

# Polishing Up the Diamond Trade: How to Revitalize the Kimberley Process

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## I. INTRODUCTION

Creating an auxiliary category of standards to function in conjunction with the Kimberley Process Certification Scheme (KPCS) represents a useful means to enhance the scope and effectiveness of the existing regulation of the natural jewelry-quality diamond<sup>1</sup> industry. This Note will begin with an explication of the origins of the international diamond trade, with an emphasis on De Beers, the West African civil wars, and the Kimberley Process. Then follows an analysis of the KPCS’s efficacy and the impact of more recent developments in the diamond industry since its inception. Finally, this Note recommends new ethics standards be added to the KPCS via an additional “suggestion” category, which I term “KPCS Plus,” that could (1) act as a trial run for potential new measures to incorporate into the larger KPCS, (2) offer internationally sanctioned ways for diamond sellers to distinguish their product as “ethical,” (3) suggest ways for member countries to ensure ethical sourcing for their diamonds, and (4) draw non-governmental organization (NGO) watchdogs back into the KPCS.

## II. BACKGROUND

### A. *The History of the Early Diamond Trade: Colonial Roots and the De Beers Monopoly*

Though diamonds have been discovered around the world, the origins of the international diamond trade are located within the borders of modern-day South Africa, in a portion formerly known as Cape Colony.<sup>2</sup> The land was under Dutch colonial control from 1652 to 1806, except for a period of British control from 1795 to 1803 due to the Napoleonic Wars.<sup>3</sup> The Netherlands ceded the land to Britain in 1806—or perhaps the British merely occupied it until the Dutch gave up—and diamonds were discovered at

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1. Unless otherwise stated, all discussion of diamonds in this note refers exclusively to jewelry-quality gems. Though there are many industrial uses for diamonds, the stones used for these purposes are of poorer quality and have no relevance for the analysis in this Note. See discussion *infra* Section II.B.

2. *History of Slavery and Early Colonisation in South Africa*, S. AFR. HIST. ONLINE (Dec. 2, 2019), <https://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa> [<https://perma.cc/RUB8-VJ5U>].

3. *Id.*

Kimberley in 1867.<sup>4</sup>

It was a few years after this find when the diamond trade began in earnest. Two brothers, farmers Diederick Arnoldus and Johannes Nicholas de Beer, sold their land to Dunell Ebdon & Co., a mining company, in 1871.<sup>5</sup> This humble farmland became the site for two of the most famous and prolific diamond mines in the world: the De Beers Mine and the Kimberley Mine.<sup>6</sup> An entrepreneur named Cecil Rhodes amassed land in the De Beers Mine and created the De Beers Mining Company in 1880 to manage his mining interests.<sup>7</sup> His takeover was not hostile; rather, Rhodes managed to convince other landowners to sell him their De Beers plots “in exchange for exclusive purchasing rights from him so that they could, in turn, resell the diamonds at set prices and in specific quantities.”<sup>8</sup> Thus, Rhodes had already created the essence of the modern diamond cartel by collaborating with distributors to restrict supply and maintain artificially inflated prices.<sup>9</sup>

The next step in De Beers’s evolution came in 1929, after Rhodes’s death, when Ernest Oppenheimer became its chairman.<sup>10</sup> Oppenheimer took Rhodes’s existing business strategies even further, buying scores of cheap diamonds from desperate American sellers during the Great Depression and bringing De Beers’s grip outside of South Africa.<sup>11</sup> Noting an increase in diamond producers, De Beers formed the Central Selling Organization (CSO) in 1930.<sup>12</sup> As ever-more industry players were recruited by De Beers, including diamond processors, the legendary cartel reached the zenith of its power.<sup>13</sup> This unification of the industry allowed De Beers to regulate diamond prices on a global scale, controlling the world’s rough diamond supply in a variety of warehouses around the world.<sup>14</sup> Other diamond producers gladly assented to this arrangement, secure in the knowledge that cooperating assured them a share of the profits from artificially high diamond prices.

However, De Beers’s power began to wane near the turn of the 20th century.<sup>15</sup> An increasing number of diamond producers—and the discovery of large diamond deposits in Australia, Canada, and Russia—forced De Beers to let more producers into the cartel,

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4. *South Africa Profile—Timeline*, BBC NEWS (Apr. 4, 2018), <https://www.bbc.com/news/world-africa-14094918> [<https://perma.cc/BDF9-GNN3>]. *But see History of Slavery and Early Colonisation*, *supra* note 2 (detailing that Britain “occupied the Cape again in 1806, and in 1814 the Cape officially became a British colony”).

5. Matthew R. Dorsett, Note, *Diamonds Are a Cartel’s Best Friend: The Rise and Fall of Anticompetitive Business Practices Within De Beers’s International Diamond Cartel*, 16 *IND. INT’L & COMPAR. L. REV.* 145, 151 (2005).

6. *Id.* at 150–51.

7. *Id.* at 151.

8. *Id.*

9. *Id.* at 151–52.

10. Dorsett, *supra* note 5, at 152.

11. *Id.*

12. *Id.*

13. *Id.* at 152–53.

14. See Daniel L. Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 *U. PA. J. INT’L ECON. L.* 835, 842, 849–50 (2003) (describing the warehouse or “bourse” system employed by De Beers and other diamond sellers).

15. Dorsett, *supra* note 5, at 153; *De Beers’ Market Share of the Global Rough Diamond Industry*, DIAMOND LOUPE (2018), <https://www.thediamondloupe.com/sites/awdcnewswall/files/attachments/De%20Beers%20Market%20Share%20History.pdf>.

diluting its own power.<sup>16</sup> In addition to this increase in supply, De Beers faced a slew of public relations issues in the late twentieth and early twenty-first centuries that affected demand: in the 1990s the diamond-buying public gradually became aware of De Beers's trade—whether inadvertent or willfully ignorant—in blood diamonds.<sup>17</sup> The Company also pled guilty to a U.S. anti-trust indictment in 2004 on decade-old charges.<sup>18</sup> This ten-year period between indictment and settlement effectively locked De Beers out of the United States, the largest diamond market in the world, allowing other companies to catch up.<sup>19</sup> De Beers was subsequently purchased by Anglo American, one of the top ten mining companies in the world,<sup>20</sup> in 2012.<sup>21</sup> However, industry analysts still treat De Beers itself, rather than its parent company, as the beneficiary of its one-time monopoly power.<sup>22</sup>

Despite a decline in the power of the CSO, which has been rebranded as the Diamond Trading Company (DTC), De Beers remains an extremely powerful player in the international trade.<sup>23</sup> Furthermore, though “De Beers now actually controls only around eight percent of the world’s diamond supply, it is able to impose cooperation among the other members of the diamond cartel through its use of coercive tactics.”<sup>24</sup> One industry analyst estimates De Beers still controlled 37% of the world’s rough diamond industry in 2018.<sup>25</sup>

16. Dorsett, *supra* note 5, at 153.

17. See, e.g., Blaine Harden, *DIAMOND WARS: A Special Report.; Africa’s Gems: Warfare’s Best Friend*, N.Y. TIMES (Apr. 6, 2000), <https://www.nytimes.com/2000/04/06/world/diamond-wars-a-special-report-africa-s-gems-warfare-s-best-friend.html> [<https://perma.cc/W7A6-6JSV>]; Stefan Palios, *De Beers Turns to Blockchain to Remove ‘Conflict Diamonds’ from the Market*, COINSQUARE (Jan. 25, 2018), <https://news.coinsquare.com/business/de-beers-blockchain-conflict-diamonds/> [<https://perma.cc/M6TG-CCZW>] (recounting that “[i]n the early 2000s, De Beers was accused by the UN of trading blood diamonds” and faced public criticism from Canadian politician Stephen Kakfwi).

