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The Kimberley Process: Did the Lion Roar?

In a world of failures, this is a story about NGO campaigning, corporate social responsibility and diplomacy that still has a chance of working, not just to end and prevent conflict, but to turn diamonds with secrets and blood in their pedigree into an engine of development and hope in places where these virtues are in tragically short supply.

Ian Smillie, conflict diamonds expert, referring to the KP¹

Chapter Overview

This chapter discusses the Kimberley Process Certification Scheme (KP), which is the centrepiece of the conflict diamonds governance system. The chapter gives an overview of the Kimberley Process, and discusses its operation, including the way it accepts new members, its annual reporting, and its distinctive peer-review mechanism. In discussing peer review, there is a particular focus on the KP's management of cases of serious non-compliance. The role of industry in the KP is discussed, including self-regulation, as is the role of non-governmental organisations (NGOs), with a particular focus on

¹ Smillie, I, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade* (Anthem Press, 2010) 207.

the continuing role of NGOs beyond the KP, including the Diamond Development Initiative International (DDII). The implementation of KP obligations at the national level is the final focus of analysis, including consideration of regulatory options under national legislation in Angola, the Democratic Republic of Congo (DRC), Côte d'Ivoire, Sierra Leone, Australia, and the Netherlands.

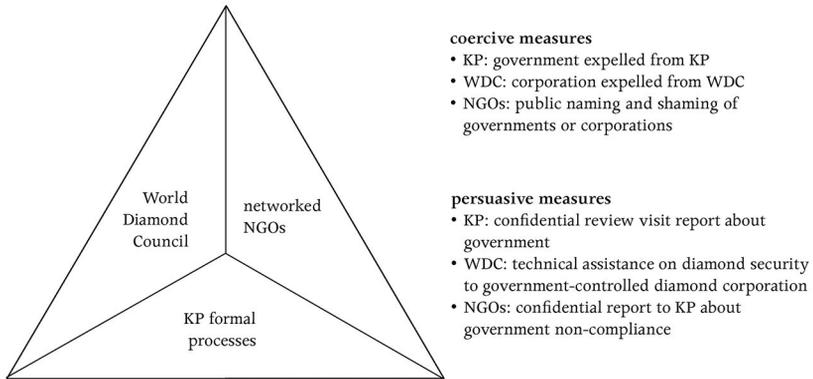


Figure 3.1: Kimberley Process: Networked Regulators Operating in Parallel

Source: Author's research.

Overview of the Kimberley Process

The Kimberley Process Certification Scheme is the primary response by the international community to overcome the conflict diamonds problem. As discussed in Chapter 2, conflict diamonds are rough diamonds that are associated with conflict and gross human rights violations. The Kimberley Process aims to distinguish the legitimate rough diamond trade from the illegal trade through the use of a system of certification at the point of export. The central obligation of governmental participants in the KP is to ensure that all conflict-

free rough diamond goods are certified at the point of export, and to ensure that only legally certified rough diamonds are imported into the country.²

The Kimberley Process was launched in May 2000 in the city of Kimberley, South Africa. It began as a consultative process involving governments, business, and NGOs, later becoming a negotiating process that culminated in the adoption of the Kimberley Process core document at a ministerial meeting in Interlaken, Switzerland, in November 2002.³ Participating nations agreed to implement the provisions of that agreement by 1 January 2003. The agreement took just 30 months to negotiate, which has been described as blazing speed by UN standards.⁴ The Kimberley Process received the formal endorsement of the UN General Assembly (UNGA)

2 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) ss II, III. See also Wright, C, 'Tackling Conflict Diamonds: The Kimberley Process Certification Scheme' (2004) 11(4) *International Peacekeeping* 697, 699–700; Fishman, J L, 'Is Diamond Smuggling Forever?: The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem' (2005) 13 *University of Miami Business Law Review* 217, 218–219. Although the central objective of the KP is to exclude trading in rough diamonds from non-members, the 2008 plenary discussed the possibility of a mechanism to provide for trade between participants and certain authorised non-participants (in particular, Turkey). Kimberley Process Chair, 'Report on the Intersessional Meeting of the Working Groups of the Kimberley Process Certification Scheme' (New Delhi, India, 19 June 2008).

3 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002); Kimberley Process, *Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds* (5 November 2002). Preliminary meetings were held prior to finalising the core document, in Namibia: Kimberley Process, 'Kimberley Process Meeting and Technical Workshop' (Report on Preliminary Meeting, Windhoek, Namibia, 13–16 February 2001); Belgium: Kimberley Process, 'Kimberley Process Meeting: Final Communiqué' (Report on Preliminary Meeting, Brussels, Belgium, 25–27 April 2001); the Russian Federation: Kimberley Process, 'Kimberley Process: Final Communiqué' (Report on Preliminary Meeting, Moscow, Russia, 3–4 July 2001); England: Kimberley Process, 'Kimberley Process: Meeting in Twickenham' (Report on Preliminary Meeting, Twickenham, England, 11–13 September 2001); and Canada: Kimberley Process, 'Kimberley Process Meeting Final Communiqué' (Report on Preliminary Meeting, Ottawa, Canada, 18–20 March 2002). See also Wallis, A, 'Data Mining: Lessons from the Kimberley Process for the United Nations' Development of Human Rights Norms for Transnational Corporations' (2005) 4(2) *Northwestern Journal of International Human Rights* 388, 389. Wallis contrasts the development of the Kimberley Process, a more grass-roots model, to the approach by which the United Nations have sought to develop other human rights instruments to regulate international corporations.

4 Wexler, P, *The Kimberley Process Certification Scheme on the Occasion of its Third Anniversary: An Independent Commissioned Review* (Review Report submitted to the Ad Hoc Working Group on the Review of the Kimberley Process, February 2006) 6.

in 2001.⁵ The Kimberley Process has 54 participants, representing 81 countries, with the European Union and its 28 member states counting as a single participant.⁶

Noting its growing membership, it can be argued that the Kimberley Process has already made significant progress in reducing the trade in conflict diamonds. Statistics concerning the now monitored legal diamond trade are also encouraging. One indicator of success is the greater number of legitimate diamond exports, demonstrating how the controls have helped reduce illicit trading and bringing more revenues from the trade into the legitimate market. According to a three-year review of the Kimberley Process, the trade in conflict diamonds was less than 0.2 per cent of the overall diamond trade.⁷ Sierra Leone is cited as an example of a country where controls have helped maintain the fragile peace, and where the legitimate trade has risen exponentially.⁸ In 2008, for example, Sierra Leone exported US\$99 million of diamonds, up from \$26 million in 2001. Similarly, legitimate rough diamond exports from the DRC were valued at US\$552 million in 2008.⁹ It should be noted, however, that the black market in diamonds still remains very significant, especially when individual countries are

5 The Role of Diamonds in Fuelling Conflict: Breaking the Link Between the Illicit Transaction of Rough Diamonds and Armed Conflict as a Contribution to Prevention and Settlement of Conflicts, GA Res 55/56, UN GAOR, 55th sess, 79th plen mtg, Un Doc A/RES/55/56 (1 December 2001).

6 Latest figures on participants were taken from the Kimberley Process website, www.kimberleyprocess.com, accessed on 13 August 2015, although the website states that the figures are from 2 August 2013.

7 Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, *Kimberley Process Certification Scheme: Third Year Review* (Review Report, Kimberley Process, November 2006) 17; Letter from Karel Kovanda, Kimberley Process Chair, to Kimberley Process Members, 31 January 2007.

8 Global Witness, 'Kimberley Process Certification Scheme Questionnaire for the Review of the Scheme' (Review Submission, 5 April 2006).

9 Kimberley Process Secretariat, 'Annual Global Summary: 2008 Production, Imports, Exports and KPC Counts' (Annual Report Summary, 7 August 2010); Wexler, P, *The Kimberley Process Certification Scheme on the Occasion of its Third Anniversary: An Independent Commissioned Review* (Review Report submitted to the Ad Hoc Working Group on the Review of the Kimberley Process, February 2006).

considered. Despite the progress made in Sierra Leone, for example, it has been estimated that between 10 and 20 per cent of diamonds in that country are still being illegally smuggled, so challenges remain.¹⁰

The Kimberley Process is distinctive in that it is not a legally binding treaty. While the Kimberley Process Certification Scheme is set out in the form of an international treaty, the instrument is not a legally binding treaty under international law, and is not signed and ratified under standard treaty procedures. However, this less formal structure lends itself to greater flexibility, and wider involvement of non-state actors, which is arguably the strength of the Kimberley Process. Following the informal establishment of the Kimberley Process, commentators such as Global Witness have advocated its being made legally binding through the operation of a UNSC resolution, made with reference to Chapter VII of the UN Charter.¹¹

The second distinctive feature of the Kimberley Process is the high level of involvement of businesses and non-governmental organisations in the system.¹² Although not possessing formal voting rights as members, business and NGO groups may be granted observer status and play significant roles in the working groups and committees that comprise the de facto secretariat of the Kimberley Process. For example, in June 2010, the World Diamond Council (WDC), the umbrella

10 Interview with Global Witness Representative (telephone interview with author, 30 April 2007). The exact date of the review visit was not specified. In order to obtain information on the operation of the Kimberley Process, a number of standardised questions were presented to government, NGO, and industry participants in the Kimberley Process. The government participant, the Australian Federal Government, provided a written response, while the NGO participant, Global Witness, and the industry participant, Rio Tinto, responded to the questions by means of a verbal interview process. The interviews were recorded and a written transcript produced. In relation to all three participants, the ethical requirements set out by The Australian National University concerning such research were complied with and approved by the ANU Research Ethics Committee.

11 Indications that the KP is not a legally binding treaty are in the Preamble to Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002), where participants 'recommend' particular measures, the absence of standard signature and ratification clauses that are present in treaty status documents, and the definition of 'Observer' in s I, which includes industry and non-governmental organisation representatives. Curtis has suggested that the Kimberley Process, while not legally binding under international law, is authoritative and is, in fact, a scheme which imposes obligations on its participants. Curtis, K, 'But is it Law?: An Analysis on the Legal Nature of the Kimberley Process Certification Scheme on Conflict Diamonds and its Treatment of Non-State Actors' (2007) Spring *The American University International Law Review*, 26–27.

12 Wright, C, 'Tackling Conflict Diamonds: The Kimberley Process Certification Scheme' (2004) 11(4) *International Peacekeeping* 697, 702.

representative group for the diamond industry, was a member of the monitoring, participation, and statistics committees and was the chair of the diamond experts committee. Global Witness, an NGO with longstanding interest in conflict diamonds issues, was a member of the participation, artisanal and alluvial, statistics, and monitoring committees, while the NGO Partnership Africa Canada was a member of the monitoring, statistics, artisanal and alluvial, and participation committees.¹³

The observer status of industry groups within the Kimberley Process creates direct connections with industry, thereby promoting compliance with the system by the diamond industry, which sees itself as having a stake in the process. The system thus becomes a hybrid of industry self-regulation and government regulation. The institutionalised involvement of NGOs provides further checks and balances to the system. NGOs, possessing independent information and analysis networks, and with links to the international media, provide a scrutineering role that is built in to the Kimberley framework.

