BETWEEN A ROC AND A HARD PLACE: THE REPUBLIC OF CONGO’S ILLICIT TRADE IN DIAMONDS AND EFFORTS TO BREAK THE CYCLE OF CORRUPTION

Haley Blaire Goldman

1. INTRODUCTION

For more than half a century, diamond-rich African nations such as Angola, Sierra Leone, and the Democratic Republic of Congo (“DRC”) were—and in some cases, continue to be—plagued by vicious civil wars financed principally by trade in rough “conflict diamonds” mined within their borders. Proceeds from the illicit trade of diamonds were consistently used to purchase weapons and thus to fuel long-running conflicts in African nations. In 2003, the Kimberley Process Certification Scheme (“KPCS”) was created as a means of regulating trade in rough diamonds while protecting the legitimate diamond industry, upon which numerous nations, in Africa and around the globe, rely. The United Nations (“U.N.”)-backed KPCS imposes requirements related to the movement, import, and export of rough diamonds on all participants in order to prevent conflict and illicit diamonds from entering legitimate channels of trade.

1 J.D. Candidate 2009, University of Pennsylvania Law School; B.S. 2005, Cornell University. The Author would like to express her gratitude to her family and friends for their support and encouragement, as well as to all those who assisted with this endeavor by offering their time and expertise.

2 See infra Section 2.2.2.

In 2004, the Republic of Congo ("ROC")—which, due to its conspicuously low export tax, geographic proximity, and corrupt and unstable political environment, served as the primary destination for conflict and illicit diamonds being smuggled out of the DRC and other nations—was expelled from the Kimberley Process ("KP"). However, expulsion from the KP has not eradicated the ROC's illegal diamond-related activities. Such illicit trade continues to have significant adverse economic and non-economic consequences for neighboring resource-rich nations and for citizens of the impoverished ROC, as well. Due to its lack of international systems of monitoring and enforcement, the KPCS has, in the past, proved unsuccessful at eliminating the flow of illicitly traded diamonds out of the ROC. In spite of this fact, and despite its post-expulsion record of illegal trade, the ROC was readmitted to the KP in November 2007. KP officials have yet to proffer any concrete explanation as to the grounds for this decision.

Accordingly, as a means of both preventing illicitly traded diamonds from entering legitimate channels of trade and restoring diverted and much-needed revenues to the government and citizens in a transparent way, the Republic of Congo should raise its export tax on diamonds to a level commensurate with that of similarly situated nations. Should the ROC choose not to comply with a request from the international community to increase the

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relevant tax, possible means of persuasion include the threat of or actual expulsion from the KP and similar threats of or actual imposition of sanctions by the United States ("U.S."). In addition to raising its export tax on diamonds, the ROC should, with international support, act to increase transparency in government and natural resource extraction and to implement an anti-corruption plan. Such modifications will likely also have a positive effect on the debt-ridden ROC’s ability to attract international investment opportunities.

Section 2 of this Comment offers several definitions of “conflict diamonds,” briefly examines the history of such diamonds in Africa, and provides information on the international response to the conflict diamond issue. Section 3 focuses on the ROC’s role in this ongoing problem, beginning with background information on the country, followed by a discussion of its history of involvement in the illicit diamond trade, its resultant expulsion from the KP, and the relatively minor consequences that have stemmed therefrom. Section 3 also illustrates the KPCS’ inability, as currently formulated, to prevent all conflict and illicit diamonds from entering legitimate channels of trade, and notes the effects of such illicit trade on resource-rich nations neighboring the ROC. Section 4 reiterates the failure of the KPCS to regulate the flow of illicitly traded diamonds out of the ROC, argues that the ROC should raise its export tax on diamonds, and includes possible means of coercing the ROC to do so, should they prove necessary. Finally, Section 5 discusses prospects for change in the ROC and consequently, in neighboring nations.

2. CONFLICT DIAMONDS IN AFRICA AND THE KIMBERLEY PROCESS CERTIFICATION SCHEME

2.1. Conflict Diamonds Exposed

The United Nations defines “conflict diamonds” as “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 contravention of the decisions of the Security Council.”7 With respect to Africa specifically, London-based non-governmental

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organization ("NGO") Global Witness\(^8\) provides a working definition for conflict diamonds as “diamonds which originate from areas in Africa controlled by forces fighting the legitimate and internationally recognized government of the relevant country.”\(^9\)

For those purposes contemplated by the KPCS, namely, an international certification scheme for rough diamonds,\(^10\) conflict diamonds are defined as:

[R]ough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council ("UNSC") resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly ("UNGA") Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future.\(^11\)


\(^9\) GLOBAL WITNESS, CONFLICT DIAMONDS: POSSIBILITIES FOR THE IDENTIFICATION, CERTIFICATION, AND CONTROL OF DIAMONDS 1 (2000), available at http://www.globalwitness.org/media_library_detail.php/86/en/conflict_diamonds. Global Witness further explains that with respect to Africa specifically, “[d]iamonds that originate from areas under the control of forces that are in opposition to elected and internationally recognized governments, or are in any way connected to those groups should be considered as conflict diamonds.” Id.

\(^10\) KPCS, supra note 2, Section 1.

\(^11\) Id. Simply put, “rough” diamonds are those that have yet to be cut or polished. LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 2. The KPCS defines “rough diamonds” as “diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31.” KPCS, supra note 2, Section 1. “Diamonds” are defined to mean “a natural mineral consisting essentially of pure crystallized carbon in the isometric system, with a hardness on the Mohs (scratch) scale of 10, a specific gravity of approximately 3.52 and a refractive index of 2.42.” Id.
2.2. Conflict Diamonds in Africa—A Brief History

2.2.1. Practicality of Using Diamonds to Fund Conflict

Diamonds have a number of characteristics that contribute to their proven effectiveness as a source of funding for rebel insurgencies and terrorists in Africa. They are small in size, highly fungible, easily concealed, and quite difficult to trace and police. They are frequently referred to as the world’s most concentrated form of wealth. As a convertible form of wealth, diamonds appeal to those who wish to move high-value resources across borders and yet circumvent interactions with legitimate financial institutions. The ease with which diamonds may be mined also plays a role in their prevalence as a means of funding insurgent causes. Diamonds can be mined in unstable regions using little or no technology, as opposed to other resources such as oil and copper, which must be mined on an industrial scale and thus require substantial investment and on-site stability. In addition, diamond mining largely takes place “in the most remote and lawless areas of the world.”

2.2.2. Nations Devastated by Diamond-Funded Conflicts

Diamonds have financed vicious conflicts responsible for the death and displacement of millions of people and economic ruin in

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13 *Id.*
14 *Id.*
16 Diamonds easily function as currency and may be used, for example, “to purchase weapons, fund drug deals, launder money, or finance other crimes.” Price, *supra* note 15, at 25; see also Woody, *supra* note 12, at 337 (explaining that sometimes, rough diamonds are sold for cash, while at other times, they are directly exchanged for weapons).
18 *Id.*
19 *Id.* at 62.
20 Malamut, *supra* note 4, at 27.
numerous African countries. Angola, Sierra Leone, and the DRC have yet to fully recover from the pervasive destruction caused by diamond-funded civil wars. According to Global Witness, as of late 2006, diamonds were still being used for money laundering, tax evasion, and organized crime in these nations.

Natural resource-rich Angola was plagued by civil wars from 1961 through 2002. The nation gained independence from Portugal in 1975. From 1975 through 2002, the conflicts in Angola were generally dominated by the National Union for the Total Independence of Angola (“UNITA”), the country’s leading rebel group, and the Popular Movement for the Liberation of Angola (“MPLA”). The MPLA relied on Angola’s oil reserves as its means of generating revenue, while UNITA, led by guerrilla leader Jonas Savimbi, seized control of the bulk of the nation’s diamond mines. Angola is one of Africa’s principal diamond resources, and its diamonds rank among the world’s top stones when measured by value per carat. As such, diamonds proved a key source of funding for the UNITA military. Apart from serving as a means of financing rebel causes, however, control of Angola’s diamond mines may have also been an objective of the conflict in and of itself.

22 Id.
23 Id.
25 Kaplan, supra note 3, at 573.
26 Price, supra note 15, at 8-10.
27 Id. at 9.
28 Kaplan, supra note 3, at 574.
29 The Cartel Isn’t Forever, ECONOMIST, July 17, 2004, at 60.
30 From 1992 through 1998, UNITA earned an estimated minimum of between $3.7 and $4 billion from sales of Angolan-mined diamonds, much of which was dedicated to the funding of “a serious guerrilla offensive.” Kaplan, supra note 3, at 574-575.
31 UNITA launched two of its major wars during considerable recessions in the diamond industry, throughout which it organized repeated attacks on
In response to what seemed an undeniable link between diamonds and the ongoing Angolan conflict, in 1998 the U.N. Security Council (“UNSC”) passed Resolutions 1173 and 1176, a key element of which is a prohibition on the direct or indirect import of Angolan diamonds not controlled through a government-issued certificate of origin. The wars in Angola resulted in an estimated loss of as many as 1.5 million lives, in addition to thousands of incidents of maiming caused by active landmines. As of 2002, when UNITA signed a peace pact with the Angolan government, an estimated 4.5 million citizens had been displaced. The diamond sanctions imposed by the UNSC were lifted in 2002.