18. Dorsett, *supra* note 5, at 155–56.

19. *Id.* at 155.

20. M. Garside, *2020 Global List of Leading Mining Companies Based on Revenue*, STATISTA (Apr. 28, 2020), <https://statista.com/statistics/272707/ranking-of-top-10-mining-companies-based-on-revenue/> [<https://perma.cc/5X6T-97ZV>] (ranking Anglo American as the fifth biggest company); Shahzad Khurram Ahmed, *Top 25 Mining Companies by Market Capitalization*, S&P GLOBAL: MKT. INTEL. (Feb. 7, 2018), <https://www.spglobal.com/marketintelligence/en/news-insights/research/18-top-25-mining-companies-by-market-cap>.

21. Press Release, Anglo Am. PLC, Anglo American Completes Acquisition of De Beers Shareholding (Aug. 16, 2012), <https://www.angloamerican.com/media/press-releases/2012/2012-08-16> [<https://perma.cc/NA6A-H5ZK>]. The acquisition is by no means taking De Beers away from its roots—Anglo American was founded by Ernest Oppenheimer, the same man who transformed De Beers into a powerhouse diamond producer. *At a Glance*, ANGLO AM., <https://www.angloamerican.com/about-us/at-a-glance> [<https://perma.cc/ZC5S-RYE3>]; Dorsett, *supra* note 5, at 152.

22. See Palios, *supra* note 17 (naming De Beers as “the world’s largest producer and distributor of diamonds”); Pdraig Belton, *How Do You Know Your Diamond Isn’t Fake?*, BBC NEWS (July 2, 2019), <https://www.bbc.com/news/business-48824290> [<https://perma.cc/2B84-CW48>]; Bryan Hood, *Lab-Grown Diamonds Are Now a \$280 Million Business*, ROBB REP. (May 22, 2019), <https://robbreport.com/style/jewelry/lab-grown-diamonds-moment-2851840/> [<https://perma.cc/HU4D-B3A9>] (discussing De Beers’s past and current marketing strategies relating to lab-grown diamonds).

23. See Dorsett, *supra* note 5, at 153 (noting that De Beers “has yet to fully relinquish” its dominant position as leader of the cartel).

24. *Id.* at 156.

25. This estimate accounts for De Beers’s purchases from competing diamond producers. *De Beers’ Market Share*, *supra* note 15.

### B. Synthetic Diamonds and the Jewelry Market

In the early 1950s, scientists succeeded in creating artificial or lab-grown diamonds for the first time.<sup>26</sup> These first efforts only yielded small, cloudy, brown stones, which were immediately put to industrial and experimental use.<sup>27</sup> It would take at least half a century until gem-quality lab-grown diamonds became commercially available on a wide scale in the early 2000s.<sup>28</sup> This breakthrough is owed, in part, to improvements in the High Pressure High Temperature (HPHT) and Chemical Vapor Deposition (CVD) methods of synthetic diamond manufacture. Both methods involve layering superheated carbon around an extremely small “seed” diamond.<sup>29</sup>

These higher-quality stones were worth the wait because they are the perfect alternative to natural diamonds: they are faster to produce, equally hard, and free from ethical mining concerns.<sup>30</sup> They can be produced in certain “fancy” colors,<sup>31</sup> and they are always cheaper than comparable natural diamonds.<sup>32</sup> In fact, when they first became widely available, these high-quality synthetic gems averaged around 15% cheaper than mined diamonds, a price gap that has grown in the decade since.<sup>33</sup> Why, then, have lab diamonds failed to eclipse natural gems in consumer uptake? Paradoxically, much of the answer lies in this ostensibly favorable price differential: lab-grown stones do not hold even a fraction of their value because there is no viable resale market for them.<sup>34</sup>

In 2002, after the debut of quality synthetic gems, De Beers and other natural diamond producers mounted the “Gem Defense Program,” an initiative advocating the mandatory labeling of all lab diamonds as “man-made” or “synthetic.”<sup>35</sup> The company also pioneered the use of various technological means to tell natural diamonds apart from synthetics: they

26. Kori Kelley, Note, *Are Mined Diamonds Forever? The Emergence of Lab Diamonds and the Suppression of Conflict Diamonds*, 20 GEO. INT’L ENV’T L. REV. 451, 453–54 (2008).

27. *Id.* at 454.

28. *See generally id.* (detailing the rise of lab-grown diamonds in the diamond industry). Colored gem-quality diamonds were beginning to be produced as early as the 1970s and 1980s, but the final step to achieve colorless lab diamonds took far longer. Paul Sullivan, *A Battle over Diamonds: Made by Nature or in a Lab?*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/your-money/synthetic-diamond-jewelry.html> [<https://perma.cc/T3XS-D6CV>].

29. Elizabeth Paton, *How to Make a Synthetic Diamond*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/business/synthetic-diamond-production.html> [<https://perma.cc/NU6J-A65R>].

30. Sullivan, *supra* note 28.

31. Common colors include light pinks and blues. *Lab-Grown Diamonds*, LIGHTBOX, <https://lightboxjewelry.com/pages/laboratory-grown-diamonds> [<https://perma.cc/CF7M-FR4Z>].

32. Paton, *supra* note 29. Here, “comparable” means similar cut, color, and clarity ratings. *See Sell Diamonds Using Our Diamond Valuation Guide*, WP DIAMONDS, <https://www.wpdiamonds.com/diamonds/diamond-selling-guides/valuation-guide/> [<https://perma.cc/PL23-T9VD>] (describing a nine-step valuation process for cut, set diamonds).

33. Kelley, *supra* note 26, at 455; Eric Onstad & Barbara Lewis, *Lab-Grown Diamond Prices Slide as De Beers Fights Back*, REUTERS (Dec. 21, 2018, 1:36 AM), <https://www.reuters.com/article/us-diamonds-De-Beers-synthetic-analysis/lab-grown-diamond-prices-slide-as-de-beers-fights-back-idUSKCN1OKOMQ>.

34. *See* Sullivan, *supra* note 28 (stating that although only two to four percent of natural diamonds can appreciate in value, jewelers refuse to resell any lab diamonds, regardless of size, cut, or clarity).

