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CLEER

The European Union and the Kimberley Process

Gloria Fernández Arribas



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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**THE EUROPEAN UNION
AND THE KIMBERLEY PROCESS**

GLORIA FERNÁNDEZ ARRIBAS

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LIST OF TERMS AND ABBREVIATIONS

Art.	Article
DRC	Democratic Republic of Congo
EC	European Community
EEAS	European External Action Service
EU	European Union
FPI	Foreign Policy Instrument
IfS	Instrument for Stability
JRC	Joint Research Centre
Kimberley Committee	Committee for implementation of the KPCS for the international trade in rough diamonds
KP	Kimberley Process
KPCS	Kimberley Process Certification Scheme
MoU	Memorandum of Understanding
MPLA	Movimento Popular de Libertação de Angola
NGO	Non-governmental Organisation
TARIC	Tarif Intégré de la Communauté
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNITA	União Nacional para la Independência Total de Angola
USAID	United States Agency for International Development
WTO	World Trade Organization

1. INTRODUCTION

The Kimberley Process (the KP or Process) celebrated its tenth anniversary in 2013. Official results indicate that there has been a reduction in the number of illegal rough diamonds in circulation.¹ However, the Process is currently struggling to restore its credibility and effectiveness. Requests have been made for extending the KP's scope of action to human rights protection, for introducing a more effective system of control, and even for an amendment to the decision-making procedure. The European Union (EU) plays an important part in this complex situation, having been present in the KP since its creation and having developed an active role during its ten years of existence.

The KP's creation was characterised by the participation of different actors – specifically by the large role played by NGOs during the initial phases, but also by the adoption of a non-legally binding agreement, the Kimberley Process Certification Scheme (KPCS). This agreement has been the cornerstone for various domestic legally binding regulations that have led to a number of changes in the world's diamond trade. The results achieved by this agreement are significant and have provided an opportunity to analyse, and to use this model so as to control the trade of other natural resources also affecting the stability of some developing countries. Hence, the Process has been of utmost significance thus far.

There has, however, been little research into the relationship between the EU and the KP despite the important implications of this relationship, and the fact that the KP touches upon many different areas of EU policy, as well as the particularity of the implementation of a non-binding agreement to which the EU Member States are not party. This gives rise to many areas of uncertainty, some relating to the legal status of the KP and how the non-binding agreement should be implemented by the EU.

This paper aims to study the origins of the rough diamond regulation that laid the foundations of the current system (2), and also what exactly the KP is, including its objective, function, administrative structure, legal status and failures

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¹ We speak of 'rough diamonds' because polished diamonds are not within the control of the Kimberley Certification Scheme, even though there are several bodies calling for their inclusion following 'evidence of suspicious trade', as Brouder stated, 'between 2004 and 2006, the Republic of Congo (DCR), Uganda, and Zambia reported exports of polished diamonds with a value of USD 4.7 million to KPCS countries. Neither Uganda nor Zambia is a Participant in the Kimberley Process and neither country produces diamonds. Moreover neither country has a tradition of trading in rough diamonds, or any known polishing centres. The most likely explanation for this is that rough diamonds are smuggled into these countries, probably from the DCR, and then deliberately misclassified and exported as polished diamonds', A. Brouder, 'Kimberley Process Certification Scheme', in C. Tietje and A. Brouder (eds.), *Handbook of Transnational Economic Governance Regimes*, (Leiden: Martinus Nijhoff Publishers, 2009), at 983.

(3). The next step will be to analyse the relationship between the EU and the KP (4). Since the very beginning, the EU has been part of the KP. It is now relevant to study the role the EU has today. But one of the more complicated aspects of this study is how the EU implements the KP rules and how the EU's powers are internally organised, given that it involves two different areas of the EU: commercial policy and conflict prevention. To conclude, this study will consider human rights and the so-called Marange problem, as well as the EU's somewhat questionable stance on this matter.

Therefore, this study aims to provide clarification of a matter which has now been present in EU external relations for ten years, and which is becoming ever more important as the relationship between natural resources and violent conflicts becomes increasingly evident, especially within the African continent.

2. CONFLICT DIAMONDS AND THE KIMBERLEY PROCESS

The KP has its origin mainly in two factors: the traffic of rough diamonds in some African countries, and the use of those funds to fuel armed conflicts. Rough diamonds are a favoured trafficking object because they are highly valuable, small in size, easy to hide, difficult to trace and not detected by metal detectors.² The trafficking of these gems and the use of the funds earned from it to fuel armed conflict began to be a problem in the 1990s. However, income from diamond trafficking has not only been used to fuel conflicts.³ Trade in diamonds has allowed corrupt dictators and autocrats to remain in power, and has provided funding for terrorist organisations such as Al Qaeda.⁴ In any case, it is necessary to point out that 'the vast majority of rough diamonds produced in the world are from legitimate sources'.⁵

The Angolan Civil War drew attention to the terrible consequences of diamond trafficking and drew international focus on conflict diamonds. The conflict started in 1975 when Portugal, the colonial power, left the country leaving the nationalist groups fighting for control. There were two main groups, the MPLA (*Movimento Popular de Libertação de Angola*) and UNITA (*União Nacional para la Independência Total de Angola*). In 1992, after a period of ceasefire, the MPLA won the national elections, but the results were not accepted by UNITA. A new period of conflict began, lasting until the end of the war in 2002. It was

² K. Curtis, 'But is it Law? An Analysis on the Legal Nature of the Kimberley Process Certification Scheme on Conflict Diamonds and its Treatment of Non-state Actors', available at: <http://works.bepress.com/Kimberley_curtis/1>, 2007, at 7.

³ J. A. Grant and I. Taylor, 'Global Governance and conflict diamonds: the Kimberley Process and the quest for clean gems', 93 *The Commonwealth Journal of International Affairs*, 2007, at 388.

⁴ Grant and Taylor indicate that 'dealers associated directly with key operatives in the al Qaeda network have been known to have purchased diamonds from rebels in Sierra Leone and sold them in Europe', *ibid.*, at 388.

⁵ United Nations General Assembly Resolution 55/56 (2000).

during this period in the 1990s that UNITA started trafficking diamonds in order to fuel its military activities in an attempt to overthrow the government.⁶

The Angolan Civil War was not the only conflict fuelled with diamonds. In the Sierra Leone Civil War, populations not only suffered the brutal consequences of armed conflict, but also the torture and slavery of the diamond mines.

The conflict in the Democratic Republic of Congo (DRC), which still continues today, has been characterised by its brutality, and the specific involvement of other African countries –not only in the armed conflict but also in the trafficking of diamonds. The country's porous borders further complicated the conflict. In fact, this latter factor plays a role in other countries too, with diamonds being trafficked from Sierra Leone right through to Liberia – but in the DRC it is particularly significant and difficult to control, due the aforementioned porosity of borders.

Similarly to the countries already mentioned, Ivory Coast and Liberia have also suffered internal conflict fuelled by diamonds. Although the origins of the KP were in African conflicts, irregularities in diamond trading have also been found in Venezuela and Guyana,⁷ which extends the KP's work to Latin America.

The activity of the diamond traffickers was revealed in 1998, when the NGO Global Witness released a report⁸ about the Angolan Civil War and the involvement of private companies therein. In this report, Global Witness described how UNITA was using the incomes generated by trading illegal diamonds to fuel its war against the government,⁹ and that the diamond industry, specifically the company De Beers¹⁰ and Central Selling Organizations, were trading with rebels and thereby fuelling the conflict, breaching the United Nations (UN) embargo¹¹ on unofficial Angolan diamonds.

Global Witness launched a campaign entitled 'Combating Conflict diamonds' and joined other NGOs. In 2000, Partnership Africa Canada produced a report

⁶ See. Global Witness, 'A Rough Trade. The Role of Companies and Governments in the Angolan Conflict' (1 December 1998), available at <<http://www.globalwitness.org/library/rough-trade>>.

⁷ C. Kantz, 'Kimberley Process', in T. Hale and D. Held (eds.) *Handbook of transnational Governance. Institutions and Innovations*, (Cambridge: Polity Press, 2001), 303-304.

⁸ Global Witness, *supra* note 6.

⁹ In 1999 UNITA obtained approximately 3 million US dollars from the illegal diamonds trade. See V. Haufler, 'The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention', 89 *Journal of Business Ethics* 2010, at 61.

¹⁰ De Beers is the precursor of the diamonds industry. It began its activities in 1888 in South Africa and controlled the international diamond trade for several years, selling about 80% of the world rough diamonds during the 1990s. Today De Beers controls around 40% of the rough diamond market. *Ibid.*, at 60. On the subject of the the international diamond market see M. P. Diago Diago, 'El comercio internacional de diamantes: Sistema de Certificación del Proceso Kimberley', 1 *Cuadernos de Derecho Transnacional* 2009.

¹¹ On 24th June 1998 the UN Security Council adopted a Resolution in which, among other measures, the export or import of unofficial Angolan diamonds was prohibited. United Nations Security Council Resolution 1176 (1998).

about the link between diamonds and bloodshed in Sierra Leone.¹² An internationally extended campaign by both NGOs led to the term 'blood diamonds' being introduced into common vocabulary, which undermined consumer confidence,¹³ and linked diamonds – sold as a luxury item –¹⁴ to war, mutilation and bloodshed. Civil society began to call for effective Certificates of Origin and made the industry responsible for fuelling conflicts.

The diamond industry, fearing that the campaigns would affect the sales and image of diamonds,¹⁵ reacted by creating the World Diamond Council in 2000, implementing a voluntary system of certification, including the 'Conflict Free' certificate,¹⁶ and supporting a government-controlled system over the import and export of diamonds. This commitment from the diamond industry was reflected in some UN resolutions, such as UN Security Council Resolution 1306 (2000) on Sierra Leone in which the UN Security Council stated that it was 'welcoming ongoing efforts by interested States, the International Diamond Manufacturers Association, the World Federation of Diamond Bourses, the Diamond High Council, other representatives of the diamond industry and non-governmental experts to improve the transparency of the international diamond trade, and encouraging further action in this regard', and 'the commitments made by certain members of the diamond industry not to trade in diamonds originating from conflict zones'.

In any case, the reaction to the NGOs' campaigns did not only come from the diamond industry – the UN itself also adopted measures to fight conflict diamonds. In 1998 the UN Security Council adopted a Resolution prohibiting the import and export of rough diamonds from Angola, unless it was controlled through the Certificate of Origin regime. However, as pointed out by Global Witness, this prohibition was continuously breached, so it was clear that further steps needed to be taken. In 1999 the UN Security Council¹⁷ established a

¹² I. Smillie, L. Gberie, R. Hazleton, 'The Heart of the Matter. Sierra Leone, Diamonds and Human Security', Partnership Africa Canada (January 2000) available at <http://www.pacweb.org/Documents/diamonds_KP/heart_of_the_matter-full-2000-01-eng.pdf>.

¹³ A.R. Harrington, 'Faceting the Future: The Need for and Proposal of Adoption of a Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market' 18 *Transnational Law and Contemporary Problems* 2009, at 357.