Since the emergence of the Kimberley Process, a number of similarly structured organisations have been created, under the general title of multi-stakeholder initiatives. Of particular relevance was the Extractive Industries Transparency Initiative (EITI), which emerged as a result of the World Summit on Sustainable Development held in Johannesburg in 2002. Like the Kimberley Process, the EITI brings together large corporations, governments, and NGOs to achieve its core objectives. The EITI aims to bring financial transparency to the work of extractive industries such as oil, gas, and mining, by requiring corporations to disclose all payments by corporations to governments, and all revenues made by governments from their involvement with these extractive industries. There are 49 corporations that are involved, including large multinationals such as De Beers, ExxonMobil, Shell, and British Petroleum. Also involved with the EITI are nine NGOs,

13 Kimberley Process, *The Kimberley Process Certification Scheme (Core Document, 2002)* ss II, VI(8)–(10); Grant, A J and I Taylor, 'Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems' (2004) 93(375) *The Round Table* 385, 386–687.

including Global Witness, Oxfam, Transparency International, and Publish-What-You-Pay. On the governmental level, the EITI has the provisional or full membership of 51 governments.¹⁴

A preliminary assessment of the EITI suggests that it has made a good start, noting the mild language employed by NGOs, multi-national corporations, and governments indicates a significant level of cooperation. One of the insights noted in relation to the EITI was the relative ease by which it was established, with the EITI relying on a consensus building technique to fully engage with the range of stakeholders. However, the noted drawback of this approach has been the relative difficulty of ensuring effective implementation of the system once it has been created. As implementation mechanisms are often difficult to reach agreement upon, as opposed to general objectives, multi-stakeholder initiatives such as the EITI have begun to experience difficulties when they attempt to bring stakeholders to account in relation to the standards they have agreed to. Behaviour modification is more difficult to address where such processes were not clearly envisaged and set out during the initial negotiations.¹⁵

Operation of the Kimberley Process

The Kimberley Process functions at two levels, the first being the national level, or the within-country level, where the primary regulator is the national government. At this level, the national

14 Statistics about the EITI are located at EITI, *EITI Countries* (2009). Available at: eiti.org/countries. For an analysis of the establishment of the EITI, Koechlin, L and R Calland, 'Standard-setting at the Cutting Edge: An Evidence-based Typology for Multi-stakeholder Initiatives' in A Peters et al. (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009). For further background on multi-stakeholder initiatives in general, see Calton, J M and S L Payne, 'Coping With Paradox Multistakeholder Learning Dialogue as a Pluralist Sensemaking Process for Addressing Messy Problems' (2003) 42(1) *Business and Society* 7; Witte, J M, T Benner and C Streck 'Partnerships and networks in global environmental governance', in U Petschow, J Rosenau and E U von Weizsacker (eds), *Governance and Sustainability: New Challenges for States, Companies and Civil Society* (Greenleaf, 2005); O'Rourke, D, 'Multi-stakeholder Regulation: Privatizing or Socializing Global Labour Standards?' (2006) 34(5) *World Development*; Mena, S and G. Palazzo, 'Input and Output Legitimacy of Multi-stakeholder Initiatives' (2012) 22(3) *Business Ethics Quarterly* 527.

15 Koechlin, L and R Calland, 'Standard-setting at the Cutting Edge: An Evidence-based Typology for Multi-stakeholder Initiatives' in A Peters et al. (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009).

government regulates the national diamond industry by ensuring that all legitimate diamond exports are certified by the means of a Kimberley Process certificate.

The Kimberley Process also operates on the international plane, where the primary regulator is the Kimberley Process Plenary, and the parties that are regulated are the national governments themselves. Important policy decisions are made at the annual plenary meeting of the Kimberley Process, with a consensus mode of decision making: 'Participants are to reach decisions by consensus. In the event that consensus proves to be impossible, the Chair is to conduct consultations.'¹⁶

The exact meaning of the term 'consensus' has, however, been the subject of divergent opinions. In particular, commentator Ian Smillie points out that some, but not all, government members of the Kimberley Process have considered the word to mean 'unanimity'. Smillie turned to the Oxford Dictionary as the basis for a different meaning for consensus: 'general agreement ... majority view, collective opinion'. Although conceding that other international organisations, such as NATO, equate unanimity with consensus, Smillie presented a different, more sophisticated understanding of the term in his recent paper. He highlighted some failures of the consensus approach as currently practised by the Kimberley Process. In particular, failure to reach consensus occurred as a result of minorities blocking forward movement, disruption, time-wasting, appeasement, lowest common denominator decisions, ineffectual facilitation of critical issues, and lack of confidence and trust. A further challenge occurs where persons are not fully empowered by their representative government or organisation to reach particular negotiated settlements.¹⁷

Given the challenges faced by a purely consensus approach, Smillie recommends a change to the decision-making procedure to allow voting in the absence of consensus:

16 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s VI(5).

17 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 6.

Participants are to reach decisions by consensus. In the absence of consensus, decisions will be made by simple majority of all voting Participants present, except for decisions on those matters specified in Annex A which require a 75% majority of those voting Participants present.¹⁸

The type of suggestion made by Smillie merits consideration. Even if a consensus decision is viewed as incorporating instances where there are one or two dissenting voices, in contrast to a unanimity approach, it appears necessary and desirable to have an alternative available so that issues can be progressed, following consultation, even where a minority is opposed (i.e. by a majority vote). Smillie suggests that the annex, requiring a 75 per cent majority, be reserved for issues such as additions or deletions from the participants list (i.e. government membership of the Kimberley Process), suspension of participants, and the application of other interim measures relating to non-compliance.¹⁹

Consensus as a decision-making technique has obvious advantages in terms of optimising the participation of governments and industries in the Kimberley Process. However, in common with other multi-stakeholder initiatives, such as the EITI, this technique held traps for the future evolution of the organisation, where behaviour modification became more important to the future of the organisation than standard-setting. Situations where coercive approaches to behaviour modification are required, by definition, involve departure from unanimity, and put strains on any definition of consensus. In such situations, some type of voting method is preferable.²⁰

Between plenaries, the chair plays the central executive role. A vice-chair is elected at each plenary, with the understanding that this representative will assist the chair in this capacity before becoming the new chair in the following year. The chair is also assisted in its executive tasks by a number of committees performing significant regulatory functions. The primary regulatory functions include

18 Ibid.

19 Ibid.

20 Koechlin, L and R Calland, 'Standard-setting at the Cutting Edge: An Evidence-based Typology for Multi-stakeholder Initiatives' in A Peters et al. (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009).

annual reporting, peer review, and managing serious non-compliance. Ad hoc working groups have also been formed concerning artisanal mining, diamond technical topics, and the collation of statistics.²¹

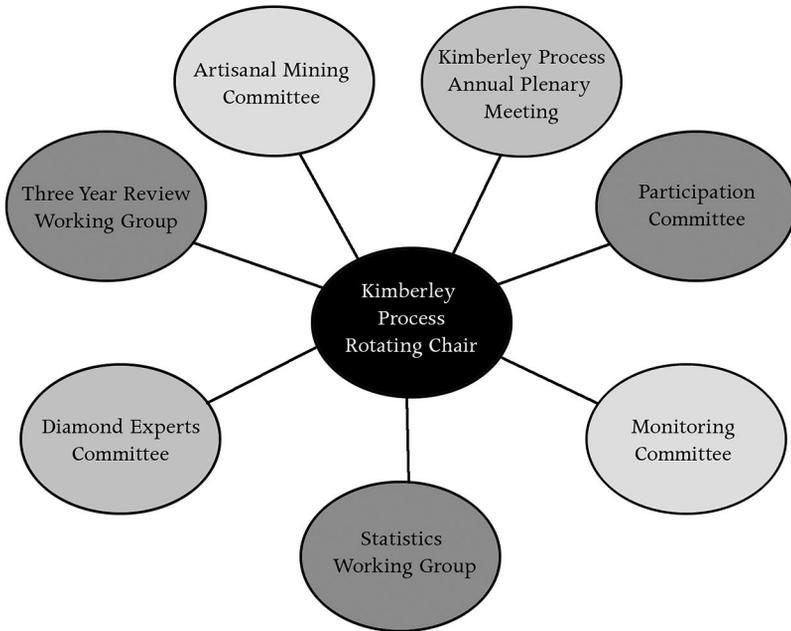


Figure 3.2: Kimberley Process Governance Structures

Source: Author's research.

Accepting New Members

Section VI, paragraph 8 of the Kimberley Process core document states that 'participation in the Certification Scheme is open on a global non-discriminatory basis to all Applicants willing and able to fulfil the requirements of that Scheme'. Apart from the need for a new applicant to provide the chair with 'its relevant laws, regulations, rules, procedures and practices, and update that information

21 In its resolution on October 2003, the Kimberley Process Plenary decided to provide a system whereby the vice-chair of the process, elected annually, would automatically become the rotating chair the subsequent year. Kimberley Process, 'Final Communique: Kimberley Process Plenary Meeting' (Sun City, South Africa, 29–31 October 2003). Namibia was the Rotating Chair for 2009. Final Message from Rahul Khullar, Kimberley Process Chair to Kimberley Process Members, 31 December 2008. Israel took the Rotating Chair for 2010. Kimberley Process, 'Kimberley Process Plenary Session Communique' (Swakopmund, Namibia, 5 November 2009) 6.

as required', there were no other stipulations. Despite the simplicity of this requirement, there were initially a number of countries who did not comply. Several had not done so within the first few months of KP operations, and matters had become critical by the end of April 2003 when a special KP plenary meeting was held in Johannesburg. It was agreed at that meeting that a Participation Committee would be struck to examine the credentials of all existing and prospective KP members, to determine whether or not they could meet the minimum standards. It was agreed that there would be a 'tolerance period' until 31 May 2003, during which all participants and prospective participants would submit information relevant to their membership. The tolerance period was extended to June, then to the end of July, and finally, with a chair's notice at the end of July, to August 31.²²

The Participation Committee included seven governments (Angola, Canada, the European Community as it was then called, Israel, Russian Federation, South Africa, and the United States), NGOs (Global Witness and Partnership Africa Canada) and the WDC. During this period, the committee examined the legislation, regulations, and relevant documentation of every participant.²³

At this time a euphemism for removing a country from the KP was developed, which would be 'dropped from the list'. Following the examination of credentials, several countries were dropped from the list: Brazil, Burkina Faso, Cyprus, Gabon, Malta, Mexico, Norway, Philippines, and Poland. Three of these countries — Brazil, Mexico and Norway — subsequently rejoined the KP.²⁴

The Participation Committee play a central role in the Kimberley Process international enforcement system. The Kimberley Process core document states that participation in the certification scheme is open on a global, non-discriminatory basis to all applicants willing and able to fulfil the requirements of the scheme. It is significant that only those applicants willing and able to fulfil the requirements of the

22 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 6–7.

23 Ibid.

24 Ibid.

scheme will be able to join. The work of the Participation Committee is largely concerned with whether prospective members are able to fulfil these requirements, such that they may be admitted to the scheme.²⁵

The Participation Committee Terms of Reference elaborates on the functioning of that committee.²⁶ Like other committees, the Participation Committee must include representatives from NGOs and industry, as well as governmental representatives. The chair must also ensure an appropriate geographical balance, and that there is appropriate expertise on the committee to perform its functions.

The Participation Committee is tasked with assisting the chair in its role of handling the admission of new applicants to the Kimberley Process, and may enter into a dialogue with the applicant on issues to be addressed.²⁷

Annual Reporting

The Kimberley Process operates internationally to ensure compliance by national governments. Participating governments are required to provide information on an annual basis on the way in which they are implementing the requirements of the Kimberley Process.²⁸ Annual reports must include information on the national laws and regulations for the export and import of rough diamonds; internal controls prior to the export of diamonds and after import; penalties for individuals and companies contravening diamond regulations; the collection of import and export data; whether there is a procedure for issuing Kimberley Process certificates; whether the certificate fulfils security requirements; evidence to be provided by exporter as proof diamonds as not conflict tainted; and the number of Kimberley Process certificates issued and to which participating governments they were sent.²⁹

25 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s VI (8).

26 Kimberley Process, *Administrative Decision: Participation Committee Terms of Reference* (Plenary Meeting Decision, Gatineau, Quebec, 29 October 2004).

27 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) ss II, V(a), VI(8), (9).

28 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s VI (11); Kimberley Process, *Administrative Decision: Implementation of Peer Review in the Kimberley Process* (Plenary Meeting Decision, Sun City, South Africa, 30 October 2003).

29 Administrative Decision on Annual Reporting, Annex I.

Also to be included in annual reports is information on the system of internal controls and industry self-regulation that is implemented in the participant state, information about statistical collection, and observations on experiences, problems and solutions that have been noted during the implementation process.

The collection of statistics in an area of economic regulation such as the international diamond trade is naturally a central aspect of effective management. Such data is particularly important for identifying any irregularities or anomalies that could indicate that conflict diamonds are entering the legitimate trade. Kimberley member governments are required to keep quarterly aggregate statistics on rough diamond exports and imports in a standardised format, as well as numbers of certificates validated for export, and imported shipments accompanied by certificates. Annual statistics in the rough diamond trade, listed according to country, are now publicly available through a dedicated website maintained by a Kimberley Process Working Group on Statistics. Statistics on exports and imports must record diamond origin and provenance, carat weight, and value.³⁰

The Working Group on Statistics is mandated to deal with statistical matters pertaining to rough diamonds, particularly in respect to the production and trade in rough diamonds, to ensure the effective implementation of the Kimberley Process.³¹ Like the Monitoring Committee, the Statistics Committee's role includes general policy development in the area of statistics, including the use of common classification systems. Its second role is concerned with statistical collation and analysis, and administrative support to the Kimberley Process. Should a member government fail to provide statistics within three months of the close of a quarter, then issue of the continued membership of that government will be forwarded to the Participation Committee for consideration and possible compliance action.³²

In early KP negotiations, statistical data was regarded by some governments as information that could not be shared, either internally among KP participants, or externally. Some countries cited commercial

30 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) Annex III. The document refers to Harmonised Commodity Description and Coding System (HS) classifications 7102.10, 7102.21, and 7102.31.

