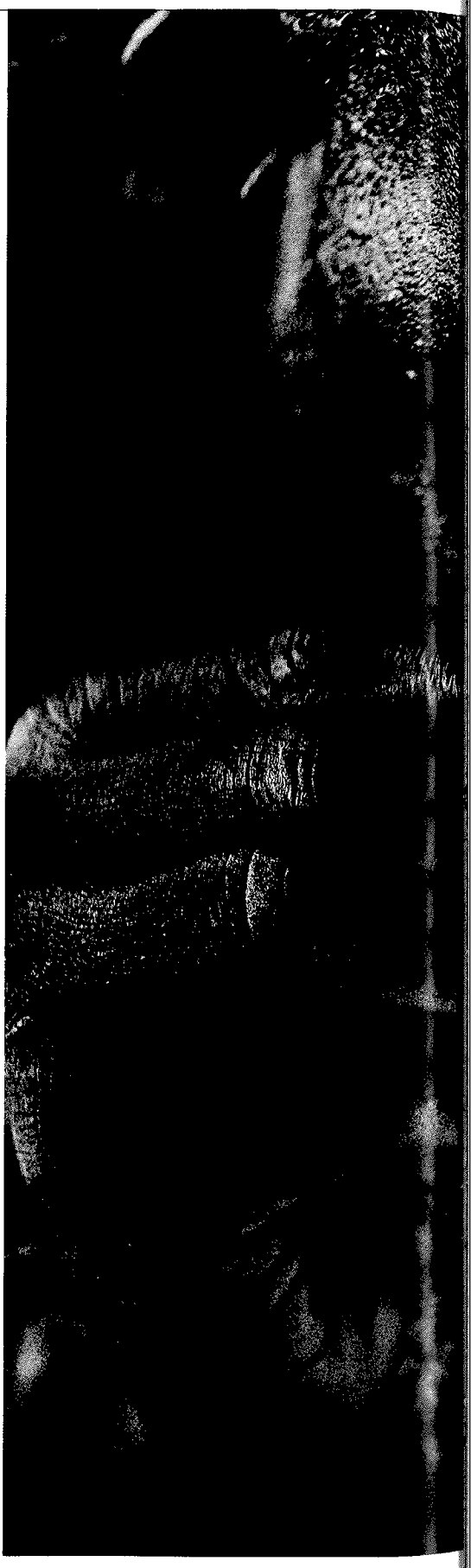
BLOOD DIAMONDS

Carat and stick tactics

'Blood diamonds' have been financing and fuelling armed conflicts that have caused untold human suffering. However, an international scheme to stop their trade and break their link with rebel movements can be further strengthened with the help of ADR.



EYEVINE

CONFLICT DIAMONDS HAVE BEEN A MAJOR international problem for more than 20 years. Also known as 'blood diamonds', they are rough diamonds extracted from mines in areas controlled by a rebel movement or its allies. They are then sold to finance conflict that is designed to undermine a legitimate government. While the trade in conflict diamonds potentially affects almost every country in the world, the roots of the problem first appeared in Angola, Sierra Leone and the Democratic Republic of Congo.

Rough diamond production is big business. Mines in various countries (Russia, Canada, Australia, and Africa) produce several million carats of rough diamonds a year. Regarding buyers, there are about 1,500 diamond offices in Antwerp. A five-carat rough diamond might be worth more than $300 per carat. The UN recognises that the vast majority of the diamonds produced are from legitimate sources and that the legal diamond trade makes a critical contribution to the economic development of many countries.

However, in the absence of controls on the trade in rough diamonds, a warlord seeking to finance a coup against a legitimate government would find the temptation of seizing the country's diamond fields too great to resist. An apt example is the situation in Angola in the 1990s, where Unita was waging a civil war. It is estimated that at that time it controlled 93 per cent of the Angolan diamond trade, with a value of about $4.3 billion between 1993 and 1998. That was not, however, the real cost of the trade - it's been estimated more than three million people were killed in armed conflicts funded by the trade in blood diamonds in a 10-year period at the end of the 20th century.

By Julie Browne and Stuart Sime

Countries must ensure no diamond trades finance any group seeking to overthrow a government

Before 2003, sanctions were the principal tool used by the UN in seeking to reduce the human suffering caused by armed conflict. Sanctions were imposed on Unita in 1998. Sanction-busting, however, was rife.

It was the realisation that the UN had no powers to enforce compliance beyond naming and shaming those in breach that led to the adoption by the UN General Assembly of Resolutions A/RES/55/56 in 2000. These supported the creation of an international certification scheme for rough diamonds, with the aim of preventing conflict diamonds entering the legitimate diamond trade and thereby removing diamond sales as a source of funding for armed conflict. The international community was then galvanised into signing up to the Kimberley Process (KP) from 1 January 2003. Today, there are 54 participants, covering 81 countries (the EU counts as a single participant), who account for 99.8 per cent of the world diamond trade.

