HCJ 909/08

A.I.M.D. LTD
v.
1. Shmuel Mordechai – Diamonds Supervisor
2. Diamonds, Precious Gems and Jewelry Administration
3. Ministry of Industry and Trade

The Supreme Court sitting as the High Court of Justice
[12 January 2009]

Before Justices E.E. Levy, E. Arbel, H. Meltzer

Petition to the Supreme Court sitting as the High Court of Justice

Facts: This is a petition to quash the decision of the Diamonds Supervisor to seize and confiscate goods imported by the petitioner. In February 2007, the petitioner – a company that imports and exports diamonds – imported into Israel a diamond weighing 14.32 carats from the African state of Mali. Mali is not a member of the Kimberley Process Certification Scheme, in which Israel is a participant. The imported diamond was not accompanied by a "Kimberley Process Certificate," as required under the Israeli legislation implementing the Kimberley Process. Therefore, the Supervisor did not issue an import license for the diamond, seized it, and ordered its forfeiture. The petitioner challenged the Diamond Supervisor's exercise of discretion, arguing that it should be permitted to return the diamond to the country of origin, and that in view of the grave financial loss to the petitioner and the availability of a less harmful alternative, confiscation of the diamond constituted an extreme abuse of discretion.

Held: The High Court of Justice unanimously denied the petition. The imperative nature of the term "will be forfeited" in the Import and Export Law, imposing a duty upon the customs officer to confiscate the goods, has long been deemed conditional by the Court, and under certain circumstances, unlawfully imported goods will not be forfeited. An examination of the legislative purpose of section 7 of the Import and

Export Ordinance shows that the supervising authorities enjoy a certain, albeit narrow, degree of discretion in regard to the question of the means of enforcement to be applied in regard to diamonds that cannot lawfully be imported or exported. While forfeiture will normally be the most effective and appropriate means for realizing the objectives of the Kimberley Process, there must be at least a limited possibility for not adopting that course when the circumstances demand. An examination of the various considerations shows that in view of the time that passed between Israel's joining the Kimberley Process and the importing of the diamond, the instructions given to the petitioner in regard to the Kimberley Process, and primarily, due to the importance of the fight against the blood diamonds phenomenon, the respondent's decision to require forfeiture was reasonable, and the respondent did not act improperly in weighing the various considerations.

Israeli Supreme Court cases cited:

[1] C.A. 663/85 *Rozman v. United Mizrahi Bank Ltd.,* [1985] IsrSC 42(1) 216.

[2] C.A. 77/88 *Zimmerman v. Minister of Health*, [1989] IsrSC 43(4) 63.

[3] Leave for Civil Appeal 3899/04 *State of Israel v. Even Zohar* (1 May 2006) (unreported).

[4] HCJ 267/88 *Ha-Idra Seminaries Network Assoc. v. Municipal Affairs Court*, [1989] IsrSC 43(3) 728.

[5] C.A. 10554/02 *Arachim Investments (1993) Ltd. v. Tel Aviv Assessment Officer 1* (21 Nov. 2006) (unreported)).

[6] *Lindorn v. Karnit – Road Accident Victims Compensation Fund*, [2001] IsrSC 55(1) 12.

[7] HCJ 693/91 *Dr Michal Efrat v. Director of the Population Registry in the Ministry of the Interior* [1993] IsrSC 47(1) 749.

[8] C.A. 8269/02 *Haifa Assessment Officer v. Carmel Studios Ltd.*, [2004] IsrSC 59(1) 499.

[9] HCJ 2366/05 *Al Nabari v. IDF Chief of Staff*, (29 June 2008) (unreported).

[10] HCJ 297/82 *Berger v. Minister of the Interior*, [1982] IsrSC 37(3) 29.

[11] HCJ 292/65 *Roshgold v. Minister of Finance,* [1966] IsrSC 20(1) 639.

[12] HCJ 6446/96 *Cat Welfare Society v. Arad Municipality*, [1996] IsrSC 55(1) 769.