31 Kimberley Process, *Working Group on Statistics Terms of Reference* (29 April 2003).

32 Kimberley Process, *Administrative Decision on Statistical Reporting* (undated).

sensitivity as a reason Russia treated diamond production data as a state secret, and said that it would not go along with a certification system that would reveal this secret to others.³³

By 2003, however, much of the sensitivity on statistics had diminished, and in 2004 even Russia had agreed to submit quarterly trade data and semi-annual production data. The KP statistics website is today the best source of data on rough diamond production and trade, and is an essential tool in tracking anomalies in the system.³⁴

For several of its early years, however, the KP statistics website was accessible to participants only. There was very strong resistance to making any of the data public, with governments citing 'commercial sensitivity'. Nevertheless, in the past two years greater, although not complete, statistical openness has been achieved, without any apparent ill effect. The major advantage appears to be an end to charges that the Kimberley Process was hiding something by refusing to make its statistics public.³⁵

The Working Group on Monitoring is tasked with reviewing annual reports by member governments and reporting to the plenary. In doing so, the Working Group on Monitoring must draw on available statistical data, and work cooperatively with the Statistics Working Group and the Participation Committee. Other Kimberley members may also present reports for consideration by the Working Group on Monitoring.³⁶

33 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 13.

34 Ibid.

35 Ibid.

36 The selection of office-holders to chair working groups, ad hoc bodies, etc. is to be decided by participants in plenary following consultation by the chairperson. The terms of reference for the Monitoring Committee were approved at the 28–30 April 2003 plenary, but were revised at the Gaborone Plenary meeting in November 2006 as a result of the three-year review of the KP. Kimberley Process, *Administrative Decision about the KPCS Peer Review System* (Plenary Meeting Decision, Gaborone, Botswana, November 2006).

The Participation Committee must also be informed by the Working Group on Monitoring, via the chair, of government members that have failed to submit an annual report from the previous year and countries that have failed to provide the required statistical data.³⁷

Peer Review: General Operation

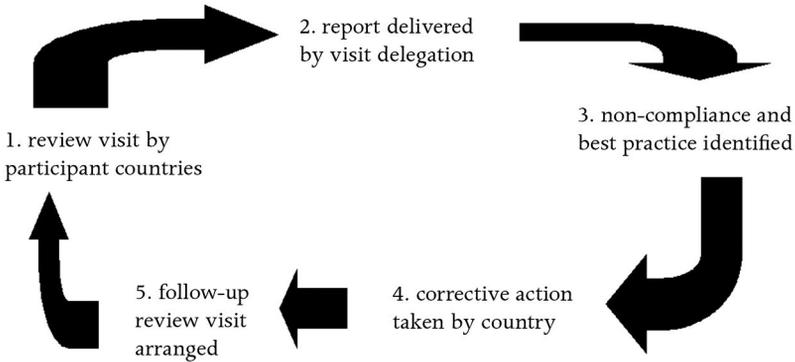


Figure 3.3: Kimberley Process Peer Review

Source: Author's research.

Monitoring is essential in any system dealing with standards and supply chains. A number of global commodity governance systems have evolved over time to include rigorous and credible third-party verification systems, such as the Forest Stewardship Council, the Fair Labour Association, and the Responsible Jewellery Council. From the beginning, monitoring was a highly contentious subject in Kimberley Process negotiations. Diamonds were regarded as a strategic mineral in Russia, for example, and data regarding production and trade was classified. In many countries there were commercial sensitivities and

³⁷ Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s V. A challenge that has been addressed by the rotating chair relates to the appearance of fraudulent KP certificates in Sierra Leone and Ghana. Following the appearance of such certificates, particular certificates were removed from certification and brought to the attention of other KP participants. Kovanda, K, Kimberley Process Chair, 'The Appearance of Fraudulent Certificates' (Letter to Kimberley Process Members, 23 March 2007).

security issues. In the initial KP agreement, there was provision only for monitoring in cases of 'significant non-compliance', a term that was never defined.³⁸

It is also arguable that the flexibility of the Kimberley Process, with its focus on diplomacy, consensus, and information sharing, has emphasised the autonomy and sovereign equality of state actors, thus constituting a horizontal approach to regulation, rather than focusing solely on the vertical dimension, involving the cession of authority to a supranational body. The horizontal approach is particularly evident in relation to the system of monitoring through the peer review system. In contrast with other international systems that focus on adversarial dispute resolution before an international tribunal, the focus on peer review is a novel approach. It arguably engages more effectively with government members by promoting a sense of ownership for the certification system. States must take responsibility for the effective functioning of the system, rather than ceding this role to a supranational entity.³⁹

The Monitoring Committee is responsible for the implementation of the peer-review process within the Kimberley Process. Peer review involves two central tasks: monitoring the implementation of the Kimberley Process by participant countries through review visits,⁴⁰ and monitoring situations of serious non-compliance through review missions.⁴¹

Although review missions and visits are conducted with the consent of the government member, a review team must be given the full cooperation of the authorities of the country under review, who should facilitate access to governmental institutions and organisations

38 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 9.

39 Other international organisations have monitoring mechanisms that function in similar ways to review missions, such as investigative missions for the United Nations High Commissioner for Human Rights. However, these missions are typically carried out at the supranational level, rather than being staffed by representatives of member nations themselves, as occurs within the Kimberley Process.

40 Kimberley Process, *Administrative Decision: Implementation of Peer Review in the Kimberley Process* (Plenary Meeting Decision, Sun City, South Africa, 30 October 2003); Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s VI.

41 Kimberley Process, *Administrative Decision: Implementation of Peer Review in the Kimberley Process* (Plenary Meeting Decision, Sun City, South Africa, 30 October 2003).

relevant to the implementation of the Kimberley Process, and solicit the cooperation of industry, consistent with national law and organisational rules and regulations.⁴²

Review missions and visits should generally number five members in total, consisting of three government members, an observer from civil society, and an observer from the private sector. The Administrative Decision on Peer Review further provides that, in nominating government member representatives, the chair would seek to ensure geographical balance and adequate balance between countries that are primarily engaged in production, trading, and processing of rough diamonds.⁴³ They should last between two and five working days, with dates determined with the consent of the government member being reviewed. The fact that individual members of the review mission must provide their own expenses presents a challenge for civil society representatives, particularly those representing artisanal miners from diamond-producing nations. To date there has been some limited sponsorship made available from government members to support the important role of civil society experts in these teams.⁴⁴

The leader of the review mission or visit must draw up a written draft report giving an account of the activities of the mission and its findings, in particular reflecting the implementation of the Kimberley Process in the reviewed country. The draft report must be submitted simultaneously to the chair and the reviewed country.

The government under review has a right of reply in relation to the review report, and may send observations to the chair and members of the review mission or visit within a month of the submission of the draft report. The chair may then invite the government's authorities to discuss the observations with the review team members to clarify any misunderstandings. In the event that disagreement persists, the report

42 Ibid.

43 Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, *Kimberley Process Certification Scheme: Third Year Review* (Review Report, Kimberley Process, November 2006) 41.

44 Kimberley Process, *Administrative Decision: Implementation of Peer Review in the Kimberley Process* (Plenary Meeting Decision, Sun City, South Africa, 30 October 2003).

will be circulated along with the observations of the government member to other countries and observers. The chair may add its own observations as well.⁴⁵

Review visit and review mission reports are considered confidential, as between government and non-government members within the Kimberley Process system. The administrative decision also provides for follow-up action in relation to a review mission or review visit. Where the review mission deems it necessary and appropriate, the chair may recommend to the plenary the sending of a follow-up mission or review visit.⁴⁶

The Sun City Plenary in 2002 provided for a roster of experts to be drawn up by the chair on a recommendation from the Monitoring Committee. Since then, a substantial number of government and non-government Kimberley members have nominated experts for inclusion in the roster that, as of July 2006, comprised 97 experts representing government, industry, and civil society. On the basis of this very positive response, it was possible in all cases for teams to be appointed corresponding to the required criteria. To date, experts from 17 different government members, and from all major geographical regions represented in the Kimberley Process, have participated in review visits.⁴⁷

It was possible for a number of experts from developing, artisanal-alluvial producing countries to participate in review visits and review missions. Participation by such experts is of great importance because of the crucial role of the visits in disseminating best practices among government members and teaching participating experts. The KP three-year review recommended that the participation of experts from artisanal-alluvial-producing nations in as many review visits as possible should be continued and, if possible, further developed, above all in review visits to artisanal-alluvial-producing countries.⁴⁸

45 Ibid.

46 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s VI (16); Kimberley Process, *Administrative Decision: Implementation of Peer Review in the Kimberley Process* (Plenary Meeting Decision, Sun City, South Africa, 30 October 2003).

47 Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, *Kimberley Process Certification Scheme: Third Year Review* (Review Report, Kimberley Process, November 2006) 41.

48 Ibid.

The Participation Committee also has a role in relation to compliance. It considers information submitted to it by the Working Group on Monitoring regarding compliance by a government member, and can determine whether the government is able and willing to meet the minimum common standards of the certification scheme.⁴⁹

Peer Review: Cases of Serious Non-Compliance

Through the action of the peer-review system, in tandem with the working groups on monitoring and participation, the Kimberley Process has responsive yet effective mechanisms for holding member governments to account regarding their obligations under the system. The Kimberley Process commands the threat of a significant sanction, which is the expulsion of members for non-compliance, through which the diamond trade with that member is prohibited to other Kimberley Process participant countries. Through sharing of information and experience, with heavy reliance on consensus and diplomatic pressure, the Kimberley Process offers a novel approach for addressing urgent global issues.⁵⁰ The informality of its mode of operation has, arguably, enhanced its ability to respond quickly to crises that have occurred in the system, notably in the Republic of Congo-Brazzaville (RCB) and Côte d'Ivoire.⁵¹

Two straightforward cases of apparently serious non-compliance occurred early in the life of the Kimberley Process. In May 2003, the Central African Republic (CAR) was suspended from the KP following a coup in which François Bozizé overthrew the government of President Ange-Félix Patassé and suspended the constitution. The CAR was reinstated as a participant after authorities provided

49 Kimberley Process, *Administrative Decision: Participation Committee Terms of Reference* (Plenary Meeting Decision, Gatineau, Quebec, 29 October 2004) s 4.1; Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s VI (8).

50 Wexler, P, *The Kimberley Process Certification Scheme on the Occasion of its Third Anniversary: An Independent Commissioned Review* (Review Report submitted to the Ad Hoc Working Group on the Review of the Kimberley Process, February 2006) 6.

51 Subsequent to the action taken by the Kimberley Process Chair in relation to the Côte d'Ivoire situation, the Kimberley Process Plenary issued resolution and follow-up action, including cooperation with the United Nations. Kimberley Process, 'Final Communiqué: Kimberley Process Plenary Meeting' (Moscow, Russia, 15–17 November 2005). Other participants have also been suspended from the Kimberley Process for differing periods of time. Ghana was suspended following an Administrative Decision of the Gaborone Plenary on 9 November 2006, but was reinstated by the KP chair on 1 March 2007. Letter from Karel Kovanda, Kimberley Process Chair, to Kimberley Process Members, 1 March 2007.

assurances they could implement the KP and agreed to let a review mission evaluate the country's diamond control system. The review found that CAR was managing its internal diamond controls and KP standards responsibly.⁵²

Lebanon expressed its eagerness to join the Kimberley Process in early 2003. It submitted all of the required documentation, including legislation that at the end of the tolerance period was awaiting presidential signature. Lebanon was included in the list comprising 39 countries plus the European Community that was approved with effect from 31 August 2003. However, nine months later, the presidential approval for the country's KP legislation had not been given and Lebanon was dropped from the list on 1 April 2004. In 2005, Lebanon was readmitted to the Kimberley Process following enactment of the legislation and two KP review missions.⁵³

The first major test of the ability of the Kimberley Process to manage serious non-compliance was in relation to the RCB, which neighbours the DRC. Following consideration of relevant statistics and reports, it was brought to the attention of the Kimberley Process that the RCB appeared to be funnelling diamonds mined in the DRC through its borders, thereby bypassing the certification requirements that would otherwise have been implemented in the DRC. The chair of the Kimberley Process took rapid action, firstly securing the agreement of the RCB President that a KP review was required, and authorising the deployment of a review mission that verified the problem. The review took place in May 2004, and included an aerial survey of the country's diamond mining areas. The review concluded that the RCB's exports could not be explained by local production or official imports.⁵⁴

In July, through a chair's notice, RCB was expelled from the Kimberley Process, meaning that other countries no longer traded in diamonds with that country. Conditions for readmission included an independent third-party survey of the country's geological diamond potential. The result of the expulsion was that the legitimate, certified

52 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 6–7.