The KP was a joint initiative of governments, the international diamond industry and non-governmental organisations (NGOs). Participating countries must ensure that no diamond trades crossing their borders are used to finance any group seeking to overthrow a legitimate UN-recognised government. They must provide annual reports on the amount and value of their exports and imports of rough diamonds that can be audited. They agree to establish a system of internal controls and every shipment of rough diamonds crossing a border has to be accompanied by a certificate issued in accordance with the Kimberley Process Certification Scheme (KPCS). In participating countries, rough

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diamonds can only be imported from and exported to KPCS participating countries. Diamond merchants certify on their invoices (the System of Warranties) to buyers that the diamonds being sold and purchased have been obtained from legitimate sources. KP certificates can be issued not only by the country of origin of the diamonds, but also participating countries that are not diamond producing countries but that can sell diamonds from more than one source, under a KP certificate indicating that the diamonds are of mixed origin. To prevent any contention that the KP could contravene the provisions of the General Agreement on Tariffs and Trade, the General Council of the World Trade Organisation (WTO) granted a waiver in respect of the process, and this has recently been extended until 31 December 2018.

Does the KP work? In many ways it is both ingenious and inspirational since it had the immediate effect of destroying the market in conflict diamonds while preserving legitimate international trade. For the first few years it reduced the volume of conflict diamonds to approximately 1 per cent of the world trade in rough diamonds. Like many regulatory schemes, it was only a matter of time before those determined to evade the system started to find ways to do so. More recent estimates put the trade in conflict diamonds as constituting about 4 to 5 per cent of global trade, with the fear that this will grow.

There are four main problems:

(i) False KPCS certificates

Although the KPCS requires each certificate issued under the process to be resistant to forgery there are frequent alerts about fake KP certificates.

(ii) Inadequate enforcement mechanisms

On an international level, compliance with the KPCS by participating countries is overseen by a Working Group on Monitoring. A key source of information on the extent of compliance is the annual report that each participant is required to submit. A peer review system of compliance exists by which experts and observers can visit a participating country and carry out on-the-spot inspections of mines and processes, but this only works if the participating country co-operates with these visits.

Decision-making under the KP is, for the most part, carried out by consensus, with a search for mutually acceptable solutions in relation to contentious issues. In the event of an issue regarding compliance by a participant, all participants are informed and

For the first few years, the KP reduced the volume of conflict diamonds to 1 per cent

enter into dialogue on how to address it, with the chair of the KP mediating the dispute. If non-compliance is proved, the defaulting country can be asked to leave the scheme. Independently of the KP, the UN can also impose sanctions on diamond exports from a defaulting country.

At local level, the KP requires participating countries to enact legislation to enforce compliance with the process by its diamond traders. These can impose tough sentences for infringement, such as the Canadian legislation, which provides for unlimited fines and imprisonment for up to 10 years. However not all participants police their local laws to secure full compliance with the KP with the same degree of efficiency.

(iii) Human rights abuses

The KP is designed to keep diamonds tainted with violence out of international trade. However, the purpose of the process is said by many to be too narrow. It was not designed to cover economic and human rights abuses caused by legitimate governments and their associated companies. In recent years, NGOs such as Global Witness have been reporting incidents of extreme violence and state-sponsored human rights abuses by internal security forces against those working in the diamond fields, as well as diamond smuggling by official entities to neighbouring countries. The KP has come under a great deal of criticism for not expelling members from the KP Certification Scheme.

(iv) Evading the KP

One abuse was to obtain conflict diamonds, and transfer them to subsidiary companies based in countries that provide financial secrecy, where they would be mingled with diamonds from legitimate sources. Rather like money laundering, they were then given a KP certificate of mixed origin, and resold at full market price.

So how can the KP be made more effective? What is almost certainly needed is a 'Kimberley Process II', which should aim to address the known abuses and which needs to have effective enforcement processes that it can implement at both international and local level. Some such reforms include: addressing the legal status of KP (it isn't currently a permanent organisation and it doesn't constitute a legal agreement or treaty); widening the KP so that blood diamonds also covers rough diamonds tainted by human rights or economic abuses by legitimate governments; restricting issue of KP certificates to the diamond producing country of origin; a clearer decision-making process that is not reliant on consensus; making it mandatory for cash purchases to be routed through official banking channels; a need for a system of regular independent, rigorous, mandatory monitoring and auditing of participants to ensure effective and full compliance; and more effective monitoring and compliance at local level by an independent body set up in each country.