¹⁴ The high diamond prices are artificially created by the industry, as stated in a report by Partnership Africa Canada: 'with the disintegration of Asian economies in 1997, retail diamond sales fell by 18 per cent in a single year. De Beers responded by significantly reducing diamond sales through its CSO in the latter part of 1997 and throughout 1998, stockpiling diamonds in order to maintain the price levels of previous years. As a result, sales by the CSO during 1998 were US\$3,345 million – a drop of 28 per cent on the previous year. De Beers then convinced other 'core sellers' which were contracted to the CSO to share the burden by agreeing to stockpile 26 per cent of their production, despite the short-term effect on revenue. Overall, De Beers was successful in reducing stocks of rough and polished diamonds by a value of US \$1 billion and, in De Beers' terms, "leaving the stock-to-sales ratios in the cutting centres at much healthier levels". What this means for the consumer is artificially determined higher retail prices'. I. Smillie, L. Gberie and R. Hazleton, *supra* note 12, at 25.

¹⁵ V. Haufler, *supra* note 9, at 63.

¹⁶ J.E. Nichols, 'A Conflict of Diamonds: The Kimberley Process and Zimbabwe's Marange Diamond Fields', 4 *Denver Journal of International Law and Policy* 2012, at 649.

¹⁷ United Nations Security Council Resolution 1237 (1999). In 1993 the Security Council Resolution 864 established a Committee to follow the situation in Angola and report to the Security

Panel of Experts on violations of Security Council sanctions against Angola, and in 2000 the Fowler Report was published by the UN.¹⁸ This report showed that UNITA had obtained and sold diamonds in other countries such as Burkina Faso, Namibia and South Africa, which eventually surfaced in Antwerp, Belgium, and that the Belgian authorities had failed to establish an effective import certification regime.¹⁹ It also named individuals involved in diamond trafficking. The information provided by the Fowler Report put significant pressure on the diamond industry.

Following this report, a new UN Security Council Resolution²⁰ called again for an effective procedure for Certificate of Origin to be established, and introduced significant penalties for the possessing of rough diamonds imported in breach of Security Council resolutions. This resolution also launched a meeting of experts to devise a monitoring system that would facilitate the implementation of measures contained in previous resolutions. However, it did not take any new measures that would enable countries and individuals to enforce the sanctions.

The UN Security Council's efforts did not focus solely on the trafficking of diamonds in Angola. In 2000 the Council adopted a resolution²¹ on the trafficking of diamonds in Sierra Leone, in which it decided that all countries were required to adopt measures prohibiting the import of rough diamonds from Sierra Leone.

The Resolution also requested that Sierra Leone ensure an effective Certificate of Origin system. Once implemented, this system would allow diamonds that were controlled by the government through the certification procedure to be authorised for trade.²²

But the main consequence of the NGO campaign came after a meeting that took place in South Africa in May 2000, which gathered representatives from countries involved in diamond trade, and from the diamond industry itself. The meeting, held in Kimberley, studied measures to stop the trade in conflict diamonds and the fuelling of armed conflicts. Following the meeting in May 2000, an inclusive consultation process began with the number of participants gradually increasing. Subsequent meetings took place in South Africa, Namibia, Russia, Belgium, the United Kingdom, Angola and Botswana, in what later

Council, and this Resolution also planned to establish a Panel of Experts which would report to the Committee.

¹⁸ Final Report of the United Nations Panel of Experts on Violations of Security Council Sanctions against UNITA. The Fowler Report, 10 March 2000.

¹⁹ The report was focused on the breach of sanctions which included not only the trade in diamonds, but also arms and military equipment, petroleum, UNITA Finances and assets, and UNITA representation and travel abroad.

²⁰ United Nations Security Council Resolution 1295 (2000).

²¹ United Nations Security Council Resolution 1306 (2000). Also the Security Council adopted sanctions against Liberia and calls for the implementation of a Certificate of Origin, see United Nations Security Council Resolution 1408 (2002).

²² As the Security Council stated in the mentioned Resolution, 'the legitimate diamond trade is of great economic importance for many States, and can make a positive contribution to prosperity and stability and to the reconstruction of countries emerging from conflict', hence the importance of a quick implementation of a certification regime that would allow diamonds to be traded again.

came to be known as the Kimberley Process. Chairmanship and administrative support for the Process was provided by South Africa.

These meetings were not preparing any sort of international conference, and the final objective was not the adoption of a treaty. The participation of representatives of the diamond industry and civil society moved these meetings away from being an international conference. These meetings simply kick-started a negotiation process in order to conclude a legal document that would achieve the objective of establishing effective rules in the diamond trade.

The negotiations continued to take place for two more years, during which time the KP gained the support of international organisations such as the UN and the G8; a support that which was made explicit in final communiqués from various meetings.²³ The KP's negotiations finally came to an end with the Interlaken Declaration of 5 November 2002.

As described above, the UN support toward the KP consisted principally of two General Assembly resolutions. In 2001 the UN General Assembly adopted Resolution 55/56, entitled 'The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts'. In this resolution the UN General Assembly defines conflict diamonds as diamonds 'which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate governments'. This definition was used later in the KPCS. The UN General Assembly noted that the majority of diamonds had a legitimate origin and that trading those diamonds contributed to the development of the countries, and that the measures undertaken should not hinder the development of the diamond industry.

In this sense, the Resolution welcomed the KP and stated that the measures to be adopted should be effective and pragmatic, including 'the creation and implementation of a simple and workable international certification scheme for rough diamonds'. The UN General Assembly considered that the KP should have the widest possible scope, including all diamond-producing, diamond-processing, diamond-exporting and diamond-importing countries, as well as the diamond industry itself.

This support was accompanied by Resolution 56/263, in which the UN General Assembly recognises the work carried out by the KP and embraces the result of the negotiations expressed in the working document 9/2001.²⁴ This document was to become the basis for the forthcoming certification scheme.

It is worth mentioning that the Resolution pays particular attention to the humanitarian consequences of illegal diamond trafficking, considering that it can be linked to armed conflict, rebel movements to overthrow governments, and the illicit trafficking of arms – especially small arms and light weapons.

²³ S. Chardon, 'The EU and the Kimberley Process: A new international actor for new international relations' in S. Blockmans, J. Wouters and T. Ruys (eds.), *The European Union and Peace building Policy and Legal Aspects* (The Hague: T.M.C. Asser Press 2010), at 476.

²⁴ United Nations General Assembly, 'Essential elements of an international scheme of certification for rough diamonds, with a view to breaking the link between armed conflict and the trade in rough diamonds'. A56/775, Annex VIII.

Therefore, from a humanitarian point of view, it was considered necessary to adopt the international certification scheme as soon as possible.

The final action of the KP was the aforementioned Interlaken Declaration of 5 November 2002, which focused on the Kimberley Process Certification Scheme for rough diamonds. This declaration was adopted during a meeting in Switzerland, in which ministers and Heads of Delegation from 37 countries and the European Community (EC) participated. Global Witness, Partnership Africa Canada and the World Diamond Council participated as observers. Today there are more than fifty countries, together with the EU, bringing the total number of countries applying the KPCS to over seventy. The Interlaken Declaration focused on the relationship between conflict diamonds, their impact on peace and security and the violation of human rights. This declaration adopted the international rough diamonds certification scheme, clarifying that the system should be based on internal laws and systems of control that could allow the trade in rough diamonds to be monitored in order to prevent the trading of conflict diamonds.

The declaration called for those countries involved in trading diamonds to join together in order to achieve a wide-reaching participation, with a deadline of 1 January 2003. It laid out the voluntary system of control implemented by the industry, which included internal penalties.²⁵

The role played by the International World Trade Organization (WTO) at the beginning of the KPCS is also worthy of note, owing to its commercial implications. The KPCS constituted a restriction on trade that had the possibility of breaching WTO rules. In order to avoid this incompatibility, the WTO granted a waiver²⁶ allowing participants to be part of the KP²⁷ without being in breach of WTO law. In 2003, the KPCS was ready to be implemented and its activity set to begin.

3. THE KIMBERLEY PROCESS CERTIFICATION SCHEME

The Kimberley Process Certification Scheme defines conflict diamonds as 'rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments'. This definition was based on UN Security Council resolutions and a UN General Assembly resolution. However, it has been contested by those who argue that it does not cover all the different situations affected by trade in rough diamonds. For instance, the definition does not mention diamonds used to fuel terrorist activities.²⁸ There are

²⁵ Code practice to eliminate the presence of conflict diamonds: provision of warranties or guaranties on each invoice for a sale of rough or cut polished diamonds, attesting that the goods are conflict-free; maintaining detailed records of purchases and sales of rough diamonds; and the use of independent auditors to attest that the Code, warranties and records are being deployed, provided and maintained correctly. C. Wright, 'Tackling conflict diamonds: the Kimberley process certification scheme', 11 *International Peacekeeping* 2004, at 700-701.

²⁶ WTO: Waiver Concerning Kimberley Process Certification Scheme for rough diamonds G/C/W/432/Rev.1, 24 February 2003.

²⁷ See A.R. Harrington, *supra* note 13, at 357-358; S. Chardon, *supra* note 23, at 476.

²⁸ A.R. Harrington, *supra* note 13, at 12

also other consequences, for example the trading of polished diamonds leading to illicit diamonds being introduced into the licit trade;²⁹ and implications of human rights violations as demonstrated by the Marange diamonds case in Zimbabwe (the latter to be discussed in section 4.4).³⁰ These are some of the reasons why it has been suggested that the definition of 'conflict diamond' be changed in order to be wider reaching.³¹ Diamond-producing countries, however, have so far been reluctant to adopt a new definition, and the configuration of the certification system requires participants to give their voluntary acceptance for changes to take place.

The KPCS consists of a certificate that must accompany each shipment of rough diamonds at the time of export. The certificate must be expedited by the appropriate authority in the country of origin. The certificate has to observe the minimum standards established by the KP, with the remaining regulation left to be implemented at the national level. As a result, the certificates vary from one country to the next.

This system means that KPCS diamond exportation and importation can only take place between participating countries. Both countries importing and exporting are required to undertake some system of control,³² entailing national penalties in case of breach. The participating countries are also required to give information to the Chair of the Kimberley Process about their practices and the domestic implementation of the KPSC,³³ so that the Process can remain transparent. Despite this, the information and statistics provided by participants do not always fulfil the requirements. It is often 'delayed, missing or based on different methodologies making it very difficult to compile a coherent and accurate database'.³⁴

While the granting of observer status has included the participation of the diamond industry as an actor in the KP, the certification scheme also gives attention to them. It recognises the voluntary self-regulation system implemented by the diamond industry, based on verification by independent auditors

²⁹ A. Brouder, *supra* note 1, at 983.

³⁰ J.E. Nichols, *supra* note 16; V. Haufler, *supra* note 9, at 66. About the Marange diamonds see *infra* section 4.4.

³¹ See. J.E. Nichols, *supra* note 16, 681-683.

³² According to Section IV of the Kimberley Process Certification Scheme, 'Each participant should:

(a) establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory;

(b) designate an Importing and an Exporting Authority(ies);

(c) ensure that rough diamonds are imported and exported in tamper resistant containers;

(d) as required, amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions;

(e) collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V.