As one commentator aptly noted, “[w]hile the war in Angola brought the issue of conflict diamonds to the attention of the U.N. and NGOs, Sierra Leone and its now infamous war atrocities brought conflict diamonds to the forefront of civil society.” From 1991 through 2002, Sierra Leone was ravaged by civil war of the most brutal kind when the Revolutionary United Front (“RUF”) and other rebel groups clashed over control of the nation’s diamond mines, some of the richest on the planet.

In 1991, the RUF, led by former army corporal Foday Sankoh, commenced its mission to overthrow then-President Joseph Momoh and capture Sierra Leone’s diamond fields. Over the course of its roughly decade-long campaign for control of the government mining projects and attempts to shut down Angola’s official mining industry.

32 Id. at 574-575. Such tactics “made it extremely difficult for the government to reap any profit from its diamond resources and turned government mining projects into ‘a war zone.’” Id. at 575.
33 Dietrich, supra note 4, at 3.
34 TRUTH ABOUT DIAMONDS, supra note 21, at 1.
36 TRUTH ABOUT DIAMONDS, supra note 21, at 1.
37 Price, supra note 15, at 12.
38 TRUTH ABOUT DIAMONDS, supra note 21, at 1. See infra notes 40–49 and accompanying text (describing the egregious war atrocities and human rights violations that occurred during the civil war).
40 Id. at 13.
country’s diamonds, the RUF committed some of the most vicious human rights atrocities in recorded history. Aside from countless abductions and murders, these include the mass rape of women and children\textsuperscript{41} and conscription of approximately 12,000 children who were then forced to fight among the rebels\textsuperscript{42}. The most outrageous human rights violations, however, for which the RUF is most infamous, were its machete-inflicted amputations of citizens’ limbs\textsuperscript{43}. Endeavoring to send the message that people without hands could not vote against the RUF, the rebel group mutilated more than 20,000 people\textsuperscript{44}.

Employing such violent tactics, the RUF achieved a mass removal of citizens from Sierra Leone’s diamond-rich areas\textsuperscript{45} and mined up to an estimated $125 million worth of diamonds each year\textsuperscript{46}. The RUF traded the stones for weapons, such that Sankoh, diamond merchants, and arms dealers alike were profiting from the perpetuation of the conflict\textsuperscript{47}. In addition, diamond smuggling was rampant and often facilitated by complicit neighboring governments such as that of Liberia\textsuperscript{48}. Due to the RUF’s activities, Sierra Leone’s official diamond exports plummeted and almost vanished entirely\textsuperscript{49}.

Responding to the atrocities plaguing Sierra Leone, in July 2000, the UNSC passed Resolution 1306; among other things, this resolution imposed an embargo against the direct or indirect import of rough diamonds from Sierra Leone without a valid certificate of origin\textsuperscript{50}. As of March 2001, Resolution 1343


\textsuperscript{42} Price, \textit{supra} note 15, at 12.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.}

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Truth About Diamonds}, \textit{supra} note 21, at 1. The up-to-$125 million figure is applicable for the years 1991–2002, during which Sierra Leone was engaged in civil war. \textit{Id.}

\textsuperscript{47} Kaplan, \textit{supra} note 3, at 568.

\textsuperscript{48} \textit{Id.} at 569.

\textsuperscript{49} \textit{See} Price, \textit{supra} note 15, at 15 (contrasting Sierra Leone’s official diamond exports before and during the war; in the 1960s, Sierra Leone exported approximately two million carats per year, whereas in 1999, only 9,000 carats were officially exported).

prohibited the import of all rough diamonds from Liberia—irrespective of the stones’ country of origin—and the supply of arms to Liberia. By the end of the war in 2002, more than 75,000 people had perished and 80% of Sierra Leone’s citizens were refugees. In 2003, the UNSC lifted the diamond sanctions imposed on Sierra Leone, and the embargo on Liberian diamonds was similarly lifted in 2007.

The natural resources of the DRC have been described by at least one commentator as possibly “the most opulent on earth.” But despite having mined billions of dollars worth of diamonds, the DRC is exceptionally poor and stands as one of the world’s least developed countries. Plagued by a long history of corruption, bad governance, and complex conflict involving both domestic and international actors seeking to exploit its precious resources, the DRC has been unable to profit from its natural wealth.

Instead, the nation became embroiled in civil war in 1998, which came to involve armies from Uganda, Rwanda, and Burundi (backing Congolese rebels), along with Angola, Namibia, and Zimbabwe (backing the Congolese government). This conflict has been referred to as “Africa’s first world war.” In 2001, the U.N. issued a report in which it explicitly recognized a link between the conflict’s prolongation and “the systematic

55 TRUTH ABOUT DIAMONDS, supra note 21, at 4.
56 Dietrich, supra note 4, at 1.
57 Id. at 13.
58 Kaplan, supra note 3, at 578.
59 Id.
exploitation of natural resources and other forms of wealth.”61 The largely diamond-driven war ended in 2003, with a staggering estimated death toll of over 3 million lives.62

2.3. International Response to Conflict Diamonds Issue

It was impossible for the international community to ignore the ghastly situation fueled by the desire for diamonds in Africa. As early as 1998, NGOs such as Global Witness and Partnership Africa Canada became actively involved in the campaign to publicize and ultimately put an end to the brutal African conflicts both caused and funded by diamonds. These organizations published myriad reports condemning the human rights atrocities linked to the diamond trade.63 In May 2000, major diamond trading and producing countries, diamond industry representatives, and NGOs met in Kimberley, South Africa, to discuss ways to confront the conflict diamonds issue. Mindful of the importance of the legitimate diamond industry—upon which numerous countries rely—the participants began a three-year negotiating process, the Kimberley Process, to institute an international certification scheme for rough diamonds.64

Faced with mounting pressures and the risk of a “potentially crippling consumer backlash and boycott,” the diamond industry was aware that the time was ripe for action.65 At their meeting in Antwerp, Belgium in July 2000, the World Federation of Diamond Bourses and the International Diamond Manufacturers

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62 TRUTH ABOUT DIAMONDS, supra note 21, at 1.


Association—the two largest international diamond trade organizations—passed a resolution creating the World Diamond Council ("WDC").\textsuperscript{66} In addition to representatives from the diamond industry itself, the WDC was to include emissaries from nations where diamonds play a major economic role and the international banking sector.\textsuperscript{68} The WDC was charged with the development, implementation, and oversight of a tracking system for the import and export of rough diamonds so as to thwart the exploitation of diamonds for illicit purposes such as war and the infliction of cruelty.\textsuperscript{69}

In December 2000, the United Nations General Assembly unanimously adopted Resolution 55/56, recognizing the role of diamonds in fueling conflicts.\textsuperscript{70} This resolution called upon the international community to develop and implement a "simple and workable international certification scheme for rough diamonds" based predominantly on national certification schemes and internationally agreed minimum standards.\textsuperscript{71} In addition to this and other related General Assembly resolutions,\textsuperscript{72} a number of UNSC resolutions imposing sanctions for trading in conflict diamonds (including those discussed in Section 2.2.2) have also "played an active role in responding to and shaping the conflict diamond agenda."\textsuperscript{73}

After three years of negotiations, the international cooperation sought by the U.N. was realized in the form of the Kimberley Process Certification Scheme.\textsuperscript{74} The KPCS, which was put into practice in January 2003, is an international certification scheme for

\textsuperscript{66} Banat, \textit{supra} note 41, at 949.

\textsuperscript{67} World Diamond Council, About WDC, \url{http://www.worlddiamondcouncil.com} (last visited Sept. 11, 2008).

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.}


\textsuperscript{71} Resolution 55/56, \textit{supra} note 70, at 2.


\textsuperscript{73} Kaplan, \textit{supra} note 3, at 587.

\textsuperscript{74} \textit{Truth About Diamonds, supra} note 21, at 2.
the import and export of rough diamonds with the goal of preventing trade in conflict diamonds while protecting the legitimate diamond trade. As succinctly described by one commentator, the KPCS has three main elements: “a system of internal controls from the mine to the point of export; requirements for shipping rough diamonds; and a system to track the movement of rough diamonds after the point of export.” As of September 2007, the KP had 48 participants representing 74 countries, with all European Community countries counted as a single participant. The KP thus applies to more than 99% of global rough diamond production.

