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Diamond Is Forever: De Beers, the Kimberly Process, and the Efficacy of Public and Corporate Co-Regulatory Initiatives in Securing Regulatory Compliance Note

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A DIAMOND IS FOREVER: DE BEERS, THE KIMBERLEY PROCESS, AND THE EFFICACY OF PUBLIC AND CORPORATE CO- REGULATORY INITIATIVES IN SECURING REGULATORY COMPLIANCE

“Diamonds have always been far more than jewels; they
are history twinkling on the skin.”

-*Stefan Kanfer*¹

*Anne E. Andrews*²

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¹ STEFAN KANFER, *THE LAST EMPIRE: DE BEERS, DIAMONDS,
AND THE WORLD* 8 (1993).

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would like to thank Professor Stephen Legomsky and Maggi Carfield
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INTRODUCTION

As Stefan Kanfer intimates, diamonds have long been intertwined with the human experience. Indeed, though many people often associate diamonds with love and romance,³ the valuable gems have been at the heart of struggles for power and wealth among national governments, industry players, and guerrilla fighters.⁴ Until recently, 80% of the world's rough diamonds were under the tight control of De Beers, a multinational corporation that maintained near dictatorial control over the world's supply.⁵ In addition, national governments have sought diamonds as a lucrative natural resource. Through policy, governments have tried, with varying levels of success, to limit the ability of rebel groups and corporations in order to exercise autonomy over diamonds.⁶

However, several significant changes in the diamond industry have threatened to fundamentally alter both its structure and the way in which key industry players

³ See *University of Arkansas Sociologists Study Why Americans Covet Deadly, Dazzling Diamonds*, ASCRIBE NEWSWIRE, Feb. 26, 2003.

⁴ See *infra* notes 27-64 and accompanying text. See also GLOBAL WITNESS, *CONFLICT DIAMONDS: POSSIBILITIES FOR THE IDENTIFICATION, CERTIFICATION AND CONTROL OF DIAMONDS* 1 (2000).

⁵ See *Rough Diamond Sales Rose 40% in '86, DeBeers Says*, WALL ST. J., May 4, 1987, at 27.

⁶ See, e.g., *infra* note 64 and accompanying text (explaining U.S. efforts to legislate on diamonds).

conduct business.⁷ In 1994, the U.S. Department of Justice indicted De Beers for criminal price fixing of industrial diamonds. However, the company refused to answer the charges for ten years, preferring instead to limit its contact with the U.S.⁸ Then, in 2000, countries and industry representatives began adopting the Kimberley Process, an international certification scheme for diamonds.⁹ Members of the diamond industry, representatives of major diamond producing nations, and the international community set the initiative in motion with the purpose of eradicating the use of diamonds to finance wars.¹⁰ De Beers later agreed to comply with Kimberley Process regulations limiting which diamonds the company would be permitted to buy.¹¹

In examining these events, it appears the Kimberley Process has had the ultimate effect of inducing De Beers to modify some of its corporate practices.¹² The De Beers case also suggests that heterogeneous regulatory bodies, which include an aspect of self-regulation, can prove to be

⁷ See *infra* notes 27-96 and accompanying text (discussing publicity over conflict diamonds, the creation of the Kimberley Process, and antitrust charges against De Beers).

⁸ See Mark Williams, *Plea Deal Clears De Beers to Sell Diamonds in U.S. Directly Again*, CHI. SUN-TIMES, July 14, 2004, at 79.

⁹ See *The Diamond Cartel - The Cartel Isn't For Ever*, THE ECONOMIST, July 17, 2004, at 61.

¹⁰ See *infra* notes 35-80 and accompanying text (discussing the creation of the Kimberley Process).

¹¹ See Kimberley Process: FAQs, <http://www.kimberleyprocess.com:8080/site/?name=faq> (last visited Feb. 28, 2006); World Diamond Council: Membership Information, <http://www.worlddiamondcouncil.com> (last visited Feb. 28, 2006).

¹² See *infra* notes 114-117 and accompanying text (discussing the effectiveness of the Kimberley Process).

effective in securing regulatory compliance from dominant multinational corporations.¹³

This Note scrutinizes De Beers's response to the charges issued by the U.S. and also analyzes how De Beers responded to the creation of the Kimberley Process. This Note thereby examines the effectiveness of enhanced self-regulation schemes in inducing multinational corporations to alter business practices, particularly when those businesses operate on a global scale.

Part II will discuss the history of the diamond trade and De Beers's rise to power within the industry. It will explore the problem of conflict diamonds and the growth of the international outcry against the sale of such diamonds to fund domestic conflicts. Finally, it will explain the workings of the diamond industry and De Beers's recent role within it, including the alleged monopolistic practices and antitrust charges that have been filed.

Part III will examine De Beers's response to charges issued by the U.S. and to the regulations of the Kimberley Process. Part III will also suggest that enhanced self-regulation schemes such as the Kimberley Process may prove effective in similar industries as a means of altering the behavior of strong multinational corporations.

Finally Part IV will affirm the Kimberley Process as an effective method for addressing the conflict diamond problem. It will also propose that in addition to continuing its efforts to regulate the workings of the diamond industry, the Kimberly Process should apply additional scrutiny to

¹³ See *infra* notes 106-113 and accompanying text (concluding that the De Beers example shows that heterogeneous regulatory bodies can be very effective).

ensure that banned diamonds do not enter the market through illicit channels.

I. HISTORY AND BACKGROUND

A. *De Beers and the Diamond Trade*

Diamonds were first discovered in India some time before the 18th century.¹⁴ They were immediately prized for their sparkling luminescence and their unique property of reflecting light outward so as to sparkle brilliantly.¹⁵ In 1869, an 83.5-carat diamond, known as the "Star of Africa," was discovered in South Africa.¹⁶ From that point forward, Africa has been one of the world's chief sources of diamonds.¹⁷

¹⁴ GODEHARD LENZEN, *THE HISTORY OF DIAMOND PRODUCTION AND THE DIAMOND TRADE I* (F. Bradley trans., Barrie Books Limited 1970) (1966). There is some discussion among historians over when diamonds were actually discovered. *See, e.g., id.* at 1-5.

¹⁵ *See id.* at 13. In fact, from the first century B.C., the diamond enjoyed prestige arising from its unique hardness that led some to believe it had the mystical ability to protect those who wore it from "snakes, fire, poison, disease, thieves, water, and black magic." *Id.* at 21.

¹⁶ DOUGLAS FARAH, *BLOOD FROM STONES: THE SECRET FINANCIAL NETWORK OF TERROR* 21 (2004).

¹⁷ *See* G. Ariovich, *The Economics of Diamond Price Movements*, 6 *MANAGERIAL & DECISION ECON.* 234, 236 n.4 (1985); So-Young Chang, *The Global Diamond Industry*, CHAZEN WEB J. OF INT'L BUS. 4 (Fall 2002), available at http://www1.gsb.columbia.edu/journals/files/chazen/Global_Diamond_Industry.pdf. In fact, the diamond industry as a whole, including mining, sorting, cutting, polishing, manufacturing, and retail sectors employs 28,000 workers in the South African economy. Emma Muller, *Diamond Business in a Huff Over 'Conflict Free' Oscar Freebies*, BUSINESS DAY, March 1, 2005, available at <http://allafrica.com/stories/printable/200503010253.html>.

Following the discovery of the "Star of Africa,"¹⁸ mining companies began to move to the continent in order to stake their claims over land they hoped would yield large volumes of rough diamonds.¹⁹ The diamond mining process was grueling work.²⁰ Before mining technology had developed on a large scale, companies employed large numbers of native Africans to work the mines.²¹ Living conditions were dismal for the workers as they were kept closely supervised, and any attempt to smuggle diamonds out of the mines – a feat that promised more riches than a lifetime of working in the mines ever could – resulted in severe punishment.²²

¹⁸ FARAH, *supra* note 16, at 21.

¹⁹ See LENZEN, *supra* note 14, at 147 (showing a map of various diamond mining companies' claims staked at the Kimberley mine as of 1880).

²⁰ See KANFER, *supra* note 1, at 42-3 (referring to the situation of black men working the diamond fields in the late 1800s as "slavery"). During this time, South Africa developed Pass Laws, which restricted the movement of black miners and contributed to the beginning of apartheid in that nation. *Id.* at 43. The Pass Laws were instituted on behalf of the diamond companies that had begun to mine the country and feared that the native miners would steal diamonds and run away with them. *Id.* At the same time, mining companies needed these native workers to do the backbreaking mining work in return for the low wages. See *id.*; John M. Smalberger, *The Role of the Diamond-Mining Industry in the Development of the Pass-Law System in South Africa*, 9 INT'L J. AFR. HIST. STUD. 419, 420 n.3 (1976).