(f) when establishing a system of internal controls, take into account, where appropriate, the further options and recommendations for internal controls as elaborated in Annex II.'

³³ This information to the Chair also includes an exchange of information between Participant and assistant.

³⁴ V. Vidal, 'Informal International Lawmaking: The Kimberley Process' Mechanism of Accountability' 3 *Law of the Future Series* 2012, at 518.

and supported by internal penalties. In this sense, even though the KPSC does not address the industry directly, this actor is taken into account, and through national legislation, the system could also be applied to it.³⁵

Regarding administrative matters such as structure and organisation, it is worth pointing out that the KP does not have its own general secretary, budget or personnel. It has a rotating Chair that is selected in the annual plenary meeting. The Chair, who is in charge of the Secretary,³⁶ is financed by the country that hosts it, and 'oversees the implementation of the certification scheme, the operations of the working groups and committees, and general administration'.³⁷ The Chair therefore has political as well as administrative duties.³⁸

In addition, the Chair assumes most of the costs of the system, with support from the voluntary resources provided by the rest of the participants. The reasons for this, as Bieri stated, are the following: firstly, the KP's creation has been characterised by voluntarism, which has meant that resources have been contributed to the KP voluntarily at the different meetings. Furthermore, implementation has been carried out on a national level, which could have led to some countries considering that it was not necessary to formalise it. And finally, it could be the case that in order for the KP to achieve rapid approval and implementation, some matters – such as securing a budget or secretariat – were postponed until a later date.³⁹

The administrative elements of the KP are carried out by the working groups and committees. There are four working groups: the Working Group on Monitoring, the Working Group on Statistics, the Working Group of Diamond Experts and the relatively new Working Group on Artisanal and Alluvial Production. These working groups are chaired by participating states or by the EU, with the exception of the Working Group of Diamond Experts which is chaired by the World Diamond Council, which, by reason of its technical functions, seems to be the most appropriate choice. In addition to the working groups there are three committees: the Committee on Participation and Chairmanship (replacing the previous Selection Committee and Participation Committee), the Committee on Participation and Chairmanship Terms of Reference (both created in the last plenary meeting in November 2013), and the Rules and Procedures Committee. Joining these committees is voluntary, and entails costs for the funding of activities. This system 'encourages participation, although it has the effect of placing a very high burden on a limited number of states'.⁴⁰

³⁵ The Clean Diamond Trade Act (2003) in the USA, available at <<http://www.state.gov/documents/organization/77550.pdf>>, or Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for international trade in rough diamonds. *OJ* [2002] L 358, 31.12.2002.

³⁶ The Secretary coordinates the activities of the working groups, connects Participants together, and organizes the two main plenary meetings.

³⁷ A. Brouder, *supra* note 1, at 976

³⁸ S. Chardon, *supra* note 23, at 478.

³⁹ F. Bieri, *From Blood Diamonds to the Kimberley Process. How NGOs cleaned up the global diamond industry*, (Farnham: Ashgate, 2010), at 107.

⁴⁰ K. Curtis, *supra* note 2, at 12.

The working groups and committees have intercessional meetings, but in general their activities are developed through informal meetings, including teleconferences, whose results are eventually confirmed in the plenary sessions.⁴¹ Their task, among other things, is to carry out the classification of diamond powder, to organise review visits in participating countries and to advise if a participant fails to comply with requirements.

One thing that has characterised the KP is what has been called the 'tripartite consensus'⁴² or 'dynamic consensus'.⁴³ Decisions are taken by consensus among the participants, which in theory does not include the observers. However, in practice, the observers are consulted during the decision-making process and their opinions are taken very seriously. As a result, it can be stated that decisions are made by the Participants, the NGOs and the diamond industry.⁴⁴ In any case, it can be said that the participation of NGOs in the KP is strong, as they are part of the working groups⁴⁵ and participate in review visits or meetings.⁴⁶

Having explained the administrative structure of the KP, it seems relevant to ask: what is the KPCS' legal status?

Despite the fact the KP's elaboration process – which included several meetings as well as a Final Meeting with Ministers or Heads of Delegations – may allude to an International Conference, the KPCS was not officially signed by its participants and, evidently, has never been ratified. It is a non-binding document, which includes politically binding standards.⁴⁷ It can therefore be considered a voluntary political agreement. Participants did not intend to create a binding agreement. Some considered this would have been inappropriate because of the way in which the industry had developed along national lines. Others considered that a parliamentary ratification of the treaty could take years in some countries. Finally, some participants feared that such a monitoring system would be excessively intrusive.⁴⁸

But while this document has a political character, the intention of its participants was to achieve effectiveness and to include a degree of obligation in the rules. The document contains rather precise rules, and the implementation of these rules through national legislation is a requisite to being part of the system. Therefore its implementation and effectiveness comes mainly through nation-

⁴¹ F. Bieri, *supra* note 36, at 111.

⁴² *Ibid.*, at 110.

⁴³ S. Chardon, *supra* note 23, at 480.

⁴⁴ F. Bieri, *supra* note 36, at 112.

⁴⁵ Partnership Africa Canada is member of the working group on Artisanal and Alluvial Production and the Working Group on Statistics; and the Civil Society Coalition is member of the Working Group on Monitoring and Participation Committee.

⁴⁶ S. Chardon, *supra* note 23, at 480. On the other side, recently there has been criticism from NGOs for 'stifling swift and decisive actions by the KP against non-compliant countries'. F. Bieri, *supra* note 36, at 112.

⁴⁷ C. Wright, *supra* note 25, at 699.

⁴⁸ *Ibid.*, at 703. In this sense Brouder considers that 'a traditional treaty would certainly have slowed the process down from the beginning, and could have limited its flexibility by placing unnecessary bureaucratic obstacles in the way'. A. Brouder, *supra* note 1, at 97.

al legislation. In this sense the KPCS has no enforcement mechanisms.⁴⁹ The way the KPCS obliges participants to fulfil their political commitments is by threatening them with suspension if they do not comply.

According to the aforementioned implementation system, one of the principles of the KPCS is that it shall only trade with participants that respect the certification system. Therefore, disrespecting the KPCS mandates could lead to isolation from the other countries and ultimately to the inability to trade. In this sense, even though the system does not include the possibility of suspension, this consequence has been adopted on several occasions.⁵⁰ Thus, as stated by Bieri, 'it in essence became compulsory for any state seeking to trade diamonds because countries in the KPCS agreed to trade only with other KPCS members'.⁵¹

This particular system has led to talk of the KPCS as a soft law regulation. Despite the controversy about the existence of hard law and soft law,⁵² we consider that Aust's definition of soft law seems to correspond with the function of the KPCS. Aust states that soft law is generally 'used to describe international instruments which their makers recognise are not treaties, even if they employ mandatory language such as 'shall', but have as their purpose the promulgation of norms (albeit not legally binding) of general or universal application. Such non-treaty instruments are typically given names such as Guidelines, Principles, Declarations, Codes of Practices, Recommendations and Programmes'.⁵³

The participation of non-states in the creation process has been pointed out as a characteristic of soft law,⁵⁴ given that this could give more legitimacy to

⁴⁹ K. Curtis, *supra* note 2, at 12: T.M. Price, 'The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate', 12 *Minnesota Journal of International Law* 2003, at 66.

⁵⁰ In 2003 Central African Republic was suspended because of the doubts on the ability of this country to implement an effective system of control after the coup d'état. It was suspended again in 2013 because of the control of rebels of diamond-producing areas; Republic of Congo was suspended in 2004 because of laundering diamonds from the Democratic Republic of Congo and Angola; also Ghana was suspended in 2006 as it was suspected of serving as a conduit of the Ivorian sanctioned diamonds. Marange diamonds of Zimbabwe, which are still a controversial subject, were suspended in 2009.

⁵¹ F. Bieri, *supra* note 36, at 103.

⁵² In relation to soft law there are two conflicting theories; the negative theory led by Klabbers and Weil, which considers that soft law does not exist, in fact soft law, as Klabbers stated, is 'redundant' as 'law can be more or less exact, more or less determinate, more or less wide in scope, more or less pressing, more or less serious, more or less far-reaching; the only thing it cannot be is more or less binding'. J. Klabbers, 'The redundancy of soft law', 5 *Nordic Journal of International Law* 2005, at 181. Also Weil considers that to use the word 'law' it is necessary to ensure that it refers to law, therefore to a normative act, which mean that those that are non-binding hardly can be considered as law. See M.G. Desta, 'Soft Law in international Law: an overview', in A.K. Bjorklund and A. Reinisch, (eds.) *International investments law and soft law* (Cheltenham: Edward Elgar Publishing, 2012). On the contrary there are those that consider that 'It is certainly a fallacy to dismiss these forms of soft law as not law and therefore of no importance' A. Boyle, 'Soft Law in International Law-Making', in M. D. Evans (ed.), *International Law* (Oxford: Oxford University Press 2006), at 123. See also M.G. Desta, at 43-45.

⁵³ A. Aust, *Modern Treaty Law*, (Cambridge: Cambridge University Press 2007), at 52-53.

⁵⁴ In this sense, Toro Huerta reflects the views of Daniel Thürer and Martin Witte. M. I. del Toro Huerta, 'El fenómeno del Soft Law y las nuevas perspectivas del Derecho Internacional', 6

norms.⁵⁵ This characteristic can be also observed within the KPCS, together with other characteristics of soft law such as careful negotiation and careful draft statements.⁵⁶ The reasons that normally lead to soft law norms being adopted can also be applied to the KPCS. In this sense, the adoption of soft law allows for an agreement to be reached quickly and easily. Soft law also avoids the need for national ratifications being one of the reasons that a non-binding agreement was created for the KPCS; and soft law is also more flexible and provides evidence of international support.⁵⁷

Finally, the possibility of soft law becoming hard law through rules of national implementation has also been discussed.⁵⁸ Although this possibility appears to have an example in the KPCS, we consider that the result of this implementation would be the elaboration of domestic, and not international, hard law. The nature of these legal instruments in international law will always be non-binding, because that is how they were designed by their makers.

However, in relation to the legal nature of the KP, there is a new concept that also fits within the characteristics of this system: Informal International Lawmaking (IN-LAW). This concept is probably a more accurate way of defining the legal character of the KP, since it includes in its definition the adoption of norms in 'a forum other than a traditional international organisation'. Which is precisely the specificity of the KP, not being considered an international organisation. But the KP also fulfils other elements of IN-LAW, specifically 'cross-border cooperation between public authorities' with the participation of private actors and international organisations, and 'which does not result in a formal treaty or other traditional source of international law'.⁵⁹ Despite these special characteristics, IN-LAW is still a specific manifestation of soft law.⁶⁰ Therefore it operates within the same field of activity.

This particular approach to the regulation of the diamond trade presents certain difficulties that also highlight its failures. Nichols stated that the main weaknesses of the system are 'vague language, the nearly impossible requirement of complete consensus, the gap in regulation between mine and export, the fact that virtually all "obligations" are, in fact, voluntary', as well as the lack of an enforcement mechanism, together with the troublesome definition of

Anuario Mexicano de Derecho Internacional 2006, 11-12; D. Shelton, 'Soft Law', in D. Armstrong, *Routledge Handbook of International Law*, (New York: Routledge 2009), at 76.

