infrastructure development and resulting

the risk of civil war and conflict by incentivizing the maintenance of the status quo.²⁷³ As a corollary, states benefit not just from the reduced risk of conflict, but also from a shift away from the extralegal markets to legal, taxable markets.²⁷⁴

Indeed, the KP has recognized the need for KP participants and donors to focus on “[providing] support for the establishment of effective traceability systems for artisanal production”²⁷⁵ The KP also recently encouraged all participants to incorporate practices similar to PRADD’s GIS identification on “all invoices and documentation accompanying the diamonds to the point of export.”²⁷⁶ Yet, if the past decade has taught the KP anything, the KP must realize that merely encouraging measures is insufficient. Rather, the KP must work to implement a PRADD-based system for registering diamond mines by refocusing foreign aid to regions infected by illicit diamond production.

Through the so-called “resource curse,” economists and social commentators have long-recognized the pernicious phenomenon by which a state’s high concentration of a valuable natural resource is often correlated with poor economic growth, economic volatility, authoritarianism, corruption, and civil conflict.²⁷⁷ The phenomenon is particularly striking in Africa:

Resource-related conflicts may pose special problems for the states of Africa [C]onflicts in Africa, of all the world’s regions, show the most worrisome trends. Between 1992 and 2001 the number of armed conflicts outside of Africa dropped by half, yet the number of conflicts in Africa stayed roughly the same Moreover, within Africa, armed conflicts have grown

stability. See DE BEERS, REPORT TO SOCIETY 21-22 (2011).

²⁷³ See Collier & Hoeffler, *supra* note 175, at 298 (discussing that the chance of civil war increases proportionate to the proportion of a country’s GDP that is derived from the exportation of natural resource).

²⁷⁴ Taxes on diamond production are vital to the sub-Saharan economy. See SMILLIE, *supra*, note 11, at 171 (“The diamond industry is vital to the South African and the Southern African economy.”) (quoting Press Release, De Beers, De Beers’ Comments on “The Heart of the Matter” (Jan. 26, 2000)).

²⁷⁵ KIMBERLEY PROCESS, *supra* note 138, at 3.

²⁷⁶ See *id.* at 2.

²⁷⁷ See Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* 21-22 (Nat’l Bureau of Econ. Research, Working Paper No. 5398), available at <http://www.nber.org/papers/w5398.pdf>.

more severe.²⁷⁸

Economic theory submits that increased revenues from natural resources have two perverse side-effects: (1) deindustrializing the market economy by raising the exchange rate; and (2) detaching revenue from industry and funneling it into the coffers of corrupt leaders.²⁷⁹ Alarmingly, economists also associate these debilitating ancillaries with *foreign aid*.²⁸⁰

The KP must lead in developing a cautious supply of foreign aid conditioned on the implementation of PRADD-based property systems. In post-conflict and struggling regions, domestic authorities are largely dependent on foreign aid.²⁸¹ As such, foreign assistance can be conditioned on specific measures, permitting donors to exercise considerable control over the mode of reform.²⁸² Therefore, by orchestrating measured foreign assistance, the KP can increase the returns on aid, while simultaneously shifting returns on natural resources to individual economic participants.²⁸³ In turn, improving access to legitimate sources of capital, primarily through a formalized property rights system, incentivizes participation in the legal economy while decreasing the appeal of joining the illicit diamond trade.

X. Conclusion

Going forward, the KP must gain legitimate force if it is to implement a more effective response to the pervasive dilemmas caused by illicit alluvial diamonds trading. The KP realizes that the current measures are failing. Key to implementing lasting change is its ability to establish a dependable system of property

²⁷⁸ See Michael Ross, *The Natural Resource Curse: How Wealth Can Make You Poor*, in *OPTIONS AND ACTIONS*, *supra* note 120, at 17.

²⁷⁹ See generally Collier & Hoeffler, *supra* note 175, at 303-08 (discussing the “Dutch Disease” and the adverse effects of immense resources in areas with poor infrastructure).

²⁸⁰ See *id.* at 304.

²⁸¹ See Siri Aas Rustad et al., *Building or Spoiling Peace? Lessons From the Management of High-value Natural Resources*, in *HIGH-VALUE NATURAL RESOURCES AND POST-CONFLICT PEACEBUILDING*, *supra* note 23, at 599.

²⁸² See *id.*

²⁸³ See Collier & Hoeffler, *supra* note 175, at 309 (“Policy coherence demands that the international community focus on raising the returns from natural resource revenues, just as it has struggled to raise the returns on aid.”).

rights. Reinforcing property rights incentivizes economic growth from the ground up by facilitating the creation of capital while disincentivizing illicit activity.

Despite obstacles, a relatively simple approach utilizing already-prevalent and inexpensive technology presents the most viable path to increasing individual access to legitimate income. By tying foreign aid to the implementation of programs with demonstrated success in this arena, such as PRADD, the KP can foster economic growth from the ground up.