²¹ James Searing & Robert Tignor, *Colonial Africa*, in BLACK HISTORY 6 (Patricia J.F. Rosef et al. eds., 1983).

²² See Smalberger, *supra* note 20, at 420; KANFER, *supra* note 1, at 71 (describing the living conditions for mine workers, and African workers' attempts to smuggle diamonds out of the mines). See also GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES 6-9 (2002) (describing a visit to a diamond mine and the difficult jobs diggers perform); *Many Countries Show Major Flaws in Diamond Trade Controls*, ECON. NEWS, Oct. 29, 2004 (discussing the dismal conditions in diamond mines even now, with the average diamond miner in Africa earning \$1

De Beers, which currently controls a majority of the world's diamonds,²³ began with one ambitious man who became involved in South African diamond mining in the 1800s.²⁴ The company grew and eventually consolidated its power to form two parent companies, each with multiple subsidiaries: De Beers Consolidated Mines Ltd. (incorporated in South Africa), and De Beers Centenary AG (incorporated in Switzerland).²⁵ Both companies control the Central Selling Organization (CSO), a powerful marketing arm that also controls the company's rough diamond sales.²⁶

Originally, diamonds were reserved for only the wealthiest individuals.²⁷ However, sales grew steadily as the gems became more plentiful with the discovery of more efficient mining technologies and new mines.²⁸ By the end

per day); *Diamonds Shine Brighter, But Government Revenues Remain Dull*, INTEGRATED REGIONAL INFORMATION NETWORKS, Feb. 24, 2005 (discussing the absence of written contracts, enforceable health and safety regulations, or child labor laws, and estimating that there are 10,000 child diamond miners in the small African nation).

²³ See John R. Wilke, *DeBeers Is in Talks to Settle Price-Fixing Charge*, WALL ST. J., Feb. 24, 2004, at A1 (explaining that as of 2002, DeBeers and its affiliates produce 62% of the world's diamonds). Controlling diamond production is very lucrative; in 1999 alone, the world's diamond production for the year was valued at \$6.8 billion. GLOBAL WITNESS, *supra* note 4, at 3.

²⁴ See LENZEN, *supra* note 14, at 154-5.

²⁵ Dale J. Montpelier, Comment, *Diamonds are Forever? Implications of United States Antitrust Statutes on International Trade and the De Beers Diamond Cartel*, 24 CAL. W. INT'L L.J. 277, 285-8 (1994).

²⁶ *Id.* at 288.

²⁷ University of Texas, *Mineral Lore and Mythology*, http://www.tmm.utexas.edu/npl/mineralogy/Lore_and_Mythology/index.htm (last visited Feb. 28, 2006). Cf. GLOBAL WITNESS, *supra* note 4, at 2 ("Diamonds are one of the most concentrated forms of wealth known to man.").

²⁸ See Bryson Burke Diamond Corporation, *The Story of*

of the 19th century, diamonds were commonly seen on engagement rings and in other forms of jewelry owned by the the upper-middle class.²⁹ Now, partially as a result of De Beers's marketing efforts, diamonds are in high demand worldwide as jewels.³⁰ In fact, De Beers's advertising

<i>Indicator</i>	<i>Minerals</i>	–	<i>History,</i>
http://brysonburke.com/indicator_minerals_history.html (last visited Feb. 28, 2006). See Harriet Kelsall Jewellery Design, <i>Engagement Rings</i> history, http://www.hkjewellery.co.uk/default.asp?Page=engagementrings-history (last visited Feb. 28, 2006). At their point of origin, diamonds are in a “rough” state and scarcely resemble the sparkling jewels most people envision. See LENZEN, <i>supra</i> note 14, at Fig. 1. After a diamond has been mined, it is sold to a buyer and goes through the process of being cut and polished, jobs that are completed by separate experts in each task. See also <i>id.</i> at 75-81 (describing diamond origins and the cutting process). By the time a diamond reaches a jewelry store display case, it has undergone a significant transformation and changed hands multiple times. CAMPBELL, <i>supra</i> note 22, at 111-2. As diamonds change hands, their price increases dramatically; the final price of a finished, polished diamond can be up to 100 times the price paid for the diamond at its source. <i>Id.</i> See also GLOBAL WITNESS, <i>supra</i> note 4, at 4 (explaining the diamond trading process in depth); Ariovich, <i>supra</i> note 17 (examining the factors involved in diamond pricing).			

²⁹ See Francesca Carnevali, *Golden Opportunities: Jewelry Making in Birmingham Between Mass Production and Specialty*, 4 ENTERPRISE & SOCIETY 272, 287-8 (2003).

³⁰ See CAMPBELL, *supra* note 22, at 112-3. In the U.S., diamonds play an important cultural and symbolic role largely due to De Beers marketing. De Beers first employed NW Ayer & Partners, an advertising agency, to market diamonds as a necessary part of every engagement ring in 1939. Sharda Prashad, *Why Diamonds Are a Girl's Best Friend*, TORONTO STAR, Jan. 23, 2005, at D12. “De Beers manipulated romance,” one journalist suggested, “[b]ut the strategy worked.” *Id.* Today there are very few engagement rings that do not include a diamond of some size, which has come to be an expectation. *Id.* As of 2004, 82% of engagement rings were made with diamonds, and 85% of newly engaged women were presented with a diamond engagement ring. *Id.* Advertisements selling diamond jewelry often allude to the diamond's role in the “mating game,” with slogans

served as the driving force behind the creation of the post-World War II cultural norm in Germany and Japan of diamond engagement rings.³¹ Prior to World War II, less than 1% of Japanese citizens had diamonds on their wedding rings, but following De Beers's advertising efforts after the war, 70% of new engagement rings contained diamonds.³² Furthermore, German wedding rings had not traditionally contained diamonds until De Beers introduced a kind of wedding ring with diamonds in the late 1960s, after which German diamond consumption grew dramatically.³³ In addition to their marketability as jewelry, a market has emerged for the use of diamonds as industrial tools, which can best be attributed to gems' rare hardness.³⁴

B. Conflict Diamonds and the Creation of the Kimberley Process

The phrase "conflict diamonds," refers to "diamonds that originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments, or in

targeted toward men, such as "Only her ears need enhancing," and "Of course there's a return on your investment. We just can't print it here." Christine Bittar, *De Beers Plays Up Details, Diamonds in Ad Push*, BRANDWEEK, Nov. 20, 2000, at 10. Recently, De Beers has developed a new marketing campaign that expands the target audience for buying diamond rings. De Beers's new advertisements encourage single women to buy a diamond ring for their right hands, dubbing it a "right-hand" ring. Prashad, *supra* at D12. Advertisements encourage, "Your left hand says 'we.' Your right hand says 'me.' Women of the world, raise your right hand." *Id.*

³¹ KANFER, *supra* note 1, at 7.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 23.

contravention of the decisions of the UN Security Council.”³⁵ Conflict diamonds have been at the center of at least two brutal African wars³⁶ in which rebel groups fought for control over their governments and gained territory in diamond-rich areas.³⁷ After gaining control, rebels then attempted to smuggle rough diamonds out of the country and sell them to buyers through other countries in order to finance their wars with the profits.³⁸

The trade in conflict diamonds has proven harmful to the countries and citizens where such diamonds originate.³⁹ Not only do conflict diamonds sustain the groups that threaten to undermine legitimate governments,

³⁵ Conflict Diamonds: Sanctions and War, <http://www.un.org/peace/africa/Diamond.html> (last visited Feb. 28, 2006). See also FARAH, *supra* note 16, at 4; Dick Durham, *Diamond Trade Fuels Bloody Wars*, <http://cnnstudentnews.cnn.com/2001/WORLD/africa/01/18/diamonds.o> verview/ (last visited Feb. 28, 2006).

³⁶ Conflict Diamonds: Sanctions and War, *supra* note 35.

³⁷ See *infra* notes 41-5 and accompanying text. Although much of this Note refers to the negative consequences of the diamond trade, not all of De Beers's involvement with such African nations has been harmful. For example, DeBeers's presence in Botswana has enabled it to dictate HIV/AIDS prevention policies. Martha L. Salomon, Note, *AIDS is Risky Business: Examining the Effect of the AIDS Crisis on Publicly Traded Companies in South Africa and the Implications for Both South African and U.S. Investors*, 37 VAND. J. TRANSNAT'L L. 1473, 1475 (2004) (explaining in that nation, De Beers has refused to complete contracts with small business owners locally unless they demonstrate that they have incorporated an intensive HIV/AIDS policy into their workplaces).