⁵⁵ *Ibid.*, at 15.

⁵⁶ A. Boyle, *supra* note 51, at 124-125. Boyle also mentions non-treaty form, but soft law can also have the form of a treaty without being considered a binding instrument. See C.M. Chinkin, 'The Challenge of Soft Law: development and change in International Law', *International and Comparative Law Quarterly*, n. 38, 1989, at 851.

⁵⁷ A. Boyle, *supra* note 51, at 125; C.M. Chinkin, *supra* note 55, 859-861; D. Shelton, *supra* note 53, 75-77.

⁵⁸ D. Shelton, *supra* note 53, 74; C.M. Chinkin, *supra* note 55, at 859.

⁵⁹ J. Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J. Pauwelyn, R. A. Wessel and J. Wouters, *Informal International Lawmaking*, (Oxford: Oxford University Press 2012) at 22; V. Vidal, *supra* note 34, at 507.

⁶⁰ Klabbbers considers that informal international law can be called politically binding agreements, instant custom, or soft law. J. Klabbbers 'International Courts and Informal International Law', in J. Pauwelyn, R. A. Wessel and J. Wouters, *supra* note 58, at 220.

conflict diamonds.⁶¹ In addition, it is worth noting the lack of responsibility from rebel groups⁶² under this system. Furthermore, the need for consensus slows down and in some cases impedes completely, the decision-making process.

The current state of affairs has meant that the KPCS has faced certain challenges. Firstly, the inability to confront and solve fraud in countries such as Brazil, Venezuela or Togo, meaning that suspicious diamonds continue to enter the market. Other challenges include corruption within some governments, who have been found to facilitate certificates for conflict diamonds, as well as Marange diamonds and doubts about human rights in Marange diamond mines, the laundering of conflict diamonds through the polished diamond trade⁶³ and the overlooking of social and environmental problems.⁶⁴ In general, NGOs consider that the 'KP organisation and working methods – in a word, its limited institutional and administrative capacity – hamper its ability to fulfil its mandate and cause concern as to its sustainability over the long term'.⁶⁵

The effects of bans on certain local communities have also been put forward as an example of one of the system's failures. One such example is the Akwatia community in Ghana. When Ghana suspended Akwatia's rough diamonds exports following suspicions that it was trafficking diamonds from Ivory Coast, the artisanal mining community of Akwatia was deeply affected and hundreds of local buyers and sponsors went bankrupt.⁶⁶

However, perhaps the development which has had the most damaging impact on the KP was Global Witness' decision to withdraw from the KP in December 2011⁶⁷ after the ban on Marange diamonds was lifted. Global Witness considered that the KP had failed in its objectives, and that no actions had been taken to reform it and make it more effective. Global Witness' founding director stated: 'The scheme has failed three tests: it failed to deal with the trade in conflict diamonds from Ivory Coast, was unwilling to take serious action in the face of blatant breaches of the rules over a number of years by Venezuela and has proved unwilling to stop diamonds fuelling corruption and violence in Zimbabwe. It has become an accomplice to diamond laundering – whereby dirty diamonds are mixed in with clean gems'.⁶⁸

⁶¹ J.E. Nichols, *supra* note 16, at 660.

⁶² K. Curtis, *supra* note 2, at 36-37.

⁶³ A. Brouder, *supra* note 1, at 983

⁶⁴ C. Kantz, *supra* note 7, at 306.

⁶⁵ S. Chardon, *supra* note 23, at 491.

⁶⁶ G. Hilson and M.J. Clifford, "A 'Kimberley Protest': Diamond Mining, Export Sanctions, and Poverty in Akwatia, Ghana", 109 *African Affairs* 2010.

⁶⁷ This has not been the only withdrawal. Partnership Africa Canada decided to leave because the failure of the system. Hauffer, *supra* note 9, at 66.

⁶⁸ Global Witness, 'Global Witness leaves Kimberley Process, calls for diamond trade to be held accountable' (5 December 2011) available at <<http://www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable>>. In 2010 Global Witness also published a report on the failures of the Kimberley Process on preventing the trade in rough diamonds from Marange, considering that this situation was affecting the credibility of the Process. They concluded that 'consumers simply cannot understand why so many KP participants refuse to acknowledge the existence of Zimbabwean blood diamonds, even in the face of ongoing state-sponsored violence against civilians in the Marange diamond fields'. Global Witness, 'Return of the blood diamond. The deadly race to control Zimbabwe's new-found diamond

On the other hand, some authors have highlighted certain achievements of the Process, such as the decrease in the number of conflict diamonds arriving on the market,⁶⁹ or its contribution to preventing conflict in some countries and consolidating peace in others.⁷⁰

4. THE EUROPEAN UNION AND THE KIMBERLEY PROCESS

Since the beginning of the negotiations, the EU has been involved in the creation of the KPCS. Europe is one of the largest diamond importers of the world, and indeed 'more than 80% of the world's rough diamonds pass through Antwerp'.⁷¹ During this initial negotiation process the Member States were represented by the EU. Prior to the KP's creation, the EU had already taken certain actions to fight against conflict diamonds, mainly by unsuccessfully attempting to apply UN Security Council sanctions against African countries (Liberia, Angola and Sierra Leone), which also consisted of a certification scheme.⁷²

As a result of the EU's role in fighting against conflict diamonds and in the KP, it has been recognised as one of the main actors on this issue. It took the Chairmanship of the KP in 2007, and is currently chairing the Working Group on Monitoring, which has provided it with a critical role in the Marange mines conflict, which we will analyse later.

But before we consider the role of the EU in the KP, it is necessary to clarify how the KP is organised inside the EU: what are the institutions involved, which areas are affected, and which norms have been adopted in order to implement the KP.

As has already been noted, the KP is not an international agreement, therefore during its negotiation the normal EU procedure for concluding an international agreement⁷³ was not officially applied. As a consequence, the European

wealth', 2010. The KP Civil Society Coalition consisting of NGOs, except Global Witness, decided to continue involvement in the Kimberley Process, but released a critical communiqué about the decision on Marange, considering that "the agreement between the Kimberley Process and Zimbabwe being discussed this week falls far short of what is acceptable to maintain the credibility of the Kimberley Process" and "for that reason we are expressing a vote of no confidence in the Kimberley Process". Kimberley Process Civil Society Coalition Statement. Kinshasa Inter-sessional Meeting. 23 June 2011, available at <http://www.globalwitness.org/sites/default/files/Kinshasa_closing_speech_EN.pdf>

⁶⁹ Wright remarks that number of conflict diamonds in the market has been reduced from 4% to less than 1%. C. Wright, *supra* note 25, at 702. The European Commission is even more optimistic since it considered that the number of conflict diamonds in the market was between 0,1 to 0,2% in 2007. Vid. Parliamentary Question 26 February 2007 E-0953/07. OJ [2007] C 293, 05.12.2007.

⁷⁰ S. Chardon, *supra* note 23, 485-487.

⁷¹ European Commission, 'Kimberley Process-United to fight blood diamonds!' (31 October 2007), MEMO/07/444, available at < http://europa.eu/rapid/press-release_MEMO-07-444_en.htm>

⁷² Vid. Parliamentary Question 9 January 2002 E-3637/01. OJ [2002] C 301 E, 5.12.2002.

⁷³ This procedure was regulated in the former Article 133 and 300 TEC, which established the participation of the Council of the European Union in the initiation of the negotiations, the signature and the celebration of the agreement.

Community added an annexation to the Interlaken Declaration, stating that it reserved the right to return to the participant listing if this was deemed necessary after the Council of the EU had taken a decision thereon.⁷⁴ With this statement the EC was indirectly applying the procedure for concluding an international agreement, which needed authorisation from the Council. In any case, in a European Council meeting in 2001 (Gothenburg Programme), the EU programme for the prevention of violent conflicts was adopted,⁷⁵ in which support for the KP was considered a way of strengthening EU instruments for violent conflict prevention in the long and short term. Therefore, it is possible to say that the EU's participation in the KP had the support of the European Council from the beginning.

During the negotiations, the European Commission was in charge of representing the EC, given that this subject was related to common commercial policy – specifically, international trade. However, it is necessary to note that the scope of the KP and its first objective, tackling the illicit trafficking of rough diamonds, is wider, as it also affects the field of conflict prevention and this matter is included in the EU's objectives in Article 21 TEU.

For this reason, we can establish that the EU has two main fields of action in relation to the KP. The first relates to the trade in diamonds and is regulated mainly by the Council Regulation of 20 December 2002 implementing the KPCS.⁷⁶ The second is related to conflict prevention, as part of the objectives in Article 21 TEU. But the KP has also indirectly affected a third field: development cooperation through the Instrument for Stability.⁷⁷

As noted above, the European Commission was in charge of representing the EC in the KP through the Directorate General for External Relations. And despite the reorganisation of the EU's external actions,⁷⁸ the Commission continues to be in charge of the KP and the representation of the EU within it.⁷⁹

⁷⁴ Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds. Annex to the Interlaken Ministerial Declaration.

⁷⁵ European Union programme for the prevention of violent conflicts. Gothenburg Programme (2001), at 4.

⁷⁶ Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds. *OJ* [2002] L 358, 31.12.2002.

⁷⁷ The Instrument for Stability was created through the Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability. *OJ* [2006] L 327, 24.11.2006.

⁷⁸ See P. Koutrakos, (ed.) *The European Union's External Relations a year after Lisbon*, CLEER WORKING PAPERS 2011/3; Koutrakos, P. (ed.) *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar 2011); A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press 2008); J. Wouters, D. Coppens and B. De Meester, 'The European Union's External Relations after the Lisbon Treaty', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU constitutionalism without a Constitutional Treaty?* (Vienna: Springer 2008); A. Biondi and P. Eeckhout (eds.), *European Union Law After the Treaty of Lisbon*, (Oxford: Oxford University Press 2012); M. Cremona 'External Relations and External Competence: The Emergence of an Integrated Policy', in G. de Búrca and P. Craig (eds.) *The Evolution of EU Law* (Oxford: Oxford University Press 2011).

⁷⁹ Article 21. Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds. *OJ* [2002] L 358, 31.12.2002.

However, within this reorganisation it is the High Representative and Vice-president of the Commission who is in charge of the KP through the Foreign Policy Instrument (FPI), which acts in close collaboration with the European External Action Service (EEAS) in all issues affecting the EU's external relations. Within the Foreign Policy Instrument is the area of Foreign Policy Regulation Instruments that deal with the KP and the KPCS. However, these are not the only areas of the EU affected by the KP. As we will see, the Instrument for Stability has also allocated funds to projects dealing with matters linked to KP, such as alluvial and artisanal diamonds.

Regarding the EU's participation in the KP, together with the Chair of the Working Group on Monitoring, the EU is also part of other Working Groups: the Diamond Experts Working Group, the Participation Committee, the Rules and Procedures Committee, the Selection Committee, the Statistics Working Group and the KPCS Review Committee.

Therefore the EU is fully involved in the functioning of the KP, something that was demonstrated when it assumed the Chairmanship of the KP in 2007,⁸⁰ as mentioned above, and the associated costs.

