

Kimberley Process Certification Scheme

(outline of presentation to be given at Berlin conference, 29 March 2007)

The main issue addressed will be the extent to which the Kimberly Process Certification Scheme (KPCS) could serve as a model for other mechanisms to control the (international) flow of natural resources in order to diminish or eliminate their role in creating or enabling (violent) conflicts.

Another question that will be addressed is the capacity of the PCS to survive a protracted period where rough diamonds do not play a role in violent conflicts or a serious defection by Participants or the arrival of new actors who will stay outside the KPCS.

Short introduction of the KPCS: essentially a mechanism to control the origin and/or provenance of internationally traded rough diamonds, in order to eliminate so-called conflict diamonds from this trade. Controls at the national borders of the participating states and the European Community play a preponderant role. Of equal importance are the controls within the borders: of producing countries and of trading countries. Assurance of the effectiveness of the scheme as a whole is the control of the controls: the monitoring system.

Assuming that the KPCS is functioning as intended (which in reality it still isn't), some characteristics of the international trade in rough diamonds will be pointed out, which may make the KPCS a rather unique control mechanism that may be hard to emulate for the control of other internationally traded natural resources.

Which characteristics may make the KPCS unique?

1. The existence of one big player, with the potential power to punish (economically) those who do not want to play along
2. The intrinsic limited economic value of jewellery, which makes the final product and therewith the basic material vulnerable to changes in consumers choices/preferences
3. The relatively small numbers of players (producers, traders, countries)
4. The cruelty and massiveness of the killings financed by trade in rough diamonds and the corresponding attention of the international community
5. Effort and zeal of some dedicated and knowledgeable individuals

Which elements may threaten existence of the KPCS?

1. No legally binding basis for the scheme
2. GATT compatibility
3. Technical progress in cutting and polishing
4. Costs of mechanism

Ad 1 The existence of a big player

It is probably widely known that the production of and international trade in rough diamonds is to a large extent in the hands of one company: the De Beers. At the time of the negotiations on the KPCS the De Beers controlled an estimated 60 % of the international trade and about 50 % of the world-wide production.

Acceptance by such a player of the need of effective controls makes the attainment of such controls a lot easier than when one has to deal with a multitude of small players. The De Beers theoretically had the possibility to create a separate market, thereby leaving the task of sorting out the problem of the conflict diamonds to the rest of the producers and traders. Such an approach would, however, have made it necessary to create a separate market for rough diamonds but also one for the finished product, the polished diamond. The latter option would have been certainly much more difficult and costly than the first option: pressuring others to cooperate with a control system.

The De Beers was able to make a credible threat, however. For the De Beers it was relatively easy to free its own business from conflict diamonds, because most if not all of its own production is from kimberlite mining. Their involvement in conflict diamonds stemmed from their buying on certain markets of rough diamonds, where there was a large supply of rough diamonds coming from alluvial mining. The latter type of mining is more prone to illicit production and trading and therefore conflict diamonds can hide easier in the flow of rough diamonds coming from alluvial mining.

Once the De Beers had decided to free its own business from conflict diamonds, it used its influence on the other producers and traders to clean up their act, where necessary.

The role of the De Beers can be compared to the role of a major bank or a group of major banks in situations of reaching an agreement between private banks and a country on a rescheduling of sovereign debt of that country. Once a few big creditor banks succeed in reaching agreement among themselves, smaller banks have often to follow, because they run the risk that the country in question will conclude a deal with the big boys and the smaller one will in the end receive nothing.

Ad 2: Limited alternative uses of rough diamonds

To say it rather crudely: a rough diamond is just a piece of ..stone, a piece of pure carbon, with almost none other uses than to be made a piece of jewellery. And as we all know, the value of jewellery is much in the eye of the beholder. This means that its value is highly vulnerable to perception and to changes in perception.