35. Kelley, *supra* note 26, at 470. *See also* Chris Welbourn & Richard Williams, *DTC Research Comes to Diamonds’ Defense*, DIAMONDS.NET (May 6, 2002, 11:00 AM), <https://www.diamonds.net/News/NewsItem.aspx?ArticleID=6491&ArticleTitle=DTC+research+Comes+to+Diamonds+Defense> [<https://perma.cc/H25T-LTS3>] (describing the program and the Diamond Trading Company’s research to distinguish lab diamonds).

famously led the development and distribution of specialized machines designed to distinguish between mined and lab-grown diamonds,<sup>36</sup> also investing in a means of laser etching the inside of diamonds to track natural stones from their source.<sup>37</sup> Despite this longstanding effort to maintain separation between the synthetic and natural diamond markets, De Beers announced in May 2018 that it would begin selling synthetic diamond jewelry, much to the shock of the wider diamond industry.<sup>38</sup>

In May 2018, a one-carat mined diamond sold for about \$6,000, while a similar lab-grown diamond cost about \$4,200.<sup>39</sup> De Beers, however, began selling their lab diamonds at \$800 a carat, marketing them as gimmicky accessories rather than luxury items on par with natural diamonds.<sup>40</sup> Though many were shocked at this marketing choice, the price is reasonable, considering the production price of synthetic diamonds plummeted to only \$300 per carat in December 2018.<sup>41</sup> The response to this market entry has been drastic; as of February 2019, De Beers reported a 60% price drop in the price of synthetic stones.<sup>42</sup>

The presence of lab-grown diamonds in the market is of great interest to one particular consumer segment: young adults. Younger diamond purchasers, often termed “millennials,” have a much stronger awareness of ethical diamond concerns than did preceding generations.<sup>43</sup> They increasingly turn to synthetic gems or those mined with a more stringent ethical certification process than the KPCS, though each of these remains a minority offering in the current diamond market.<sup>44</sup>

### C. The Civil Wars of West Africa and the Genesis of the Kimberley Process

In the late 1990s, civil war rocked the African nations of Angola, Sierra Leone, the Republic of the Congo, and the Democratic Republic of the Congo.<sup>45</sup> Though the origin of each conflict was unique, all three involved clashes between official governments and domestic rebel armies, and each rebel group was largely financed by the sale of rough diamonds.<sup>46</sup> This system of financial support arose due to the discrete nature of diamond deposits, which are found in scattered vertical “pipes” rather than in large horizontal veins

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36. Welbourn & Williams, *supra* note 35.

37. Palios, *supra* note 17. Though surface etching has been attempted by other companies, this can be scratched off using another diamond. In response, some experts are attempting to pioneer interior laser etching. Belton, *supra* note 22 (discussing Andrew Rimmer’s work at Opsydia, a company that has already sold such interior etching machines to De Beers).

38. Onstad & Lewis, *supra* note 33.

39. *Id.*

40. *Id.*

41. *Id.*

42. Barbara Lewis, *De Beers Says Lab-Grown Diamond Wholesale Prices Fall by up to 60 Percent*, REUTERS (Feb. 21, 2019), <https://www.reuters.com/article/us-anglo-results-de-beers/de-beers-says-lab-grown-diamond-wholesale-prices-fall-by-up-to-60-percent-idUSKCN1QA255>.

43. Mary Hanbury, *Millennial Attitudes Are Forcing a Massive Change in the Diamond Industry*, BUS. INSIDER (May 10, 2018, 11:41 AM), <https://www.businessinsider.com/millennials-want-cheap-ethical-diamond-engagement-rings-2018-5> [<https://perma.cc/EZX4-MXGV>].

44. *Id.* While there is a clear demand for diamond jewelry outside of the United States, this Note’s contemporary analysis focuses on the domestic diamond market.

45. Eli J. Burton, Comment, *Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa*, 28 EMORY INT’L L. REV. 425, 425–26 (2014); Feldman, *supra* note 14, at 840.

46. Feldman, *supra* note 14, at 840.

like precious metals.<sup>47</sup> This rendered it far easier for rebel groups to take over diamond mining operations with relatively small forces, as these required the occupation and defense of a much smaller area of land than did most other extraction sites, such as metal deposits.<sup>48</sup> In addition, before the dawn of the Kimberley Process, diamond sellers were loath to disclose the source of their gems.<sup>49</sup> This resulted in widespread ignorance, even among industry experts, of the corrupt sources of diamond jewelry being sold worldwide in the mid-to-late 1990s.<sup>50</sup>

Nongovernmental organizations (NGOs) led the charge in bringing to light the human rights abuses in these warring West African nations, putting pressure on industry leaders and government officials to cut off the trade in “blood diamonds.”<sup>51</sup> Industry groups like the Jewelers Vigilance Committee (JVC)—wary of a public relations disaster—attempted to walk a fine line in lobbying for change that would redeem the diamond trade in the eyes of consumers without actually inhibiting trade.<sup>52</sup> The Bush Administration initially opposed diamond regulation because of its preference for free trade.<sup>53</sup> However, when it was revealed shortly after 9/11 that terrorist group Al Qaeda dealt in African blood diamonds, the federal government became much more willing to pass legislation to stem their sale.<sup>54</sup>

When Congress first passed a resolution designed to curb the sale and trade of conflict diamonds within the United States in November of 2001, the Kimberley Process had not yet been formed.<sup>55</sup> The Kimberley Process Certification Scheme was the culmination of several international meetings that took place over two years,<sup>56</sup> attended by representatives from approximately 40 nations, several NGOs, and diamond industry representatives.<sup>57</sup> Finally, on November 5, 2002, the KPCS was completed, with the support of 48 countries.<sup>58</sup>

The agreement was not a treaty, and lacked “formal or diplomatic status,” in part due

47. See Joanna Fantozzi, *Which Is Rarer: Gold or Diamonds?*, LIVE SCI. (Aug. 28, 2018), <https://www.livescience.com/63451-which-is-rarer-gold-or-diamonds.html> [https://perma.cc/QLK6-VWHV] (exploring the reason behind the “rarity” of each substance); Kevin Bonsor, *How Diamonds Work*, HOWSTUFFWORKS (July 16, 2001), <https://science.howstuffworks.com/environmental/earth/geology/diamond1.htm> [https://perma.cc/S4UR-HKYT] (describing the formation of kimberlite diamond deposits); *Forming Deposits*, AM. MUSEUM NAT’L HIST., <https://www.amnh.org/exhibitions/gold/incomparable-gold/forming-deposits> [https://perma.cc/PK3K-Q856] (listing several types of gold deposits, noting the relative ages and concentrations of the precious metal).

48. See Burton, *supra* note 45, at 428–29 (describing the ability of rebel fighters in Sierra Leone to retain control of the nation’s diamond mines with diminishing forces despite popular opposition).

49. Feldman, *supra* note 14, at 842.

50. See *id.* at 846 (describing how JVC General Counsel was unaware of the conflict diamond trade until a phone call from a representative for Global Witness, a human rights NGO, in 1999).

51. Global Witness was, and remains, arguably the most significant NGO in the ethical diamond regulation space, credited with galvanizing several industry and government leaders to action. *Id.* See also Kelley, *supra* note 26, at 459–60.

52. *Id.*

53. *Id.* at 844.

54. Feldman, *supra* note 14, at 853–54.

55. *Id.* at 854.

56. *Id.* at 836.