During its Chairmanship the EU established two main objectives. The first focused on the continuity and consolidation of the KP, and the second dealt with its capacity for crisis reaction. In the first objective, the EU included the sub-objective of strengthening the peer review process. As has already been noted, the EU holds the Chair of the Monitoring Group, so this is one of its main interests. The increase of transparency and accuracy of statistics was also included among the first sub-objectives, together with researching the traceability of diamonds, promoting participation, improving information and communication, and improving national implementation.

It should be noted that in order to accomplish the objectives established by the EU, as long as the KP is not an international organisation it is necessary to achieve the involvement and implementation by the participants. This is something that the EU has encouraged, helping third countries to fulfil requirements through technical assistance, including training or the exchange of views.

4.1. The Foreign Policy Instrument

The KP is under the responsibility of the Foreign Policy Instrument Service. This Commission service, created in 2011, is responsible for the operational expenditure of some foreign policy instruments. In other words it 'has the right to approve Commission-controlled foreign policy funds'.⁸¹ Specifically, the FPI is responsible for the operational management of budgets for Common Foreign and Security Policy, Instrument for Stability, the Industrialised Countries Instrument, Election Observation Missions and press and public diplomacy. But

⁸⁰ As it has been noted, the Kimberley Process does not have its own budget, so the cost of the activities related with the Chairmanship are borne by the Participant in the post.

⁸¹ M.E. Smith, 'The European External Action Service and the security-development nexus: organizing for effectiveness or incoherence?', 20 *Journal of European Public Policy* 2013, at 1308.

within the FPI there are two special areas, the Stability Instrument Operations and the Foreign Policy Regulatory Instruments. It is the former that is in charge of the KP, together with sanctions and Anti-Torture Regulation.

The FPI is placed under the authority of the High Representative in her capacity as Vice-President of the Commission. Therefore the KP, is under the control of the European Commission, since the Commission has competence in policy trade and conflict prevention – but at the same time the High Representative of the Union for Foreign Affairs and Security Policy gives political cover in materialising the EU objectives of Article 21 TEU.

However, the FPI also works in close collaboration with the EEAS and other Commission services, such as development or trade, which are also affected by the KP. And, in particular, in relation to the budget, the FPI is considered a ‘bridge between EEAS and the rest of the Commission’.⁸² Lavelle states that the connection between the FPI and the EEAS is considered by many insiders to be that the FPI is, in practice, integrated within in the EEAS. They are also located in the same building. However, legally the FPI is not part of the EEAS, and the fact the FPI is housed in same building as the EEAS is in order to ‘make contact easier among all actors involved in the EU’s external action’.⁸³

In this context, FPI has three general objectives: a) to ‘contribute to the implementation of the Treaty of the EU (Article 21(2)(c))’; b) ‘To contribute to the advancement of EU interest through increased cooperation and dialogue with the main industrialised and high-income partners in some specific areas’; and c) to ‘consolidate and promote democracy, the rule of law, human rights and the principles of international law through support to democratic electoral process’.⁸⁴

For the KP specifically, the FPI, by means of the Foreign Policy Regulatory Instrument, represents the EU in the KP, holds the Chair of the KP Working Group on Monitoring, is responsible for implementing the EU Kimberley Process Regulation,⁸⁵ or gives technical assistance, through training or exchanges of points of view, to participating countries in order to fulfil the KP’s requirements. Therefore, the activities of the FPI in this area are not related to funding. It is only in specific situations that the Foreign Policy Regulatory Instrument funds special projects through the Instrument for Stability. In this sense, each participant funds its own activities within the KP. For instance, the countries that are part of the Working Group on Monitoring, as with the EU, fund the review visits.

⁸² European Commission, “2012 Annual Activity Report. Service for Foreign Policy Instrument (FPI)”, available at <http://ec.europa.eu/atwork/synthesis/aar/doc/fpi_aar_2012.pdf>, at 3.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Service for Foreign Policy Instrument, available at <http://ec.europa.eu/dgs/fpi/what-we-do/kimberley_process_en.htm>

4.2. The Kimberley Process as a subject of Common Commercial Policy

The EU took its first measures in relation to the illicit trade on rough diamonds in application of a UN Security Council Resolution that established sanctions for diamond exports from Sierra Leone. In this case, the EC first adopted the Council Common Position of 20 July 2000 concerning a prohibition of rough diamond imports from Sierra Leone,⁸⁶ in which the EC prohibited the direct or indirect import of all rough diamonds from this country. This Common Position was renewed later⁸⁷ at the same time as the renewal of UN Security Council sanctions. Based on this Council Common Position and the events that followed, the EC adopted several regulations⁸⁸ relating to the import of diamonds from Sierra Leone in application of Article 301 TEC, which was intended for cases in which a Title V TEU decision provided 'for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries'. Therefore, until that moment, EU actions that related to diamond trade control were based on UN actions. This situation changed with the implementation of the KP.

The KP's main objective was security and promoting stability in export countries. Although this issue was taken into account by the EC, the first step adopted was in the area of trade, through implementation of the certification scheme.

The implementation of the KP in the EC took place through the Council regulation which put into place the KPCS for the international trade in rough diamonds.⁸⁹ A month and a half later, the system was established by the Inter-laken Declaration.

The legal basis for this regulation was the aforementioned Article 133 TEC, today Article 207 of the TFEU, which is included in Title II on Common Commercial Policy, and inside Part Five of the TFEU on the Union's External Relations. This Article rules the areas of EU common commercial policy, the legislative procedure for adopting regulations, as well as the procedure for concluding international agreements. As it has been stated, the KP is not an international agreement. However it would seem that the EC applied, for the most part, the model established in this Article, with negotiation by the Commission following the authorisation of the Council.⁹⁰

⁸⁶ Council Common Position of 20 July 2000 concerning a prohibition on imports of rough diamonds from Sierra Leone. *OJ* [2000] L 183, 22.7.2000.

⁸⁷ Council Common Position of 11 January 2002 concerning a prohibition on imports of rough diamonds from Sierra Leone. *OJ* [2002] L 10, 12.01.2002.

⁸⁸ Council Regulation (EC) No 1745/2000 of 3 August 2000 on the importation into the Community of rough diamonds from Sierra Leone. *OJ* [2000] L 200, 08.08.2000; Council Regulation (EC) No 303/2002 of 18 February 2002 concerning the importation into the Community of rough diamonds from Sierra Leone. *OJ* [2002] L 47, 19.02.2002.

⁸⁹ Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds.

⁹⁰ We mentioned previously that in a European Council meeting in Gothenburg in 2001, the EU programme for the prevention of violent conflict was adopted, which included support to the Kimberley Process. So, even though it was the European Council who approved this support, this

Regarding the regulation of the KP, the first noteworthy aspect is the number of competences awarded to the Member States in this area. Certificates have to be verified by authorities of the EU, and these authorities are designed by each Member State in their own territory and not by the EU. Participants are only required to inform the EU about the suitability of authorities designated to fulfil the tasks therein. Also Member States will determine the sanctions to be imposed for the infringement of the Regulation. This means there could be differences among countries, given that the only stipulations given by the Regulation are that sanctions are effective, proportionate and dissuasive, and 'capable of preventing those responsible for the infringement from obtaining any economic benefit from their action'.⁹¹ In this sense, the Guidelines on trading with the EC establish that the sanctions may be based on existing customs or external trade laws or regulations, consequently this document includes some instructions to determine the sanctions. In any case, the European Commission is the institution in charge of the optimal implementation of the Kimberley Process therefore it will decide if the sanctions established by Member States fulfil the requirements.

Given this distribution of competences, the role of the EU will be, firstly, to elaborate the certificate model valid for all Member States, which was first printed in January 2003⁹² and modified later to improve its security and functionality.⁹³ Amongst Commission's tasks will be to provide the EU authorities with authenticated certificates and all the necessary means to develop certification control. This institution, as one of the main bodies responsible for the implementation of the certification scheme, will also receive information from the EU's authorities about the certificates submitted for verification through the import regime, and about the certificates issued and validated through the export regime.

One of the Commission's most important tasks is related to the industry's self-regulation system, which has been included in Article 17 of the Regulation. This system allows the organisations representing rough diamond traders to be included in a 'fast track'⁹⁴ procedure allowing them to export diamonds without a certificate showing they have been lawfully imported. For that purpose, a signed declaration from the exporter is considered evidence of lawful import.

was a basis for the activity of the European Community. We should also take into account the statement of the EC in the Interlaken Declaration with reference to the Decision of the Council of the European Union.

⁹¹ Article 27. Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds.

⁹² Vid. Parliamentary Question 16 December 2002 E-3774/02. OJ [2003] C 222 E, 18.09.2003.

⁹³ Commission Regulation (EC) No 257/2003 of 11 February 2003 amending Council Regulation (EC) No 2368/2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds. OJ [2003] L 36, 12.02.2003.

⁹⁴ Guidelines on Trading with the European Community (EC) January 2008. A practical guide for Kimberley Participants and companies involved in trade in rough diamonds with Europe, at 10. In relation with this system the guidelines establish that the 'EC does not understand by the term "industry self-regulation" the delegation of governmental responsibilities to industries bodies. Rather it means the granting of a privilege ("fast track" insurance of KPCs) to companies subject to considerable responsibilities as members of industry bodies'.

In this context, the Commission will list organisations able to benefit from this ‘fast track’ system. It will decide whether an organisation is to be removed from the list in the case of an infringement of the requirements.⁹⁵ In order for an organisation to be listed as a beneficiary of this self-regulation system, the requirements established in Article 17 of the Regulation must be fulfilled, and this fact communicated to the Commission. Once listed, such organisations will be subject to checks through random spot-check audits⁹⁶ carried out by EU authorities.

This ‘fast track’ system has its basis in the fact that, while all rough diamond shipments imported in the EU have the import certificate, once the shipment is inside the EU it can be divided into different batches, without the need for them all to be allocated separate certificates. There have been cases reported in which the trader has failed to submit the attestation to the auditors and has been, in some cases, suspended temporarily from the ‘fast track’ system.⁹⁷

The certification system also has support from the Integrated Tariff of the Community (TARIC, *Tarif Intégré de la Communauté*). This is an electronic system that allows, once a rough diamond is registered in a Union custom authority, for the existence of a restriction to be flagged automatically.⁹⁸ This leads to the opening of the certification process as laid out in the Regulation.⁹⁹ During this certification process the authorities are required to check if the shipment came from, or has as its destination, a participant country, listed in Annex II of Regulation 2368/2002. This is modified when a country becomes a participant in the KP, withdraws from it or is suspended.¹⁰⁰

Regarding the KPCS, it has been highlighted that there is a lack of any provision regarding the final destiny of shipments failing to fulfil KPCS requirements.¹⁰¹ This could have also been an unresolved issue in the EU Regulation had it not been clarified in the Guidelines on Trading with the EU. The Regulation in Articles 5 and 14 establishes that when a shipment fails to fulfil the conditions, the EU authority will detain it. The opportunity for remediation is given in case of a failure caused unknowingly or unintentionally, or by the action of another authority. However, the Regulation says nothing for those cases where failure is caused knowingly or intentionally. It is thus necessary to refer

⁹⁵ As the guidelines state, this decision has been already adopted in relation to some companies, who have been suspended sometimes temporarily and sometimes permanently from membership. Guidelines on Trading with the European Community (EC) January 2008, 11-12.