53 Ibid.

54 Ibid 7; Global Witness, 'Kimberley Process Certification Scheme Questionnaire for the Review of the Scheme' (Review Submission, 5 April 2006); Interview with Global Witness Representative (telephone interview, 21 May 2007).

trade through the DRC picked up significantly. Three years later, in November 2007, RCB hosted another KP review, which concluded that it had met all of the Kimberley Process stipulations. The RCB was then readmitted into the Kimberley Process Certification Scheme.⁵⁵

In some respects, the Côte d'Ivoire situation is a good example of the Kimberley Process acting quickly to respond to a serious threat to its integrity. The Kimberley Process was able to rapidly make a decision to prohibit the trade in diamonds originating from Côte d'Ivoire, thereby providing at least a formal barrier to conflict diamonds. The Kimberley Process, through its Working Group on Monitoring, was apprised of the situation in Côte d'Ivoire in September 2004, following the emergence of indications that diamond production was continuing in rebel-controlled northern Côte d'Ivoire. The Working Group on Monitoring adopted a recommendation to the chair on the matter on 24 September 2004, after which the chair entered into communications with the Côte d'Ivoire authorities, who clarified that an export ban had been imposed on rough diamond throughout Côte d'Ivoire.⁵⁶ The Chair of the Kimberley Process issued a request on 23 November 2004 to all participants not to accept any shipments with Côte d'Ivoire certificates until further notice, and reported on the status of Côte d'Ivoire at the Ottawa Plenary in October 2004.⁵⁷ It should be noted, however, that UNSC expert panels noted ongoing diamond mining in Côte d'Ivoire during the civil war, even after the country was excluded from the Kimberley Process.⁵⁸

55 Global Witness, 'Kimberley Process Certification Scheme Questionnaire for the Review of the Scheme' (Review Submission, 5 April 2006); Interview between Author and Global Witness Representative; Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 7–8. However, some commentators have questioned whether expulsion of the Republic of Congo would be sufficient to stop the conflict diamonds trade in the neighbouring DRC. Malamut, S A, 'A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of Congo' (2005) 29 *Suffolk Transnational Law Review* 25, 26, 44–45.

56 Kimberley Process Working Group on Monitoring, 'Submission for the 2006 Review of the KPCS' (Kimberley Process Secretariat, February 2006) 19.

57 *Ibid* 19–20.

58 Update Report of the Group of Experts Submitted Pursuant to Paragraph 2 of Security Council Resolution 1632 (2005) Concerning Côte d'Ivoire, UN Doc S/2006/204 (31 March 2006).

Other countries in which serious compliance issues have arisen include Zimbabwe, Ghana, Bangladesh, Brazil, and Venezuela.⁵⁹ In mid-2005, Venezuela, a KP participant since 2003, ceased issuing Kimberley Process certificates, and communications with the KP ceased. Nevertheless, diamonds were being mined and openly, if not legally, exported. The problems were documented in a 2006 Partnership Africa Canada report. The KP procrastinated, and it was not until October 2008, following bitter internal debate and widespread calls for Venezuela's expulsion from the KP, that a KP team visited Venezuela, corroborating many of Partnership Africa Canada's findings. In November 2008, Venezuela announced that it would self-suspend from the KP, saying it would halt all diamond production and trade for at least two years while reorganising its diamond sector. The KP concurred with this approach.⁶⁰

However, in Venezuela little changed. Early in 2009, the mineral leases of five diamond mining cooperatives held by the state-owned mining concern Corporación Venezolana de Guayana were renewed. Diamond mining and exporting, whether legal or illegal, continued as before.⁶¹

In a March 2009 letter, the KP Chair, Namibia, hailed the arrangement with Venezuela, saying that the KP would 'assist and support the country in developing appropriate internal controls over its alluvial diamond mining'. The chair said that this was 'yet another example of mutual inclusiveness inherent in the Scheme and is testimony to the willingness of the KP family to stand together, learn from global best practices and proactively provide assistance when required'.⁶²

However, there has been little substantive communication with Venezuela since 2008, and the KP has provided no assistance or support, but rather turned a blind eye to the fact that Venezuela's diamonds are entering world markets illegally.⁶³

59 Letter Prior to Plenary Meeting in Brussels from Karel Kovanda, Kimberley Process Chair to Kimberley Process Members, 2007.

60 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 8.

61 Ibid.

62 Ibid.

63 Ibid.

In 2008, a number of events occurred suggesting that Zimbabwe was losing its ability to meet KP minimum standards. Large volumes of easily identified smuggled Zimbabwean diamonds were the subject of arrests in Dubai and India. A diamond rush by illicit diamond diggers in the Marange area was suppressed by well-documented extrajudicial killings and widespread human rights abuse by the buying offices in Manica, just across the Zimbabwe border in Mozambique, where a flourishing trade in smuggled goods continues today.⁶⁴

Zimbabwe became the subject of bitter debate within the KP. It took months before a review mission could be undertaken, and the mission itself became the subject of debate and political manipulation. Its findings were clear but its recommendations were vague, and in the end a bitter debate resulted in little more than the appointment of a KP monitor whose terms of reference omitted almost all the topics of controversy. Zimbabwe's continued presence without censure in the KP has been ensured by strong support from South Africa and other neighbouring countries, although its behaviour continues to be both erratic and controversial, and its ability to meet minimum KP standards cannot be demonstrated.⁶⁵

The Zimbabwean situation has arguably been the most concerning, with reports of violence and smuggling in the Marange mining area following the occurrence of a diamond rush there. As a result, the Kimberley Process agreed to send a review visit to the country. Although irregularities were discovered, the Kimberley Process decided against suspending Zimbabwe's membership in the scheme. However, a Joint Work Plan was agreed between the Kimberley Process and Zimbabwe, involving the appointment of a special Kimberley monitor to address compliance issues. A 'supervised export mechanism' was established for exports of rough diamonds from Marange, under which the Kimberley Monitor must examine potential exports and sign the Kimberley Process certificate before they can be

64 Ibid 8–9.

65 Ibid.

considered as legitimate.⁶⁶ One of the consequences of the Marange diamonds dispute within the Kimberley Process, when it became clear that Zimbabwe would be permitted to export diamonds from Marange, was that NGO members from the KP, including Global Witness, chose to leave the KP completely, taking the view that it had failed in its core mandate.⁶⁷ Other NGOs, such as Partnership Africa Canada, have chosen to remain within the KP despite their objections to the handling of the issue.⁶⁸ With the Marange diamonds issue settled in its favour, Zimbabwe has gone on to export a large quantity of diamonds legitimated by the Kimberley Process: it exported US\$480 million of rough diamonds in 2014.⁶⁹

Review missions have an important role where there are more serious allegations of non-compliance. The case of Brazil is a good example. In 2005, Partnership Africa Canada published a report detailing instances of fraud relating to illicit diamond production and exports within Brazil's diamond industry. This led Brazil's Federal Police to launch an investigation into the country's diamond industry, and Brazilian authorities to suspend diamond exports. A previously commissioned Kimberley review visit found a range of shortcomings in the way in which the scheme was implemented in Brazil, ranging from a lack of training and experience among staff and customs officers, to flaws

66 Esau, Bernhard, MP, Kimberley Process Chair, 'Public Statement on the Situation in the Marange Diamond Fields, Zimbabwe' (Kimberley Process Secretariat, Windhoek, Namibia, 26 March 2009); Esau, Bernhard, MP, Kimberley Process Chair, 'Statement: High Level Envoy Visit to Zimbabwe: Situation in Marange Diamond Fields' (Kimberley Process Secretariat, Windhoek, Namibia, 16 April 2009); Esau, Bernhard, MP, Kimberley Process Chair, 'Risk of Fake KP Certificates' (Kimberley Process Secretariat, Windhoek, Namibia, June 2009); Kimberley Process Secretariat, 'Kimberley Process Intersessional Meeting Communique' (Windhoek, Namibia, 25 June 2009); Esau, Bernhard, Hon, Kimberley Process Chair, 'Clarification About the Kimberley Process Chair's Working Visit to Zimbabwe Which Took Place 19–21 August 2009' (Kimberley Process Secretariat, Windhoek, Namibia, 3 September 2009); Hirsch, Boaz, Kimberley Process Chair, 'Appointment of KP Monitor to Zimbabwe' (Kimberley Process Secretariat, Jerusalem, Israel, 1 March 2010); Hirsch, Boaz, Kimberley Process Chair, 'Re: Trade of Marange Diamonds in Compliance with KPCS Requirements: Vigilance Against the Laundering of Illicit Shipments' (Letter to Kimberley Process Participants, 6 May 2010).

67 Global Witness, 'Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable' (2 December 2011). Available at: www.globalwitness.org/archive/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable/.

68 Partnership Africa Canada, 'PAC and the Kimberley Process: A History', www.pacweb.org/en/pac-and-the-kimberly-process; a listing of remaining members of the official KP civil society observers is available at the Kimberley Process website: www.kimberleyprocess.com/en/civil-society-coalition.

69 Kimberley Process website: www.kimberleyprocess.com/node/227.

in Brazil's Kimberley certificate.⁷⁰ Brazil handled the revelation of irregularities well. On its own accord, Brazil suspended all diamond exports for 2006 well in advance of the Kimberley review visit. Brazilian authorities were transparent and eager to assist the review team. Brazil invited a follow-up review visit.⁷¹

Peer Review: Evaluation

In the initial KP agreement, there was provision only for monitoring in cases of 'significant non-compliance', a term that was never defined. A year after the KP came on stream in 2003, the peer-review system was agreed to. The entire process was developed after the core document had been finalised, providing a textbook case of how the KP has evolved in order to achieve the goals that are expected of it.⁷²

The peer-review mechanism was assessed as part of the November 2006 review of the Kimberley Process, which was conducted by an Ad Hoc Working Group, as envisaged in the Kimberley core document. The group reported that there was widespread agreement among governments, civil society, and NGOs that the peer-review mechanism had been a great success. In particular, the review highlighted the fact that review visits were a crucial confidence-building tool, allowing the Kimberley Process to be sure its requirements were being met effectively.⁷³ The review noted that 32 participants received review visits prior to the review, and that a further two non-participants, Liberia and Lebanon, had received special expert missions prior to joining the Kimberley Process. Two review missions had been carried out: to the Central African Republic and the Republic of Congo. As at 30 October 2006, 12 member governments had not yet received review

70 Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, *Kimberley Process Certification Scheme: Third Year Review* (Review Report, Kimberley Process, November 2006) 39–40.

71 Ibid 40.

72 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 8–9.

73 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s 20; Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, *Kimberley Process Certification Scheme: Third Year Review* (Review Report, Kimberley Process, November 2006). See also Ad Hoc Working Group on the Review of the KPCS, *Kimberley Process Certification Scheme Questionnaire for the Review of the Scheme* (Questions for Review Submissions, Kimberley Process, 2005); Kimberley Process, *Administrative Decision: Terms of Reference Ad-Hoc Working Group on the Review of the KPCS* (Revised 31 July 2006).

visits, but nine invited review visits. Overall, 42 of the 45 Kimberley participants (93 per cent) received or invited review visits or missions. All previously conflict diamond-affected countries received review visits, and almost all countries reporting diamond production or trade had had review visits.⁷⁴

The review, however, also mentioned a number of areas in which the peer-review mechanism could be improved. Croatia, Indonesia, and Venezuela had not had review visits, and had not requested them. The three-year review recognised that these three countries should be encouraged as strongly as possible to invite review visits as soon as possible. The chair of the Monitoring Committee confirmed that these countries had been approached and are considering inviting a review visit.⁷⁵

The three-year review also recommended a number of modifications to the Monitoring Committee mandate, specifically so that review visit activities could explicitly integrate a regional dimension into their activities — i.e. trading patterns in neighbouring countries. Expert missions should be able to be deployed on an ad hoc basis in preparation for determining whether or not to admit a particular applicant into the Kimberley Process.⁷⁶

The three-year review considered the effectiveness of review visits in two ways: by considering whether the system had detected the main implementation problems, and whether the peer-review system had contributed to bringing about tangible improvements to the identified problems. The Review Working Group concluded that governments who had been reviewed had received the visits with openness, and provided access to their documentation and the range of activities linked to certification. This made it possible for the review team to identify issues that would not otherwise have been apparent.