Although the meetings that engendered the KPCS lacked the benefit of formal or diplomatic status and the agreement does not constitute a treaty, the Kimberley Process accords resembled any ordinary legislative process; in addition, the U.N.’s backing of the KP serves to buttress its international legitimacy. However, while some commentators have argued that the KPCS should be viewed as legally binding, many others describe the scheme as a mere political agreement that technically lacks “the binding force of international law” and thus neglects to provide a framework for legal means of enforcing the failings of participants. KP participants are required to pass national laws implementing

75 KPCS, supra note 2.
76 Kaplan, supra note 3, at 587.
80 Woody, supra note 12, at 345.
81 See, e.g., Feldman, supra note 77, at 836 (arguing that “the agreement has the force of law”).
82 See Price, supra note 15, at 66 (“Without a legally binding treaty, complete with a monitoring and enforcement mechanism, the KP may be no more binding than a nod and a handshake.”).
83 The KPCS defines “participant” as “a state or a regional economic integration organisation for which the Certification Scheme is effective.” KPCS, supra note 2, § 1.
84 The term “required” (along with other similarly obligatory-sounding language) must be interpreted loosely in this context, in light of the fact that the KPCS only provides for what participants “should” do. See KPCS, supra note 2, §§ 2–5 (describing in detail what participants “should” do to comply with the KPCS). Indeed, as explained by Wallis, the General Accounting Office (“GAO”) has
import and export control regimes, which must entail the use of KP certificates to accompany all shipments of rough diamonds both leaving and entering their respective countries. In theory, this should prevent conflict diamonds from entering the legitimate “diamond pipeline.” In practice, however, the KPCS’ lack of an international monitoring body or legally binding compliance standards has proved a serious weakness.

The KPCS prohibits participants from trading in rough diamonds with non-participants. Since the category of non-participants encompasses some members of the World Trade Organization (“WTO”), the KPCS restricts some trade between WTO members and thus violates certain articles of the General Agreement on Tariffs and Trade (“GATT”) treaty. However, in May 2003, the WTO granted a waiver on trade restrictions so as to proscribe the exportation of rough diamonds to non-participants in the KP. In the past, the waiver was reviewed annually; in December 2006, the WTO extended the waiver for six years.

expressed concerns “stemming from [the KPCS’] ethos of voluntary participation and self-governance.” Wallis, supra note 65, at 403. One such concern relates to the fact that “adoption of the Scheme’s recommended internal controls is entirely optional and the expectation is that each participant will create appropriate internal controls voluntarily at the national level.” Id.

85 See id. § 2-4. See also Woody, supra note 12, at 345 (describing the scheme).


87 Woody, supra note 12, at 345–46. See infra notes 169–70 and accompanying text (describing this problematic dimension of the KPCS with respect to the Republic of Congo).

88 KPCS, supra note 2, § 3 (“Each Participant should . . . (c) ensure that no shipment of rough diamonds is imported from or exported to a non-Participant.”). See infra note 143 and accompanying text, where this element of the KPCS is described in greater detail.


90 Woody, supra note 12, at 336.

91 Id.
3. THE REPUBLIC OF CONGO AND THE ILLICIT DIAMOND TRADE

3.1. The Republic of Congo: Background Information

The Republic of Congo, also known as Congo-Brazzaville, is a former French colony located in western central Africa. After being granted formal independence from France in 1960, the ROC experimented with a Marxist form of government for more than two decades.92 As a result of gradual moderation of Congolese economic and political views, the ROC completed a transition to multi-party democracy in 1992.93 The nation’s democratic progress was frustrated in 1997, however, when civil war broke out and restored former Marxist president Denis Sassou-Nguesso, who was in power from approximately 1979 through 1992.94

Prior to the war’s inception in 1997, the ROC’s system of government was comparable to that of the French.95 After seizing control, however, Sassou-Nguesso discontinued the 1992 constitution upon which this system was based.96 A new constitution was approved in 2002—shortly before Sassou-Nguesso won a largely boycotted presidential election97—which provides for a seven-year presidential term and a parliament of two houses, members of which serve for five years.98 This system vests most of the decisionmaking authority directly in the president and his administration.99 In 2007, General Emmanuel Ngouelondele, a former head of the special services unit of police intelligence, commented that the ROC’s authoritarian regime has weakened the people to such an extent that they have lost the will to resist, and that citizens “have been starved, humiliated, and

92 Dietrich, supra note 4, at 3.
94 Id.
95 Id.
96 Id.
97 Karanta Kalley, Sustained High Oil Prices Drive Global Insight to Revise Congo’s Sovereign Risk Rating, GLOBAL INSIGHT, Nov. 16, 2006.
98 Id.
Ngouelondele also stated that “corruption is the [nation’s] system of governance,” whereby giving a bit of money to the people serves to assuage popular criticism.\textsuperscript{101}

The ROC has been described as “one of the poorest nations on earth” and is among the world’s least developed countries.\textsuperscript{102} As of August 2007, roughly 34\% of the nation’s population\textsuperscript{103} was living below the poverty line, the per capita gross domestic product stood at $950, and the country ranked 140 out of 177 on the United Nations Development Programme (“UNDP”) Human Development Index.\textsuperscript{104} An estimated 70\% of the population lives on less than $1 per day.\textsuperscript{105}

By 2006, the country’s total external debt stock stood at over $5.5 billion, amounting to 123\% of the gross domestic product (“GDP”).\textsuperscript{106} As explained by one commentator, “[m]ore important than the sheer volume of this crippling debt is the profile of its creditors.”\textsuperscript{107} More than one-third of the ROC’s nominal external debt stock is held by commercial creditors, in contrast to the debt of most neighboring nations; the amount of commercial debt in the country’s debt stock poses significant risk of default, “particularly given the heavy reliance on export revenue from a narrow basket of commodities.”\textsuperscript{108} The ROC’s economy is based primarily on the petroleum sector, which accounts for 89\% of the nation’s export earnings.\textsuperscript{109} Other sources of export earnings include lumber,


\textsuperscript{101} \textit{Id.}

\textsuperscript{102} Alan Beattie, Vultures Unlikely Allies in Anti-Graft Cause, FIN. TIMES (London), July 18, 2007, at 6; see also Dietrich, \textit{supra} note 4, at 1 (describing central Africa’s diamond exporters, including the ROC, as some of the “least developed countries in the world”).

\textsuperscript{103} As of July 2007, the population of the Republic of Congo was estimated at 3,800,610. ROC BACKGROUND NOTE, \textit{supra} note 93.

\textsuperscript{104} World Health Org. (WHO), Health Action in Crises: Republic of the Congo (Aug. 2007) [hereinafter WHO on ROC], \textit{available at} http://www.who.int/hac/crises/cog/roc_aug2007.pdf. The higher the number of a country’s rank on the UNDP Human Development Index, the less developed the country is. \textit{Id.} at 1.

\textsuperscript{105} Tony Allen-Mills, Congo Ruler Runs Up £207,000 Hotel Bill, SUNDAY TIMES (London), Jan. 7, 2007, at 27.

\textsuperscript{106} Kalley, \textit{supra} note 97.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} ROC BACKGROUND NOTE, \textit{supra} note 93.
plywood, sugar, cocoa, coffee, and diamonds. Short-term instability of commodity prices and the consequent variability of export earnings is, according to the WTO, “a major obstacle to sustained development,” as instability of export earnings may appreciably reduce economic welfare. Of the world’s least developed countries (“LDCs”) and even those nations with the most concentrated economies, the ROC ranks near the very top on an export earning variability index.

3.2. The Republic of Congo’s Suspect Exporting Activities and Ultimate Expulsion from the KP

The Republic of Congo has an extensive history of suspicious trading in diamonds. Most of the diamonds smuggled through the ROC come from the DRC; diamond trade between these nations has been occurring for approximately three-quarters of a century, with diamond counters set up in Brazzaville—the ROC’s capital—in the 1930s to export stones (both smuggled and legitimate) to Europe. The DRC’s smuggling problem gained momentum in the 1980s, and the ROC played a key role in effectuating the trend. Due to the geographical proximity of and well-established trade routes between the two countries, as well as the ROC’s lenient diamond regulations and lower export tax, the DRC’s neighbor was an attractive destination for smugglers and corrupt international diamond dealers alike.

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110 Id.
112 Id. Variable export earnings may decrease economic welfare in a number of ways, including: disruption of investment planning decisions, misallocation of resources, and adversely affecting growth; generating balance of payment problems, which may result in a high degree of external debt (as found in the ROC); and negatively impacting public finances. Id. at 9-10.
113 Id.
114 See e.g., Congo-Brazzaville: Coming Cleaner, 45 AFR. CONFIDENTIAL 15, 6 (2004) [hereinafter Coming Cleaner] (discussing the history of the diamond trade between the ROC and the DRC).
115 Dietrich, supra note 4, at 5.
116 The ports of Brazzaville and Kinshasa—the capital of the DRC—are separated by only five kilometers. Ports and Shipping: Congo-DR Congo, 42 AFR. RES. BULL. 16743, 16761 (2005).
117 Dietrich, supra note 4, at 16; Malamut, supra note 4, at 33.
In September 2000, International Diamond Industries ("IDI"), an Israeli firm, was awarded an eighteen-month monopoly on diamond exports from the DRC. Although questionable and contradictory statistics obscure the precise extent of the decline, diamond exports from the DRC dropped immediately. As soon as the IDI monopoly went into effect, there was a 50% drop in diamond imports to Belgium from the DRC and a striking upsurge in such imports from the ROC, which has only minimal diamond production of its own. Even after the IDI monopoly was annulled in April 2001 and Belgian diamond imports from the DRC increased, such imports from the ROC continued to rise. There are several possible explanations for this phenomenon.