[13] Leave for C.A. 2910/98 *Arie Playing Cards Co. v. State of Israel, Customs and VAT Division*, [1999] IsrSC 53(4) 411.
[14] C.A. 666/88 *State of Israel v. Monogil Food Industries Ltd*, [1992] IsrSC 46(4) 1.
[15] C.A. 545/96 *Sheridon Exim Ltd. v. Port and Railroad Authority*, [1999] IsrSC 53(2) 289.
[16] Cr.A. 7598/95 *Ben Shetreet v. State of Israel*, [1998] IsrSC 52(2) 385.
[17] C.A. 6702/04 *Maazen v. State of Israel*, (10 Nov. 2005) (unreported).
[18] Misc.Cr. 6817/05 *State of Israel v. Sitbon*, [31 Oct. 2007] (unreported).
[19] Misc.Cr. 3750/09 *Al Houashla v. State of Israel*, (2 June 2009) (unreported).
[20] C.A. 3901/96 *Raanana Local Planning and Building Board v. Horowitz*, [2002] IsrSC 56(4) 913.
[21] C.A. 6182/98 *Sheinbein v. Attorney General*, [1999] IsrSC 53(1) 625.
[22] HCJ 302/72 *Hilu v. State of Israel*, [1973] IsrSC 27(2) 169.
[23] Cr.A. 437/74 *Kawan v. State of Israel*, [1974] IsrSC 29(1) 589.
[24] HCJ 219/81 Shetreet v. Minister of Agriculture, [1983] IsrSC 37(3) 481.
[25] HCJ 935/89 *Ganor v. Attorney General*, [1990] IsrSC 44(2) 485.
[26] HCJ 389/80 *Golden Pages Ltd. v. Israel Broadcasting Authority*, [1981] IsrSC 38(1) 421.
[27] HCJ 6163/92 *Eisenberg v. Minister of Construction and Housing*, [1993] IsrSC 47(2) 229.
[28] HCJ 3477/95 *Ben Atiya v. Minister of Education*, [1995] IsrSC 49(5) 1.

Foreign Cases cited:

[29] *United States of America v. Approximately 1,170 Carats of Rough Diamonds*, 2004 U.S. Dist. Lexis 56734.

Israeli Laws and Regulations cited:

Directives of the Director General of the Ministry of Industry and Trade, No. 10.1, concerning Trading in Rough Diamonds – Issuance of Permits and Certificates under the Kimberley Process**,** ss. 4,5

Import and Export Ordinance (New Version), 5739-1979**,** ss. 1,2,3,7,8

Free Import Order, 5766-2006**,** s. 2

Free Export Order, 5738-1978

Free Export Order, 5766-2006, s. 2

Dangerous Drugs Ordinance [New Version], 5733-1973, ss. 35, 36A, 36B, 36C

Prohibition on Money Laundering Law, 5760-2000, ss. 22,23
Basic Law: Human Dignity and Liberty

Foreign Laws and Regulations cited:
United States:
Public Law 108–19 Clean Diamond Trade Act
19 USC 3907 - Section 3907. Enforcement
19 USC 1595a - Forfeitures and other penalties, s. (2)(c)

Canada:
Export and Import of Rough Diamonds Act, S.C. 2002, C. 25, s. 17

New Zealand:
United Nations (Kimberley Process) Regulations 2004 (SR 2004/463), s. 8

European Union:
Council Regulation (EC) No 2368/2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds, Chap. II, arts. 5, 14

International Agreements cited:
Kimberley Process Certification Scheme, ss. 4,5,6

United Nations Resolutions cited:
General Assembly Resolution A/RES/55/56
General Assembly Resolution A/RES/57/302

For the Petitioner – R. Schiowitz
For Respondents – I. Ravid

JUDGMENT

Justice E. Arbel

The petition before us concerns the petitioner's request that we order Respondent 1(hereinafter: the respondent) to show cause why his order to confiscate a diamond it imported to Israel without a "Kimberley Process Certificate" should not be reversed, and why it not be permitted to return the diamond to its country of origin in a manner that will prevent monetary loss.

Factual background

1. The petitioner is a company that imports and exports diamonds. In February 2007, the petitioner imported into Israel a diamond weighing 14.32 carats from the African state of Mali, for which it claims to have paid the sum of $71,600. Mali is not a member of the Kimberley Process Certification Scheme, in which a number of states, among them Israel, participate, and which, as shall be explained below, is intended to prevent trade in diamonds that are suspected of originating in conflict states in Africa, and that serve to finance the operations of rebel groups in that continent. In this case, the imported diamond was not accompanied by a "Kimberley Process Certificate," as required under section 2 of the Free Import Order, 5766-2006 (hereinafter: the Free Import Order) and the Supplement to that Order, and the petitioner was not issued an import license. As a result, the petitioner was not permitted to bring the diamond into the state and it was seized by the respondent and transferred to his keeping.