However, the three-year review also noted that some review visits were more sophisticated in comparing the actual mining capacity of a reviewed government to its declared rough diamond exports.

74 Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, *Kimberley Process Certification Scheme: Third Year Review* (Review Report, Kimberley Process, November 2006) 38.

75 Ibid.

76 Ibid.

The review recommended that each team report on whether it has reviewed internal controls for effective compliance in the countries it has visited. The three-year review also suggested that individual countries identify different needs for technical assistance and training in order to help participating governments implement effective internal controls. Examples of constructive interaction, resulting in improved implementation practices, included the adoption of proper import procedures by some producing governments that did not have import procedures in place; the training of diamond valuers to enable them to carry out a review visit's recommendation that all imports into a government member be subjected to a regime of physical inspection; and the initiation of an investigation by a government into suspicious trading activities pursuant to the findings of a review visit. One suggestion to improve the capacity of review visits was to increase the length of the average review visit. Given that these are normally only three to five days long, they can take on more of a diplomatic than an investigative character.⁷⁷

The review also recommended that the Kimberley Process should seek to further diversify the leadership of review visits to include in particular alluvial-producing countries, as only Sierra Leone in 2006 had taken such a role. It was also suggested that the criteria in the Administrative Decision on Peer Review should be expanded to include a provision that experts are required to be impartial and highly professional, and should further require members to disclose any potential conflict of interest.⁷⁸

The review suggested that the peer-review system be maintained, but that the Administrative Decision on Peer Review be amended, specifying that, in further review visits, attention should be focused on follow-up of issues identified in the first visit. In the case of repeated review visits, the visiting teams should be flexible in size and duration, to ensure that scarce resources are focused on substantial implementation issues. The Participation Committee

77 Ibid 38–39; Interview between Author and Global Witness Representative.

78 Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme, *Kimberley Process Certification Scheme: Third Year Review* (Review Report, Kimberley Process, November 2006) 41–42.

should carefully engage with countries that fail to implement the review visit recommendations, with expulsion from the KP available as a last resort.⁷⁹

One of the areas in which the peer-review could be strengthened would be to make the receipt of a peer-review visit compulsory to all members. The reluctance of some members to receive a peer-review visit calls into question the entire monitoring and enforcement system of the Kimberley Process. If a country is able to deny access to a review team, there is no ability for the Kimberley Process to verify its level of compliance with the process.

In evaluating the Kimberley Process's response to cases of serious non-compliance, its ability to take executive action between plenary meetings, mediated by the chair, has been very important. In this feature, a year-round operational secretariat, it resembles the success of the equivalent secretariat responsible for managing compliance with the *Convention on the Illegal Trade in Endangered Species of Wild Flora and Fauna*. A system has been developed for the convention whereby a decision concerning a serious non-compliance issue can be made during the course of a year, prior to a meeting of the plenary. Action such as a trading ban with the problematic country can be implemented in this interim period.⁸⁰

Although the office of the Kimberley Process Chair has been highlighted as a strength of the peer-review system, it has also been criticised for being overly dependent on the willingness of the incumbent to take decisive action. For example, observers have argued that it was fortunate that the Canadians were chairing the Kimberley Process at the time that the Republic of Congo was expelled, as they were proactive and took the decision to ensure the integrity of the system.⁸¹ This example can be contrasted with the situation of Venezuela. Although seen as being in blatant non-compliance with Kimberley requirements, Venezuela was not targeted for expulsion under the mandate of the European Community (2007)

79 Ibid 46; Interview between Author and Global Witness Representative.

80 Hewitt, T, 'Implementation and Enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the South Pacific Region: Management and Scientific Authorities' (2002) 2(1) *Queensland University of Technology Law Journal* 98, 98–130.

81 Interview between Author and Global Witness Representative.

or Angola (2008).⁸² This highlights the need for a formal procedure for dealing with countries that are seriously non-compliant, and, arguably, in determining the suitability of particular governments to carry out this important function.⁸³

When it works well, the peer-review system is adequate, although three-day reviews in some cases are not long enough to develop a comprehensive understanding of a country's diamond industry. In many cases, however, it is far from adequate. Worst case examples include a review of Ghana where the report, a year in production, was superseded by a much tougher UN report revealing the transit through Ghana of conflict diamonds from Côte d'Ivoire (missed entirely by the KP team). An enormous nine-member Guinea review team spent less than two hours outside the capital city and did not complete its report for more than a year. A review of Venezuela was orchestrated entirely by the non-compliant host government. Civil society was prevented from participating in the exercise, and the team was never allowed near diamond mining or trading areas.⁸⁴

The makeup of review teams is inconsistent. Burden sharing has been uneven, with some NGOs footing a larger share of review costs than most governments. This has been alleviated in recent years by contributions from Rio Tinto Diamonds, Norway, Switzerland, and the United States to a fund for NGO participation.⁸⁵

82 Ibid; Interview between Author and Global Witness Representative. Subsequently, an Administrative Decision (AD) on Venezuela's participation was adopted in the plenary meeting of the Kimberley Process in Brussels in 2007. Further to this, the KP Chair attempted to organise a review visit in the first quarter of 2008 but this was never acceded to by Venezuela. As a result, the Working Group on Monitoring concluded on 10 June 2008 that, since it could not ensure the implementation of the administrative decision, that the matter should be referred to the Participation Committee. Just prior to the intersessional meeting, the KP Chair received a notification from Venezuela that it intended to 'voluntarily separate from the KP for a period of two years and to cease certification for export of its diamonds'. Message regarding Compliance of Venezuela from Kimberley Process Chair Rahul Khullar to Kimberley Process Members, 9 July 2008. The plenary formally encouraged continued efforts to reintegrate Venezuela into the KP at its meeting in 2009. Kimberley Process, 'Kimberley Process Plenary Session Communique' (Swakopmund, Namibia, 5 November 2009).

83 Interview between Author and Global Witness Representative.

84 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 10.

85 Ibid.

While some reviews have been thorough and have made important recommendations, there has been a chronic lack of follow-up. Review teams have repeatedly stated that some of the countries worst affected by conflict diamonds, such as Angola, the DRC, and Sierra Leone, have extremely weak internal controls. Getting a grip on internal controls remains the single most important issue for the diamond industry and the Kimberley Process.⁸⁶

Well-documented cases of serious non-compliance have been brought to the attention of the Kimberley Process on several occasions, mainly by civil society representatives and the media, but the KP has been either slow to act, or has not acted at all. Smuggling of diamonds from Brazil, Venezuela, Guyana, and Zimbabwe has been debated at length, but have elicited weak, slow, or no response. The same has been true in cases where gross statistical anomalies suggest the need for urgent action: Guinea and Lebanon are two cases that were 'pending' throughout 2009, and which remain unresolved.⁸⁷

'Technical assistance' has been used as a catch-all, last-minute answer to many of these problems. Assistance, regardless of how it is described, is not always the solution to problems of compliance. The KP approach, however, has been ad hoc and patchy. Guyana and Ghana, among others, are still awaiting technical assistance promised by the Kimberley Process. KP terminology and thinking need to expand beyond the idea of technical assistance as sending experts, to incorporate other ideas, including longer-term inputs and the provision of equipment.⁸⁸

In sum, the Kimberley Process needs a rigorous, clear and phased compliance enforcement strategy that starts with assistance and internal pressure, moves to public naming and shaming, and then moves to high levels of sanctions, suspension, and expulsion.⁸⁹

Smillie recommends the establishment of independent, third-party monitoring. He suggests that the KP Chair create a panel of experienced experts to design and propose a range of models for independent, third-party monitoring, complemented by rigorous

86 Ibid.

87 Ibid.

88 Ibid 11.

89 Ibid.

follow-up, credible sanctions in cases of continued non-compliance, and a decision-making process on non-compliance that is not hostage to political interference.⁹⁰

Smillie also recommends the establishment of a small permanent KP secretariat to manage monitoring and follow-up, providing service to the KP Chair and working groups as required. The secretariat would not replace or supplant the Working Group on Monitoring; it would handle the organisational and managerial functions that currently fall to a single KP participant.⁹¹

Smillie also recommended the establishment of a multi-donor trust fund for timely and appropriate follow-up assistance in helping participants to meet KP minimum standards.⁹²

Smillie also notes that the Kimberley Process has repeatedly ignored calls for the inclusion of oversight on the cutting and polishing industry in KP minimum standards. This sector remains vulnerable to, and a convenient laundry for, rough diamonds that have evaded KP scrutiny. The volume of illicit goods is growing: 100 per cent of Venezuela's production; conflict diamonds from Côte d'Ivoire; a large volume of Zimbabwe's diamonds moving through Mozambique; and an unknown volume of smuggled and stolen goods from other countries. Major seizures of illicit diamonds in India, Dubai, and elsewhere in recent months may be the tip of an iceberg.⁹³

Smillie recommends that companies that cut and polish diamonds document their sources, and that their records be made subject to independent audit as an integral part of KP minimum standards. He suggests that the World Diamond Council should commission an independent evaluation of its system of warranties, to determine how it could improve the performance of industry actors in meeting KP challenges.⁹⁴

Public transparency was originally a key focus of the Kimberley Process. The preamble to an early draft of the core document stated: 'Acknowledging that an international certification scheme for

90 Ibid.

91 Ibid.

92 Ibid.

93 Ibid 12.

94 Ibid 11.

rough diamonds will only be credible if supported by appropriate arrangements to ensure transparency and accountability with respect to its implementation.⁹⁵

Under the heading 'Cooperation and Transparency', however, the final KP core document lists seven provisions, dealing only with the exchange of information among participants. There is no discussion of public transparency. The KP's most notable failing in this area is the fact that reports of review visits are kept confidential.

The explanation given for this is that governments would not open themselves to full peer scrutiny if blemishes were to be made public. Most blemishes are, however, self-evident to inside observers, and are hardly a public secret. By hiding the reviews and their recommendations, and by failing to follow up on the recommendations, the KP effectively removes a tool that might improve matters without any effort on its part: publicity. Confidentiality, of course, also obscures the KP's lack of follow-up on its own recommendations. It also prevents concerned citizens from knowing about, and calling for change in, their governments' implementation of KP obligations.⁹⁶

According to Smillie, greater openness in the Kimberley Process might be uncomfortable because it would be easier for the media, civil society, and others to hold it more accountable for timely follow-up on reviews, and for action on issues of serious non-compliance. But all of these stories find their way into the media anyway. Greater transparency would help to make the KP the regulatory body it aims to be, and the one the industry and African producer countries so badly require.⁹⁷

Smillie recommends that all KP annual reports and reports of KP reviews, as a matter of course, be placed on the open KP website, along with details of follow-up action. A transparency working group should be established to develop criteria on exceptions to the rule, and to deal with special requests for confidentiality.⁹⁸

95 Kimberley Process, (Working Document no 3/2001, 21 August 2001) cited in Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 12.

96 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 12.

97 Ibid 14.

98 Ibid.

Smillie is also critical of what he considers self-censorship by the Kimberley Process of draft resolutions prepared for submission to the General Assembly of the United Nations. He states that, in 2009, Venezuela insisted that all references to Venezuela be dropped; China insisted that all references to human rights be dropped; and Zimbabwe insisted that all references to Zimbabwe be dropped. An anodyne UNGA resolution was passed, as a result, without a single reference to the issues that had most consumed the Kimberley Process over the previous two years. Echoing the growing dissidence from civil society and some industry players, several governments, including Switzerland, Sweden, Canada, and the United States, challenged the official KP version of events in the UNGA debate.⁹⁹

According to Smillie, a major concern at the outset of KP negotiations was the potential cost implications of a global regulatory system. It was assumed that the industry would have to bear most of the cost, although as it turned out most of the financial burden has fallen on governments. In almost all countries, government has taken on most if not all of the cost of implementing the KP. The industry created the WDC to represent its interests in the Kimberley Process, and in some countries a low-cost chain of warranty system has been developed. Industry has participated in review visits and has contributed to the costs of special undertakings such as the 2006 review of Ghanaian diamond exports. All things considered, however, the cost of the KCPS to industry has been small.¹⁰⁰

Civil society organisations have participated in all working groups, plenaries and intersessional meetings, and have participated in most review visits and missions. Civil society organisations have also undertaken a large number of independent reviews, studies and publications and have, arguably, borne a disproportionate cost of participation — and in holding the Kimberley Process accountable to its mandate.¹⁰¹

99 Ibid; Charbonneau, L, 'Zimbabwe "Blood Diamonds" Dispute Breaks out at UN', *Reuters Canada* (11 December 2009). Available at: ca.reuters.com/article/topNews/idCATRE5BA3OI20091211.

100 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010) 16–17.