One partial explanation is the typical seasonal increase in alluvial production when the rainy season subsides in southern DRC in April. Another viable explanation is that smuggling from the DRC persisted in spite of the IDI monopoly coming to an end. Other potential sources of the ROC’s increased diamond exports include Angola and Liberia. The ROC served as an outlet for UNITA diamonds when the rebels still controlled industrial mining sites in northeastern Angola prior to 1998, which is indicated in part by Belgian rough diamond imports from the ROC worth over $1 billion between 1995 and 1996. Angolan

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118 Dietrich, supra note 4, at 15.
119 Id.
120 Id. See infra note 137 and accompanying text.
121 Id. at 16.
122 "Alluvial [is] [t]he name of a type of diamond and the type of shallow mine it is extracted from, with diamonds found in river beds and in shallow deposits.” A ROUGH TRADE, supra note 24, at 15.
123 See Dietrich, supra note 4, at 16 (noting that “[o]ne partial explanation is the normal seasonal increase in alluvial production once the rains subside in April”); see also U.S. DEP’T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: DEMOCRATIC REPUBLIC OF THE CONGO (2008) [hereinafter DRC BACKGROUND NOTE] (explaining that the DRC is situated on the Equator, with one-third of the country to the north and two-thirds to the south; south of the Equator, the rainy season occurs from October to May, as compared to the April through November rainy season in the north), available at http://www.state.gov/r/pa/ei/bgn/2823.htm (last visited Sept. 7, 2008).
124 See Dietrich, supra note 4, at 16 (“The most likely explanation is that the DRC traders simply continued to smuggle diamonds through Brazzaville, fearful that the flip-flop in laws, ministers and even governments in Kinshasa could backfire on their local activities again.”).
125 Id.
126 Id.
diamonds from certain sources are often declared in Belgium as having come from the ROC, and smuggling of Angolan diamonds rose in 2001, with the ROC and the DRC as probable conduits.\textsuperscript{127} Furthermore, throughout the 1990s, Liberia was a critical outlet for conflict diamonds from Sierra Leone and for illicit diamonds originating elsewhere.\textsuperscript{128} When a UNSC ban on Liberian diamonds took effect in May 2001,\textsuperscript{129} Belgian imports from Liberia trickled off, while imports from the ROC doubled.\textsuperscript{130}

Despite unreliable, confusing, and sometimes even nonexistent statistics profiling the international diamond trade, the inescapable conclusion is that the Republic of Congo had become “a major hub for the trafficking of illicit and conflict diamonds.”\textsuperscript{131} Nevertheless, the nation was admitted to the Kimberley Process in 2003. At the time, the focus was on whether criteria were met on paper, as opposed to in practice, and the ROC had passed regulations calculated to achieve the minimum conditions required by the scheme.\textsuperscript{132} However, in response to concerns that the nation’s rough diamond exports far surpassed its geological production capacity,\textsuperscript{133} as well as suspicions relating to the fact that the country was only charging a 2\% export tax on diamonds, in contrast to the more typical 3\% elsewhere in the region, the KP dispatched a review mission to the ROC in 2004.\textsuperscript{134}

Headed by former KP Chairman Abbey Chikane of South Africa, who was joined by experts from Canada, Israel, the WDC, and the Ottawa-based NGO Partnership Africa-Canada, the review mission spent May 31 through June 4 of 2004 investigating in the ROC.\textsuperscript{135} According to a report subsequently submitted by the

\begin{itemize}
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} S.C. Res. 1343, supra note 51.
  \item \textsuperscript{130} Dietrich, supra note 4, at 16. See also Malamut, supra note 4, at 33 (“It was not until after the U.N. sanctions went into effect against Liberia in 2001 . . . that the ROC became the primary exporter of smuggled Central African conflict diamonds.”).
  \item \textsuperscript{131} Dietrich, supra note 4, at 17.
  \item \textsuperscript{132} Wallis, supra note 65, at 408.
  \item \textsuperscript{133} Id. See infra note 137 and accompanying text.
  \item \textsuperscript{134} Wolf-Christian Paes, “Conflict Diamonds” to “Clean Diamonds”: The Development of the Kimberley Process Scheme, in RESOURCE POLITICS IN SUB-SAHARAN AFRICA 318 (Matthias Basedau & Andreas Mehler eds., 2005) [hereinafter RESOURCE POLITICS].
  \item \textsuperscript{135} News Release, Kimberley Process, Kimberley Process Removes the Republic of Congo from the List of Participants (July 9, 2004) [hereinafter KP Press
review mission, ROC authorities were unable to account for a “massive discrepancy” between the magnitude of rough diamond exports and the lack of any reported production or imports.\footnote{Id.} While its estimated production capacity hovered at only 55,000 carats per year,\footnote{Christian Tsoumou, Experts Examine Congo’s Efforts to Stop Blood Diamonds, REUTERS, Sept. 5, 2007, available at http://www.alertnet.org/thenews/newsdesk/L05885891.htm.} the ROC’s reported diamond exports totaled approximately 5.2 million carats per year—thus, exports exceeded production by over 9000\%.

Investigators reported that ROC officials trafficked the stones through the secondary diamond centers of Switzerland and the United Arab Emirates to skirt more exacting controls at the world’s diamond hub, Antwerp, Belgium.\footnote{Daniel Balint-Kurti, Congo Suspended from World Diamond Trade, ASSOCIATED PRESS, July 10, 2004, available at http://www.globalpolicy.org/security/issues/diamond/2004/0710congsusp.htm.} According to investigators, these officials also significantly undervalued the stones upon formally declaring them in Switzerland; in order to avoid paying taxes and withhold revenues, they declared uncut, unset gem-quality stones at, on average, a scant 1.3\% of the market price which they would ordinarily command—\$0.98 per carat, in contrast to the average market price of \$75.90 per carat.\footnote{Id.} Such findings begged the conclusion that the ROC lacked adequate controls to ensure that Kimberley Process certificates were only issued for rough diamonds mined in or legitimately imported into the country.\footnote{KP Press Release, supra note 135, at 1.} Accordingly, the nation was expelled from the KP in July 2004.\footnote{Id.}

3.3. Consequences of Expulsion for the Republic of Congo

As mentioned briefly in the context of the WTO waiver described in Section 2.3,\footnote{See supra note 88 and accompanying text (explaining the prohibition on trade in rough diamonds between participants and non-participants in the KP).} a key aspect of the Kimberley Process is that participants may only trade rough diamonds with other

\begin{itemize}
  \item \footnote{Release], available at http://www.kimberleyprocess.com/media/news_archives_en.html (last visited Oct. 4, 2008).}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
\end{itemize}
participants that have complied with the minimum obligations of the KPCS.\(^{144}\) Thus, by its removal from the KP, the Republic of Congo lost its ability to trade rough diamonds with dozens of nations, including Belgium—the international center of the diamond trade—and the U.S., which purchases two-thirds of the world’s diamonds.\(^{145}\) Since it was thereby precluded from trading rough diamonds with legitimate channels representing at least 98\% of the world diamond trade,\(^{146}\) expulsion likely led to the loss of legitimate revenues for the ROC.

In addition to revenues lost as a direct result of the country’s inability to trade rough diamonds with almost the entire diamond-trading community, the ROC may experience—if it has not already—further losses in revenue as a consequence of expulsion-related harm to its reputation. As one commentator has noted, “[t]he international diamond trade is operated by a close-knit and consolidated industry that . . . has special interests in avoiding a blemish on a product which it markets as a symbol of love.”\(^{147}\) Both the ROC’s history of trading in conflict and illicit diamonds and its expulsion from the KP have been highly publicized.\(^{148}\) Thus, industry players might be reluctant to deal with the ROC for even those diamond-related transactions that are not proscribed, such as trade in polished diamonds,\(^{149}\) which could cause additional revenue loss. Because diamonds are not among the ROC’s prevailing resources, however, potential legitimate revenues forgone as a result of the country’s expulsion from the KP would likely not be of dire significance. Nevertheless, some

\(^{144}\) KPCS, supra note 2, § 3.

\(^{145}\) Balint-Kurti, supra note 138.

\(^{146}\) At the time of the ROC’s expulsion on July 9, 2004, the Kimberley Process had 43 participants, with the European Community counting as a single participant. KP Press Release, supra note 135, at 5. This represented roughly 98\% of the world diamond trade. See Balint-Kurti, supra note 138 (discussing the ROC’s expulsion from the KP and the legitimate world diamond trade). As of September 2007, the KP had 48 participants, representing 74 countries and accounting for over 99\% of the world diamond trade. See supra notes 86–87 and accompanying text (examining obstacles to eradicating the illicit world diamond trade).

\(^{147}\) SCHRAM, supra note 86, at 37.

\(^{148}\) LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 6.

\(^{149}\) See infra notes 164–65 and accompanying text (explaining the legality of trade in polished stones between participants and non-participants).
diamond production does exist,\footnote{See Mexivada Begins Work Program on Congo Coloured Diamonds Project, CAN. NEWS WIRE, Nov. 20, 2006 (discussing current excavation programs in the ROC, which have yielded “diamonds to sizes in excess of 1 carat ... including colored diamonds”); see, e.g., Mexivada Subsidiary Awarded Three Additional Exclusive Diamond Concessions in Republic of Congo (Brazzaville), PR NEWSWIRE US, Oct. 24, 2006 (noting that “significant quantities” of diamonds were produced in regions located within concession areas awarded to Mexivada’s subsidiary in the ROC).} and in a nation where the majority of the population has minimal purchasing power and little access to adequate food and healthcare,\footnote{WHO on ROC, supra note 104, at 2. The mortality rate for children under age 5 in the ROC is over 10%, and more than half of the country’s population lacks access to safe drinking water. Id.} such lost revenues are not without consequence for the citizens of the ROC.