57. *Id.*

58. *Id.* at 835.

to the inclusion of parties that were not sovereign states.<sup>59</sup> The framework is administered by the Kimberley Process Plenary, which holds annual meetings and is headed by an annually rotating Chair and Vice Chair.<sup>60</sup> Major decisions are reached by consensus among the participating nations, with responsibility on each participating nation to enact its own internal laws to enforce these rules domestically.<sup>61</sup> All participating states almost immediately did so, including the United States with its own Clean Diamonds Trade Act<sup>62</sup> in April 2003, which officially enacted the KPCS agreement.<sup>63</sup>

The KPCS aims to combat trade in “conflict diamonds,” which are defined as “rough diamonds used to finance wars against governments.”<sup>64</sup> At the core of the program are four obligations, under which participating nations must: (1) “[s]atisfy ‘minimum requirements’ and establish national legislation, institutions, and import/export controls[.]” (2) “[c]ommit to transparent practices and to the exchange of critical statistical data[.]” (3) “[t]rade with only fellow members who also satisfy the fundamentals of the agreement[.] and (4) [c]ertify shipments as conflict-free and provide the supporting certification[.]”<sup>65</sup> Because the KPCS lacks any formal legal authority of its own, it has no true enforcement mechanism.<sup>66</sup> Its sole means of punishing a free-riding, noncompliant member is the suspension or retraction of that nation’s membership—a step taken in the past against several nations, including Venezuela and Zimbabwe.<sup>67</sup>

#### D. Current Ethics Concerns After 15+ Years of the KPCS

Though the KPCS eliminated nearly all international trade in what it considers “conflict diamonds,”<sup>68</sup> there remains a myriad of environmental and human rights violations not covered by the scheme.<sup>69</sup>

In the Democratic Republic of the Congo (DRC), for example, diamond mining pits have caused run-off into drinking water sources, greatly increasing the incidence of illness in nearby towns.<sup>70</sup> Sierra Leone, a nation heavily dependent on diamonds and other mining

59. Feldman, *supra* note 14, at 836. *See also* *What Is the Kimberley Process?*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/what-kp> [<https://perma.cc/F9U9-ZCNJ>] (explaining that the KPCS cannot “be considered as an international agreement from a legal perspective”).

60. NIGEL DAVIDSON, *THE LION THAT DIDN’T ROAR: CAN THE KIMBERLEY PROCESS STOP THE BLOOD DIAMONDS TRADE?* 80 (2016); *Chair: Leading and Enlarging the Influence of the KP Every Year*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/chair> [<https://perma.cc/67Z3-ETRM>].

61. Burton, *supra* note 45, at 434; DAVIDSON, *supra* note 60, at 79–80.

62. 19 U.S.C.A. §§ 3901–13 (West 2003).

63. Feldman, *supra* note 14, at 836–37.

64. KIMBERLEY PROCESS, <https://www.kimberleyprocess.com> [<https://perma.cc/2ZTW-SKHJ>].

65. *What Is the Kimberley Process?*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/what-kp> [<https://perma.cc/47NQ-UAG6>]. The process now includes 55 nation-participants that comprise 82 countries—a quirk attributable to the EU’s inclusion as a single member to the agreement. *Id.*

66. Burton, *supra* note 45, at 434–35.

67. *Id.* at 435–38.

68. The KPCS claims to have “stemm[ed] 99.8% of the global production of conflict diamonds.” KIMBERLEY PROCESS, *supra* note 64.

69. *See* Burton, *supra* note 45, at 435–38 (describing various abuses in Zimbabwe and Venezuela as examples).

70. Kelley, *supra* note 26, at 463–64. Local ecosystems also suffered when “warring parties [in the Congolese civil wars] destroyed the infrastructure for agricultural production in certain areas in order to create mining zones and coerce local citizens to participate in resource extraction.” *Id.*



industries, experienced a malaria outbreak after abandoned mining pits went unfilled.<sup>71</sup> The pits filled with water and became a breeding ground for disease-carrying mosquitoes.<sup>72</sup>

Aside from environmental havoc, the KPCS also fails to address abuses perpetrated by a government against its own people.<sup>73</sup> Zimbabwe provides many examples of the latter, including reports of child labor, sexual abuse, and even a wrongful death claim.<sup>74</sup> There are also well-supported allegations that the government embezzles heavily from the mining operations.<sup>75</sup>

### E. Criticisms of the KPCS and Other Existing Frameworks

#### 1. KPCS Under Fire: “Toothless” and Underinclusive

There is no shortage of criticism of the KPCS by NGOs, scholars, and even diamond sellers.<sup>76</sup> Most commentators consider the KPCS effective but under-inclusive in its protections.<sup>77</sup> Many criticize its lack of emphasis on human rights abuses by elected officials (rather than rebel insurrections) and its silence on labor abuses.<sup>78</sup>

Still others, noting the framework’s unofficial nature and lack of an enforcement mechanism, consider it ineffective and little more than a public relations effort.<sup>79</sup> Global Witness—a leading NGO widely credited with initiating the public push for the KPCS—offered the most scathing and impactful source of this criticism when it resigned from the KPCS out of protest in 2011, calling the framework a “toothless” means to cover up “diamond laundering.”<sup>80</sup> Given the important role of NGOs in the Kimberley Process,<sup>81</sup> Global Witness’s resignation was a serious blow to the framework’s strength and reputation.<sup>82</sup>

Finally, some commentators have noted the false dichotomy that the KPCS draws in

71. *Id.* at 464.

72. *Id.*

73. See Burton, *supra* note 45, at 435–38 (showing that KPCS failed to address the many abuses perpetrated by the Zimbabwe government against its people in the operation of the diamond mines); Kelley, *supra* note 26, at 463–64 (detailing how warring factions in the DRC destroyed the agricultural infrastructure in certain areas to create mining zones and coerced local citizens to work at the mines).

74. Burton, *supra* note 45, at 436. Under the Mugabe regime, which ended in 2017, Zimbabwe was “in a strange position of meeting the KPCS standards while extracting the diamonds in an environment allegedly full of human rights abuses.” *Id.* at 436–37.

75. *Id.*

76. See Burton, *supra* note 45, at 434–39 (discussing shortcomings of the KPCS); Kelley, *supra* note 26, at 460–61 (describing international mechanisms to suppress conflict diamonds).

77. Burton, *supra* note 45, at 434; Kelley, *supra* note 26, at 460–61.

78. Burton, *supra* note 45, at 434; Kelley, *supra* note 26, at 460–61.

79. See Liz Ford, *Global Witness Quits Kimberley Process in Protest at ‘Diamond Laundering’*, GUARDIAN (Dec. 5, 2011), <https://www.theguardian.com/global-development/2011/dec/05/kimberley-process-global-witness-withdrawsc> [<https://perma.cc/CMH3-7SRD>] (discussing Global Witness’s departure from the KPCS and its parting criticism of the framework); Burton, *supra* note 45, at 461 (discussing international shortcomings of the KPCS).

80. Burton, *supra* note 45, at 438, 448.

81. See *infra* Section III.A.2.

82. See Feldman, *supra* note 14, at 843 (noting that “[a]t the United Nations, the NGOs could exercise considerable power”).

considering gems either ethical or “conflict diamonds.”<sup>83</sup> Especially given the limited subject matter that the KPCS considers,<sup>84</sup> this reduction to two categories may seem suspect. However, none of the prominent regulatory frameworks in the diamond industry (or general mineral extraction industries) have attempted to implement a more nuanced framework.<sup>85</sup>

## 2. Alternative Frameworks

A number of important alternative frameworks attempt to regulate the process of diamond mining, though the most prominent alternatives are not diamond-specific.<sup>86</sup>

One such system was initiated by the Responsible Jewellery Council (RJC) in 2005 and included a supply chain certification system much like the KPCS.<sup>87</sup> The RJC initially included only diamonds and gold, but it has since expanded its scope to various other precious metals and gemstones.<sup>88</sup> Sovereign nations form no part of the RJC; rather, mining and jewelry businesses form its membership and are audited by third parties.<sup>89</sup> Compliance with RJC’s standards is voluntary for members, lacking the “mandatory chain of custody procedures that the KPCS has.”<sup>90</sup> However, the RJC has received praise for its ability to “respond quicker to reported human rights abuses.”<sup>91</sup>

The Extractive Industries Transparency Initiative (EITI) represents another generalist regulatory framework, covering “the oil, gas, and mining industries” in its purview.<sup>92</sup> The EITI framework, like the Kimberley Process, requires the collaboration of states, NGOs, and industry players.<sup>93</sup> The relationship between these three segments, however, is very different from the KPCS, because each state is afforded the individual flexibility to carry out its own mining reforms, rather than measures decided centrally by the EITI itself.<sup>94</sup> The EITI also emphasizes data sharing and transparency of existing practices instead of seeking to force members to conform to preset standards.<sup>95</sup> Thus, the EITI and KPCS both lack the means to enforce compliance.<sup>96</sup> Despite this, the EITI enjoys extremely

83. See *Conflict Diamond Issues*, BRILLIANT EARTH, <https://www.brilliantearth.com/conflict-diamond-facts/> [<https://perma.cc/BA4L-8TFW>](outlining one jewelry company’s criticism of the KPCS as a robust framework for ethically sourced natural diamonds).