101 Ibid.

The major cost implications lie in the adoption of an independent, third-party monitoring system, the establishment of a small secretariat to manage that function, and the required follow-up as an ongoing service to the chair of the day. The Working Group on Monitoring would continue to set the agenda and the policy framework and other working groups would remain unchanged. Smillie estimates the costs of the working group as being US\$2.25 million per annum.¹⁰²

Role of Industry

Although the primary regulator for the Kimberley Process at the national level is the national government and its agencies, one of the distinctive features of the Kimberley Process is that it can be considered as operating simultaneously as a government-regulated system as well as an exercise in industry self-regulation. The Kimberley Process has, from the outset, been driven by the needs and interests of the diamond industry. The De Beers corporation was a significant driving force in the finalisation of the Kimberley Process core document, and the industry as a whole has been represented through the WDC, an umbrella organisation for the large firm commercial diamond sector, at subsequent plenary meetings of the Kimberley Process.¹⁰³

The journey of the high-end corporate diamond sector from the targets of bad press to advocates for the continued operation of the Kimberley Process is one of the striking features of the history of the organisation. One commentator has described this transformation as being a process of socialisation from self-interest to 'enlightened self-interest'.¹⁰⁴ The high sensitivity of the industry to its media and public image can be understood in the light of the end products of the industry. Although mining rough diamonds is undertaken for industrial purposes, such as their use in high-powered cutting tools, the bulk of the commercial value in the industry resides in the jewellery retail sector. Fundamentally, the value of a diamond in this context is aesthetic and sentimental, meaning that its value is at risk if it were

102 Ibid 17.

103 Commentator C Kantz argues that, while it was NGOs who highlighted the problem of conflict diamonds, the diamond industry became socialised to take responsibility for addressing the issue: Kantz, C, 'The Power of Socialization: Engaging the Diamond Industry in the Kimberley Process' (2007) 9(3) *Business and Politics* Art 2, 3.

104 Ibid.

to become associated with negative sentiment resulting from a link with human rights violations. Given its awareness of the risk, the commercial diamond industry has positioned itself as an advocate for the Kimberley Process, so as to separate its product from the conflict diamonds trade. One of the interesting findings from interviews conducted with Rio Tinto and the Australian Government was that Rio Tinto was a very strong advocate for the continued operation of the Kimberley Process whereas the Australian Government expressed the view that its relevance was diminished given the emergence of peace in Angola and Sierra Leone. The expression of this view by government would appear to be connected to the fact that much of the operating costs of the Kimberley Process comes from government rather than industry. This view, however, appears a little short-sighted given the emergence of new conflict diamonds threats in the DRC, Côte d'Ivoire, and Zimbabwe, in tandem with the importance of the Kimberley Process for the prevention of threats emerging again in Angola and Sierra Leone, or surfacing in another country.¹⁰⁵

Although the WDC has observer status rather than voting status in the Kimberley Process, it can be argued that its representations at this level have a strong influence, whether voiced through the plenary or particular working groups and committees. This influence is particularly strong considering that decisions of the Kimberley Process plenary must be through consensus.¹⁰⁶ This means that, should the WDC lobby only a single government delegation to support its viewpoint, then it would not be possible for the Kimberley Process Plenary to make a decision regarding that which it does not concur.

The involvement of industry representatives and NGOs in the international Kimberley Process system is perhaps most pronounced through the committee and working group system. All committees have, both in principle and practice, involved industry and NGO representatives. Representatives are also mandated to participate in

105 Interview with Rio Tinto Representative (telephone interview, 30 May 2007); Written Response from Australian Government to Author's Interview Questions, 14 September 2007.

106 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) s VI (5). Other international regulatory initiatives have sought to directly manage the activities of multinational corporations, including instruments such as the UN Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, discussed in Tripathi, S, 'International Regulation of Multinational Corporations' (2005) 33(1) *Oxford Development Studies* 117, 126.

review visits and review missions as part of the peer-review mechanism employed by the Kimberley Process. This level of involvement stands apart from standard expectations of NGOs and civil society, which typically are excluded from direct participation in the execution of treaty body decisions, and do not normally enjoy such a high level of influence in decision-making processes.¹⁰⁷

One of the benefits of industry involvement is its ability to provide experts who enhance the system procedurally and practically. Rio Tinto has been asked for advice by other diamond-producing mines regarding Kimberley Process compliance, and has happily offered this advice in the knowledge that the company's reputation is affected if diamond-mining operations by others are not Kimberley-compliant.¹⁰⁸

Industry Involvement Through Self-Regulation

Given the direct involvement of major diamond-producing corporations, such as De Beers, in the WDC, the formal diamond sector has been strongly integrated into the self-management of conflict diamonds prevention standards. As such, De Beers management, for example, has sought to ensure that its component corporate entities are compliant with certification requirements and its other obligations under the Kimberley Process.

One of the challenges, however, has been the involvement of the informal diamond sector in this process. It is very important to engage the informal sector, predominantly representing alluvial diamond miners, as this sector has been so directly implicated in producing diamonds for militia groups. As it does not appear that their interests are represented through the WDC, it will perhaps fall to national

107 Grant, A J and I Taylor, 'Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems' (2004) 93(375) *The Round Table* 385, 385–387.

108 Interview between Author and Rio Tinto Representative.

governments to engage with the informal sector. It is noteworthy that guidelines for such engagement are currently being developed at the international level through the Kimberley Process to assist governments.¹⁰⁹ This movement culminated in the attendance of representatives of artisanal miners at the 2007 Kimberley Process Plenary in Brussels. The Kimberley Process decided to establish an Artisanal Mining Working Group to especially meet the needs of this central sector.¹¹⁰

The ability of the diamond industry to regulate itself in relation to the chain of warranties from import to retail was the subject of a 2004 study of the retail sector. Diamond retailers in the US and the UK were targeted by a survey, coordinated through the efforts of Global Witness and Amnesty International, to determine the effectiveness of diamond industry self-regulation at the retail end of the trading chain. In particular, reference was made to commitments made by the industry in January 2003 to implement a code of conduct to prevent buying or selling conflict diamonds; to implement a system of warranties requiring that all invoices for the sale of diamonds and jewellery containing diamonds contain a written guarantee that diamonds are conflict-free; to keep records of the warranty invoices given and received, and for this to be audited and reconciled on an annual basis by the company's own auditors; and to inform company employees about the industry's policies and government regulations to combat the trade in conflict diamonds.¹¹¹ Unfortunately, the study found that implementation of the system of warranties at the point of retail was inconsistent and not fully functioning. In particular, the study showed that retailers, where they were in fact implementing the voluntary self-regulatory measures, were not taking sufficient precautions to ensure that their suppliers were providing Kimberley-compliant diamonds. The study made a number of recommendations with diamond retailers in mind. It recommended that strict criteria

109 Kovanda, Karel, Kimberley Process Chair, 'Valedictory Remarks of Mr Karel Kovanda, Kimberley Process 2007 Chairman' (Intersessional Meeting, Brussels, Belgium, 8 November 2007).

110 Ibid.

111 Global Witness and Amnesty International, 'Déjà vu: Diamond Industry still Failing to Deliver on Promises: Summary of UK and US Results of UK and US Results of Global Witness and Amnesty International Survey' (Report, Global Witness, October 2004).

be applied in the selection of suppliers and that third-party auditing procedures be adopted to ensure that policies are working effectively; that retailers provide written assurances to consumers stating that the diamonds they purchase are conflict-free, so that the system of warranties covers the entire supply chain, from point of mine to point of sale to the consumer; and that retailers carry out education and training on conflict diamonds and the Kimberley Process, and require it as a condition of employment, so that salespeople are fully informed about policies and communicate this to consumers in a transparent manner.¹¹²

Both the formal and informal diamond sectors have some ability to enforce standards in a self-regulatory context. For example, internal disciplinary boards can be established to hear complaints about breaches of Kimberley Process standards by diamond industry employees.

Role of Non-Governmental Organisations

Non-governmental organisations such as Global Witness and Partnership Africa Canada were pivotal in bringing the problem of conflict diamonds to the attention of the international community, leading to the establishment of the Kimberley Process. They have subsequently had a vital role within the Kimberley Process, and have been described as representing the 'conscience of the Kimberley Process'.¹¹³

Non-governmental organisations play a very important role in the monitoring of Kimberley Process obligations both within the system and outside the system. Within the system, as discussed earlier, NGOs are able to bring potential non-compliance issues to the attention of the Kimberley Process, and to participate in the peer-review mechanism.

112 Global Witness, 'Broken Vows: Exposing the "Loupe" Holes in the Diamond Industry's Efforts to Prevent the Trade in Conflict Diamonds' (Report, March 2004).

113 Kovanda, Karel, 'Valedictory Remarks of Mr Karel Kovanda, Kimberley Process 2007 Chairman' (Intersessional Meeting, Brussels, Belgium, 8 November 2007).

NGOs have had a central role in the development of standard-setting within the Kimberley Process, including those standards relevant to regulation at the national level. They have an institutionalised role in relation to the functioning of the Kimberley Process, including providing ideas and recommendations as to further developments in the area of standard-setting.

The Kimberley Rules of Procedure clarify that observers may be invited to attend meetings of an ad hoc working group or a subsidiary body, either on a temporary or a permanent basis. The plenary may take a decision to revoke an invitation.¹¹⁴

One of the key successes and unique features of the Kimberley Process is its high degree of involvement with non-state entities, in particular representatives from the diamond industry and non-governmental organisations. NGOs play important roles in standard-setting and monitoring within the scheme. As stated in one review submission: 'NGOs and experts from throughout the diamond industry have played a vital role and their input is accepted (if not expected) as if they were states.'¹¹⁵

NGOs often initiate the incorporation of new standards in the context of Kimberley Process meetings. An example that stands out is the drive for more detailed internal controls to be set out through the Kimberley Process. In the area of monitoring, Global Witness and Partnership Africa Canada have contributed assessments as part of the three-year review of the Kimberley Process, they serve on the Working Groups on Monitoring and Participation within the Kimberley Process, and they have been involved in several review visits and missions.

114 Kimberley Process, *Rules of Procedure of Meetings of the Plenary, and its Ad Hoc Working Groups and Subsidiary Bodies* (2003).

115 Wexler, P, *The Kimberley Process Certification Scheme on the Occasion of its Third Anniversary: An Independent Commissioned Review* (Review Report submitted to the Ad Hoc Working Group on the Review of the Kimberley Process, February 2006) 6.

Rather than preferring an adversarial approach to the Kimberley Process, these organisations engage dynamically within the process to effect change.¹¹⁶

In their landmark study of the 'governance triangle', assessing a range of tripartite (government, business, NGO) initiatives, Abbott and Snidal interestingly position the Kimberley Process at the centre of their triangle model, indicating their assessment that, as regards the relative influence of the three stakeholders, the KP is perhaps the most evenly balanced of the assessed initiatives. It is possible to challenge this assessment, however, by observing that only governments are voting members of the KP, despite the significant influence of NGOs and businesses. Given the walk-out at the Kinshasa interplenary meeting, and the subsequent non-attendance by NGOs at the November 2011 plenary, the structural weighting towards governments has more clearly made itself manifest.¹¹⁷

116 Kimberley Process, *The Kimberley Process Certification Scheme* (Core Document, 2002) ss III, IV. Work has been initiated within the Kimberley Process in relation to the effectiveness of such internal controls and industry self-regulation. Kimberley Process, 'Final Communiqué: Kimberley Process Plenary Meeting' (Gatineau, Canada, 29 October 2004). This culminated with Kimberley Process Plenary's endorsement of a document, called the Brussels Declaration, on internal controls of participants with rough diamond trading and manufacturing. The declaration gives guidance on controls for record keeping, spot checks of trading companies, physical inspections of imports and exports, and maintenance of verifiable records of rough diamond inventories. Kimberley Process, '2007 Kimberley Process Communiqué' (Brussels, Belgium, 8 November 2007). A critique of the lack of internal controls in the Kimberley Process is set out in Fishman, J L, 'Is Diamond Smuggling Forever?: The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem' (2005) 13 *University of Miami Business Law Review* 217, 237–238; Interview between Author and Global Witness Representative. The use of strategies within and outside formal processes to influence outcomes by NGOs has been described as 'multitrack diplomacy'. Grant, A J and I Taylor, 'Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems' (2004) 93(375) *The Round Table* 385, 386–687.

117 Abbott, K and D Snidal 'The Governance Triangle' in W Mattli and N N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 50–52; Partnership Africa Canada, 'Kimberley Process lets Zimbabwe off the Hook Again', (2 November 2011). Available at: www.pacweb.org/Documents/Press_releases/2011/KP_lets_Zim_off_the_hook_Nov2011.pdf.