Aside from potential losses in legitimate revenues, the Republic of Congo has suffered few, if any, consequences related to its illicit trade in diamonds and resultant expulsion from the KP. In fact, although its legal trade in rough diamonds largely ceased, there is evidence that the ROC’s illegal trade in rough diamonds has continued post-expulsion. According to Global Witness, analysis of the United Nations’ Commodity Trade Statistics (“Comtrade”) Database indicates that from 2004 to 2006, illegal trade in rough diamonds worth at least $10.2 million transpired between KP participant and non-participant countries.\footnote{LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 1.} As this figure excludes smuggled diamonds, trade that was not officially declared by the importer or exporter, and trade in countries that did not report the relevant data to the U.N.,\footnote{See infra text accompanying notes 158, 159 (describing the difficulties inherent in sustaining a legitimate international diamond trade).} it is anticipated to be appreciably lower than the aggregate illegal trade that actually took place.\footnote{LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 6.} Analysis of the data further indicates that exchanges with the ROC accounted for the bulk of illicit trade, with a number of participant countries reporting trade in rough diamonds with the non-participant country in 2005 and 2006, for a total of close to $8.3 million.\footnote{Id.} These participant countries include the United States, India, South Africa, Hong Kong, and the United Kingdom, among others.\footnote{Id.}
As duly recognized by Global Witness, however, the underlying data is not without limitations. \(^{157}\) The U.N. Comtrade Database comprises official statistics submitted to the U.N. by each nation that decides to report on its trade figures. \(^{158}\) Since many countries either do not keep or do not report thorough information on international trade, the data is not comprehensive. Nevertheless, in spite of such imperfections, Comtrade data does represent officially reported trade statistics and is used extensively as a definitive source for international trade figures. \(^{159}\)

Apart from the Comtrade data, the Kimberley Process also amasses and evaluates statistical data pertaining to the production and trade of rough diamonds. \(^{160}\) In order to maintain compliance with the terms of the KPCS, participants must submit data relating to their trade in rough diamonds on a quarterly basis and on their production of rough diamonds on a semi-annual basis. \(^{161}\) Like the Comtrade data, the KP data has its inadequacies—it only covers trade between participating countries and thus fails to expose leakages in the system; also, the data only pertains to rough diamonds (to the exclusion of polished stones). \(^{162}\) In addition, “[s]everal participant countries either submit their statistics late or not at all, without penalty, despite the fact that statistical reporting is a fundamental element of Kimberley Process membership and compliance.” \(^{163}\) But while both of these pools of information leave something to be desired in terms of comprehensiveness and unfailing accuracy, they constitute the most complete collection of statistics relevant to the international diamond trade and overall success of the KPCS, and are thus of considerable value. Regardless of the precise dimensions of the illegal trade suggested by the figures, it is clear that transactions involving the Republic of Congo accounted for the vast majority of it.

\(^{157}\) “Bad statistics, false statistics, and no statistics at all have plagued the diamond industry for years.” Dietrich, supra note 4, at 17. See also supra note 131 and accompanying text (explaining the unreliability of present diamond trading statistics).

\(^{158}\) LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 4.

\(^{159}\) Id.

\(^{160}\) Id.

\(^{161}\) Id.

\(^{162}\) Id.

\(^{163}\) Wallis, supra note 65, at 407.
Exclusive of the ROC’s contributions to the illegal trade of rough diamonds, the U.N. Comtrade figures implicate the nation in the illicit trade of polished stones as well. The KPCS controls only trade in rough diamonds,\(^\text{164}\) and therefore, as implied above,\(^\text{165}\) the legality of the ROC’s trade in polished diamonds was not affected by its expulsion from the certification scheme. Despite its continued propriety, the occurrence and extent of the nation’s post-expulsion trade in polished diamonds has raised eyebrows. This is to be expected, given the country’s geological production capacity and history of illicit trade, among other things.

As analyzed by Global Witness, the U.N. Comtrade data indicates that from 2005 to 2006 the Republic of Congo exported more than $650,000 worth of polished diamonds to the United States.\(^\text{166}\) Since the ROC does have some diamond production of its own,\(^\text{167}\) domestic polishing factories could have legally purchased domestically-produced diamonds\(^\text{168}\) and then legally exported them to the U.S. As the ROC lacks effective procedures to control its trade in rough diamonds, however, there would be no means of ensuring that the rough stones had not been illegally smuggled into the country.\(^\text{169}\) After all, a nation with a consistent history of government involvement in illicit trade of diamonds can hardly be expected to domestically enforce such violations of relevant local law.\(^\text{170}\) Smuggled rough diamonds could also be deliberately misclassified and exported as polished diamonds, which would not be checked for a KP certificate.\(^\text{171}\) It is worthy of note that once

\(^{164}\) See generally KPCS, supra note 2 §§ 1–4 (detailing the responsibilities, with regards to diamond trading, of participants in the KP).

\(^{165}\) See supra note 149 (describing the effects of participation and non-participation in the KP on the legality of trade in polished diamonds).

\(^{166}\) See LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 13 (indicating that from 2005–2006 the U.S. imported $665,490 worth of polished diamonds from the Republic of Congo).

\(^{167}\) See supra note 150 (detailing the Mexivada Mining Corporation’s involvement in diamond production initiatives within the ROC).

\(^{168}\) LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 9.

\(^{169}\) Id. See supra note 141 and accompanying text (explaining the ROC’s removal from the KP).

\(^{170}\) Cf. Woody, supra note 12, at 346 (explaining the problem of the KPCS’ lack of international monitoring: “The extent of any monitoring lies within the realm of domestic enforcement for any violation of domestic legislation. However, this enforcement could be sporadic at best, and entirely at the discretion of the participating country.”) (emphasis added).

\(^{171}\) Id.
diamonds are polished, it is nearly impossible to ascertain their source.\textsuperscript{172} This situation illustrates just one of the weaknesses of the KPCS.

### 3.4. Effects of the Republic of Congo’s Illicit Trade in Diamonds on Neighboring Nations

As noted by one commentator, “a direct effect of the illegal diamond trade and mineral exploitation is that the producing countries, overrun by rebel groups, lose millions in possible revenue for the country.”\textsuperscript{173} Such lost revenues serve to perpetuate the cycle of war and conflict, further injuring already dilapidated infrastructure and thus reducing the capacity of nations to deal with domestic and international conflicts.\textsuperscript{174} In addition, such revenues are desperately needed to fund healthcare initiatives and other social welfare programs in producing nations.\textsuperscript{175} “Peace and the protection of the legal diamond trade are vital to the social and economic welfare of those diamond-rich but impoverished and politically fragile African countries.”\textsuperscript{176}

One such country is the Democratic Republic of Congo. At a minimum,\textsuperscript{177} official diamond exports constitute approximately one-third of the total foreign currency generated by the DRC’s trade balance and from 1995 through 2000, brought in an approximate total of slightly over $2 billion.\textsuperscript{178} However, the potential but unrealized gains far exceed this figure. Smuggled diamonds divest the DRC diamond trade’s formal sector of foreign currency and the government of legitimate revenue.\textsuperscript{179} As a result of diamonds being smuggled out of the country, the DRC’s potential GDP is robbed of approximately $854 million per year.\textsuperscript{180}

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\textsuperscript{172} See Price, supra note 15, at 26 (“Experienced diamond traders can determine the origin of uncut stones, but once rough diamonds are polished, it is virtually impossible to determine their true source.”).
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\textsuperscript{173} Woody, supra note 12, at 339.
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\textsuperscript{174} Id. at 340.
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\textsuperscript{175} See, e.g., infra note 185 and accompanying text (stating that failing infrastructure has weakened the DRC’s healthcare system).
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\textsuperscript{176} Price, supra note 15, at 26-27.
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\textsuperscript{177} In 2003, diamonds accounted for more than half of the DRC’s official exports, worth approximately $642 million. DRC BACKGROUND NOTE, supra note 123.
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\textsuperscript{178} Dietrich, supra note 4, at 13.
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\textsuperscript{179} Id.
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\textsuperscript{180} Woody, supra note 12, at 340.
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Most of the diamonds smuggled through the Republic of Congo come from its neighbor, the DRC.181

The DRC cannot afford such losses. The country ranks 167 out of 177 on the UNDP Human Development Index scale, and 80 out of 102 on the Human Poverty Index.182 As of 2006, the DRC’s external debt stood at a staggering $10 billion and the per capita GDP was a mere $300 in 2007.183 “An estimated 1,200 people die each day as a result of conflict-related causes such as poverty, preventable diseases, and gender-based violence.”184 “Conflict and collapsed infrastructure” have “severely weakened” the DRC’s health system—in many parts of the country, the system “functions as if it were private and patients cannot afford to seek assistance.”185