84. See *infra* Section III.A.1.

85. See *infra* Section II.E.2.

86. Here I refer to the Extractive Industries Transparency Initiative (EITI) and the Responsible Jewellery Council (RJC), which are discussed in further detail below. Burton, *supra* note 45, at 439–41.

87. *RJC at a Glance*, RESPONSIBLE JEWELLERY COUNCIL, <https://www.responsiblejewellery.com/about/vision-2030/> [<https://perma.cc/8GVB-YU8J>].

88. As of September 2020, the RJC purview includes “gold, silver, platinum group metals” (rhodium, palladium, and platinum), “diamonds and coloured gemstones” such as rubies, sapphires, and emeralds. *Id.*

89. Burton, *supra* note 45, at 439.

90. *Id.*; *Chain of Custody 2017*, RESPONSIBLE JEWELLERY COUNCIL, <https://www.responsiblejewellery.com/chain-of-custody-certification/> [<https://perma.cc/FH53-GCNA>].

91. Burton, *supra* note 45, at 439–40.

92. *Id.* at 441. The EITI was created in 2003, shortly after the KPCS, but it was not implemented until 2009. *Id.*

93. *Id.*

94. *Id.* at 441–42.

95. *Who We Are*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/who-we-are> [<https://perma.cc/M53D-99NN>].

96. Burton, *supra* note 45, at 442.

widespread support from intergovernmental organizations (IGOs) like the Bretton Woods organizations, the UN, and others.<sup>97</sup>

Finally, the Diamond Development Initiative (DDI) represents a diamond industry-specific attempt to complement the KPCS through an emphasis on “artisanal and small-scale miners.”<sup>98</sup> This framework was created to function in conjunction with other regulatory bodies, working to ensure that the proceeds from surface diamond mining go back to the poor communities whose labor originally extracted the gems.<sup>99</sup> Like all the aforementioned frameworks, the DDI lacks any enforcement mechanism; instead, it prefers to focus on transparency and “sustainable community development” rather than punishing noncompliance.<sup>100</sup>

### III. ANALYSIS

#### A. *The KPCS in Practice*

The Kimberley Process is often criticized for its under-inclusivity.<sup>101</sup> However, the focus of the framework—though narrow in hindsight—reflects the unusual circumstances of its ratification and the importance of keeping key industry and nation participants in the fold.<sup>102</sup>

##### 1. *The KPCS Addressed the Problem for Which It Was Designed (and No More): To Secure the Cooperation of De Beers and Reluctant Nations*

The KPCS was the result of an unusually cohesive, near-worldwide effort to stem the flow of cash to violent rebel groups in West Africa.<sup>103</sup> Though the KPCS has occasionally stretched to cover other areas of unethical behavior, the framework itself is narrowly tailored, as industry players probably intended. This narrow focus was unsurprising given the unofficial nature of the KPCS meetings<sup>104</sup> and the delicate balance of interests at stake.

In order to effectively regulate the diamond industry, the acquiescence of industry giants like De Beers was critical for reasons both practical and political. On one hand, it was important that industry members have a voice to opine on which regulation measures could fit more seamlessly and efficiently into the existing systems of diamond mining and transport. The industry’s fondness for secrecy, though well known, was well beyond what most other trade regulations comprehended.<sup>105</sup> Above all else, this was what necessitated

97. As of September 2020, the EITI enjoys the support of 14 countries, 68 companies, and several NGOs, most notably Global Witness. *Supporters*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <https://eiti.org/supporters> [<https://perma.cc/L8Z6-CGK7>].

98. *Who We Are: Overview*, DIAMOND DEV. INITIATIVE, <http://ddiglobal.org/who-we-are-overview/> [<https://perma.cc/YZ89-56HS>].

99. *Id.*; Burton, *supra* note 45, at 440.

100. *Who We Are: Overview*, *supra* note 98; Burton, *supra* note 45, at 441.

101. See *supra* Section II.E.1 (explaining why the KPCS is criticized for being underinclusive).

102. See Feldman, *supra* note 14, at 843 (“The battle to control the conflict diamond problem was fought in many different arenas, each with its own special problems.”).

103. *Id.* at 835–36.

104. *Id.* at 836.

105. See *id.* at 842 (describing the role that secrecy traditionally played in the diamond industry).

the participation of diamond dealers in the Kimberley Process negotiations.<sup>106</sup> This helpful degree of insight aside, excluding large industry players was never truly an option because doing so would have alienated some of the KPCS's most important nation participants.

Most obvious among these countries is South Africa, the home of De Beers. The company was at one point the largest in South Africa, and that nation's failure to prosecute De Beers on antitrust grounds indicates a tacit commitment to protect its longstanding mining industry.<sup>107</sup> De Beers also has deep ties to Botswana, which has been by far the most prolific diamond-producing African nation in the twenty-first century.<sup>108</sup> Notably, it is the world's number one producer of diamonds by value, with all of its high-producing mines owned by De Beers.<sup>109</sup>

Without the cooperation of South Africa or Botswana, the purpose of the KPCS would have been hopelessly frustrated at its inception, because a large portion of the diamond trade would be unregulated.<sup>110</sup> Were these nations outside of the KPCS, it would be an easy matter for either nation to import non-KPCS certified diamond shipments and then mix in those gems with its own large domestic supply.<sup>111</sup> Thus, it is this very fact—that either nation's diamonds could be traded into non-KPCS member African states over land borders—that made courting African nations so critical to the KPCS's success. For all practical purposes, when the Kimberley Process was being formed from 2000 to 2002, this required courting De Beers by extension; the company had its hand in too many different diamond producing nations.<sup>112</sup>

In addition to including the interests of diamond companies and African nations, there were political differences that had to be dodged in order to secure support for the KPCS. Due to the multitude of different ways organized labor and mining are handled among member states, it did not make sense to attempt to stretch the KPCS to cover issues beyond the effort to curb the blood diamond trade.<sup>113</sup> In addition to this simple issue of KPCS's scope, it also stands to reason that many governments may have resisted—as an affront to their national autonomy—far-reaching labor or ethics standards imposed by an unofficial body.<sup>114</sup> In contrast, stemming profit flows to African rebel warlords represented a non-controversial, well-publicized topic that governments and industry players alike could publicly support.<sup>115</sup>

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106. *See id.* (explaining how the aforementioned industry secrecy necessitated change).

107. Dorsett, *supra* note 5, at 158.

108. Ehud Arye Laniado, *World's Top Diamond-Producing Countries*, ALL DIAMOND (July 8, 2015), <https://ehudlaniado.com/home/index.php/news/entry/world-s-top-diamond-producing-countries> [<https://perma.cc/8ZF5-PERC>].