³⁸ See, e.g., S.C. Res. 1306, ¶ 19, U.N. Doc. S/RES/1306 (July 5, 2000); S.C. Res. 1295, ¶ 18, N.C. Doc. S/RES1295 (April 18, 2000); S.C. Res. 1195, ¶ 81, U.N. Doc. S/RES/1195 (Dec. 19, 2000) (suggesting that the RUF smuggles most of its diamonds out of Sierra Leone through Liberia). Rebel armies use diamonds to “buy arms and munitions, to pay and feed troops and to keep strategic alliances alive.” GLOBAL WITNESS, *supra* note 4, at 2.

³⁹ See, e.g., CAMPBELL, *supra* note 22, at 9.

the trade has led to atrocities against residents of villages located near the valuable diamond mines that rebel groups have sought control over.⁴⁰ For example, in Sierra Leone, the rebel group Revolutionary United Front (RUF) incited a war in 1991 and used diamond mining as a crucial source of income.⁴¹ During that period, the RUF controlled the richest diamond-producing areas in the nation⁴² and terrorized local communities by methodically amputating limbs for the purpose of dispelling the native populations.⁴³ In Angola, rebels of the União Nacional Para a Independência Total de Angola (UNITA) fought a civil war with the government for two decades before reaching a shaky peace agreement in 1994.⁴⁴ However, UNITA was reluctant to uphold its agreement to relinquish control over the Cuango Valley, the country's diamond-rich region traditionally exploited for its diamond resources for the purpose of financing the group's military operations.⁴⁵

⁴⁰ See Durham, *supra* note 35.

⁴¹ S.C. Res. 1295, *supra* note 38, at 16; GLOBAL WITNESS, *supra* note 4, at 2. Conflict diamonds represent "a major and primary source of income for the RUF." FARAH, *supra* note 16, at 33. See also CAMPBELL, *supra* note 22, at 22-3 (explaining that even during the most dangerous times of the RUF conflict, diamond merchants continued to buy from RUF rebels, and smuggling continued). In part because of the diamonds it illegally mined, the RUF was able to generate \$3.7 billion over six years in the 1990s to finance its operations. GLOBAL WITNESS, *supra* note 4, at 2.

⁴² S.C. Res. 1306, *supra* note 38, at 17.

⁴³ See CAMPBELL, *supra* note 22, at xiii-xiv (describing the RUF's method of chopping off of civilians' hands). See also CAMPBELL, *supra* note 22, for a history of conflict over diamonds in Sierra Leone, particularly between the government and the RUF.

⁴⁴ Robert Block, *Angolan Foes in Talks to Split Diamond Industry*, WALL ST. J., Sept. 24, 1997, at A15.

⁴⁵ *Id.* See generally S.C. Res. 1295, *supra* note 38. One estimate suggests that there have been as many as 400,000 illicit diamond miners in Angola in the last 12 years, and that UNITA

The trade in conflict diamonds has had numerous adverse effects on the countries in which they originate. Rebels who traffic conflict diamonds deny their native country some of its most valuable natural resources. Impoverished nations are thereby precluded the opportunity to tax proceeds from diamond sales which could otherwise be utilized to build infrastructure and provide for citizens' basic needs.⁴⁶ Additionally, the sale of conflict diamonds has been attributed to terrorist organizations – most notably, Al Qaeda, Hezbollah, and Hamas – to support their activities,⁴⁷ highlighting another of their troublesome uses.

brought many of them into the country. GLOBAL WITNESS & PARTNERSHIP AFRICA CANADA, *THE KEY TO KIMBERLEY INTERNAL DIAMOND CONTROLS: SEVEN CASE STUDIES* 5 (2004).

⁴⁶ See, e.g., Muller, *supra* note 17 (explaining that nations whose diamond trade is largely legitimate use revenues from diamond sales to fund HIV/AIDS initiatives, health care, and education for their populations). Additionally, legitimate diamond mining and the entire diamond finishing process can provide employment opportunities for these nations and their citizens. See also *id.* (citing diamond mining and production as a key employer in South Africa and Botswana, and crediting a Botswana mining conglomerate, partly owned by De Beers, as enabling Botswana to “transform itself from an undeveloped agriculture-based economy to one of the most successful in the world”); *Diamonds Shine Brighter*, *supra* note 22 (estimating that between \$30 million and \$170 million worth of diamonds exited Sierra Leone illegally during 2004, and explaining that the government receives very little in tax revenue from the diamonds that pass through it).

⁴⁷ See CAMPBELL, *supra* note 22, at xxv; Michael Maggi, Note, *The Currency of Terrorism: An Alternative Way to Combat Terrorism and End the Trade of Conflict Diamonds*, 15 PACE INT’L L. REV. 513, 514 (2003). See also FARAH, *supra* note 16, at 1-8 (describing diamonds as a source of income for Osama bin Laden’s terrorist network and explaining how money from the sale of conflict diamonds thwarted the U.S.’s attempts after September 11, 2001 to disable terrorists’ financial network).

Difficulty in identifying and tracing conflict diamonds is one major reason why they have proliferated.⁴⁸ Tom Shane, an American diamond importer, explained, “[y]ou take a diamond that’s been cut and polished and there’s no human being on earth who can tell with certainty where that stone came from.”⁴⁹ The difficulty in deciphering the origin of such diamonds has plagued the international community in its attempts to address the conflict diamond problem.⁵⁰

After many years of inaction, the international community finally got involved.⁵¹ Several international nongovernmental organizations (NGOs), including Global Witness and Partnership Africa, adopted the conflict diamond issue as a part of their agenda, and began pressuring the diamond industry to enact measures that would eliminate the use of conflict diamonds.⁵² These efforts induced both industry members and regulatory

⁴⁸ See Sean D. Murphy, *U.S. Legislation in Support of Diamonds Controls*, 96 AM. J. INT’L L. 485, 485 n.2 (2002). See, e.g., Maggi, *supra* note 47, at 525-6. But see GLOBAL WITNESS, *supra* note 4, at 7-14 (suggesting that it is possible to identify the general area of a diamond’s origin, discussing at length the current status of attempts to identify a diamonds’ source, and describing some scientific methods for identification).

⁴⁹ See CAMPBELL, *supra* note 22, at 122. Campbell suggests, “[d]iamonds are so portable—and their value so enticing—that no system of certificates will ever be able to answer, for certain, whether or not the diamonds in an engagement ring came from perfectly legitimate sources in South Africa or from under the tongue of an RUF rebel called Colonel Poison.” *Id.* at 133.

⁵⁰ Robert Block, *You Can Learn a Lot About a Diamond if You Smash it Up*, WALL ST. J., July 12, 2000, at A1.

⁵¹ See, e.g., Global Witness, <http://www.globalwitness.org> (last visited Feb. 28, 2006); Partnership Africa Canada, http://www.africa-ata.org/canada_pac.htm (last visited Oct. 11, 2004).

⁵² *Id.*; Many Countries Show Major Flaws in Diamond Trade Controls, *supra* note 22.

bodies to take action to address conflict diamond proliferation.⁵³ The first efforts began when the Diamond High Council, a nonprofit organization representing the Belgian diamond industry,⁵⁴ sought to create transparency in diamond origins by requiring that diamond importers list the place where each imported diamond was mined.⁵⁵ However, this requirement proved ineffective. As reported by a UN panel of experts in 2000 examining the imports for a company moving goods between Liberia and Belgium, "diamonds *far in excess of the quality or quantity available in Liberia* had been imported as Liberian in province *and in origin*."⁵⁶ These findings indicated that, in fact, the reporting requirements for importing nations had not stopped the flow of diamonds through illegal streams of commerce.⁵⁷

Beginning in the 1990s, the UN Security Council, in an attempt to stem the conflict diamond trade, issued several resolutions denouncing diamonds purchased from African rebel groups known to be involved in the conflict diamond trade.⁵⁸ In 1998, the Security Council adopted Resolution 1173, which sanctioned diamonds from Angolan rebels,⁵⁹ and also adopted Resolution 1176, which sanctioned diamonds from the RUF.⁶⁰ In 2000, the Security Council adopted Resolution 1306, which banned

⁵³ See CAMPBELL, *supra* note 22, at 126-29.

⁵⁴ See Gendiat: The Diamond High Council, <http://www.diamondmanufacturer.com/tutorial/council.ht> (last visited Feb. 28, 2006).

⁵⁵ See CAMPBELL, *supra* note 22, at 125.

⁵⁶ S.C. Res. 1195, *supra* note 38, at 125.

⁵⁷ See *id.* The UN surmised that these excess diamonds may have been smuggled into Liberia via Sierra Leone and were actually conflict diamonds originating with the rebel group RUF. See *id.*

⁵⁸ See CAMPBELL, *supra* note 22, at 130.

⁵⁹ S.C. Res. 1173, U.N. DOC. S/RES/1173 (June 12, 1998).