4. PRINCIPAL SUGGESTION FOR CHANGE: RAISING THE REPUBLIC OF CONGO’S EXPORT TAX ON DIAMONDS

The KPCS has not succeeded at keeping all illicit rough diamonds out of legitimate channels of trade. The Republic of Congo, in particular, has managed to evade KPCS controls and continue to serve as a hub for the smuggling of conflict and illicit diamonds, as it has for the greater part of the past century.186 Despite such indiscretions, the ROC was readmitted to the Kimberley Process in November 2007.187 According to Karel

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181 Coming Cleaner, supra note 114, at 6.
183 DRC BACKGROUND NOTE, supra note 123.
184 WHO on DRC, supra note 182, at 1. One commentator refers to the eastern part of the DRC as “[t]he rape capital of the world,” explaining that “in some areas, three-quarters of women have been raped.” Nicholas D. Kristof, The Weapon of Rape, N.Y. TIMES, June 15, 2008, at 14.
185 WHO on DRC, supra note 182, at 1.
186 See Coming Cleaner, supra note 114 and accompanying text (describing the smuggling which has occurred in the ROC for roughly seventy-five years); notes 131–42 and accompanying text (explaining the ROC’s illicit trade in diamonds prior to the country’s expulsion from the KP); notes 152–56 and accompanying text (describing the ROC’s continued illicit trade in rough diamonds with participant countries subsequent to its expulsion from the KP).
187 2007 KP Communiqué, supra note 6, at 1.
Kovanda, chairperson of the KP secretariat, the country’s readmission was the result of its “very serious domestic effort to put their house in order and to get their domestic systems to the level required.”\textsuperscript{188} Beyond this vague justification, scant information has been released concerning concrete changes made or other explanations relevant to the ROC’s readmission.\textsuperscript{189}

Given the Republic of Congo’s extensive history of illicit trade in diamonds and the KP’s demonstrated inability to curb the occurrence of such trade, the severity of the humanitarian and economic crises plaguing the ROC and neighboring resource-rich nations, and the extent to which corruption compromises the integrity of the ROC government,\textsuperscript{190} the country’s readmission to the KP alone will not likely thwart its trade in conflict and illicit diamonds.\textsuperscript{191} Instead, as a means of demonstrating its commitment to keeping illicitly traded diamonds out of legitimate channels of trade and restoring expropriated and much-needed revenues to the government and citizens in a transparent way, the ROC should raise its export tax on diamonds.

The ROC’s export tax\textsuperscript{192} on diamonds is appreciably lower than that of its resource-rich neighbors, which is one generally accepted rationale for the country’s position as a hub for smuggling.\textsuperscript{193}


\textsuperscript{189} See, e.g., 2007 KP Communiqué, \textit{supra} note 6, at 2 (declaring that “[p]lenary approved the re-admission of the Republic of Congo to the Kimberley Process,” without providing further information); see also ROC BACKGROUND NOTE, \textit{supra} note 93 (stating solely that “[i]n November 2007, Congo was readmitted to the Kimberley Process, an international multi-stakeholder initiative designed to stem the trade of conflict diamonds”).

\textsuperscript{190} See infra Sections 5.1, 5.2 (explaining that wealth in natural resources coupled with deficient governmental transparency typically leads to governmental corruption).

\textsuperscript{191} This is especially true in light of the fact that the KPCS lacks the framework for a system of international monitoring or legally binding enforcement of violations. See \textit{supra} notes 80–85 and accompanying text.

\textsuperscript{192} Within the ROC’s export regime, the measure directly related to diamonds is in fact technically a royalty. International Monetary Fund [IMF], \textit{Country Report No. 07/206, Republic of Congo: Selected Issues} 90 (2007) [hereinafter IMF Country Report]. However, the relevant royalty is almost universally described by commentators as an export tax and in practical operation has comparable, if not identical, effects on the volume of diamonds exported from the ROC.

\textsuperscript{193} See Dietrich, \textit{supra} note 4, at 16 (“Diamond regulations in Congo-Brazzaville are lax, and taxes are low, major attractions for corrupt international diamond dealers positioning themselves along African smuggling routes.”); see
Lower export taxes serve as an incentive to import or otherwise bring smuggled rough diamonds into the ROC and export them, more cheaply, under the guise of the stones having been mined domestically.\textsuperscript{194} In stark contrast to Angola, which imposes an export tax on diamonds of up to 11\% of their value, and the DRC, with a 3.75\% tax,\textsuperscript{195} the Republic of Congo’s export tax on diamonds lags at a mere 2\%.\textsuperscript{196}

The significant disparity between the DRC’s export tax on diamonds and that of Angola may be explained by the fact that unlike the DRC, Angola does not depend on diamond exports to maintain state revenue.\textsuperscript{197} Despite the plentiful presence of diamonds in Angola, Angolan exports are dominated by petroleum and derivatives; in 2006, petroleum and derivatives accounted for 94\% of exports, whereas diamonds accounted for just 3.5\%.\textsuperscript{198} In contrast, diamonds accounted for more than half of the total value of exports in the DRC in 2003.\textsuperscript{199}

Unlike the DRC, the Republic of Congo does not rely on diamond exports to maintain state revenue. In fact, petroleum accounted for an estimated 89\% of the nation’s export earnings in 2006, with forestry coming in second and generating just under 7\%.\textsuperscript{200} The ROC’s lack of reliance on diamond exports to maintain legitimate state revenue supports the conclusion that raising the country’s export tax on diamonds to a level commensurate with that of similarly situated nations, such as Angola, will not significantly affect its economy. What raising the export tax will do is serve as a disincentive for corrupt officials and other potential

\textsuperscript{194} Malamut, supra note 4, at 28.

\textsuperscript{195} REFORMING DRC DIAMOND SECTOR, supra note 193, at 2.

\textsuperscript{196} IMF Country Report, supra note 192, at 90. RESOURCE POLITICS, supra note 134, at 318.

\textsuperscript{197} Dietrich, supra note 4, at 24.


\textsuperscript{199} DRC BACKGROUND NOTE, supra note 123.

\textsuperscript{200} ROC BACKGROUND NOTE, supra note 93.
smugglers to bring rough diamonds—conflict or illicit—into the ROC with the intent to export them out at a higher profit.

All export taxes reduce the volume of exports and thus operate as a form of export restriction.\(^{201}\) According to the WTO, “[i]t is generally argued that export taxes are the preferred instrument among the various policy options to restrict exports. Taxes are a credible policy, yielding the government some revenue while being transparent and simple to administer.”\(^{202}\) From an economic standpoint, raising the ROC’s export tax on diamonds will have nominal—if any—adverse consequences for consumers, both foreign and domestic. As explained by the WTO, if a country imposing an export tax is a “small” country, meaning that it represents only a small share of the world supply of the taxed commodity, changes in its volume of exports will not affect world price.\(^{203}\) Thus, foreign consumers will not bear any of the cost of an increased tax on diamonds exported from the ROC.\(^{204}\) With respect to domestic consumers, of which there are likely few, a tax on exports decreases the price of the taxed good.\(^{205}\) Accordingly, those domestic-diamond purchasing citizens of the ROC stand to gain from a higher export tax.

The impact of an export tax also extends to the markets of substitutable and complementary goods, as well as “those of the goods backwards and forward in the production chain.”\(^{206}\) Typically, an export tax on a commodity will have a negative impact on the sector producing a substitute good and a positive impact on those sectors producing complementary goods.\(^{207}\) The existence of the conflict diamond situation itself serves to demonstrate that there is no real substitute for a diamond, and thus no true cause for concern over the potential negative impact that raising the export tax on diamonds might have for sectors producing a substitute good. Moreover, quasi-substitutes such as

\(^{201}\) WTO Report, supra note 111, at 3.
\(^{202}\) Id.
\(^{203}\) Id. at 4.
\(^{204}\) Id. at 6.
\(^{205}\) Id. at 5.
\(^{206}\) Id.
\(^{207}\) Id. Take, for example, the case of an export tax imposed on coffee. Because of the lower price, domestic purchasers will increase demand for coffee and reduce that for a substitute, such as tea. While the tea industry stands to lose in such a situation, the coffee-maker machine industry will gain as demand for its products rises. Id.
other rare gems are not produced in the Republic of Congo, so potential damage to such industries should not pose a concern either.

Another factor weighing in favor of the ROC raising its export tax on diamonds pertains to ease of revenue collection. According to the WTO, when the commodity produced and exported has a known international price, “export taxes can be more readily applied and are more transparent.”\(^{208}\) Diamonds command an easily verifiable and consistently high price across the globe; thus, provided uncorrupt customs agents are employed, valuation of whatever legitimate diamonds make their way through ROC customs should not present an issue. In addition, as a WTO member, the ROC is bound to adhere to the terms of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, which governs customs valuation.\(^{209}\) This further enhances the ease and transparency with which ROC customs valuation of diamonds and relevant revenue collection may occur.

4.1. Possible Means of Exacting Compliance with a Request that the Republic of Congo Raise its Export Tax on Diamonds

There are several potential approaches which might be used to persuade an otherwise unwilling Republic of Congo to raise its export tax on diamonds. Initially, the threat of expulsion from the Kimberley Process might suffice to convince the ROC to increase the relevant export tax. If the mere threat of expulsion is not enough, KP officials should, for the second time, expel the ROC from the KP.