⁹⁶ This audit involves: examining the companies’ incomes and checking the presence of the warranty on the invoices; checking the presence of Kimberley Process certificates in respect of imports and exports of rough diamonds; checking data on the annual stock declarations against information on the KPC database held by the Community Authority”, Guidelines on Trading with the European Community (EC) January 2008, p. 12.

⁹⁷ *Ibid.*, at 11.

⁹⁸ *Ibid.*, at 1.

⁹⁹ Article 3 and 4 for the import regime, and Articles 11 and 12 for the export regime.

¹⁰⁰ Commission Implementing Regulation (EU) No 789/2013 of 16 August 2013 amending Council Regulation (EC) No 2368/2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds. *OJ* [2013] L 222, 20.8.2013 This Regulation eliminates from the list of the participant countries the Central African Republic, once the Kimberley Process suspended it as a participant country.

¹⁰¹ A.R. Harrington, *supra* note 13, at 482.

to the Guidelines, which also refer to the EC's Community Customs Code¹⁰² which considers 'that any necessary measures, including confiscation and sale, are to be taken to deal with goods which cannot be released'.¹⁰³ Together with these measures sanctions established in accordance with Article 27 of the Regulation shall be included. By these means this issue is solved by EU rules, not by the KPCS itself.

Finally, in order to assist the European Commission in its activities, in accordance with the Decision 1999/468/CE,¹⁰⁴ the 'Committee for implementation of the KPCS for the international trade in rough diamonds' (Kimberley Committee) has been created. This Committee not only assists the European Commission in the application of the Kimberley Regulation – in particular regarding the certification procedure for shipments – but is also in charge of all matters covered by the KP extending beyond commercial policy. This includes planning the EU's participation in the Kimberley Committee and the collaboration for implementing the process by participants. The body responsible for this Committee is the Foreign Policy Instrument Service, as the body in charge of the KP in the EU.

4.3. The Kimberley Process as an instrument of conflict prevention

The KP is considered an instrument for promoting peace and stability. In fact, the initial reason for preventing trade in conflict diamonds was the fact that it was linked with 'the fuelling of armed conflicts, the activities of rebel movements aimed at undermining or overthrowing legitimate governments and the illicit traffic in, and proliferation of, armaments especially small arms and light weapons' and the 'devastating impact of such conflicts on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts'.¹⁰⁵ Therefore, the areas affected by the KP go beyond the EU's trade policy and the KP needs its approach to be wider reaching. Accordingly, the KP is an instrument that

¹⁰² Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), *OJ* [2008] L 145, 4.6.2008.

¹⁰³ Guidelines on Trading with the European Community (EC) January 2008, at 9. Art. 126 Regulation (EC) No 450/2008 of the European Parliament and of the Council. In the answer given by Mrs. Ferrero-Waldner on behalf of the Commission to a Parliamentary question posed in 2007, she remarked that "Member States have so far seized more than 30 shipments of rough diamonds suspected of infringing one or more provisions of Council Regulation (EC) No 2368/2002 (...) and have launched investigations in a number of additional cases where actual seizure of the diamonds was not possible. In some cases, confiscation has been approved by the courts, and individuals or companies have been fined; in others, investigations or legal proceedings are ongoing. The total volume of the diamonds seized is in excess of 12 000 carats, with an aggregate estimated value of more than USD 1 500 000". Parliamentary Question 19 January 2007 E-0090/07. *OJ* [2007] L 293, 6.12.2007.

¹⁰⁴ 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

¹⁰⁵ Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for rough diamonds.

allows the EU to accomplish the objective, included in Article 21.2 c) TEU, of preserving peace, preventing conflicts and strengthening international security.

The EU High Representative Catherine Ashton, in her statement on the outcome of the KP's Plenary meeting in Washington, said that she considered the KP 'a unique tool for conflict prevention'. This opinion is clearly relevant to the EU's approach to conflict prevention because the Gothenburg Programme (2001),¹⁰⁶ in ways to strengthen the instruments for long- and short-term conflict prevention, included the search for ways to break the link between violent conflicts and rough diamonds – thereby supporting the KP.¹⁰⁷ This was also one of the reasons given by the EC during its Chairmanship as to why the KP matters to the organisation. According to the leaflet provided on that occasion: 'the Kimberley Process, seeing it as a conflict prevention instrument which can promote peace and international security.'¹⁰⁸ Therefore, together with the developments and rules in the common commercial policy, the EU has also implemented the KP as an instrument for conflict prevention.

On this subject, it is necessary to analyse the Instrument for Stability (IfS)¹⁰⁹ which has founded some projects affecting the KP, despite the fact that not all are part of the work carried out by Foreign Policy Regulatory Instruments, and could be included within the normal activity of the EU in its cooperation areas.

The IfS came into force in 2007. It affects all areas of cooperation within the EU, from development cooperation to financial, economic and technical cooperation. It aims to provide coherence in the EU's external action and to enable the prevention of and response to international crises. This instrument complements the geographic EU instruments on development. As stated in its Regulation, assistance 'shall be provided only to the extent that an adequate and effective response cannot be provided under those instruments'.¹¹⁰

This Instrument is mainly focused in two types of assistance: assistance in response to situations of crisis or emerging crisis, and assistance in the context of stable conditions for cooperation. Within the latter 'Pre- and post-crisis capacity building' is included, known also as Peacebuilding Partnership, which could be the main legal basis within the IfS for the conflict diamond activity. In this sense it has been stated that conflict diamonds are used to fuel violent conflicts, therefore the actions undertaken by the EU in accordance with this Instrument find their legal bases in this component (pre- and post-crisis). The efforts of the EU in the pre- and post- crisis area will be addressed to '(a) promoting early warning, confidence-building, mediation and reconciliation, and

¹⁰⁶ EU Programme for the Prevention of Violent Conflicts. Gothenburg Programme (2001).

¹⁰⁷ European Union programme for the prevention of violent conflicts. Gothenburg Programme (2001), at 4.

¹⁰⁸ EC Chairmanship of the Kimberley Process. From conflict diamonds to prosperity diamonds, available at <http://eeas.europa.eu/blood_diamonds/docs/handout07_en.pdf>.

¹⁰⁹ Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability.

¹¹⁰ Article 2.1. Regulation (EC) No 1717/2006

addressing emerging inter-community tensions' and '(b) improving post-conflict and post-disaster recovery'.¹¹¹

Regarding the EU's activities in relation to the KP, the EU, as Chairman of the KP's Working Group on Monitoring, does not only focus its efforts on the control of the fulfilment of commitments by participant countries. It also works to provide assistance to those countries with problems of fulfilment, providing, as part of the work developed by the Foreign Policy Regulatory Instrument, technical assistance or training, but also financial assistance through the IfS that goes beyond the Foreign Policy Regulatory Instrument's area of action.¹¹² As it has been noted, the effectiveness of the KP depends on the capacity of the participant countries to guarantee compliance with the rules of the KP.¹¹³

This activity is closely related to alluvial/artisanal mining, since this type of mining is difficult to control by governments owing to its production methods and because the mines are usually in remote areas.¹¹⁴ The KP created a special working group to address this particular problem in 2006 entitled the Working Group on Artisanal and Alluvial Production.

This issue has been the subject of intensive study by different actors, such as the United States Agency for International Development (USAID), which has played an essential role in this matter and in 2007 launched the 'Property rights and artisanal diamond development' initiative¹¹⁵ in the Central African Republic. In 2010 this was also implemented in Liberia. Moreover, the World Bank has also participated in the matter by means of its Communities and Small-Scale Mining Initiative,¹¹⁶ as well as the NGO Diamond Development Initiative,¹¹⁷ which is involved in this issue with the objective of providing solutions to the problems surrounding artisanal mining.

The EU has also been involved in the matter of alluvial diamonds and, in the IfS' 2012 annual action programme, one million euros was allocated for a two-year project which had the objective of bringing into the legal chain a large quantity of alluvial diamonds, together with improving livelihood options for

¹¹¹ Article 5 (3). Regulation (EC) No 1717/2006. The measures to be undertaken will include 'know-how transfer, the exchange of information, risk/threat assessment, research and analysis, early warning system and training'.

¹¹² The Commission implementing decision of the annual programme for IFS established in the Action Fiche No. 5 that those countries will be identified 'on the basis of the complementary or synergy with other EU funded activities'. Commission Implementing Decision of 20.3.2012 on a 2012 Annual Action Programme for the Instrument for Stability – Crisis Preparedness Component (Peace-building Partnership). C (2012) 1791 final. Brussels, 20.3.2012.

¹¹³ European Commission, *supra* note 69, at 4.

¹¹⁴ The Kimberley Process considers that over 10 million diamantaires, miners and diggers, including their families, are precisely included in this sector of the industry. Kimberley Process: <<http://www.kimberleyprocess.com/en/artisanal-and-alluvial-wgaap-0>>

¹¹⁵ United States Agency for International Development, 'Program Brief: Property Rights and Artisanal Diamond Development (PRADD)', available at <<http://usaidlandtenure.net/pradd/project-brief>>.

¹¹⁶ The World Bank, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20246087~menuPK:509392~pagePK:148956~piPK:216618~theSitePK:336930~isCURL:Y,00.html>>.

¹¹⁷ Diamond Development Initiative, available at <<http://www.ddiglobal.org/pages/mission.php>>.

local populations. It can be said that the involvement of the EU in alluvial diamonds has increased over the years.

In the Kimberley Process Washington Plenary Meeting in November 2012 the 'Washington Declaration on Integrating Development of Artisanal and Small Scale Diamond Mining with Kimberley Process implementation' was adopted. This comprised two main objectives: to improve the formalisation of artisanal mining, and to improve social conditions in artisanal and small-scale mining communities.¹¹⁸ A Memorandum of Understanding (MoU) was also signed between the USAID and the EU in support of the implementation of the KP and, under this Memorandum, the USAID and the EU agreed to co-fund the implementation of the Property Rights and Artisanal Diamond Development initiative in Ivory Coast.

Regarding Ivory Coast, it is necessary to mention that in 2010 the UN Security Council¹¹⁹ adopted sanctions against the regime of Laurent Gbagbo because of his unwillingness to accept the electoral results. The EU applied this UN Resolution through a Council decision and enlarged the scope of targeted persons and entities.¹²⁰ Both the UN Resolution and the EU Decision included the prohibition of imported rough diamonds from Ivory Coast. Continuing with the sanctions adopted against Ivory Coast, this country was also suspended as a KP Participant. In order to support its reintegration, the EU has worked on various different actions, as well as being a member of the Friends of Côte d'Ivoire group. The aforementioned MoU can be included among these actions. This intensive activity has yielded positive results. For example, in the last KP Plenary Meeting in November 2013, it was recognised that Ivory Coast had fulfilled the minimum requirements of the KP, therefore the only sanctions that need to be lifted in order to import diamonds from Ivory Coast are UN Security Council sanctions. This is likely to take place in April 2014 when the UN Security Council considers progress made towards KPCS implementation with the aim of lifting the sanctions.