⁶⁰ S.C. Res. 1176, U.N. DOC. S/RES/1176 (June 24, 1998).

countries from importing any rough diamonds from Sierra Leone until a certification process was put into place.⁶¹ Likewise, in 2001, the diamond industry responded to pressures from the UN and NGOs by creating the World Diamond Council in Belgium, an organization mandated to speak on behalf of the diamond industry and work with the UN on the conflict diamond issue.⁶² Lawmakers from individual nations also joined the effort to eliminate conflict diamonds.⁶³ In fact, within the U.S., several Congressmen introduced legislation in 2001 to ensure that all diamonds imported to the U.S. were "clean."⁶⁴

Though the efforts of the diamond industry, the UN, and individual nations were well-intentioned, it soon became apparent that they were failing, and that more comprehensive measures were needed to stem the proliferation of conflict diamonds.⁶⁵ Human rights organizations, the UN, the World Bank, and policymakers from individual nations continued to pressure the diamond industry to hold itself accountable for regulating the sources of its diamonds.⁶⁶ In response to the mounting

⁶¹ S.C. Res. 1306, *supra* note 38.

⁶² CAMPBELL, *supra* note 22, at 130.

⁶³ See, e.g., FARAH, *supra* note 16, at 104-07.

⁶⁴ See CAMPBELL, *supra* note 22, at 129-30. In 2001, Congressman Tony Hall and Senator Judd Gregg introduced the Clean Diamond Act. *Id.* The bill passed in the House but was never brought to a vote in the Senate. FARAH, *supra* note 16, at 106. Interestingly, in 2001, the diamond industry spent \$2 million lobbying Congress, the same year in which the Act was introduced. *Id.* See generally Murphy, *supra* note 48 (discussing the international community and U.S. lawmakers' legislative response to the role diamonds played in the armed conflicts in Angola and Sierra Leone).

⁶⁵ See CAMPBELL, *supra* note 22, at 130 (positing that, based on the author's own personal observations in Sierra Leone and discussions with rebel leaders, the legislative measures enacted had virtually no effect on RUF's diamond smuggling activities).

⁶⁶ Block, *You Can Learn a Lot About a Diamond if You Smash*

pressure, the diamond industry joined the UN and governments of diamond-producing nations to form a self-regulating mechanism known as the Kimberley Process.⁶⁷

South Africa, a nation whose diamond industry is one of the world's largest, first organized the Kimberley Process in May 2000.⁶⁸ Key players from the diamond industry, UN representatives, and stakeholding national governments met in Kimberley, South Africa to discuss various plans for eliminating the conflict diamond trade.⁶⁹ A set of regulations, now known as the Kimberley Process Certification Scheme, or KPCS, emerged.⁷⁰

It Up, *supra* note 50, at A1.

⁶⁷ See *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, at 61.

⁶⁸ CAMPBELL, *supra* note 22, at 130; GLOBAL WITNESS, *supra* note 4, at 3; Polishing a Rough Diamond, http://www.southafrica.info/doing_business/economy/key_sectors/diamonds-report2004.htm (last visited Feb. 28, 2006) ("South Africa's world-class mining sector forms the cornerstone of its economy.").

⁶⁹ See CAMPBELL, *supra* note 22, at 130-32 (describing the various plans that were suggested in the discussions on how to accomplish the Kimberley Process's goal, including branding rough diamonds with lasers at their mines of origin, and creating an international database of chemical and physical properties of diamonds from locations where they are found). See also GLOBAL WITNESS, *supra* note 4, at 120-25 (outlining other potential methods and technologies for diamond identification).

⁷⁰ Kimberley Process Certification Scheme, <http://www.kimberleyprocess.com:8080/site/?name=kpcs> (last visited Feb. 28, 2006). However, the conflict diamond issue has been addressed in ways other than the Kimberley Process's certification scheme. Key diamond industry players have become involved in other efforts to stop the illegal trade of diamonds. For example, the Rapaport Group (an international network of companies trading diamonds), Global Witness (an NGO working on the conflict diamond issue), and the U.S. Agency for International Development (an American agency providing foreign assistance) have formed a diggers' cooperative in Sierra Leone that aims to pay workers a fair price for diamonds they

The Kimberley Process requires that each diamond be accompanied from its point of origin by a certificate stating its place of mining, and further prohibits any industry member or nation from purchasing or importing any diamond lacking a certificate affirming that it is "clean."⁷¹ The Kimberley Process is particularly significant in that it combines aspects of self-regulation with UN and individual nations' assistance to form its decision-making and enforcement processes.⁷² This heterogeneous body can be described as a combination of "public and corporate co-regulation" and improves upon the traditional self-regulating bodies that only included industry players.⁷³ De Beers, as an industry representative and member of the Kimberley Process, has pledged to abide by the

find. Clayton Collins, *When Bullets Fly, Some Firms Swoop In*, CHRISTIAN SCI. MONITOR, Dec. 27, 2004, at 13. Efforts such as this have been lauded as enterprising and even brave, as nations like Sierra Leone are still in an uncertain conflict or post-conflict state that discourages most companies from investing. *Id.* However, such cooperatives aim not only to make profits, but also to improve the quality of life of the average diamond worker. *Id.* While still young, such initiatives could prove to augment the Kimberley Process by providing capital and employment in war-torn areas to help those nations rebuild their economies. *Id.*

⁷¹ See Kimberley Process Certification Scheme, *supra* note 70. But see CAMPBELL, *supra* note 22, at 132-33 (suggesting that the Kimberley Process plan for diamond certification may be unworkable because it will require unrealistic organization and honesty, and predicting, for example, low-paid customs officials in Sierra Leone may be easily bribed in the certification process).

⁷² *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, at 61; Kimberley Process Certification Scheme, *supra* note 70.

⁷³ See JUDITH RICHTER, HOLDING CORPORATIONS ACCOUNTABLE: CORPORATE CONDUCT, INTERNATIONAL CODES, AND CITIZEN ACTION 40 (2001) (defining "public and corporate co-regulation" as "regulatory arrangements between industry and government authorities or UN agencies").

certification rules that prohibit it from purchasing any diamond without a certificate ensuring it is conflict-free.⁷⁴

While the Kimberley Process officially began in 2002,⁷⁵ and its long-term success is still somewhat speculative, one recent event suggests that this process of enhanced self-regulation may at least be more effective than previous efforts.⁷⁶ In July 2004, the Kimberley Process affirmed its pledge to "[p]rotect the legitimate diamond industry" by expelling Congo-Brazzaville from its ranks.⁷⁷ The expulsion followed a Kimberley Process committee's discovery that the country's diamond exports far exceeded the number of diamonds that could legitimately be mined by way of legal, conflict-free sources.⁷⁸ Expulsion has serious implications for Congo-Brazzaville, a country that relies heavily on diamond exportation. Expulsion requires that "no shipment of rough diamonds [be] imported from or exported to a non-Participant," which would effectively prohibit the world's main diamond importing nations from legally purchasing Congo-Brazzaville diamonds.⁷⁹ This action has been

⁷⁴ See Collins, *supra* note 70; see also Kimberley Process Certification Scheme, *supra* note 70. Before the institution of the Kimberley Process, De Beers had achieved record levels of sales in 1996 and boasted that increased profits were due to purchases in Angola. CAMPBELL, *supra* note 22, at 113-14. However, this occurred during a period of intense fighting between UNITA rebels and the Angolan government, at which time UNITA controlled 70% of the diamond market. *Id.* See also *id.* at 122 ("The diamond industry knew all along where some of its stones were coming from....").

⁷⁵ See U.N. GAOR, 56th Sess., Annex 8, Agenda Item 37, at 16, U.N. Doc. A/56/775 (Jan. 17, 2002); Maggi, *supra* note 47, at 531.

⁷⁶ See *infra* notes 77-9 and accompanying text.

⁷⁷ U.N. GAOR, *supra* note 75, at 3.

⁷⁸ See *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, at 61. See also Congo-Brazzaville, <http://eia.doe.gov/emeu/cabs/congo.html> (last visited Feb. 28, 2006).

⁷⁹ Congo-Brazzaville, *supra* note 78; List of Participants,

lauded as a “test case for the [diamond] industry,”⁸⁰ as it indicates that the Kimberley Process not only has a regulatory function but also an enforcement mechanism that it will not hesitate to implement when necessary.

C. Antitrust Charges and De Beers's Reaction

Through the careful manipulation of other industry players and gradual purchasing of diamond interests internationally, De Beers has grown to control most of the world's diamond supply.⁸¹ Some have classified De Beers as an international cartel,⁸² as it certainly exhibits many of the characteristics of one.⁸³ In fact, De Beers's tight

<http://www.kimberleyprocess.com:8080/site/?name=participants> (last visited Feb. 28, 2006).