Another possibility is for the United States to impose economic sanctions. At first glance, the U.S. seems appropriately situated to implement economic sanctions against the ROC for non-compliance with a request to raise its export tax on diamonds. According to Hufbauer, a leading scholar on international trade and economic sanctions:

\(^{208}\) *Id.* at 14.

'Demonstration of resolve' has often supplied the driving force behind the imposition of sanctions. This is particularly true for the U.S., which frequently has deployed sanctions to assert its leadership in world affairs. U.S. presidents seemingly feel compelled to dramatize their opposition to foreign misdeeds... Indeed, such action is often expected by the international community—to demonstrate moral outrage and to reassure the alliance that the United States will stand by its international commitments. The impact of such moral and psychological factors on the decision to impose sanctions should not be underestimated, even if it is hard to document.\footnote{GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 11 (Peterson Institute 1990) (1985) (emphasis added).}

In conjunction with these observations, according to U.N. Comtrade data, trade between the U.S. and the ROC accounted for almost one-quarter of estimated worldwide illegal trade in rough diamonds in 2005.\footnote{See LOOPHOLES IN THE KIMBERLEY PROCESS, supra note 5, at 11-12 (valuing reported trade in rough diamonds between the U.S. and the ROC in 2005 at $1,897,748—this accounts for more than 23% of the aggregate reported illegal trade in rough diamonds in 2005, which stands at $8,168,988). With such trade, the U.S. violated not only its obligations under the KP, but also the United States Clean Diamond Trade Act. As implemented in 2003, the Clean Diamond Trade Act prohibits “the importation into, or exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme.” Clean Diamond Trade Act, 19 U.S.C. §§ 3901-10 (2000).} Given its reputation as a world leader and moral crusader, upon being presented with these figures, the U.S. would likely feel considerable pressure to act so as to combat the implication of immorality advanced by the statistics. Encouraging the ROC to raise its export tax on diamonds seems to fit the bill for such a campaign against immorality. Likewise, the ultimate imposition of economic sanctions on the ROC for non-compliance with such a request seemingly conveys an even stronger official stance against corruption.

Moreover, economic sanctions appear to be most effective when directed toward “erstwhile friends and close trading partners.”\footnote{HUFBAUER, supra note 210, at 99.} As stated by Hufbauer, “[t]he higher compliance with...
sanctions by allies and trading partners reflects their willingness to bend on specific issues in deference to an overall relationship with the sender country.” 213 The relationship between the U.S. and the ROC certainly may be considered friendly. According to the U.S. Department of State, “[r]elations between the United States and the government of President Denis Sassou-Nguesso are strong, positive, and cooperative.” 214

Furthermore, Hufbauer proposes that economic sanctions more often succeed at achieving their underlying desired end(s) when “the target country conducts a large portion of its trade with the sender.” 215 Referred to as “trade linkage,” this factor is measured by calculating “the average of: (1) the target country’s imports from the sender as a percentage of its total imports; and (2) the target country’s exports to the sender as a percentage of its total exports.” 216 Hufbauer suggests that in the majority of situations involving modest policy goals, a category into which the goal of persuading the ROC to raise its export tax on diamonds falls, the trade linkage exceeds 20 percent. 217 Trade estimates reveal that exports to the U.S. accounted for 36 percent of total ROC exports in 2006, and that 7.1 percent of all ROC imports came from the U.S. in that same year. 218 As the average of these two figures exceeds 20%, according to Hufbauer’s methodology, the ROC conducts a “significant portion” of its trade with the U.S. and thus sanctions sent by the latter nation have a greater likelihood of achieving their desired “modest policy goal.”

In addition, Hufbauer suggests a “direct correlation between the political and economic health of the target country and its susceptibility to economic pressure,” noting that “countries in distress or experiencing significant problems are far more likely to succumb to the policy objectives of the sender country.” 219 Given the “crippling” extent of the ROC’s debt, 220 the plight of its

213 Id. at 100.
214 ROC BACKGROUND NOTE, supra note 93.
215 HUFBAUER, supra note 210, at 85.
216 Id.
217 Id.
218 ROC BACKGROUND NOTE, supra note 93. Trade estimates valued ROC exports at $5.996 billion and imports at $1.964 billion for the year 2006. Id.
219 HUFBAUER, supra note 210, at 82, 83.
220 See supra note 107 and accompanying text.
impoveryness of citizens, 221 and the endemic corruption in government, 222 it would be difficult—if not impossible—to argue that the ROC is not highly susceptible to the economic pressure which would be created by the threat and/or ultimate imposition of sanctions by the U.S.

Closer examination of the United States’ position, however, reveals at least one (temporarily) insurmountable obstacle standing in the way of effective implementation of economic sanctions targeted at the ROC. This hurdle relates to the GATT treaty, which, with its primary purpose as the promotion of fair international trade, prohibits members of the WTO from implementing restrictions on trade with other members. 223 There are, however, exceptions to this general prohibition, which are found in Articles XX and XXI of the GATT. 224 For the purposes of this paper, the only relevant possible exceptions are embodied in Article XX. 225

The legality of exceptions under Article XX is analyzed as follows: at the outset, the restriction at issue must be “provisionally justified under the applicable Article XX exception,” meaning that it must be “necessary” in accordance with at least one of a variety of enumerated sets of circumstances; in addition, the restriction must comply with the introductory clause of Article XX, referred to as the “chapeau.” 226 An expression of the “international principle of good faith,” conformity with the chapeau demands that contracting parties “refrain from acts which

221 See supra notes 102–13 and accompanying text (describing the depressed condition of the ROC).
222 See supra notes 100–01, 139–40 and accompanying text (explaining the history of corruption in the ROC); see infra Section 5.2 (detailing the current pervasiveness of corruption within the ROC’s government).
223 GATT, supra note 89, art. XI; Woody, supra note 12, at 347. The U.S. has been a member of the WTO since January 1, 1995; similarly, the ROC has been a WTO member since March 27, 1997. WTO, Understanding the WTO: Members and Observers, July 27, 2007, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 25, 2008).
224 GATT, supra note 89, arts. XX, XXI.
225 Article XXI is irrelevant because it pertains to exceptions for trade restrictions either adopted pursuant to national security concerns or in pursuit of compliance with the U.N. Charter.
would defeat the object and purpose of a treaty.”227 Compliance with the chapeau also requires that measures adopted do not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”228

With respect to the possibility of U.S. sanctions against the ROC for non-compliance with a request to raise its export tax on diamonds, the most plausible routes would be to pursue an exception under Article XX(a)—pertaining to restrictions “necessary to protect public morals”—and/or Article XX(d)—relating to restrictions “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement... and the prevention of deceptive practices.”229 However, such exceptions are precluded by the fact that the U.S. and ROC have ratified a Bilateral Investment Treaty (“BIT”). The underlying object of the BIT, which entered into force on August 13, 1994, is the reciprocal encouragement and protection of investment in the U.S. and the ROC.230 Since compliance with the Article XX chapeau bars the U.S. from enforcing against the ROC any trade restrictions “which would defeat the object and purpose” of a treaty, it therefore precludes all economic sanctions which would run counter to the purpose of the BIT—namely, to encourage and protect investment in the ROC. This seemingly encompasses and thus rules out all potentially effective sanctions-related options.

However, one feasible means of breaking down this barrier in the relatively near future is a threat from the U.S. to terminate the BIT. Article XIII of the U.S.-ROC BIT contains provisions for termination of the agreement.231 Section 2 of this Article provides that either party may, upon the end of the initial ten-year period (from the effective date of the BIT) or at any time thereafter,

227 Id. at 54. See also Vienna Convention on the Law of Treaties art. 31(1), Jan. 27, 1980, 1155 U.N.T.S. 331.
228 GATT, supra note 89, art. XX.
229 Id. art. XX(a),(d).
231 Id. art. XIII.
terminate the agreement by giving one year’s notice to the other party. The mere threat of termination may be enough to persuade the ROC to raise its export tax on diamonds.

If, however, the threat of termination does not resonate with the ROC, the U.S. could submit written notice and wait one year for the termination to go into effect. Section 3 of Article XIII stipulates that the provisions of all of the other Articles of the BIT will continue to be effective as to investments made or acquired prior to termination for ten years from the effective date of termination. Thus, upon termination, the U.S. would have several options with respect to the possible implementation of economic sanctions on the ROC. These include, but are not limited to, sanctions: prohibiting future investment in the ROC; banning exports to the ROC (those not affecting investments made prior to termination of the BIT); banning imports from the ROC (again, those not affecting investments made prior to the BIT’s termination date); and prohibiting provision of other financial aid to the ROC. While France, the former colonial power, is currently the ROC’s “principal external partner, contributing significant amounts of economic assistance, while playing a highly influential role,” there is “growing interest in attracting American investors.” Accordingly, a threat from the United States to terminate the BIT could likely convince the ROC to raise its export tax on diamonds (a measure which seemingly pales in comparison to the prospect of foregoing all future American investments).