Regarding this issue, in 2013 the EU allocated €1 million to the Property Rights and Artisanal Diamond Development action. This amount, included in the Service Foreign Policy Instruments 2013 Management Plan,¹²¹ was part of component 2 related to promoting early warning capabilities, with the objective

¹¹⁸ These two main objectives are divided into different areas of activity. The first one includes lower fees and increased accessibility for mining licenses, enhancing data collection and analysis, strengthening property rights, financial transparency and good governance, empowering artisanal miners to engage with buyers and investors, expanding access to mining inputs. The improvement of social conditions includes supporting complementary livelihoods in artisanal and small scale mining communities, working capital and organization, mitigating environmental damage, harmonizing legal frameworks, occupational health and worker safety.

¹¹⁹ UN Security Council Resolution 1946 (2010) of 15 October 2010. In any case Ivory Coast has been sanctioned since 2004. Vid. UN Security Council Resolution 1572 (2004) of 15 November 2004.

¹²⁰ F. Hoffmeister, 'The European Union's common commercial policy a year after Lisbon – Sea change or business as usual?', in P. Koutrakos (ed.), *supra* note 78, at 90.

¹²¹ European Commission: Service Foreign Policy Instruments 2013 Management Plan, available at <http://ec.europa.eu/atwork/synthesis/amp/doc/fpi_mp_en.pdf>, at 27.

of 'strengthened capacity of EU and beneficiaries of EU assistance to prevent conflicts, address pre and post conflict situations and to build peace'.

In this sense, it is necessary to note that the EU's activity in the KP could be diluted within EU actions on natural resource conflicts, specifically minerals. This may run the risk of diverting attention on this matter through its inclusion in a wider matter, having the effect of disseminating efforts and eventually decreasing the results. Regarding this EU activity, it will be necessary to pay attention to the International Conference for the Great Lakes,¹²² to which €3 million was allocated in 2013 and which also includes actions on artisanal and small-scale mining.¹²³

But the EU's activity in conflict prevention in relation to the KP has not focussed uniquely on supporting participants in their fulfilment of the commitments and helping the mining communities. It has also been active in other areas, such as in research. In this sphere the EU has contributed to high-resolution satellite imagery that allows illegal diamond mines to be identified on a map.¹²⁴ This imagery is being used to monitor diamond mining in Ivory Coast.¹²⁵ This research activity has been carried out by the Joint Research Centre (JRC), which has received funding from the IfS,¹²⁶ in this case through the initiative of the Foreign Policy Regulatory Instruments. The output of the JRC in relation to conflict diamonds has also been proven by the development of a tool which analyses the risk of conflict in developing countries, which includes natural resources as part of the analysis, and which has demonstrated a strong correlation between resources-rich areas and the outbreak of conflicts.¹²⁷

¹²² The International Conference on the Great Lakes was launched in 2004, but the Pact on Security, Stability and Development in the Great Lakes Region, that effectively creates it, entered into force in 2008. The objective was to contribute to the peace and stability in the region. One of the components of the Pact was the Protocol on prevention of illegal exploitation of natural resources. This Conference has the support of the United Nations, the African Union and the Group of Friends, within which is the European Union, and which has given political, diplomatic, financial and technical support to the Conference.

¹²³ Annual Action Programme 2013 – Instrument for Stability (Crisis Preparedness Component – Peace-building Partnership). Annex. Action Fiche 5, at 27.

¹²⁴ A. Cragg, 'European Security Strategy and Earth Observation', in G. Zeug, and M. Pesaresi (eds), *Global Monitoring for Security and Stability (GMOSS). Integrated Scientific and Technological Research Supporting Security Aspects of the European Union, JRC Scientific and Technical Reports*, EUR 23033, 2007, at 15.

¹²⁵ Statement by the spokesperson of EU High Representative Catherine Ashton on the outcome of the Plenary meeting of the Kimberley Process in Washington. A 552/12. Brussels, 30 November 2012.

¹²⁶ In the information about the status of contract and disbursements of the IfS in 2007, €569,356 was contracted to support the Kimberley Process (JRC). Commission Staff Working Paper accompanying the document report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. 2010 Annual Report on the Instrument for Stability. SEC(2011) 1000 final. Brussels 16.8.2011.

¹²⁷ J. Kucera, M. Kauffmann, A.M. Duta, I. Tarrida Soler, P. Tenerelli, G. Trianni, C. Hale, L. Rizzo and S. Ferri, 'Armed Conflicts and Natural Resources. Scientific report on Global Atlas and Information Centre for Conflicts and Natural Resources'. *JRC Scientific and Technical Report*. EUR 24861, 2011.

4.4. The Kimberley Process, the European Union and human rights: The Marange dilemma

Marange is an alluvial mine area in Zimbabwe that has been the subject of great debate with regard to the effectiveness of the KP. In 2006 alluvial mines were discovered in the Marange area, and artisanal unlicensed miners went there in order to work in those mines. Up until 2008 abuse, torture and murder were reportedly being carried out on the miners by police, and this illegal mining was considered out of control. Despite this, in 2008 more unlicensed miners arrived in Marange and, in response, the government initiated a 'cleaning operation' in the area which resulted in more than 200 deaths.¹²⁸

During this period the reactions of participant countries and civil society were varied. In 2009 a review visit reported the non-compliance of Zimbabwe with KP minimum requirements. As a result, in the Plenary meeting in November 2009 the participants at the KP agreed on the Swakopmund Decision a Joint Work Plan which would allow Zimbabwe to fulfil its commitments. In the meantime, diamonds from Marange would be banned. This Plan required, among other things, demilitarisation, action on smuggling, legalisation of small scale mining and security provision in the Marange area.¹²⁹ This decision was taken because of the non-compliance of Zimbabwe with KP requirements, not because of the human rights breaches, and this position will guide the next actions to be taken on this issue.

Before this ban, the EU had already taken measures relating to Zimbabwe's diamonds through Council Regulation 314/2004 that established sanctions against Zimbabwe.¹³⁰ In 2009, by means of a Commission Regulation,¹³¹ the Zimbabwe Mining Development Company was included on the list of natural or legal persons, entities and bodies that were subject to sanctions. This company was responsible for mining in Marange, and according to the Regulation 'Zimbabwean diamonds traded in the EU cannot be owned or held by that company'.¹³² But despite this sanction, all other Zimbabwean diamonds were able to enter the EU and, as it has been noted that the Marange area was still not controlled. This meant those diamonds could be trafficked by other companies or smugglers. In any case, it was during the ban of these diamonds that a new footprint system was implemented which allowed diamonds from this area to be identified through their chemical properties. This system has also been used for diamonds from the Central African Republic.

In the KP's June meeting in Tel Aviv in June 2010, after two visits that reported Zimbabwe's compliance, it was suggested that the ban on Marange

¹²⁸ J.E. Nichols, *supra* note 16, 666-667.

¹²⁹ Kimberley Process Administrative Decision, available at <<http://www.state.gov/documents/organization/133851.pdf>>.

¹³⁰ Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe. *OJ* [2004] L 55, 24.2.2004.

¹³¹ Commission Regulation (EC) No 77/2009 of 26 January 2009 amending Council Regulation (EC) No 314/2004 concerning certain restrictive measures in respect of Zimbabwe. *OJ* [2009] L 23, 27.1.2009.

¹³² Parliamentary Question 5 August 2009 E-3989/2009. *OJ* [2011] C 10 E, 14.1.2011.

diamonds be removed. But participants were unable to reach an agreement in that meeting, so the matter was postponed until the next meeting, held in July in St. Petersburg. In that meeting, the participants finally agreed to authorise a limited number of diamonds from the Marange mines providing that they met the requirements, and that the area would receive a monitoring mission.¹³³

In the meantime, the EU continued to consider that human rights were not part of the KP's remit, which would allow it to take decisions against the Marange diamonds, but it agreed that the implementation of the KP was incompatible with violation of human rights.¹³⁴ This position was difficult to understand if we take into account the fact that the definition of conflict diamonds included in the KPCS did not make reference to human rights.

Finally, even though suspected human rights violations continued in Marange, at the plenary meeting in Kinshasa in 2011 the participants reached an agreement allowing the export of diamonds from Marange mines.¹³⁵ The EU played a distinct role in this agreement because of its intensive work in reaching this solution,¹³⁶ which, despite the Declaration of the EU High Representative on the recognition of Civil Society concerns, led to the withdrawal of Global Witness,¹³⁷ the emblematic NGO in the KP's origin.

In this sense, it was striking that the EU, at the same time as declaring that the KP was linked to the respect for human rights, and also affirming its commitment to the respect for human rights in all areas of the EU external relations,¹³⁸ was working for an agreement on the Marange diamonds when abuses in these mines were known and recognised by the EU.¹³⁹

¹³³ European Commission: 'Kimberley Process: Agreement reached on Zimbabwe's diamond exports', IP/10/969, Brussels, 19 July 2010, available at <http://europa.eu/rapid/press-release_IP-10-969_en.htm>.

¹³⁴ Parliamentary question 19 August 2010 E-6544/2010. OJ [2011] C 216 E, 22.7.2011.

¹³⁵ First, in June 2011, the Kimberley Process Chair authorised the export of diamonds from Marange, a decision that was not agreed on by consensus. This decision was considered invalid by some Participants, such as the United States of America and the European Union, but this did not prevent the entrance of new Marange diamonds into the international legal market. Vid. Statement by the spokesperson of HR Catherine Ashton following the Intersessional Meeting of the Kimberley Process, 20 to 24 June 2011, Kinshasa. A 248/11, Brussels, 24 June 2011; J.E. Nichols, *supra* note 16, 669-670.

¹³⁶ Statement by the EU High Representative, Catherine Ashton, on the agreement reached in Kimberley Process regarding to Marange Diamonds. A 439/11, Brussels 1 November 2011.

¹³⁷ Global Witness, 'Global Witness leaves Kimberley Process, calls for diamond trade to be held accountable' (5 December 2011) available at <<http://www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable>>.

¹³⁸ Article 21 TEU.

¹³⁹ 'Although there are continued reports of human rights abuses in the Marange region': statement by the EU High Representative, Catherine Ashton, on the agreement reached in Kimberley Process regarding to Marange Diamonds. A 439/11, Brussels 1 November 2011. In March 2011 the High Representative/Vice President answered a Parliamentary question on behalf of the Commission declaring that 'the Kimberley Process reacted strongly to reports of human rights violations in the Marange region (Zimbabwe) and its action has helped to improve the situation in this area, particularly as regards human rights, even though the situation remains precarious.' Parliamentary question 18 January 2011 E-000061/2011. OJ [2011] C 279 E, 23.9.2011. In August 2011 a report was also published by the BBC regarding the violations of human rights and the existence of a torture camps in Marange. H. Anderson, 'Marange diamond field: Zimbabwe torture camp discovered', BBC News, 8 August 2011, available at <<http://www.bbc.co.uk/news/>

Even though human rights are not included in the KPCS requirements, the EU is bound by the respect of human rights in its external action. In this sense Article 21.1 TEU establishes that '(t)he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement' among them 'the universality and indivisibility of human rights'.