It is important to keep this in mind because the campaign of certain NGO's to do away with conflict diamonds was mainly effective because they made the *polished* diamond the centre of the attention of the public. By effectively threatening the sales of polished diamonds the NGO's were able to mobilise the traders and sellers of polished diamonds to put pressure on the producers and traders of rough diamonds to clean up their act.

How did the main NGO's operate? Before Valentine's Day they started campaigns, asking the public, notably the consumer in the USA, if it would like that the symbol of eternal love, the polished diamond, would be tainted by blood?

These campaigns, directed at the consumer, scared the stones out of the diamond trade.

Ad 3: The relatively small numbers of players (producers, traders, countries)

This argument reinforces the one about the one big player. The relatively small number of players as such helped to reach everybody involved. The small number enabled close relationships, but is itself also a function of the large role played by mutual trust within the rough diamond industry.

Although it would go much too far to say that one can trust everybody engaged in the trade in rough diamonds, the fact is that this trade still can go on without a lot of the paper work and legal and financial advisors that one meets in the trade of other natural resources. This paper-poor trade is based essentially on trust, as far as quantity, quality and payment of transactions is concerned. Whatever the reasons for the large extent of the absence of a paper-trail, it is clear that the introduction of a paper-trail in the trade would meet with considerable resistance.

This resistance was largely overcome by accepting self-regulation as an important element of the KPCS. This self-regulation applies notably for the trade in trading centres, such as Antwerp. That means that between import and export of rough diamonds, the traders are allowed to establish themselves the regulations that have to guarantee that between import and export no non-certified diamonds can enter the chain of trade. In the case of the De Beers in London, this guarantee should be provided an independent and reputable auditing company.

Ad 4: 4. The cruelty and massiveness of the killings financed by trade in rough diamonds and the corresponding attention of the international community

The consumer-campaigns of the NGO's would not have been so effective if the public opinion was not properly informed about the cruelty and massiveness of the killings financed by the trade in rough diamonds at the time. To a large extent the NGO's deserve the credit for making these events publicly known. But the fact that also in the United Nations the Security Council gave a lot of attention to the role of conflict diamonds and established investigative panels/missions ensured that governments could not ignore their role in dealing with conflict diamonds.

Ad 5: Effort and zeal of some dedicated and knowledgeable individuals

The role of individuals can be sometimes quite important. In the case of dealing with conflict diamonds this was certainly the case.

This applies to the activities of the Security Council. It applies to the activities of the NGO's. It applies to the Kimberley Process itself, as a negotiating process.

The Kimberley Process as such was a strange setting for reaching an international agreement. The process brought together representatives of governments, of the private sector and of non-governmental organisations. Most of the participants had no experience in international negotiations. Although South-Africa formally had the Chairmanship, it did not exercise a clear steering role for a long time. A lot of technical expertise was available but it took time to translate this knowledge into practicable proposals.

In the end a couple of people managed to bridge the divides between NGO's and the private sector, the mistrust between producer countries along the North-South axis or African against non-African producers, between the private sector and the governments, between the producers and the traders. The understanding and trust reached within this small group enabled the working out of a framework for the negotiations and the steering of the negotiations themselves.

Which elements may threaten existence of the KPCS?

Diamonds are forever, the KPCS too?

1. No legally binding basis for the scheme

The KPCS is not based on an international agreement/treaty. The participating states and the European Community just adopted in November 2002 in Interlaken, Switzerland, a document that described how the KPCS should work and what had to be done.

It is therefore quite remarkable that all these participating states and the European Community have given the KPCS a firm legal basis in their domestic legislation. And maybe even more remarkable is the similarity of the domestic legislations.

Nevertheless, the absence of an international binding agreement means that failure to comply with the KPCS requirements by a participating state or the European Union cannot lead to a formal complaint of breach of contract.

Lack of a formal agreement means also that the dispute settlement clause of the KPCS – which is very weak anyhow – does not have teeth.

So what can happen if a participant seriously fails to comply?

In practice such a case presented itself already. The Republic of Congo (the Brazzaville Congo, not the Kinshasa one, which is the Democratic Republic of Congo) was found not to apply the KPCS as expected. The Republic of Congo was then excluded from the scheme.