Role of NGOs External to the Kimberley Process

Outside the system, NGOs have also been effective in undertaking their own independent monitoring of the effectiveness of the Kimberley Process in particular contexts and countries.¹¹⁸ It was through reports by organisations such as Global Witness and Partnership Africa Canada that world attention was given to the conflict diamonds problem, and Global Witness has continued to provide this external aspect of scrutiny of the Kimberley Process system. NGOs have proven adept at attracting international media attention to the conflict diamonds issue. The 1998 protests organised by Global Witness in front of Tiffany's jewellery store in New York was a landmark in attracting global attention to the problem.¹¹⁹ Another media event occurred in 2006 with the release of the popular Hollywood movie *Blood Diamond*, which brought further public attention to the issue.¹²⁰ Considering this external aspect of its scrutiny, recent reports by the organisation have considered the ability of the diamond industry to implement its chain of warranties from the point of import to the point of retail. A report dated June 2010 released by Partnership Africa Canada provides an important external and contemporary critique of the operation of the Kimberley Process.¹²¹

Bringing conflict diamonds trading to the attention of the global media, and naming and shaming unscrupulous corporate or individual behaviour, acts itself as a form of enforcement action, which is readily available to non-governmental organisations. The term 'enforcement' is used here in the regulatory sense, rather than in the normal legal sense that generally connotes action by a central authority.¹²² Enforcement in this sense indicates the pressure that negative media attention brings to bear on industry, which influences industry to change its behaviour to conform with international regulatory standards. It is

118 Examples of public reports are Global Witness, 'Broken Vows: Exposing the "Loupe Holes" in the Diamond Industry's Efforts to Prevent the Trade in Conflict Diamonds' (Report, March 2004); and Partnership Africa Canada, 'Diamonds and Human Security: Annual Review 2008' (Annual Report, October 2008).

119 Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 41.

120 Ibid 148.

121 Smillie, I, 'Paddles for Kimberley: An Agenda for Reform' (Report, Partnership Africa Canada, June 2010).

122 As discussed in Chapter 5, regulation is theorised to consist of the processes of standard-setting, monitoring, and enforcement.

noted that the ultimate consumers of diamond products purchase diamond jewellery as much for its image as its intrinsic qualities. Should diamonds develop a bad media image, the value of the industry would rapidly decrease. NGOs may also use the threat of poor media publicity as leverage with industry and governmental groups to seek higher standards under the Kimberley Process.¹²³

The Diamond Development Initiative International

The quality of internal control systems varies greatly from one KP participant to another. Implementing effective internal controls is most difficult for countries with alluvial diamond reserves. Alluvial diamonds are found in vast areas, usually along riverbeds, and these areas are often beyond the control of both states and the diamond industry. Alluvial diamonds are most frequently mined by artisanal miners who work with simple tools and often earn less than US\$1 per day. Kimberlite diamonds, on the other hand, are mined with capital-intensive machinery that extracts the diamonds directly from a volcanic pipe. Botswana, the exemplar for positive African development based on diamonds, extracts its gems from kimberlite mines. African countries with large alluvial diamond reserves include Angola, CAR, Côte d'Ivoire, the DRC, Guinea, Ghana, Liberia, and Sierra Leone.¹²⁴

Artisans mine between 10 and 20 per cent of the diamonds used for jewellery, which makes them an important part of the industry. They have no better employment opportunities and typically hope to make a big find in the diamond fields. But the vast majority, despite their back-breaking labour, will never find that large stone. The diamonds they dream of are referred to as poverty diamonds, but are closely linked to conflict diamonds: 'The poverty, the hundreds of thousands of willingly exploited adults and children, and the

123 Tamm, I J, 'Dangerous Appetites: Human Rights Activism and Conflict Commodities' (2004) 26 *Human Rights Quarterly* 687, 691. Academic commentators have noted, however, that negative publicity can operate indiscriminately, thereby damaging the diamond revenues of producer nations that are considered to have 'clean' diamond industries, such as Botswana. Taylor, I and G Mkhawa, 'Not Forever: Botswana, Conflict Diamonds and the Bushmen' (2003) 102 *African Affairs* 261, 271. See also Shaw, Timothy M, 'Regional Dimensions of Conflict and Peace-Building in Contemporary Africa' (2003) 15 *Journal of International Development* 487, 492.

124 Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 149.

volatility of the diamond fields make for a highly flammable social cocktail, one that has ignited several times in recent years, with tragic results.¹²⁵ The alluvial sector is closely linked to civil wars in those countries and has led to regional and international instability. Rebels continue to control alluvial diamond fields and poor artisanal diamond workers are easily recruited for rebel armies or to sell the diamonds they find to regional warlords. A range of social problems is associated with artisanal mining: child labour, HIV infections, environmental destruction, crime and violence, poverty, and unhealthy and dangerous working conditions. Some states have declared the alluvial diamond mining sector illegal, while most states neglect it altogether, thereby exacerbating the problems. 'There are no cases in Africa where artisanal diamond mining has been supported and regulated successfully.'¹²⁶

The conflict diamonds campaign, in particular that by Global Witness and Partnership Africa Canada, did not pay close attention to development issues relating to alluvial miners until late 2004. But local African initiatives appeared as early as the beginning of 2002, as soon as relative stability emerged in the region. Various pilot projects attempted to address the issue. For example, the government of Sierra Leone created the Diamond Area Community Development Fund, through which part of the export tax on diamonds is directly returned to the artisanal diamond communities. The DRC created an organisation to assist in creating mining cooperatives. The Campaign for Just Mining was launched by the Network Movement for Justice and Development (a Sierra Leonean NGO and Southern partner organisation of Partnership Africa Canada) in January 2000, following the widely publicised Partnership Africa Canada report *Heart of the Matter* on Sierra Leone. The Campaign for Just Mining's goals are to 'promote sustainable development in Sierra Leone by advocating accountability, transparency and social responsibility within the

125 Global Witness and Partnership Africa Canada, 'Rich Man, Poor Man, Development Diamonds and Poverty Diamonds: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa' (Report, October 2004) 6–7.

126 Global Witness and Partnership Africa Canada, 'Rich Man, Poor Man, Development Diamonds and Poverty Diamonds: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa' (Report, October 2004) 8; Bieri, E, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 149–150.

mining sector'.¹²⁷ The campaign is squarely rooted in a human rights frame, or, as they call it, a 'rights-based approach to mining', including the right to a sustainable livelihood (i.e. formalising diggers' employment status); the right to basic services; the right to security; protection of the environment; ensuring long-term human security, including food security; and avoiding illnesses such as malaria; and the right to participate in various decision-making processes.¹²⁸

Many of these local initiatives were funded through bilateral aid, which was often forthcoming after peace agreements had been reached. The Peace Diamond Alliance was launched in December 2002, organising diggers in cooperatives to help them obtain better prices for diamonds. It was funded by the United States Agency for International Development (USAID) and managed by Management Systems International, a Washington-based consulting firm. 'It has brought together an eclectic group of local and international NGOs, diamond buyers, mining companies and government officials.'¹²⁹ Other pilot projects were also initiated by state donor agencies and NGOs. Bilateral agencies such as USAID and some international governmental organisations, notably the World Bank, committed funds and organisational capacity to the issue of artisanal and small-scale mining. Many of these initiatives grew out of foreign policy efforts by states, especially the USA and the UK, sometimes in relation to their brokering of peace agreements. For instance, the involvement of the US in Sierra Leone in 1999 brought USAID and other bilaterally focused agencies into the region. The civil wars in the area, particularly in Sierra Leone, had become closely associated with diamonds during the course of the conflict diamonds campaign. The mining initiatives emerged in the context of bilateral agencies' attempts to address one of the primary causes of the wars.¹³⁰

127 Global Witness and Partnership Africa Canada, 'Rich Man, Poor Man, Development Diamonds and Poverty Diamonds: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa' (Report, October 2004) 11.

128 Global Witness and Partnership Africa Canada, 'Rich Man, Poor Man, Development Diamonds and Poverty Diamonds: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa' (Report, October 2004) 12; Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 149–150.

129 Global Witness and Partnership Africa Canada, 'Rich Man, Poor Man, Development Diamonds and Poverty Diamonds: The Potential for Change in the Artisanal Alluvial Diamond Fields of Africa' (Report, October 2004) 11.

130 Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 150–151.

These initiatives reveal several important characteristics. First, they were frequently organised in a tripartite fashion. Multi-stakeholder models had been firmly established in the development/aid sector by the late 1990s, meaning that national and local civil society partners were usually involved. In the case of mining extraction activity, where state and large-scale industry are frequently co-owners, it meant that large-scale industry was also an important stakeholder for small-scale mining initiatives.¹³¹

Second, the bilateral funds that were disbursed for artisanal diamond mining projects showed that the issue of poverty or development diamonds was already on the agenda of some state donor agencies by 2002–03. For example, the World Bank's Community and Small Scale Mining initiative, launched in March 2001, had been in the works since September 1999. It focused largely on artisanal mining in South America and Asia. But government donor agencies' agendas were also affected by the conflict diamonds campaign in early 2000. For example, the third annual general meeting of the World Bank's Community and Small Scale Mining Project was held in Ghana in September 2003, with diamond mining prominent on the agenda. Partnership Africa Canada gave a presentation on the KP. The aid that followed the peace agreements was intended to address the circumstances causing conflicts. The conflict diamonds campaign had made diamonds appear to be especially important as a source of conflict. The Sierra Leone war, for instance, had come to be defined almost entirely as a conflict diamonds issue. The conflict diamonds campaign thus influenced aid and development responses in 2002 and helped put artisanal diamond mining on the agenda of some governmental aid agencies.¹³²

Third, the emergence of the development diamond projects shows that the development frame was on the agenda of local NGOs in former conflict diamonds areas. For many African NGOs, in fact, these developmental aspects relating to artisanal miners were always at the forefront, and many African NGOs were eager to shift the focus of the conflict diamonds campaign towards underlying issues of development. Prior to 2004, African NGOs were unable to add the development framework to the global public awareness campaign, and the Western NGOs leading these efforts focused narrowly on conflict

131 Ibid 151.

132 Ibid.

diamonds. However, African NGOs became partners of bilateral aid agencies eager to work with civil society on local development projects on small-scale mining. That is how they were able to pursue a broader, more holistic approach to the role of diamonds in conflict regions and to get the Western NGOs to broaden their focus.¹³³

The first strategic meeting leading to the establishment of the Diamond Development Initiative International was called by Global Witness, Partnership Africa Canada, and De Beers in January 2005 in London. This meeting was chaired by former US Assistant Secretary of State for Africa Walter Kansteiner, and included representatives from states, the European Community, the United Nations, the Department for International Development (British Foreign Aid Agency), USAID, the World Bank, industry, and NGOs.¹³⁴

A second meeting took place in Washington DC in June, in conjunction with a Communities and Small Scale Mining meeting at the World Bank. Both meetings were devoted to defining the goals and scope of the initiative. The DDII was to address the political, social, and economic challenges associated with artisanal diamond mining in Africa, attempting to bring this large informal sector into the formalised economy. While some industry players remained sceptical, De Beers and Martin Rapaport had already been involved in the Peace Diamond Initiative in Sierra Leone. They had been important in bringing the conflict diamonds issue to the industry's attention in early 2000, when the campaign got underway. De Beers' motives for its proactive involvement on development diamonds were viewed with suspicion by some NGOs and by some in the industry. However, other NGOs recognised that, while De Beers was operating from the perspective of the financial interests of their company by managing potential bad publicity, this could be seen as a form of 'enlightened self-interest'.¹³⁵

Initiators of the DDII (De Beers, Partnership Africa Canada, Global Witness, the Rapaport Group, and Jeffrey Davidson, representing the World Bank's Communities and Small Scale Mining Secretariat) were joined by the Foundation for Environmental Sustainability and

133 Ibid.

134 Ibid.

135 Ibid.

Security, and the International Diamond Manufacturer's Association, and 'the DDII [was] endorsed by the governments of Sierra Leone, Guinea, the DRC, Namibia and others, and ... received start-up project funding from Canada's Department of Foreign Affairs'.¹³⁶ Overall, alluvial diamond mining countries expressed great interest in the initiative, while other diamond mining countries, such as South Africa, Botswana, and Namibia, were less engaged in the matter.¹³⁷

Communities and Small Scale Mining's experience in dealing with artisanal mining suggested that getting donors involved in such initiatives was difficult. It was explained that extractive industries were regarded by some donors as an area too complicated to get into. Mining was not liked generally, and artisanal mining was traditionally considered particularly problematic by donors.¹³⁸

Despite some of these early challenges, participation in the inaugural DDII meeting held in Accra (Ghana) on 27–30 October was very good. It was limited to 80 representatives from states, industry, and civil society. The meeting was financed by registration fees from industry and northern states (\$400 each), \$30,000 from the World Bank, and \$5,000 each from Rapaport, De Beers, Global Witness, and Partnership Africa Canada. Registration for NGOs and Southern states was free. At the Accra meeting, the DDII's goals were further developed.¹³⁹

The DDII seeks to integrate artisanal diamond mining initiatives already underway, such as the above-mentioned projects — the Peace Diamond Alliance, Communities and Small Scale Mining, Campaign for Just Mining. It shares with the Kimberley Process the vision

136 Partnership Africa Canada, *Diamond Development Initiative International*. Available at: www.pacweb.org.

137 Gizenga, Dorothee Ngolo, interview with F Bieri, 6 July 2006 in Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 155.