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232 Id. § 2.
233 See Christine Carneiro, Remarks at the University of Pennsylvania Journal of International Law Symposium: Trade Sanctions in a 21st Century Economy: Are They an Appropriate or Effective Means of Altering State Behavior? (Feb. 29, 2008) (transcript forthcoming, Biddle Library at the University of Pennsylvania Law School) (explaining that a great deal of economic sanctions are not imposed because the mere threat of sanctions was alone sufficient to produce the desired results).
234 U.S.-ROC BIT, supra note 230, art. XIII, § 3 (emphasis added).
235 ROC BACKGROUND NOTE, supra note 93.
236 Hufbauer’s research further supports this conclusion. See supra text accompanying note 213 (“The higher compliance with sanctions by allies and trading partners reflects their willingness to bend on specific issues in deference to an overall relationship with the sender country.”).
5. PROSPECTS FOR THE REPUBLIC OF CONGO AND NEIGHBORING RESOURCE-RICH NATIONS

5.1. Implications of Plentiful Natural Resources

As demonstrated by the situations in the ROC, the DRC, Sierra Leone, and Angola, among many other countries, a primary implication of plentiful natural resources is political repression and instability. This phenomenon is widely described as the "resource curse." While specific definitions of this concept vary depending on the commentator or organization describing it, the general idea is that the richer the nation with respect to natural resources, the poorer the quality of management and the greater the degree of political repression. An alternative but very much related formulation of the "resource curse" is that nations rich in mineral resources are plagued by extreme poverty and populations do not profit from the countries' natural wealth. The ROC, like its diamond-rich neighbors, has been plagued by the "resource curse" on account of its wealth in petroleum. In 2006, the nation "slipped from partly free to not-free status."

Another implication of abundant natural resources is a lack of transparency in extractive industries. A lack of transparency breeds ideal conditions for corruption, and the ROC ranks toward the bottom of Transparency International's Corruption Perception Index. The utter absence of transparency in the nation's extractive industries and the revenues derived therefrom has produced "an ideal climate for corruption and poor government. The implications for the most vulnerable

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238 Under Bad Management: Africa’s Bad Management, ECONOMIST.COM, (July 16, 2007) (describing a seven-year study that monitored the quality of governance in several African nations; according to this study, the majority of countries considered scored poorly on markers such as corruption, government effectiveness, regulatory quality and choice, and accountability). See also African Free-For-All?, supra note 237 (exploring the effects of the resource curse in Africa).
239 TRUTH ABOUT DIAMONDS, supra note 21, at 4. For example, "[w]hile [Angola] is one of the world’s fastest growing economies, now pumping almost two million barrels of oil a day, its people are among the poorest on earth." Celia W. Dugger, Angola’s Governing Party Wins in Landslide, N.Y. TIMES, Sept. 10, 2008.
240 African Free-For-All?, supra note 237.
241 Kalley, supra note 97, at 2.
242 Id.
communities have been disastrous.” This is demonstrated by the fact that despite having considerable oil reserves, the ROC is such an impoverished state.

5.2. Corruption in Government

As alluded to in the previous subsection and described elsewhere throughout this paper, corruption in government is rampant in the ROC. At present, such corruption largely pertains to a lack of transparency as to the State’s natural resource revenues and related conflicts of interest by public officials, particularly with respect to the marketing of oil. Despite having received a large debt relief package under the International Monetary Fund (“IMF”)—World Bank Heavily Indebted Poor Countries (“HIPC”) scheme in March 2006 on grounds that the ROC was unable to meet its financial commitments, the nation’s president and his son, along with other government officials, have been charged with lavish spending allegedly funded by the ROC’s oil income.

In granting partial debt relief to the ROC, the IMF and World Bank said the country “must address serious concerns about governance and financial transparency in order to qualify for irrevocable debt relief,” including reforming SNPC, the state-owned oil company. However, a recent case against the ROC brought in Hong Kong by Kensington, a Cayman Island fund, disclosed documents showing that the ROC’s financial managers siphoned off state oil profits through shell companies in tax havens in order to conceal money from creditors. According to court

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243 Article 19, Congo-Brazzaville; President’s Son Fails to Keep Incriminating Information From Public, AFR. NEWS, Aug. 17, 2007.

244 Id. See also Allen-Mills, supra note 105, at 27 (“More than 70% of Congo-Brazzaville’s 3 m[illion] people live off less than £1 a day, despite the wealth generated by its oil industry which earned an estimated £1.3 billion in 2006.”).

245 See supra notes 100–01, 139–40, 170 and accompanying text.

246 Global Witness, Congo-Brazzaville; High Court Blocks Bid by Leader’s Son to Bury Evidence of ‘Secret’ Payments, AFR. NEWS, Aug. 15, 2007.

247 Allen-Mills, supra note 105, at 27; Beattie, supra note 102, at 6. See Global Witness, supra note 246 (providing evidence of corrupt practices in governance); Republic of Congo: Vultures Circle, AFR. RES. BULL. 17485 (2007) (discussing the misdeeds of President Sassou-Nguesso, his son, and other ROC government officials) [hereinafter Vultures Circle].

248 Beattie, supra note 102, at 6. See also ROC BACKGROUND NOTE, supra note 93 (describing the specific governance- and transparency-related preconditions for the ROC to qualify for irrevocable debt relief under the HIPC scheme).

249 Allen-Mills, supra note 105, at 27; Vultures Circle, supra note 247, at 17485.
documents including credit card and bank statements, such hidden funds were used to pay bills related to exorbitant spending by the ROC’s president, his son, and other officials. Among the spending sprees at issue were $400,000 for luxury hotel bills (including bottles of Cristal champagne and tens of thousands of dollars worth of room service) run up during two visits to New York by President Sassou-Nguesso and his entourage in 2006, as well as over $50,000 spent on Louis Vuitton and other luxury goods by Denis Christel Sassou-Nguesso, the president’s son who is also a senior executive at SNPC and the Director General of Cotrade, the public agency in charge of the ROC’s oil sales.

According to the IMF, “the establishment of the long delayed anti-corruption observatory and the passage of a sound anti-corruption law would help establish the appropriate institutional framework to improve governance in the ROC.” Moreover, increasing the quality of governance in the ROC and in neighboring resource-rich nations also entails “ensuring governments’ access to the fair and legitimate income that might be derived from the countr[ies]’ resources, including diamonds.”

5.3. Challenges in Investment Climate

As mentioned above in reference to the implications of plentiful natural resources, a lack of transparency lends itself to political repression and instability. While such conditions have potentially adverse repercussions for foreign investors, it is also important to note that the fewer the political freedoms, the greater the risk and thus the higher the returns for those investors bold enough to commit their funds. Aside from the unstable and repressed political climate, which breeds general concerns regarding domestic security, other factors that are likely discouraging investment growth in the ROC include, but are not

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250 Beattie, supra note 102, at 6. See also Vultures Circle, supra note 247, at 17485 (describing the evidence documenting ROC officials’ use of state oil revenue to fund extravagant spending sprees).

251 Allen-Mills, supra note 105, at 27.

252 Article 19, supra note 243.


254 Dietrich, supra note 4, at 13.

255 See supra Section 5.1.

256 African Free-For-All?, supra note 237.
limited to: high costs for labor, energy, raw materials, and transportation; a restrictive labor code; low productivity and high input costs; and a deteriorating transportation infrastructure.257

6. CONCLUSION

Although the conflict diamond issue has waned considerably since its peak in the mid- to late-1990s and early years of this century, diamonds are still being used to finance illegitimate causes in some African nations, to the detriment of valid governments and citizens alike. Recent history serves as a compelling indication that the Republic of Congo’s November 2007 readmission to the Kimberley Process, in and of itself, will not diminish the country’s trade in illicit and conflict diamonds to any meaningful extent. This is especially true given the profound corruption afflicting the ROC government, documented as recently as August 2007.

A considerable portion of the literature on the conflict and illicit diamond issue in Africa cites the ROC’s appreciably low export tax on diamonds as an incentive for rebels, corrupt officials, and other smugglers to use the country as a hub for illegal diamond-related activity. This incentive clearly needs to be removed. Encouraging the ROC to raise its export tax on diamonds is concededly not a revolutionary approach. The virtue of this seemingly subtle option, however, lies in its simplicity and proven effectiveness in countless situations in both the primary commodity context and others as well. Increasing the export tax on a given category of commodities reduces the volume of the relevant commodity that leaves a country. End of story. Thus, instead of passively proceeding on the hope that holding the ROC to the less-than-stringent, voluntarily-enforced standards of the KPCS will thwart the nation’s illicit trade in diamonds, the international community should wage a campaign to convince the ROC to raise the applicable export tax. To be sure, complementary measures related to increasing transparency in government and resource extraction, as well as eradicating corruption, should also be implemented. Increasing the ROC’s export tax on diamonds, however, is the fundamental next step toward winning the war.

257 ROC BACKGROUND NOTE, supra note 93 (highlighting the history of economic problems, labor problems, and social unrest in the country, making it an unstable market for investors); see generally Kalley, supra note 97.
against illicit trade of these stones, which have proven “to die for” for an incalculable number of innocents in an all too literal sense.