That means, other Participants decided not to accept any longer imports of rough diamonds that were accompanied by a Kimberley Process Certificate issued by the competent authorities of the Republic of Congo.

In fact the Republic of Congo did accept this temporary exclusion and started to redress its shortcomings.

Had the Republic of Congo the possibility to act differently? My answer is yes: it could have pointed out that the KPCS was a voluntary mechanism, but that under the EU – Cotonou Agreement the EU is obliged to allow imports of goods originating or coming from the Republic of Congo without any quantitative restrictions. Possibly, the Republic of Cotonou had also been able to lodge a complaint within the WTO. .

2. GATT compatibility

One of the crucial elements of the KPCS is the exclusion of non-Participants of the international trade in rough diamonds. This exclusion is crucial for preventing the existence of a parallel market. During the negotiations this element was fiercely contested by a number of countries, notably Canada and the United States. These countries thought that such an exclusion was untenable in respect of members of the WTO. Therefore a waiver should be obtained from the WTO.

Such a waiver was granted, but only for a limited period of 3 years (since then renewed for another 3 years?). And the waiver applies to the exclusion of non-Participants.

But does the KPCS enable the eviction of Participants? No, because the consensus rule protects a Participant there from. If a Participant does not agree to an eviction than it can simply block any proposal to that effect.

Similarly, any non-Participant and/or non-complying Participant can threaten to vote against a prolongation of the WTO waiver.

So, the chances of a successful complaint within the WTO, would depend on the status of the Republic of Congo. Was the country no longer a Participant in the KPCS or did the other Participants just decide not to accept any longer KP Certificates from the Republic of Congo. This difference is quite interesting from a WTO legal point of view.

3. Technical progress in cutting and polishing

The KPCS is based on the assumption that it suffices to effectively control the production and trade in rough diamonds to eliminate conflict diamonds, and that it is not necessary to control in the same manner the trade in polished diamonds. It was and still is assumed that as long as also the diamond polishing countries, of which India is the most notable in quantity, are participating in the KPCS, there is no risk that conflict diamonds, which are by definition rough diamonds, will be exported to and imported into a non-Participant and then leave the non-Participants as polished diamonds which are not subjected to the KPCS.

So far this assumption seems to be correct. Although more countries have become active in cutting and polishing (for instance Armenia), they all have become Participants in the KPCS. Most probably this has been a requirement of the rough diamond producing countries (in the case of Armenia: Russia).

But what if a situation would arise similar to that in Angola? Is it feasible that a rebel movement with access to a considerable amount of rough diamonds would be able to set up itself or in a non-Participant a cutting and polishing activity? The answer is most likely to be: yes. And this positive answer is due to the technical progress in cutting and polishing.

The times that cutting and polishing was an art that only few people could master are long gone. Not the eye of the master-cutter, but the computer image of a rough diamond determines the ideal cut. Similarly, technical advances in polishing techniques, also computer aided, make it possible to set up almost anywhere a cutting and polishing activity.

Should such activities being set up by rebel movements with access to rough diamonds, a serious problem would arise, for which the KPCS would not be able to provide a remedy.

4. Costs of mechanism

The KPCS is not an international agreement and it has an institutional structure that also is rather informal. In fact the tasks of Chairmanship (of the Plenary meetings or of Working Groups) is done by “volunteers”, paid by Participants, as far as civil servants are concerned, by the industry and funds from NGO’s where representatives of these groups are concerned. The relative intensive schedule of meetings and monitoring missions – notwithstanding a frequent use of teleconferencing and e-mail exchanges – has so far been able to continue because the richer Participants have been willing to bear the costs.

A continuation of this system would of course exclude poorer Participants from fulfilling responsible and influential functions. But even some of the richer Participants are finding it difficult to justify the costs they incur by fulfilling tasks that under most international agreement usually are being fulfilled by standing secretariats.