⁸⁰ *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, at 61. In fact, evidence indicates that Congo-Brazzaville may be taking its expulsion from the KPCS quite seriously. In August 2004, Congo-Brazzaville's president Denis Sassou Nguesso announced measures to overhaul the diamond trade in his country. *Nguesso's New Tack on Diamonds*, AFRICA MINING INTELLIGENCE, Sept. 1, 2004, at 91.

⁸¹ See DEBORA L. SPAR, *THE COOPERATIVE EDGE: THE INTERNAL POLITICS OF INTERNATIONAL CARTELS* 42 (1994); *Rough Diamond Sales Rose 40% in '86, DeBeers Says*, *supra* note 5, at 27. De Beers became a private company in 2001; the Oppenheimer family owns 45%, Anglo American PLC owns 45%, and Debswana owns 10%. See Wilke, *De Beers is in Talks*, *supra* note 23, at A1.

⁸² Professor Spar has identified De Beers as the leading member of the diamond cartel. She explains that the cartel's strategy is characteristic of all cartels: restricting the quantity of an item (diamonds) released into the market and thereby maintaining the illusion of diamonds as a scarce resource. SPAR, *supra* note 81, at 41.

⁸³ See SPAR, *supra* note 81, at 39-87. International cartels have an effect that victimizes consumers around the globe. James M. Griffin, *An Inside Look At A Cartel At Work: Common Characteristics of International Cartels*, American Bar Association, Section of Antitrust Law, 48th Annual Spring Meeting, Omni Shoreham Hotel, Washington, D.C., at 15 (April 6, 2000).

control over diamond supply and demand provides persuasive evidence of its resemblance to a cartel.⁸⁴

De Beers controls the world's diamond supply by buying most of the world's rough diamonds and stockpiling them in its London warehouse.⁸⁵ The corporation then sells only enough diamonds to meet demand (a strategy which arguably has continued throughout the years); when demand goes up, De Beers increases the price.⁸⁶ De Beers further seeks to restrict diamond sales by selling only a limited number of diamonds to preferred customers through a process shrouded in secrecy and known as "selling sights."⁸⁷ Through this process, De Beers selects buyers, limits the quantity it will sell to each, determines the diamonds' quality, and sets the price.⁸⁸ The buyers may either accept or decline the entire grouping of diamonds they are offered.⁸⁹ De Beers does not permit negotiation, and in practice, no buyer refuses.⁹⁰

De Beers's impact on the market is also evident through its heavy involvement in diamond marketing

⁸⁴ See SPAR, *supra* note 81, at 52-6.

⁸⁵ See *id.* at 54-6.

⁸⁶ See LENZEN, *supra* note 14, at 192; *Rough Diamond Sales Rose 40% in '86, De Beers Says*, *supra* note 5, at 27 (explaining that De Beers raises prices when the demand for diamonds goes up, even though the corporation will not publicly admit this). See also LENZEN, *supra* note 14, at 200 (describing how the Syndicate controls both the price of rough diamonds on the closed market, and the price of rough diamonds on the free market).

⁸⁷ See SPAR, *supra* note 81, at 54-55.

⁸⁸ See *id.* at 55.

⁸⁹ See *id.*

⁹⁰ See LENZEN, *supra* note 14, at 200-201 (describing De Beers's practice of selling "sights" to only a limited number of very high-powered buyers). See also KANFER, *supra* note 1, at 3-4 (describing the ritual and secrecy of a "sight" distribution, and the fate of one sightholder who refused to buy what De Beers was offering).

through the CSO. The corporation's emphasis on marketing is so pervasive that it has had a significant impact on the worldwide demand for diamonds as jewelry.⁹¹ The CSO spends roughly \$200 million each year on diamond marketing⁹² and is responsible for the famous advertising campaign, "a diamond is forever," one of the most successful marketing slogans in history.⁹³

De Beers's tight grip on the diamond market has led to accusations, dating as far back as 1945, that the company violated U.S. antitrust laws.⁹⁴ De Beers first ceased direct

⁹¹ See *The Diamond Cartel – The Cartel Isn't For Ever*, *supra* note 9, at 62 ("Consumers believe diamonds are valuable largely because of decades of clever marketing by De Beers and its clients."). De Beers's marketing arm is also powerful enough to spark business moves by other industry competitors. See Melanie Kletter, *An Industry in Transition*, WOMENSWEAR DAILY, Jan. 27, 2003, at 6 (identifying De Beers as the impetus for diamond suppliers' move to marketing their own branded diamonds, as well as crediting the company with driving the record sales of three-stone diamond jewelry in the 2002 holiday season).

⁹² FARAH, *supra* note 16, at 21.

⁹³ See *Top 10 Slogans*, ADVERTISING AGE, March 29, 1999 (lauding De Beers's famous slogan as the most effective slogan of the 20th century). See also Barry Kaplan, *Forever Diamonds*, <http://www.jewelry-paideia.com/reference/ref-diamond-jewelry-2.php> (last visited Feb. 28, 2006) (discussing De Beers's successful advertising).

⁹⁴ See Dustin Dwyer, *Diamond in the Rough: Why U.S. Should Let in DeBeers*, ORLANDO SENTINEL, Mar. 15, 2004, at A15. See also 15 U.S.C. § 1 (2004); 1-2 JULIAN O. VON KALINOWSKI, ET. AL., ANTITRUST LAWS AND TRADE REGULATION § 2.01 (Matthew Bender & Co., Inc., 2d ed. 2005). The U.S. Department of Justice and the Federal Trade Commission have dual authority to enforce antitrust laws. See ANTITRUST § 76.01 The basis for applying American antitrust law to entities such as DeBeers that were technically based beyond U.S. borders (DeBeers is based in South Africa and Switzerland) originally rested on the "territorial principle," which allows a state sovereignty over acts that occur outside its territory when the effects reach into the state. See Walter Siegl, *International Courts Before American Courts*:

operations inside the U.S. just after World War II when the U.S. Department of Justice brought antitrust charges against the corporation for 'conspiring to restrict production, monopolize sales and arbitrarily inflate prices of 95 percent of the world output of gem and industrial diamonds.'⁹⁵ As a large, multinational corporation, De Beers was easily able to relocate its operations to other countries. By leaving the U.S., De Beers was able to both escape the reach of U.S. law enforcement and ignore the charges from a safe distance at its two main corporate bases in Switzerland and South Africa.⁹⁶

In 1994, the U.S. Department of Justice again issued charges against De Beers, alleging that the corporation had entered into a criminal conspiracy in the early 1990's with General Electric Co. The Department of Justice investigations unearthed evidence that De Beers had conspired with General Electric Co. to raise the list prices of industrial diamonds worldwide in violation of the Sherman Act,⁹⁷ resulting in the two companies together

The Issue of International Jurisdiction 18-20 (1965) (unpublished Master of Laws thesis, Tulane University) (explaining the territorial principle as a basis for charges against international cartels). The territorial principle was refined to an effects-based test in one Supreme Court case where the Court explained that the Sherman Act and U.S. antitrust law apply only to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

⁹⁵ See Wilke, *De Beers is in Talks*, *supra* note 23, at A1. See Dwyer, *supra* note 94, at A15.

⁹⁶ CAMPBELL, *supra* note 22, at 117; Wilke, *De Beers is in Talks*, *supra* note 23, at A1. However, reentering the U.S. market will likely put the company back under the scrutiny of the Department of Justice and it will require the company to take care not to tread on U.S. antitrust laws. See generally Montpelier, *supra* note 25 (providing a more detailed analysis of U.S. antitrust law and how De Beers has been particularly affected).

⁹⁷ 15 U.S.C. § 1.

controlling 80% of the world market for industrial diamonds.⁹⁸ Both companies were indicted, though De Beers again ignored the charges and avoided direct contact with the U.S. by remaining outside the country and accessing U.S. diamond customers through middlemen.⁹⁹

The U.S. government has clearly expressed its opinion regarding the legality of some of De Beers's past practices; even the fact that the Department of Justice, in its discretion, chose to level criminal sanctions against the company rather than a civil alternative indicates the seriousness with which the government views De Beers's antitrust violations.¹⁰⁰ Historically, the Department of Justice's Antitrust Division has only used criminal indictments for antitrust violations in cases involving "agreements among competitors to fix prices, rig bids, or allocate customers and territories."¹⁰¹ Therefore, if De Beers wishes to reenter the U.S. market in a visible way, it

⁹⁸ Indictment, *United States v. General Electric Company*, 1994. See also William M. Carley, *Fired Officer Who Accused GE of a Plot to Fix Diamond Prices Drops Lawsuit*, WALL ST. J., Feb. 17, 1994, at A2 (describing how antitrust allegations started with a former General Electric employee who, incidentally, retracted his statements against the company just before the trial started); *DeBeers Sees Sales Drop Because of the Recession*, WALL ST. J., Apr. 29, 1992 (explaining the Department of Justice's allegations against De Beers). General Electric also came under fire from its shareholders for allegedly conspiring with De Beers, who was its leading industrial diamond competitor at the time, to eliminate competition. See *General Electric Co. v. Welch*, 12/30/92 N.Y.L.J. 27 (Dec. 30, 1992).