109. *Id.*

110. *See id.* (tallying the stated value of 2013 diamond production by the world's ten largest national producers, a list that accounted for more than 99 percent of total world production by volume).

111. This is essentially what occurred in the Democratic Republic of the Congo in 2004, for which the nation was expelled from the KPCS for three years. Kelley, *supra* note 26, at 460–61.

112. Feldman, *supra* note 14, at 836, 844.

113. *See* Burton, *supra* note 45, at 435–38 (describing two examples of problematic KPCS members, Zimbabwe and Venezuela, and the opacity of their diamond mining operations).

114. *See* Feldman, *supra* note 14, at 836 (explaining the unofficial nature of the KPCS).

115. *See generally* Burton, *supra* note 45 (describing the global outcry at the widespread trade in blood diamonds and the rush to condemn the trade).

## 2. *The KPCS Has Been Weakened by a Failure to Incorporate NGOs into the Monitoring System*

NGOs, though far from satisfied with the coverage of the Kimberley Process (KPCS), participate in the framework as “observers.”<sup>116</sup> As NGOs lack an official vote in constructing or amending the scheme,<sup>117</sup> securing their unanimous approval was far less of a priority compared to diamond importing and exporting countries. This was demonstrated by the relative apathy shown by the Kimberley Process Plenary when Global Witness resigned its observer seat in protest,<sup>118</sup> especially when compared to the Plenary’s willingness to re-admit ejected nations such as the Central African Republic and Lebanon.<sup>119</sup> This is because only member nations may vote on substantive actions, such as adopting new standards or approving changes in a nation’s membership status. The role of NGOs, in contrast, is advisory—they “monitor[] the effectiveness of the certification scheme and . . . provide technical and administrative expertise” to the Plenary.<sup>120</sup>

The KPCS’s leadership, however, is under no obligation to heed the advice of such groups. This is made more unfortunate considering that NGOs, due to their mobility and independence from governments, often possess superior knowledge of unfavorable on-the-ground conditions that member nations may omit from their mandatory official reports.<sup>121</sup>

## 3. *Diamond Industry-Specific Regulation Is Crucial*

Diamonds are unique among other valuable minerals in two important respects: they may be mined or created in a lab, and their market has been controlled by very few players for centuries.<sup>122</sup> These factors result in sloppy, unresponsive regulation of the diamond industry with schemes originally designed for different mineral extraction industries.

Profit margins in the gem-quality diamond industry remain artificially high due to its unique past and a supply/demand curve orchestrated in the nineteenth century.<sup>123</sup> Unlike gold and other precious metals, which have long been used in their raw form to support currency values, diamonds involve a much more complex valuation that includes a multitude of factors.<sup>124</sup> Though diamond mining, like precious metal mining, can suffer from grade problems, diamonds do not undergo the smelting process that metals undergo to separate them from the ore.<sup>125</sup> Rather, rough diamonds embedded in ore are added to a

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116. *Observers*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/en/observers> [<https://perma.cc/Z7SG-9UA4>].

117. *Id.*

118. Ford, *supra* note 79.

119. *Central African Republic*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/181> [<https://perma.cc/W6TC-74UP>]; *Lebanon*, KIMBERLEY PROCESS, <https://www.kimberleyprocess.com/node/198> [<https://perma.cc/L87D-9BZ9>].

120. *Observers*, *supra* note 116.

121. See Ford, *supra* note 79 (discussing issues from the Ivory Coast, Venezuela, and Zimbabwe); Kelley, *supra* note 26, at 461 (describing previous omission of KPCS violations by suspended nations).

122. See *supra* Section II.A (discussing the history of the diamond industry).

123. See Onstad & Lewis, *supra* note 33 (discussing De Beers’ strategy to corner the growing lab-grown diamond market); Dorsett, *supra* note 5, at 151–53 (describing the growth of De Beers into a “modern international diamond cartel,” starting in the late 1800s).

124. See WP DIAMONDS, *supra* note 32 (describing a nine-step valuation process for cut, set diamonds).

125. *Discover Diamonds—Mining*, SHIMANSKY, <https://www.shimansky.co.za/discover/about-diamonds/mining> [<https://perma.cc/2LT5-L9BL>]. See Alf Stewart, *Making the Grade: Understanding*

machine called a “cyclone” with water and ferrosilicon powder; the cyclone’s tumbling causes the particles within to separate by density, with the rough diamonds settling at the bottom.<sup>126</sup>

#### 4. The Framework Gives Too Much Latitude to Signatory Countries

One of the KPCS’s best and worst attributes is the flexibility it gives participating states to administer the framework internally. At the time of its initial implementation, this was an unequivocally positive attribute: it greatly eased the ratification process by nations such as the United States, whose legislatures would have balked at—and then refused to implement—a rigid framework without room for internal legislative deliberation.<sup>127</sup> However, this flexibility is now what puts the KPCS at the greatest risk of obsolescence.

The fact that nations are given freedom to impose the KPCS within their own borders often results in disparate levels of compliance between signatory states.<sup>128</sup> For example, nations with a small group of bureaucrats in charge of all mining production may find that people’s personal or fiscal interests easily sway to admit uncertified diamond shipments into the country.<sup>129</sup> Similarly, a nation with decentralized trade regulation—one with multiple diamond sorting centers or mining areas—may also suffer from a lack of supervision, with isolated local officials more prone to bribery or kickbacks than highly concentrated mining operations.<sup>130</sup> Botswana—but for the presence of ruthlessly stringent De Beers—would be emblematic of this latter problem due to the nation’s small land size but immense wealth of diamonds.<sup>131</sup>

*Exploration Results*, RES. WORLD, <http://resourceworld.com/making-grade-understanding-exploration-results/> [<https://perma.cc/8B2K-ZPXM>] (describing what constitutes ‘high-grade’ in mining for different types of materials).

126. *Discover Diamonds*, *supra* note 125.

127. Even had the KPCS talks (or ensuing framework) had the force of law, any structure that took negotiation and molding power away from Congress would not survive long. One need only look at the failed International Trade Organization (a failed, early version of today’s World Trade Organization) to know how such a move would have likely been received. *See generally* Ivan D. Trofimov, *The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective*, 5 J. POL. & L. 56 (2012).

128. Burton, *supra* note 45, at 432–34 (discussing examples of countries with successful “self-policing” as well as notoriously noncompliant KPCS participants).

129. This particular fear was realized when the Democratic Republic of the Congo (DRC) was found to have issued fraudulent KPCS certificates and was briefly expelled from the KPCS in 2004. Kelley, *supra* note 26, at 461. The framework cannot function effectively without nearly all the African diamond producers as members, however, and thus the DRC was readmitted three years later after “recognizing its improper use of Kimberley Process certificates and promis[ing] to curb the problem through legislation.” Kelley, *supra* note 26, at 461. *See also Kimberley Process Chair Discusses Future with DRC Government*, MINING.COM (Sept. 21, 2016, 1:00 AM), <https://www.mining.com/web/kimberley-process-chair-discusses-future-with-drc-government/> [<https://perma.cc/H9AA-RYYM>] (discussing the Kimberley Process Certificate Scheme and the future of the DRC, which “is the world’s third biggest diamond producer by volume, and is responsible for approximately 13% of global output, including industrial diamonds”).