However the KP also needs to provide a clear and effective way in which international disputes between participating countries are resolved. This includes disputes about pricing and valuation of diamonds, valuation of shipments on KP certificates and serious issues of non-compliance. The KP could also require its participants to sign up to and include a clear and binding dispute resolution procedure by which internal disputes between the various stakeholders, such as enforcing government organisations in KP countries, producers, suppliers, consumers, mine workers and so forth could be resolved.

A multi-tiered dispute resolution process is likely to be most effective for resolving disputes both at international and national level under the KPCS. Stage one could consist of consultation between the parties to the

dispute assisted by a skilled independent mediator panel drawn from experts in the industry with the aim of reaching a solution by consensus. This is similar to the dispute resolution mechanisms employed at present, but it would provide more formality, clarity and independence. In the event that a solution by consensus cannot be reached within a set timeframe, the parties could bind themselves to move to stage two which would involve such disputes being referred to arbitration.

There are existing dispute resolution models for dealing with both international and internal disputes which can be examined when setting up the framework for the creation of a binding KP dispute resolution scheme.

At international level, for dealing with disputes between participating members of the KP, one model is that used for international investment arbitration under the Convention on the Settlement of Investment Disputes. This covers disputes that directly relate to financial investments where the parties are a member state and an investor in another member state. While most of the cases dealt with by the International Centre for Settlement of Investment Disputes are resolved through arbitration, it also deals with a number of cases by conciliation.

Another useful model is the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes, which provides for a multi-tiered dispute resolution model for disputes arising under one of the covered WTO trade agreements. These include adjudicated decisions by three or five member panels appointed by the WTO's Dispute Settlement Body (DSB) when a settlement cannot be achieved by consultation and mediation at the first stage, with a final appeal process to the Appellate Body. In addition to the panels and the Appellate Body, disputes can also be resolved by arbitrators, although arbitration results are not appealable to the Appellate Body. The losing party is then given time to bring its offending trade policies into line with the rulings and recommendations of the DSB, and if it fails to act within the agreed period, compensation will usually be payable, although other sanctions can be imposed such as blocking imports or exports of goods. Arbitration can also be employed after a DSB ruling to decide issues such as the time that should be given for compliance, or penalties that should be imposed for the offending party's failure to comply with a DSB decision.

At local level, in respect of internal disputes arising out of implementation of the KP within

Arbitration can be employed after a DSB ruling to decide the time given for compliance

participating states, a useful procedure from which lessons could be learned is the arbitration commission established by the Federation of Belgian Diamond Bourses to oversee KP compliance by its members, which gives the commission power to refer suspected breaches to a panel of arbitrators to make a determination. The London Diamond Bourse (LDB) has required its members to adopt a code of conduct that provides for a similar dispute resolution model, with an Arbitration Commission set out by the LDB. This oversees compliance with the KP by its members, with the power to refer suspected violations to a panel of arbitrators (the Code Board) for determination, with the parties having a right to appeal arbitration decisions to a Code Appeal Board.

Working out the parameters of a bespoke arbitration-based dispute resolution process for alleged breaches of the KP will need a great deal of care. An independent commission, empowered to monitor compliance and investigate potential breaches, and to refer cases to the arbitral tribunal, would be required both at national and international level. The arbitrators themselves could be drawn from experts in the diamond industry or appointed by a body such as the World Diamond Council. By giving a KP arbitration panel the power to make financial awards, a workable arbitration scheme might be possible. The nature of the financial award would depend on the circumstances of the case. Where the respondent is an individual or business who is found to be in breach of the KPCS, the financial award could be determined by reference to the value of the diamonds, or the profits from the transaction. The arbitral tribunal might also be given the power to order the delivery up of the diamonds. Financial awards by arbitrators are well understood around the world, and readily enforceable under the New York Convention 1958.

Machinery would also be needed for dealing with any sums recovered. With awards based on the value of the diamonds or the profits generated, the funds generated might be used first to fund the arbitral service, then the KP itself, and then perhaps to conflict related UN projects.

While it should be possible to bind the participants to the KP and the key players operating internally in each country within the KP to a two-tier dispute resolution model, it will not of course work for parties who operate outside the KP such as those involved in illicit trading in conflict diamonds for the direct purpose of funding civil wars or insurrections. Each country therefore needs to have in place an effective criminal code and a system of uniform criminal sanctions for those who flout domestic criminal law.

Consideration should also be given to whether it is necessary to set up an international court, or to extend the jurisdiction of the International Court of Justice or the International Criminal Court. Agreeing the text for the necessary treaty, setting up such a court, and obtaining ratifications from the key countries in the diamond trade would obviously be a massive undertaking.

In conclusion, the KP has achieved a great deal in the past 10 years of its operation. However, reforms are now needed so that it continues to meet the present challenges, including strong and independent monitoring and mandatory, effective dispute resolution mechanisms for dealing with issues of non-compliance at both international and national level.

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