⁹⁹ See 2 JAMES ATWOOD ET AL., *ANTITRUST & AM. BUS. ABROAD* § 15:3 (3d ed. 2004) (referring to this case as "[a]n early example of renewed assertiveness of the Justice Department in [the area of bringing criminal charges for antitrust violations]").

¹⁰⁰ See Siegl, *supra* note 93, at 13.

¹⁰¹ David H. Marks, *Anti-Trust Enforcement in the U.S.*, in *INTERNATIONAL ANTI-TRUST LAW* 162-63 (Julian Maitland-Walker ed. 1984).

will not only be subject to U.S. laws (which previously prohibited De Beers's monopolistic conduct), but also the *enforcement* of those laws.¹⁰²

Avoiding U.S. contact was of no small consequence, as the U.S. constitutes one of the largest diamond-consuming nations in the world.¹⁰³ In July 2004, De Beers finally answered the 1994 charges, ending what one reporter referred to as a "60-year-long-impasse."¹⁰⁴ The company quietly paid \$10 million in a U.S. federal court to settle the matter, stating with obvious concern, "[t]he U.S. is the biggest market for diamond jewelry – accounting for 50% of global retail jewelry sales – and we would *really, really like* to resolve these issues."¹⁰⁵

II. ANALYSIS

A. Regulation Theory

¹⁰² Siegl, *supra* note 93, at 18-20.

¹⁰³ See Wilke, *De Beers is in Talks*, *supra* note 23, at A1. The international diamond industry is a \$6 billion/year industry and the market sells 50% of its diamonds to American consumers; see generally CAMPBELL, *supra* note 22, at xx.

¹⁰⁴ *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, at 60. Compare United States Department of Justice, *DeBeers Centenary AG Pleads Guilty to Price-Fixing Indictment*, http://www.usdoj.gov/atr/public/press_releases/2004/204592.htm (last visited Feb. 28, 2006) (U.S. Department of Justice press release announcing De Beers decision to plead guilty), with DeBeers Centenary AG, *DeBeers Reaches Settlement With U.S. Department of Justice*, <http://www.debeersgroup.com/NR/rdonlyres/F3D020E7-99ED-4DDE-9E6E-CC3569B65FC5/161/MR200407131.pdf> (last visited Feb. 28, 2006) (De Beers press release announcing company's decision to plead guilty).

¹⁰⁵ Wilke, *De Beers is in Talks*, *supra* note 23, at A1 (emphasis added).

The recent growth of corporations in the international sphere has led to new questions regarding how they fit in with laws and regulations promulgated by national governments and international bodies.¹⁰⁶ Traditionally, businesses remained domestic, allowing national governments to regulate the business entities within their borders. However, an increase in global commerce has meant that it may no longer be beneficial for businesses to confine themselves within national borders. Instead, many businesses operate within multiple countries where they may be subject to a web of differing laws and regulations.¹⁰⁷ Scholars generally agree that there exists a need to regulate multinational corporations.¹⁰⁸ However, theorists have not yet reached a consensus as to how regulations should be promulgated and enforced in the global market.¹⁰⁹

Self-regulation in particular has emerged in recent years as one viable alternative to external regulation, as it gives industries the opportunity to control the regulation process.¹¹⁰ Proponents argue that it helps avoid the

¹⁰⁶ JUDITH RICHTER, HOLDING CORPORATIONS ACCOUNTABLE: CORPORATE CONDUCT, INTERNATIONAL CODES, AND CITIZEN ACTION 8 (2001).

¹⁰⁷ See Virginia Haufler, *Globalization and Industry Self-Regulation*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 227-8 (Miles Kahler & David A. Lake eds., 2003). The UN addressed this problem in 1999 when it stated, "[m]ultinational corporations are already a dominant part of the global economy – yet many of their actions go unrecorded and unaccounted . . . They need to be brought within a frame of global governance, not just a patchwork of national laws, rules and regulations." RICHTER, *supra* note 106, at 14.

¹⁰⁸ See RICHTER, *supra* note 106, at 18, 24.

¹⁰⁹ *Id.* at 11. See, e.g., *id.* at 22 (discussing several sources suggesting that self-regulation is insufficient and international regulations are needed).

¹¹⁰ See VIRGINIA HAUFLE, A PUBLIC ROLE FOR THE PRIVATE

tendency of multinational corporations to move their businesses to countries with weaker regulations, and that it provides an opportunity to balance the interests of business and society without excessive government intervention in the economy.¹¹¹ Two ideas have perpetuated the trend toward self-regulation: 1) a growing sense of corporate responsibility, evidenced by industry codes, suggests that external regulation may no longer be necessary, and 2) the increased power of transnational corporations is such that external regulation may no longer be plausible.¹¹² However, self-regulation has also been criticized by some who argue that regulations promulgated by industries or companies themselves are weak and essentially unenforceable.¹¹³

B. The Kimberley Process and its Effects on De Beers

Professor Virginia Haufler theorizes that companies are more likely to choose to participate in self-regulatory schemes when there is a risk of national or international regulation, when pressure from international activists affects the company's reputation, or when reputation is an important asset of the industry or corporation.¹¹⁴ De

SECTOR: INDUSTRY SELF-REGULATION IN A GLOBAL ECONOMY 15-19 (2001).

¹¹¹ *Id.* at 2, 4.

¹¹² RICHTER, *supra* note 106, at 31.

¹¹³ See HAUFLER, *supra* note 110, at 2.

¹¹⁴ HAUFLER, *supra* note 110, at 3, 106-8. Organizations like the UN and NGOs like Global Witness are charged with the explicit task of creating laws that protect citizens, promote fairness, and ensure smooth trade and market stability so naturally, international regulatory bodies such as the UN would support public and corporate co-regulatory bodies such as the Kimberley Process. See, e.g., Global Witness, <http://www.globalwitness.org> (last visited Feb. 28, 2006). However, it may be difficult to understand why a multinational corporation like De Beers, who had grown accustomed to a high level of self-determination, would choose to adopt such a process, knowing

Beers's choice to participate in the Kimberley Process's public and corporate co-regulatory scheme is best explained in light of the convergence of these factors, particularly the diamond industry's reliance on its reputation.¹¹⁵ The negative publicity, generated by NGOs and surrounding the conflict diamond issue, had threatened to tarnish diamonds' crystal clear image as symbols of love and romance. The company was in no position to allow public outcry or a possible boycott to affect its reputation.¹¹⁶ Had De Beers refused to adopt the process, it would have risked association with the bloody wars that the conflict diamond trade has perpetuated.¹¹⁷

C. U.S. Antitrust Charges

Although the Kimberley Process was aimed at reducing the conflict diamond trade, it has had the

that it would necessarily involve the presence of industry outsiders in the regulation process. SPAR, *supra* note 81, at 42. In fact, the Kimberley Process was likely a threat to De Beers's autonomy, as the company previously relied on a lack of transparency in its practices in order to increase its profits through purchasing conflict diamonds. CAMPBELL, *supra* note 22, at 113-4.

¹¹⁵ See *infra* note 116 and accompanying text.

¹¹⁶ *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, AT 61. See also Haufler, *supra* note 110, AT 3, 26-27.

¹¹⁷ See *id.*; see also CAMPBELL, *supra* note 22, at 115-16, 208-09 (indicating that diamond industry leaders participated in Kimberley Process talks out of fear of a public backlash that would forever taint the idea of diamonds as symbols of love and romance). However, evidence indicates that the negative publicity has not affected consumers' demand for diamonds as jewelry. See *id.* at 209. Tom Shane, American diamond importer, has said that customers appear oblivious to the issue of conflict diamonds: "Even with all the articles that have been written, we don't hear it in our stores being raised as an issue." *Id.* In fact, author Greg Campbell suggests that De Beers may have managed to use the conflict diamond issue to its advantage by addressing the problem and then by adopting a process by which it ensures that all De Beers diamonds are clean. See *id.* at 134.

additional and unintended effect of loosening De Beers's grip on the diamond industry. As a result of the introduction of the Kimberley Process's public and corporate co-regulation, De Beers has been required to overhaul its business practices. This rethinking of corporate strategies culminated in De Beers's decision to ultimately answer ten-year-old criminal charges in the United States.¹¹⁸ A consulting firm that reviewed the corporation's business strategy recommended that it abandon its current practice of controlling rough diamond supply,¹¹⁹ suggesting that the company instead market its diamonds as the premier diamonds in the luxury goods market.¹²⁰ De Beers has since significantly reduced its London stockpile,¹²¹ pled guilty to charges of price fixing (thereby positioning itself for a more direct marketing role in the U.S.), and entered into an agreement with a luxury goods company to market its diamonds.¹²²

¹¹⁸ Wilke, *De Beers is in Talks*, *supra* note 23, at A1. One De Beers representative stated, "it was apparent by 2000 that diamonds were beginning to lose out to other luxury goods. Our sales were flat, and other luxury goods were taking off." *Id.* See also *id.* ("The review concluded that a transformation of De Beers into a luxury-goods company would require a direct presence in the U.S. and a brand name unfettered by antitrust charges or 'conflict' diamonds."). Note that other factors may have contributed to De Beers's recent change in strategy, including the increase of competitors and the ever-changing political conditions in diamond rich African nations. See *The Diamond - Cartel The Cartel Isn't For Ever*, *supra* note 9, at 60-2.