130. *See* Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399, 407 (discussing several scholarly sources positing a positive correlation between decentralized government and corruption); Nelson Sobrinho & Vimal Thakoor, *More Sand than Oil*, 56 FIN. & DEV. 35 (2019) (discussing corruption in Sub-Saharan Africa).

131. Hobart M. King, *Which Countries Produce the Most Gem Diamonds?*, GEOLOGY.COM, <https://geology.com/articles/gem-diamond-map/> [<https://perma.cc/6P6Z-6RHS>] (noting “tiny” Botswana’s status as the “leading [diamond] producer on the basis of value . . . because its average diamond size is larger than what

*B. De Beers's Pricing and Marketing Scheme, if Successful, Will Neutralize the Potential of Lab Diamonds to Compete with Natural Diamonds*

As discussed in Section II.B, De Beers recently entered the synthetic diamond market, possibly in a bid to undermine it. In May 2018, a one-carat mined diamond sold for about \$6,000, while a similar lab-grown diamond cost around \$4,200.<sup>132</sup> Then, De Beers began selling synthetic diamonds at \$800 per carat, marketing them as glittery baubles rather than luxuries comparable with natural diamonds.<sup>133</sup> Though many question the motive behind this marketing choice, the price is justifiable given the mere \$300 production price of modern synthetic diamonds.<sup>134</sup> Much to the chagrin of other synthetic diamond sellers, De Beers's strategy to reduce the value of lab-grown stones appeared to work; the company reported that lab diamond prices plummeted 60% between September 2018 and February 2019.<sup>135</sup>

In addition to slashing prices, De Beers also sought to undermine the lab diamond producers' claims that its products are more environmentally conscious.<sup>136</sup> Representatives from Lightbox, De Beers's synthetic line, have made a point to acknowledge that creating lab diamonds consumes an immense amount of energy, which is often produced through fossil fuels.<sup>137</sup> This is why the company feels "uncomfortable" with designating its products as eco-friendly, implying that other synthetic diamond producers should rethink their marketing.<sup>138</sup>

#### IV. RECOMMENDATIONS FOR AN ADDITIONAL "KPCS PLUS" REGULATORY FRAMEWORK

*A. Ethical Diamond Sourcing Will Be Most Efficiently Achieved via an Additional Framework Under the KPCS*

*1. Advancing Additional Transparency and Ethics Requirements Will Draw Back NGO Sponsors*

Effective tripartite cooperation is as essential to any additional framework as it is to the KPCS. NGO watchdogs, while not official members to the framework, are crucial to its efficient and proper function.<sup>139</sup> Therefore, drawing important NGOs like Global

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is produced by Russia and of a general higher quality").

132. Onstad & Lewis, *supra* note 33.

133. *Id.*

134. *Id.*

135. Barbara Lewis, *De Beers Says Lab-Grown Diamond Wholesale Prices Fall by up to 60 Percent*, REUTERS (Feb. 21, 2019, 9:56 AM), <https://www.reuters.com/article/us-anglo-results-de-beers/de-beers-says-lab-grown-diamond-wholesale-prices-fall-by-up-to-60-percent-idUSKCN1QA255>. Amidst the economic hardship felt worldwide in the wake of the COVID-19 pandemic, some analysts report a temporary truce between the factions of natural and lab-grown diamond producers. Pamela N. Danziger, *Lab-Grown and Natural Diamond Industries End Hostilities, as Declining Jewelry Demand Threatens All*, FORBES (July 19, 2020, 7:38 AM), <https://www.forbes.com/sites/pamdanziger/2020/07/19/lab-grown-and-natural-diamond-factions-settle-hostilities-as-declining-jewelry-demand-threatens-all/#38a1adbd3660> [<https://perma.cc/6HUN-TZWJ>].

136. See Hood, *supra* note 22 (stating that members of the natural diamond industry have historically been opposed to synthetic diamonds).

137. *Id.*

138. *Id.*

139. See *supra* Sections II.C, III.A.2; Kelley, *supra* note 26, at 462–64 (describing the important watchdog

Witness back to help police KPCS compliance is an important step to ensure the framework's effective administration around the globe.<sup>140</sup>

2. *Adding an Additional Framework Under the Auspices of the KPCS Is More Efficient Than Starting from Scratch*

As discussed in Part III, the KPCS was born out of unique geopolitical circumstances.<sup>141</sup> While American consumers are increasingly conscious of the realities of conflict minerals,<sup>142</sup> there is very little chance there is sufficient worldwide momentum to launch a completely separate framework.<sup>143</sup> Thus, utilizing the KPCS framework already in place offers a much faster, more structured way to address existing issues in diamond mining.

B. *Another Dichotomous Certification Scheme Would Facilitate Ethical Transparency Without Drastic Administrative Costs*

The KPCS's oversimplification of ethical mining into two categories—either “conflict-free” or prohibited from international trade—is a necessary evil.<sup>144</sup> Despite the temptation to create a more thorough, highly nuanced framework, any additions to the ethics category or diversification in the ‘grading’ system only weakens the effectiveness of the framework in practice.<sup>145</sup>

The advantages of a simple, KPCS-like scheme lie in their clarity to consumers and administrative efficiency.<sup>146</sup> It is much easier to understand and administer a system with only two possible outcomes than, for instance, a continuum-based system like the graded system for diamond clarity.<sup>147</sup> Though the status of human rights in a given country—or even a single mine—are far from simple, putting ethics on a continuum may act to cheapen conflict-free status for consumers, relegating it to just another data point on which price may be negotiated. To preserve the importance of the framework, ethical status must be a threshold question with a simple yes or no answer, *before* a given diamond may be traded abroad.

Aside from the subtle psychological effects of creating a spectrum for consumer use, the fact remains that many consumers can be ill-equipped to interpret complex rating systems,<sup>148</sup> and they would likely be reliant on highly partial diamond dealers for an

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role that NGOs play in the KPCS).

140. See Kelley, *supra* note 26, at 462–64 (discussing importance of NGOs); Ford, *supra* note 79 (discussing Global Witness's departure from the KPCS and its prior involvement with the framework).

141. See *supra* Sections II.C, III.A.1.

142. See *supra* Section II.B.

143. See *supra* Section III.A.1.

144. See *supra* Section II.E.1.

145. See *id.*

146. See *id.*

147. See *Diamond Clarity Chart: The Official GIA Diamond Clarity Scale*, GEMOLOGICAL INST. AM., <https://4cs.gia.edu/en-us/blog/diamond-clarity-chart-official-gia-diamond-clarity-scale/> [<https://perma.cc/N6NW-WDA4>] (discussing diamond quality grading). See also *supra* Section II.E.1.

148. WP DIAMONDS, *supra* note 32 (explaining the multifaceted valuation of diamond jewelry to consumers).



explanation.<sup>149</sup> These are additional, compelling reasons to retain a gateway method for diamond certification.

*C. An Appended List of “Recommended” Provisions Would Advance More Stringent Regulation While Enhancing Consumer Choice*

New, more advanced regulatory measures may be set forth in an optional recommendations section, allowing some companies or countries to more aggressively implement measures beyond the basic certification scheme.<sup>150</sup> A company’s use of one or more additional measures across its entire diamond supply chain should entitle it to use of a “KPCS Plus” or another special designation in its marketing.