This obligation of respecting human rights is completed by Article 21(3) that includes the respect of these principles in the development and implementation of EU external action areas included in Title V TEU, and part five of the TFEU, whose Title II refers to Common Commercial Policy. As a result 'Common Commercial Policy has thus become an integrated part of the EU external relations, characterised by common values that guarantee unity and consistency in the exercise of Union powers';¹⁴⁰ and as Article 207(1) states that the Common Commercial Policy 'shall be conducted in the context of the principles and objectives of the Union's external action'.

As a consequence of this regulation in the Treaties, any action taken in KP area, as a subject of the Common Commercial Policy, has to take into account the respect of human rights, even though it was not the main objective of such action, since the guiding principles of EU's foreign policy 'must be not only respected but also promoted abroad via common policies and actions'.¹⁴¹

Therefore, despite the EU declarations which suggested that the respect for human rights did not form part of the KP objective, the EU should have taken measures against the described violations in Zimbabwe, specially taking into account the principle of consistency in the EU external action, included also in Art. 21(3) TEU, and understood as 'absence of contradictions within the external activity in different areas of foreign policy' and 'the establishment of a synergy between these aspects (coherence)'.¹⁴² In this sense, it is contradictory the inclusion of the Zimbabwe Mining Development Corporation (owned by the Government of Zimbabwe) on the list of targeted restrictive measures against individuals and entities for bearing responsibility for serious violations of human rights,¹⁴³ and its deletion two years later¹⁴⁴ despite the fact that the

world-africa-14377215>. At the moment, Global Witness continues to denounce the violation of human rights in Marange. Vid. Global Witness, 'EU warned on blood diamond love triangle' (12 February 2013), available at <<http://www.globalwitness.org/library/eu-warned-blood-diamond-love-triangle>>.

¹⁴⁰ T. Takács, A. Ott and A. Dimopoulos, 'Linking trade and non-commercial interests: The EU as a global role model?' *CLEER Working Papers*, 2013/4, at 10.

¹⁴¹ L. Pech, 'Rule of law as a guiding principle of the European Union's external action', *CLEER Working Papers*, 2012/3, at 12.

¹⁴² P. Gautier, 'Horizontal Coherence and the External competences of the European Union', 10 *European Law Journal*, 1, 2004, at 26.

¹⁴³ Council Decision 2011/101/CFSP of 15 February 2011 concerning restrictive measures against Zimbabwe, *OJ* [2011] L 42, 16.2.2011.

¹⁴⁴ Council Implementing Decision 2013/469/CFSP of 23 September 2013 implementing Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe. *OJ* [2013] L 252, 24.9.2013

High Representative had admitted that abuses of human rights were occurring in Marange.¹⁴⁵

To guarantee consistency in EU external action, the TEU calls for the cooperation of the Council and the Commission assisted by the High Representative of the Union for Foreign Affairs and Security Policy. Specifically, Article 18(4) states that the High Representative shall ensure the consistency of the Union's external action, for which it has been also created the European External Action Service which has among its tasks 'to ensure the consistency of the Union's external action'.¹⁴⁶

But going further, the Commission has created, as has been stated, the Service for Foreign Policy Instrument, under the authority of the High Representative in her capacity as Vice-President of the Commission, and it includes the Foreign Regulatory Instruments, which is in charge of the Kimberley process and sanctions, preparing and negotiating proposal for council regulations on restrictive measures.¹⁴⁷ This attribution of subjects to the Foreign Regulatory Instrument should facilitate the coherence of EU external action specifically in the area of conflict diamonds, as the same instrument governs the KP and the EU sanctions. In this sense the EU, instead of waiting for the KP's improbable decision on suspending trade with human rights-violator States, could apply Article 215 TFEU which allows the adoption of restrictive measures with the objective of bringing a change in activities or policies such as human rights violations.¹⁴⁸ Related to this matter, the Cotonou Agreement can also be taken into account, to which Zimbabwe is a signatory. Article 9 of Cotonou Agreement states the essential elements of the agreement, among which, the respect of human rights is included,¹⁴⁹ and it is well known that the violation of some of these principles can lead to the adoption of negative measures, after the previous consultation process of Article 96.¹⁵⁰ Therefore, the EU has in the Cotonou Agreement another way to force Zimbabwe to comply with human rights.

Finally, it is possible to conclude that, although the core problem is probably the definition of conflict diamonds,¹⁵¹ which as described earlier, does not in-

¹⁴⁵ *Supra* note. 139.

¹⁴⁶ Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service. OJ [2010] L 201, 3.8.2010.

¹⁴⁷ Annual Activity Report. Service for Foreign Policy Instruments (FPI), 2012, at 7.

¹⁴⁸ European Commission, 'Restrictive Measures', (2008) available at <http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf#10>.

¹⁴⁹ Art. 9.1 'Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development'.

¹⁵⁰ This method had already been used previously with Zimbabwe, see. Council Common Position of 18 February 2002 concerning restrictive measures against Zimbabwe (2002/145/CFSP). OJ [2002] L 50, 21.2.2002.

¹⁵¹ In 2010, when the Commission was asked by the Parliament about its support for a wider definition of conflict diamonds, the Commission answered that this was a controversial proposal without consensus and that it has taken the view that a well-focused mandate was necessary (Parliamentary Question 8 July 2010 P-5447/2010. OJ [2011] C 191 E, 1.7.2011). Later in 2012, in an answer given again to the Parliament, the Commission declared that it was 'provisionally in favour of reviewing the definition of conflict diamonds, so as to consider how the KP could address wider issues of violence related to or arising from diamond extraction and trade' (Parliamentary

clude compliance with human rights, the EU should have, and could have, maintained a more strict position on this issue, as is required by its commitment to human rights and its obligations under Article 21 TEU.

5. CONCLUDING REMARKS

The KP has played an effective role in reducing the number of conflict diamonds that enter the market. Over its decade of existence, the statistics show a decrease in the percentage of these diamonds. However, these results are called into question if we take into account the fact that diamonds from countries suspected of breaching the KPCS have been introduced into the market as legal diamonds, during the period in which the country was being monitored or was taking measures to fulfil the KP's requirements, meaning that compliance with the KP was not certain. According to this reasoning, it is also necessary to mention that the Working Group on Monitoring, which is the organ reviewing the compliance of participants with KP requirements, is composed of insiders and controlled by insiders,¹⁵² which can hardly be expected to guarantee a complete and independent monitoring system.

For an independent monitoring system to be implemented, funds would need to be allocated for that purpose and, as mentioned earlier, the KP does not have its own budget. At the moment each country and the EU fund their agents' travel costs in order to participate in monitoring missions. Therefore to fund agents other than those of the participants would imply the participation and financing of other entities. The most appropriate for this purpose would probably be the UN – because of its implication in and support of the process so far – and the NGOs involved. Participants could also directly fund the work of the designated entities. These changes could lead to an effective monitoring system and the restoration of the KP's credibility.

It has also been argued that the decision-making procedure needs to be changed, to see a shift from a consensus-based system to a majority system. But since the KP is a process that works through cooperation, where participation is voluntary, the implementation of a majority system would result in the decisions by those participants that did not agree with the decisions failing to meet them, even if they were threatened with suspension, seeing as the 'procedure does not respond to defined rules and this sanction is far from systematically applied'.¹⁵³

question 6 January 2012 E-012426/2011. OJ [2012] C 285 E, 21.9.2012). In the Kimberley Process a KPCS Review committee has been established, with the task of coordinating the periodic review of the KPCS, but at the moment this Committee only has objectives aimed at enhancing administrative efficiency, without reference to the definition of conflict diamonds. KPCS Administrative Decision, 'Establishment of an ad-hoc committee for exploring the modalities of enhancing the efficiency of the Kimberley Process with a view to provide administrative support for its activities'. Adopted in Jerusalem Plenary, November 2010.

¹⁵² V. Vidal, *supra* note 34, at 518.

¹⁵³ *Ibid.*

It seems that the proposed changes would lead to the transformation of this process into an international organisation, with its own budget and independence from the participants, acting in the interests of its main objectives and implementing an effective monitoring and sanctions system.

However, even though this raised doubts about the KPCS's real effects, it is possible to argue that nowadays diamonds are not considered to be the first resource fuelling armed conflict due to the implementation of this system, and furthermore, that it has given stability to some countries that had been suffering the consequences of this illegal trade. But the links between natural resources and armed conflicts remain a problem in some 'rich' countries where the trade has been transferred from diamonds to other natural resources such as wood.

In this scenario the EU has played a fundamental role, together with the United States. They have both participated actively in the KP and have funded projects. However, the specific characteristics of the KP have given rise to an intricate system inside the EU, mainly carried out by the Foreign Policy Regulatory Instruments inside the Foreign Policy Instrument, also having some manifestation in the Instrument for Stability, whose budget is operational and financially managed by the Foreign Policy Instrument. This structure has allowed the EU to develop the two areas affected by the KP: trade and conflict prevention.

In our view, probably one of the most critical aspects of the system implemented by the EU could be the fast-track system that leaves the control of the fulfilment of the requirements in the hands of those that have to be controlled, something that, in this particular matter with important economic repercussions, could raise doubts about the effectiveness and seriousness of the control exercised by the companies. This opinion can be supported by the facts that, as the former External Relations Commissioner stated, in 2007 more than 30 shipments of rough diamonds suspected of infringing one or more provisions of Council Regulation 2368/2002 were seized, and the diamonds seized are in excess of 12.000 carats, therefore still presenting a high risk of infringement.

On the other hand, as mentioned above, the main activity of the EU supporting other KP participant States has been mainly focused on technical assistance, specifically training and exchange of views. But the complexity of the system and the lack of resources, as cases like Republic of Congo, Zimbabwe or the alluvial diamonds have demonstrated, would probably require a specific programme for the KP inside the IfS. This program with economic assistance could better help States to fulfil the KP requirements, and to implement an effective system of control that will also have positive consequences on EU control, reducing the number of illegal shipments arriving at its borders.

After ten years of existence, one of the main questions is whether it is necessary to rewrite the definition of conflict diamonds so that it includes respect for human rights. There is no doubt that on this subject there is an absolute lack of political will, also by the EU, in order to maintain the high number of participants within the KP. In any case it can be considered that the EU should demonstrate stronger commitment on this issue, facing the interests of diamonds companies and States in which the violation of human rights are accepted as

a way of work. It can be argued that the EU has its own programs and policies for the promotion of human rights, but attending to the EU external coherence, this matter should be an essential part of the EU KP policy.

Finally, the initial objective of the KP was to put an end to conflicts being funded through the trade in rough diamonds, something that the KP seems to be achieving. But this compromise has its origin in the demands of civil society, which is now demanding that the KP's current mandate be extended to the protection of human rights. Again, as at the beginning of the KP, these demands are up against the reluctance and objections of the diamond-producing countries and the industry itself. They are also up against the KP's decision-making procedure that is based on consensus and therefore makes it almost impossible to modify the definition. Therefore, it is probably necessary to launch a new, vocal campaign, developed by NGOs, like those which led to the formation of the KP, so as to force the participants to modify the definition of conflict diamonds to include the protection of human rights as a KP objective, as go beyond briefly mentioning it in its current preamble.