¹¹⁹ Wilke, *De Beers is in Talks*, *supra* note 23, at A1.

¹²⁰ *Id.*

¹²¹ *Id.* After DeBeers hired a consulting company to review its finances and market strategies, it reduced its stockpile by a fourth. CAMPBELL, *supra* note 22, at 134.

¹²² Wilke, *De Beers is in Talks*, *supra* note 23, at A1. In the past four years, De Beers has made significant changes in its business strategy. See *id.* De Beers contracted with LVMH Moët Hennessy Louis Vuitton SA of Paris to establish a retail outlet. *Id.*

Answering U.S. criminal charges is proving to be an important move for the company as it signals an about-face in its current business strategy with respect to the United States. Having settled the antitrust charges, the company can now legally advertise directly in the U.S. and will gain more convenient access to U.S. consumers.¹²³ However, De Beers also faces substantial risks in accepting jurisdiction in the U.S. Most significantly, by reentering the U.S. legally, De Beers faces the likelihood of additional litigation.¹²⁴ The company currently faces several private antitrust suits which have been filed in the U.S., and it could face additional antitrust suits in the near future.¹²⁵ Even in the light of future litigation, one journalist mused, "[t]he company has apparently decided that it is worth the legal risk to regain direct access to its largest market."¹²⁶

D. Effectiveness of the Kimberley Process

On the conflict diamond issue, the Kimberley Process has required De Beers to change its practices dramatically. Although for years De Beers had failed to thwart the conflict diamond trade, upon introduction of the Kimberley Process, the corporation has begun to comply

¹²³ See Margaret Webb Pressler, *De Beers Pleads to Price-Fixing*, WASH. POST, July 14, 2004, at E1; Williams, *supra* note 8, at 79.

¹²⁴ John R. Wilke, *De Beers to Pay \$10 Million Fine, Ending Price-Fixing Lawsuit*, WALL ST. J., July 14, 2004, at A10.

¹²⁵ See Wilke, *De Beers is in Talks*, *supra* note 23, at A1. See, e.g., *Leider v. Ralfe*, 2004 U.S. Dist. LEXIS 15345 (S.D.N.Y. July 30, 2004).

¹²⁶ Wilke, *De Beers is in Talks*, *supra* note 23, at A1. More positively, De Beers executives will have the freedom to travel more freely within the U.S., which will allow for a renewed presence that could ultimately lead to a more aggressive marketing campaign directed toward U.S. consumers. See *The Diamond Cartel – The Cartel Isn't For Ever*, *supra* note 9, at 60.

fully with a host of self-regulatory provisions that strive to completely ban the mining and trade of conflict diamonds.¹²⁷ Additionally, De Beers has since announced its intentions to better scrutinize the origins of its diamonds and to certify that all De Beers diamonds are conflict-free.¹²⁸ Although the Kimberley Process was intended to stem the conflict diamond trade, it has also indirectly contributed to De Beers's reentry into the U.S. market, necessitating a guilty plea for past antitrust violations and future compliance with U.S. regulations. It was not until the presence of the Kimberley Process's public and corporate co-regulatory initiative that De Beers chose to comply with U.S. antitrust laws and submit to U.S. jurisdiction.¹²⁹

When the U.S. issued antitrust charges against De Beers in 1994, the company chose to ignore them and was still able to build its empire and increase profits exponentially without altering its business practices.¹³⁰ Without the international community's support or some form of self-regulation, the U.S. was free to issue charges, but powerless to enforce its antitrust regulations because of the global extent of De Beers's business.¹³¹ The Kimberly Process has allowed for the involvement of multiple players in an industry once controlled by a single corporation's

¹²⁷ See Kimberley Process Certification Scheme, *supra* note 70.

¹²⁸ NEIL BEHRMANN & ROBERT BLOCK, *DE BEERS TO ABANDON MONOPOLY, AIM AT NEW ROLE IN DIAMONDS*, Wall St. J., July 13, 2000, at A20. Some have even suggested that De Beers' reentry into the U.S. diamond market and its renewed presence may cause for increased Department of Justice control over the corporation, and potentially to its demise. See Dwyer, *supra* note 94, at A15 ("Once the department lets De Beers in, it may finally be able to take the company down.").

¹²⁹ See *supra* notes 114-117 and accompanying text.

¹³⁰ See *supra* notes 95, 98 and accompanying text.

¹³¹ See *supra* notes 81-105 and accompanying text.

interests, and has brought the international scrutiny that has signaled to De Beers it would no longer be able to operate behind the closed doors of foreign countries. De Beers's experience with the Kimberley Process reveals that industry-wide public and corporate co-regulatory schemes, acting in concert with national and international regulations, may be more effective than national laws when dealing with multinational corporations similar to De Beers.

Both the institution of the Kimberley Process and the criminal charges brought against De Beers may prove to threaten the company's prior hegemony within the industry; however they may also likely encourage the company to review its strategies which may ultimately cause it to place more emphasis on consumers.¹³² Although it appears that the antitrust charges alone proved ineffective in inducing the company to change its behavior,¹³³ the way in which the company dealt with the U.S. charges suggests that when dealing with large, multinational companies, domestic legal action may not prove effective in coercing such companies to alter their corporate behaviors. Indeed, when De Beers ultimately pled guilty, this corresponded with a number of changed circumstances within the diamond industry, including the increase of competitors

¹³² Wilke, *De Beers is in Talks*, *supra* note 23, at A1 ("De Beers's efforts to transform itself began in the late 1990s after a strategic review by U.S. management consultants Bain & Co. With De Beers's share of diamond production slipping and the cost of maintaining its stockpile rising, Bain recommended that De Beers abandon its role as industry enforcer and boost demand for diamonds by burnishing the De Beers brand name."). *See also* Montpelier, *supra* note 25.

¹³³ *See supra* notes 81-105 and accompanying text.

and, most notably, the institution of the Kimberley Process as a public and corporate co-regulatory initiative.¹³⁴

Professor Haufler theorizes that industry self-regulation is likely to be successful when there is a threat of national or international regulation, international activism threatens the industry's reputation, and product image is a crucial component of that industry's marketability.¹³⁵ The case of De Beers bears out her theory, but also suggests that heterogeneous regulatory schemes may be effective in generally bringing multinational companies within the ambit of domestic laws.

III. PROPOSAL

A. *The Kimberley Process and Conflict Diamonds*

By following through with its plan to impose sanctions on non-complying countries,¹³⁶ the Kimberley Process has indicated to the world that it has the ability to exert real control over the diamond industry and its key

¹³⁴ See *supra* note 117 and accompanying text. The 1990s saw the entry of new competition who were unwilling to play by De Beers's old unchallenged rules. See *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, at 61 (explaining that De Beers's "ability to control world supplies is dwindling."); Wilke, *De Beers is in Talks*, *supra* note 23, at A1 (Russia, Canada, and Australia have become diamond producers, "gradually loosening the De Beers cartel's grip on global diamond supply and pricing."). See also CAMPBELL, *supra* note 22, at 133, 135 (crediting De Beers's loss of control over the industry to the discovery of diamond fields in Canada following a 1999 diamond rush); KANFER, *supra* note 1, at 369 (identifying diamonds discovered in Yakutia, Siberia as a threat to De Beers); *The Diamond Cartel - The Cartel Isn't For Ever*, *supra* note 9, at 61-2 (discussing Lev Leviev's, a main competitor of De Beers increased presence in the industry).

¹³⁵ See *supra* note 114 and accompanying text.