*1. Recommended Measures May Serve as a Testing Ground for Additions to the Main Provisions of the KPCS*

The wider framework will receive the benefit of data from companies running such advanced measures as a test run.<sup>151</sup> Measures that individual companies or countries find effective, yet fail to find the required consensus among KPCS participant nations,<sup>152</sup> may eventually be approved for implementation in the wider framework. At the very least, these efforts may offer insight into how the framework may be tweaked to become more effective and comprehensive.<sup>153</sup>

Likewise, potential methods found to be unworkable may be rejected from inclusion in the larger framework, sparing the general body of the KPCS from this sort of trial-and-error means of refinement. Ideally, this increased availability of data may also be used to guide the implementation of new measures in additional countries.<sup>154</sup>

*2. Recommended Measures Offer a Way for Companies to Compete for Ethically Minded Customers*

Some recommended provisions may not be feasible for implementation in the wider framework due to limitations on costs or other factors. Companies may wish to implement these to demonstrate their commitment to ethical sourcing for their customers and compete for business on that basis.

As an example, De Beers’s recent commitment to laser-etch its diamonds with blockchain technology<sup>155</sup> represents a measure that cannot and should not be required on

149. See *supra* Section III.B.

150. Such a measure could allow for popular measures that were defeated by very few votes to be tested by willing nations. See *supra* Section II.C.

151. This could function in a manner similar to the EITI and other regulatory frameworks that prioritize data sharing. See *supra* Section II.E.2 (describing different regulatory frameworks).

152. DAVIDSON, *supra* note 60.

153. See *supra* Section II.E.2 (describing current effectiveness of frameworks).

154. See *id.* (explaining availability of data under existing frameworks).

155. Blockchain is a system that utilizes images (chains of blocks) in distinct patterns to encode information. Lucas Mearian, *What Is Blockchain? The Complete Guide*, COMPUTERWORLD (Jan. 29, 2019, 4:13 PM), <https://www.computerworld.com/article/3191077/what-is-blockchain-the-complete-guide.html> [https://perma.cc/P5GZ-LYEL]. These patterns form a digital ledger that can create a record for each individual diamond in order to trace its path. *Id.* Thus, though laser etching technology originally developed to distinguish lab diamonds from synthetic diamonds (for discussion, see *supra* Section II.B), it has been repurposed to create

a wide scale. Surface etching has already been proven ineffective,<sup>156</sup> and more costly etching inside the diamond represents technology that is not available in more rural mining locations, especially in Africa. Dependence on such advanced etching technology would arguably encourage smuggling.<sup>157</sup> However, De Beers—a famously efficient company with tight control over its supply chain—has the resources and government contacts<sup>158</sup> to enable the effective use of such a system.<sup>159</sup>

Thus, companies lacking the infrastructure to implement such measures are not locked out of the framework, but consumers still have the option to seek out and patronize companies going above and beyond in pursuit of ethical sourcing.<sup>160</sup> This also holds true for governments, which may elect to impose measures within their own borders that are unpopular among industry participants of the KPCS.<sup>161</sup> One such example is the relaxation of consumer protection laws requiring prominent display of a diamond’s “synthetic” or “lab-made” status.<sup>162</sup> This labeling emphasis devalues lab diamonds, keeping natural diamond prices artificially high and more profitable for smugglers and other illicit actors.<sup>163</sup>

### 3. *Official Support of Recommended Measures Validates Their Experimental Value and Acts as a Mark of Authenticity for Consumers*

One current issue with the designation of “conflict-free” diamonds is the limited meaning of that phrase.<sup>164</sup> Creating regulated, official terms of compliance for issues outside of the KPCS definition of “conflict” is needed to make sure that such claims by diamond sellers are meaningful. For example, if a diamond seller only carries stock that is

a fraud-proof method of tracking mined diamonds from the source. *See also* Palios, *supra* 17; Belton, *supra* note 22. Despite De Beers’s promise to implement this technology, the company’s platform for doing so, Tracr, is only in its pilot stage as of October 2020, with no clues as to when or if De Beers will try to implement blockchain on a wider scale. *See Chow Tai Fook Joins Tracr Pilot*, TRACR (Dec. 19, 2018), <https://www.tracr.com/press/chowtaifook> [<https://perma.cc/KB4K-KHER>].

156. Belton, *supra* note 22.

157. Overreliance on advanced technology would increase smuggling because it would deemphasize the importance of checks at each step of the supply chain. Such a measure could conceivably increase the incidence of smuggling to urban centers that have internal etching devices, where they may be indelibly marked as “conflict-free” and shipped onward to be sold. Part of the virtue of the KPCS is its multistep certification, such that each certification is determinative of the fate of the diamond and can be revoked further down in the supply chain. Until these machines have proliferated to the point where they can be easily shipped to—and repaired in—local sorting centers, they should not be required by the KPSC or any similar regulatory framework.

158. *See* King, *supra* note 131 (discussing the importance of Botswana’s production on the diamond market and De Beers’ domination of that country’s large diamond mines).

159. *See supra* Section II.A; Palios, *supra* note 17.

160. *See supra* Section II.B.

161. *See supra* Section III.C.

162. *See* Kelley, *supra* note 26, at 469–72 (discussing terminology used to describe lab-produced diamonds to consumers).

163. *See supra* Section III.B. *See also* Lenny Polivy, *Expert Q&A: What Do Changes in the Lab-Grown Diamond Market Mean for Your Collateral?*, GORDON BROTHERS, <https://www.gordonbrothers.com/insights/article/2018/lab-grown-diamonds-qa> [<https://perma.cc/FK8T-CCYL>].

164. *See supra* Sections II.C, III.A.I (highlighting the generic definition of “conflict free” and the loopholes it creates in the KPCS); Feldman, *supra* note 14, at 836 (explaining the problems inherent in the KPCS’s limited definition of “conflict-free diamonds”).

internally laser etched to verify ethical sourcing,<sup>165</sup> they could advertise their products as compliant with the “Kimberley Process Plus: Laser Etched” standard of compliance. Thus, firms without the ability to conform to this heightened standard would not be disallowed from competing, but they would be disadvantaged by the absence of this certification. To avoid a free-rider problem of seeking the label without having made the necessary reforms, it is essential that any optional measures are also given constant government and NGO supervision to ensure compliance, just like the existing provisions of the KPCS.<sup>166</sup>

## V. CONCLUSION

The KPCS framework, by design, is imperfect. It does not and cannot seek a robust enforcement mechanism, because such a measure would alienate its key members, without whom it is powerless.<sup>167</sup> However, the KPCS does not exist in a vacuum; other ethical sourcing frameworks, such as the EITI,<sup>168</sup> cover ground the KPCS cannot due to problems of national ratification.<sup>169</sup> Therefore, rather than attempting to mold the KPCS into a coercive mechanism, future KPCS reforms should focus on returning to its original framework by drawing NGOs back to act as watchdogs<sup>170</sup> and allowing the framework to evolve by utilizing free-market choice to incentivize more ethical sourcing.

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165. See *supra* Section II.B (detailing the history of synthetic diamonds and the etching process).

166. See generally Burton, *supra* note 45 (discussing how the current KPCS framework can be improved).

167. See *supra* Section III.A (spotlighting how critical certain industry and national players are to the KPCS’s success).

168. See *supra* Section II.E.2 (noting the key differences between the EITI and the KPCS in data sharing, transparency, and individual flexibility).

169. See *supra* Section II.A (discussing the foundations of diamond trade).

170. See *supra* Sections II.E.1, III.A.2 (detailing the impact that the resignation of certain NGOs had on the KPCS and how failing to incorporate NGOs back in has weakened the system).