138 Smillie, Ian, interview with F Bieri, 6 July 2006, in Bieri, Franziska, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 155.

139 Smillie and Ngolo Gizenga, interview with F Bieri, 6 July 2006, in Bieri, Franziska, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 155–156.

of being a multi-stakeholder partnership between governments, NGOs, and industry, seeking to pool resources, experience, and knowledge, although without the formal organisational structure of the KP.¹⁴⁰

The DDII seeks not only to put artisanal diamond mining on the agenda of NGOs and donors working on mining issues (such as the World Bank's Communities and Small Scale Mining project) but also to create an encompassing approach that is not country — or initiative — specific. It attempts to translate these initiatives into a more cohesive and global frame in which diamonds are a development issue, and to get the big international development organisations on board.¹⁴¹

In essence, the goal is making the world's 13 million artisanal diamond miners, most of whom live in total poverty, and face multiple health, peace, and security challenges, a new focus in development. Artisanal diamond miners tie the conflict and development frames together. By consolidating local initiatives, the DDII forms a bridge between the conflict frame and the development frame.¹⁴²

Initially, Partnership Africa Canada and Global Witness did not explicitly assign any staff, not even part-time, to the initiative.¹⁴³ The lack of resources is partially explained by the fact that the KP continues to exhaust NGOs' capacities. It is more difficult to engage other NGOs and donors on the development diamonds than conflict diamonds.¹⁴⁴

Ngolo Gizenga from Partnership Africa Canada mentions several hindering factors. First, it is more difficult to garner support from other NGOs because development diamonds do not lend themselves to the same 'sexy' consumer campaign as conflict diamonds. Second, there was suspicion about working on an initiative jointly with the industry and states. Specifically, Partnership Africa Canada was

140 Diamond Development Initiative International, *Accra Conference Background Note*, (October 2005) 2. Available at: www.artisanalmining.org/userfiles/file/DDI_Accra_Oct.5.pdf.

141 Smillie, quoted in Partnership Africa Canada, *Other Facets*, Ottawa (October 2006) 1.

142 Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 156.

143 Smillie, Ian, interview 6 July 2006 with F Bieri, in Bieri, Franziska, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 156.

144 Ibid 156; Gizenga, Dorothee Ngolo, interview with F Bieri, 6 July 2006 in Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 157.

accused of getting into bed with De Beers. However, building on the track record of cooperation from the Kimberley Process experience, which was also tripartite, the DDII seemingly overcame this obstacle and was able to continue to attract financial support for its activities. The personal relationships developed in the KP served in good stead for the creation of the DDII. The same individuals involved in the DDII have sat through countless hours of negotiations in the KP and have socialised informally at frequent meetings around the world.¹⁴⁵

While particular industry players are involved in the DDII, most notably De Beers and the Rapaport group, the WDC — the industry NGO created to deal with the conflict diamonds issue — remained uninvolved. While formally welcoming the initiative, the WDC kept its distance, saying that it was created to address only the conflict diamonds issue.¹⁴⁶

The WDC thus was intent on keeping its focus on the KP. Its distance from the DDII can possibly be explained by the fact that the DDII was an initiative of De Beers, which is both loved and hated for its dominant position in the industry. Also, the DDII leaves out industry members that have little to do with artisanal mining (i.e. industries involved in kimberlite extraction, many traders and retailers) or who were already reluctant partners in the KP/WDC.¹⁴⁷

Despite close connection between the DDII and the KP, there was never any intention of incorporating the DDII within the KP. States, the industry, and the NGOs agreed that this would have been counter-productive. No one wanted to jeopardise what had so far been achieved in the KP by overburdening it. In addition, the KP would have prevented the DDII from engaging state donor agencies who could help fund the initiative. As explained in the chapter on implementation, the KP is minimally funded, and state officials

145 Gizenga, Dorothee Ngolo, interview with F Bieri, 6 July 2006 in Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 157; Bone, Andrew, interview with F Bieri, 7 July 2005 in Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 160; Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010).

146 Izhakoff, interview with F Bieri, 2005 in Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 160.

147 Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 160–161.

in the KP are not connected to the state agencies most likely to be potential donors; instead, they represent trade departments or mineral extraction ministries. Third, most KP participants are not involved in the DDII. While any diamond trading state must participate in the KP to engage in international diamond transactions, most states take no interest in and are sceptical about being asked to engage on issues of diamonds and development.¹⁴⁸

NGOs identified that the KP was a regulatory system but not a tool for development, which was the emerging role of the DDII.¹⁴⁹ The DDII reminded KP participants why the certification was initially launched. Important links between the KP and the DDII existed and were nurtured. The KP provided the networks, reputations and know-how, especially for tripartite interaction, which were applied in the DDII.¹⁵⁰

The KP also lent the DDII legitimacy by commending its activities, which is itself a sign of the global esteem the KP had achieved by 2005. On several occasions, the DDII was given the opportunity to make presentations at formal KP meetings; Ian Smillie presented the DDII to the Moscow plenary in November 2005. The final communiqué of the KP Moscow plenary concluded: 'Liaison between the KP and the DDI was encouraged in order to optimize synergies.'¹⁵¹ The DDII thus kept development issues on the agenda of the KP by closely linking development to conflict diamonds and showing that the conflict diamonds problem could not be solved without also addressing development issues related to artisanal miners.¹⁵²

Most importantly, the DDII addressed one of the KP's key weaknesses: the lack of internal controls in alluvial diamond states. The KP in essence doesn't capture much alluvial diamond mining. It is unable to assess with confidence from which mine or mining area an alluvial

148 Ibid 161.

149 Partnership Africa Canada, *Diamond Development Initiative International*. Available at: www.pacweb.org.

150 Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 161.

151 Kimberley Process, *Kimberley Process Plenary Meeting Final Communiqué*, (Moscow, 2005). Available at: www.kimberleyprocess.com/en/2005-final-communique-plenary-moscow-compendium.

152 Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 161.

diamond comes. Concerned about this weakness, the KP established an ad hoc working group on artisanal mining, estimating that the concerns of an estimated 1 million artisanal miners were not being addressed adequately.¹⁵³

Thus, for the KP, the DDII is an important means of tackling an issue that threatens the effectiveness and legitimacy of the KP. In broader terms, the DDII is important because the KP alone cannot ensure peace in the region. The KP operates in a context supported by UN Peacekeeping operations in Liberia, Côte d'Ivoire, and the Congo, with a combined troop strength of 38,000 and an annual budget of US\$2.3 billion. The DDII contributes a further layer to the peacekeeping structure.¹⁵⁴

Current arrangements are unsustainable in the long run, and without the UN peace forces in the Congo the Kimberley Process cannot effectively ensure that diamonds will not fuel renewed conflicts. This may explain why the DDII received much attention and was positively endorsed by the KP. That the DDII's goals were defined as complementary and supportive of the KP facilitated a sound relationship between the two. The DDII did not undermine the KP for its ineffectiveness with regard to development, which would have delegitimised the process as a whole.¹⁵⁵

Overall, the KP served as an important starting point for the DDII, but the DDII was built as a separate organisational effort. While relationships developed in the KP were important, not all industry players involved in the KP became involved in the DDII. For instance, the WDC remained focused on the KP, while De Beers and Rapaport helped initiate the DDII. States that were crucial in setting up the KP (South Africa, Botswana, Namibia) were not closely involved in the DDII, while alluvial diamond-producing nations and several donor countries became active in the DDII. Canada, Britain, and the United States were involved in both, though for Britain and the United States different state agencies dealt with the KP and development diamond issues (the US Trade Department and the European Community in the KP, USAID and DFID in DDII), while for Canada the Department

153 Diamond Development Initiative International, *Accra Conference Background Note*, (October 2005) 5. Available at: www.artisanalmining.org/userfiles/file/DDI_Accra_Oct.5.pdf.

154 Smillie, quoted in Partnership Africa Canada, *Other Facets*, Ottawa (October 2006) 1.

155 Ibid 162.

of Foreign Affairs was the central agency for both initiatives. In 2008, funding for the DDII was provided by the government of Sweden, Tiffany & Co. Foundation, Partnership Africa Canada and the JCK Industry Fund, with an annual budget of \$287,580.¹⁵⁶

In the end, the NGOs did not press for the DDII agenda to become incorporated into the operations of the KP. Whilst some view this separation as desirable, it is arguable that the KP would be enhanced and revitalised by adopting a broader mandate, as exemplified by the DDII. This matter is discussed in more depth below. See in particular the discussion in Chapter 7 and Chapter 8.

DDII's first operational year, 2008, saw important progress made. The DDII produced several 'Standards and Guidelines' materials, offering various stakeholders important information on artisanal mining in specific countries. The DDII engaged in a pilot study on Guyana's registration system of alluvial miners and its internal diamond production tracking mechanisms. This study now serves workshops and training sessions in Africa to implement similar systems there.¹⁵⁷

Concluding Remarks

This chapter has provided an overview of the Kimberley Process, including the main ways in which it operates. It discussed procedures for membership, annual reporting, and the peer-review mechanism, including the manner in which the Kimberley Process has dealt with cases of serious non-compliance. The chapter has also considered the role of industry in the Kimberley Process, including self-regulation, as well as the role of NGOs, including those NGOs external to the KP, with a particular focus on the DDII. The chapter has also provided an evaluation of the overall effectiveness of the KP. The KP has been successful in creating a unique regulatory organisation harnessing the unique contributions of governments (legitimacy, capacity for national enforcement), industry (technical knowledge and self-regulation), and

¹⁵⁶ Diamond Development Initiative International, *2008 Annual Report: Beyond Dreams the Journey Begins* (2008) 9; Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 162–163.

¹⁵⁷ Diamond Development Initiative International, *2008 Annual Report: Beyond Dreams the Journey Begins* (2008) 9; Bieri, F, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Diamond Industry* (Ashgate Publishing Ltd, 2010) 162–163.

NGOs (widespread, objective networks for monitoring and behaviour modification). Its success in enlisting the support of major industry groups, in particular cartel leader De Beers, is particularly notable. On the issue, De Beers has done a 180-degree turn from opposition to ferocious agreement with NGO players, perhaps aware of focusing attention away from the potential criminal liability of its officers for complicity in human rights abuses that occurred in Angola and the DRC during the 1990s. With De Beers and peak group WDC taking ownership of the issue, a large piece of the solution falls into place simply by having these major players not engaged in the purchasing of conflict diamonds.

The KP has created unprecedented transparency in the diamond industry, particularly in the provision of statistics, which are more comprehensive, reliable, and accessible than before. With reference to these statistics, it is possible to estimate that conflict diamonds have fallen to less than 1 per cent of the international diamond trade. While the reduction in conflict diamonds is largely attributable to the emergence of peace in countries such as Sierra Leone and Liberia, the KP has arguably contributed to the tackling of the conflict diamonds problem and creating these conditions of peace.

Despite the level of success it has achieved, the KP has struggled recently in the face of serious non-compliance by some of its government members. Despite acting decisively to protect the integrity of the KP when faced by large-scale illicit trade being funnelled through the RCB in 2004, the KP did not act in this way when Venezuela behaved in a similar fashion in 2006. Most disturbing, however, are the large-scale killings and rapes that have occurred in Angolan and Zimbabwean artisanal fields, without eliciting suspension or expulsion from the KP. Diamonds emerging from these environments must be classified as conflict diamonds, and the continuing failure to act by the KP is a potential threat to its long-term viability.

This text is taken from *The Lion that Didn't Roar: Can the Kimberley Process Stop the Blood Diamonds Trade?*, by Nigel Davidson, published 2016 by ANU Press, The Australian National University, Canberra, Australia.