¹³⁶ See *supra* notes 77-80 and accompanying text (discussing the Kimberley processing expelling Congo-Brazzaville).

players. In fact, statistics indicate that the Kimberley Process may already be lowering the incidence of illegally smuggled diamonds, thus benefiting the nations where they originate. In Sierra Leone, official diamond exports almost doubled in 2004 from the previous year, totaling a taxable income of \$126 million.¹³⁷ For proponents of the Kimberley Process, this marked a vast improvement and signaled its success. The recently-published *Diamond Industry Annual Review* for Sierra Leone explained that the Kimberley Process is largely responsible for the increase in diamonds traveling through legitimate channels: “[h]ardly anyone, including government officials, attributes (the rise in diamond exports) to internal curbs on illicit diamonds mining and smuggling, both of which continue to thrive.”¹³⁸ Although Kimberley Process participants and observers would like to see the end of smuggled diamonds entirely, the early signs of the program’s success are encouraging. Such success may further indicate that the Kimberley Process has the ability to remedy the one hurdle that has plagued the international community in its past attempts to address the conflict diamond problem – the lack of an enforcement mechanism.¹³⁹

In order to ensure it attains its goal of eliminating the conflict diamond trade, the Kimberley Process will

¹³⁷ *Diamonds Shine Brighter*, *supra* note 22.

¹³⁸ *Id.* An increase in legal diamonds has multiple benefits for Sierra Leone, a nation ravaged by war, including increased taxable wealth and improvement of the nations’ foreign exchange reserves. *Id.*

¹³⁹ See Maggi, *supra* note 47, at 545 (suggesting that the implementation of the Kimberley Process is encouraging because the international community’s support indicates that it has become a global priority to end the trade in conflict diamonds). See also GLOBAL WITNESS & PARTNERSHIP AFRICA CANADA, *supra* note 45, at 1 (positing that the establishment of an “auditable trail” standard for diamonds from mine to export location is essential to the Kimberley Process’s success).

need to take the further step of closely monitoring diamond producing countries to ensure that countries such as Congo-Brazzaville do not bypass the process and find ways to smuggle illegal diamonds into the world market. Such a step will require serious dedication, as it is the countries themselves who are key players in enforcing the Kimberley Process's regulations.¹⁴⁰

For the Kimberley Process to be successful and slip permanently into the place of hegemony that De Beers once held in the industry, it will need to demonstrate a sincere willingness to follow through on the obligations it has imposed. Though a country may issue regulations, the factor predictive of success is whether the regulations can be enforced.¹⁴¹ Therefore, it will be necessary for the Kimberley Process to ensure that countries such as Congo-Brazzaville are unable to gain access to the buyers of rough diamonds, and also that such buyers, of their own accord, refuse to trade with such countries. There may be a significant temptation for low-paid officials to issue false certificates for diamonds being illegally imported or exported, especially in impoverished nations.¹⁴² As such, individual nations should remain vigilant in ensuring that their officials not succumb to the bribery and corruption

¹⁴⁰ Kimberley Process Certification Scheme, *supra* note 70. Some critics have been skeptical of diamond certification as a method for eliminating conflict diamonds, as one such critic has suggested that the plan is highly unworkable. See CAMPBELL, *supra* note 22, at 132-3 (suggesting that the necessary level of organization and honesty in the industry is impossible and predicting that foreign customs agents will be susceptible to bribes in exchange for false certification papers).

¹⁴¹ See *supra* notes 81-85 and accompanying text (discussing antitrust charges filed against De Beers, the company's subsequent withdrawal from the U.S., and the Department of Justice's inability to enforce adjudicatory jurisdiction).

¹⁴² See Maggi, *supra* note 47, at 532.

that would allow such diamonds to change hands illegally.¹⁴³

B. Lessons from De Beers

Arguably, the Kimberley Process has proven to be the most successful attempt to solve compliance and human rights issues in the diamond industry. The diamond industry's dependence on its product's image undoubtedly induced De Beers to align itself with U.S. and international trade, antitrust laws, and human rights objectives. It is also possible that a heterogeneous approach, similar to that of the Kimberley Process, would prove successful in changing the practices of similar industries, whose corporate reputations are of the utmost importance.

Globalization among industries is unlikely to slow, a reality that presents new problems for nations attempting to catch companies in their regulatory and judicial hands before those companies slip into the boundaries of more

¹⁴³ See, e.g., Amanda Bryant Banat, Note, *Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin*, 19 ARIZ. J. INT'L & COMP. L. 939, 974 (2002) (suggesting that the U.S. has a particular responsibility to answer to citizens of nations torn by diamond-fueled war, and must heavily monitor diamond imports). In a report prepared by Global Witness and Partnership Africa Canada (organizations primarily involved in lobbying for the elimination of conflict diamonds), the organizations made specific recommendations as to how each of the seven major diamond producing, importing, and trading countries should ensure that conflict diamonds do not enter or exit their borders. GLOBAL WITNESS & PARTNERSHIP AFRICA CANADA, *supra* note 45; see generally *Diamonds and Human Security*, <http://www.pacweb.org/e/index.php?option=content&task=view&id=38&Itemid=61> (last visited Feb. 28, 2006); Summary of Conflict Diamond Campaign, <http://www.globalwitness.org/campaigns/diamonds/> (last visited Feb. 28, 2006).

lenient nations. Future scholarship will be needed in order to examine the extent to which public and corporate co-regulatory schemes might be utilized to better increase regulatory compliance of multinational corporations. Such scholarship should focus its efforts on evaluating the usefulness of implementing heterogeneous regulatory bodies such as the Kimberley Process when attempting to secure regulatory compliance from other global industries that also rely heavily on reputation.

CONCLUSION

Prior to the implementation of the Kimberley Process, De Beers was the lone hegemon of the diamond industry, wielding control over diamond supply and demand internationally, and shielding the operations of the diamond trade beneath a cloak of secrecy.¹⁴⁴ The corporation could not be compelled to conform its business practices to U.S. antitrust laws even in light of criminal sanctions.¹⁴⁵ It chose to abandon direct operations in the U.S. rather than answer to the charges.¹⁴⁶ However, with the creation of the Kimberley Process, an enhanced self-regulatory scheme involving a heterogeneous group of industry stakeholders, the company has begun to change its operations.¹⁴⁷ It is now currently complying with the regulations intended to eliminate conflict diamonds and, in participating in the process, has submitted to legal enforcement.¹⁴⁸ The Kimberley Process is likely to be

¹⁴⁴ See *supra* notes 23-26 and accompanying text (explaining De Beers's structure and place within the industry).

¹⁴⁵ See *supra* note 95 and accompanying text.

¹⁴⁶ See *supra* notes 94-96 and accompanying text.

¹⁴⁷ See *supra* notes 118-122 and accompanying text (discussing changes De Beers has recently made in its business structure).

¹⁴⁸ See *supra* notes 114-117 and accompanying text (explaining De Beers's participation in the Kimberley Process).

highly successful in reducing the proliferation of conflict diamonds and also may positively affect the diamond industry as a whole.¹⁴⁹ In fact, most evidence indicates that De Beers has already lost most of its industry hegemony to the more democratic Kimberley Process, which will hopefully allow for increased competition in the diamond industry. With more control over De Beers, hopefully buyers will be free to negotiate prices in a competitive, transparent market where a diamond's true origin is more readily ascertainable.¹⁵⁰

The marked difference in the way De Beers has responded to various attempts at regulation indicates that an enhanced self-regulation scheme may be more effective than unilateral action in inducing large, multinational corporations to change their corporate practices.¹⁵¹ Furthermore, De Beers' involvement in the Kimberley Process's enhanced self-regulatory process suggests that when reputation is a significant part of an industry, as argued by Professor Haufler, multinational corporations are

¹⁴⁹ One report seems to suggest that other industry concerns form an additional impetus for key players to alter practices. See GLOBAL WITNESS, *supra* note 4, at 6 (identifying industry concerns about competition from synthetic diamonds and the synthetic filling of imperfections as one reason for the industry's willingness to certify natural diamonds).

¹⁵⁰ In anticipation of Valentine's Day 2006, journalist Ron Lieber advised consumers to avoid purchasing conflict diamonds and predicted that increased celebrity publicity, such as that from rapper Kanye West's Grammy-nominated "Diamonds from Sierra Leone" and actor Leonardo DiCaprio's upcoming "Blood Diamond," would bring the conflict diamond issue to the public's view. See Ron Lieber, *Between a Rock and a Hard Place: 'Conflict Diamonds' Emerge – but Should You Believe It?*, WALL ST. J., Feb. 4, 2006, at B1.

¹⁵¹ See *supra* notes 130-135 and accompanying text.

more likely to join self-regulation or public and corporate co-regulatory schemes and comply with their policies.¹⁵²

¹⁵² See *supra* notes 114-117 and accompanying text (outlining Professor Haufler's theory and how De Beers's actions indicate that she may be correct).