From this point on, the parties disagree on the facts: according to the petitioner, the respondent granted permission to remove the diamond from Israel and return it to its country of origin, contingent upon presenting an agreement for the cancellation of the transaction and the return of the diamond to the seller. The respondent, on his part, avers that he merely granted the petitioner additional time in which to try to obtain the legally required Kimberley Process Certificate. In any event, there is no disagreement that at the beginning of January 2008, when, according to the petitioner, it had succeeded in cancelling the transaction with the seller in the country of origin, it requested that the respondent return the diamond. The respondent refused the request, explaining that returning the diamond to the petitioner would be tantamount to a breach of the Kimberley Process in a manner that would endanger the entire Israeli diamond industry. In light of the respondent's decision, the current petition was submitted.

The arguments of the parties

2. According to the petitioner, the respondent erred in determining that he lacked the authority to return the diamond so that it could be returned to the country of origin. The petitioner claims that the respondent's words indicate that he applied the provisions of the Directives of the Director General of the Ministry of Industry and Trade, No. 10.1, concerning Trading in Rough Diamonds – Issuance of Permits and Certificates under the Kimberley Process (hereinafter: Directives of the Director General), as promulgated in May 2007, which limit the

respondent's discretion to return diamonds that he has seized, when compared to the scope of discretion under the previous guidelines, although this amendment was made following the events in the matter before us. The petitioner argues that in absolutely refusing to consider the possibility of returning the diamond in accordance with the Guidelines of the Director General then in force, the respondent breached his duty to exercise discretion. The petitioner believes that in so doing, and in ignoring the monetary loss that would result from the forfeiture, the respondent's decision was unreasonable in the extreme and should be declared void.

The petitioner further argues that the Court should reject the respondent's version of the events, according to which he granted the petitioner additional time to present a Kimberley Process Certificate, and that when it was not presented, he had no choice but to confiscate the diamond. According to the petitioner, this version is not logically consistent with the fact that the respondent knew that there was no real possibility of obtaining a Kimberley Process Certificate when the importation was from a country that is not a party to the Kimberley Process. Thus, the petitioner argues that the additional time was intended to allow it to present the respondent with an agreement for the return of the diamond to the state of origin, and when such an agreement was presented, the respondent should have granted permission to do so. In this regard, the petitioner notes that all of its actions were carried out in good faith, inasmuch as it was not aware of the need to present a Kimberley Process Certificate for diamonds imported from a country that is not a participant in the Kimberley Process Certification Scheme, and that it was sufficient that it declare the importation of the diamond into Israel, as it indeed did. The petitioner concludes that under the circumstances, and in view of the fact that we are concerned with a single diamond, forfeiture of the diamond and its destruction would constitute disproportionate punishment, particularly in light of the great value of the diamond and the availability of a less harmful legal alternative.

3. For his part, the respondent argues that the diamond that is the subject of the petition was imported from a state that is not a participant in the Kimberley Process Certification Scheme, and without an import license. As such, the import was in breach of the Kimberley Process rules as adopted into Israeli law under the Free Import Order. That being the case, and on the basis of the Directives of the Director General even before they were amended, the respondent was, he argues, left with alternative courses of action in the scope of discretion granted to him, and the Directives do not give preference to any of the choices. Therefore, the respondent is of the view that there are no grounds for the claim that his

decision was unreasonable in the extreme. The respondent further argues that the earlier Directives of the Director General, which granted the respondent discretion to return diamonds abroad, were merely intended to prevent harm to participant states that had not as yet instituted the necessary procedures for implementing the Kimberley Process in its initial stage, and no more. The respondent explains that, in practice, due to the great importance of the fight against the phenomenon for which the Kimberley Process was created, and the centrality of Israel in the international diamond trade, he absolutely abstained from exercising that authority during the entire period during which the Directives were in force. According to the respondent, the Directives were never intended to permit the return of a rough diamond to a country that was not a participant in the Kimberley Process, inasmuch as that would constitute a breach of Israel's obligations under the Kimberley Process Certification Scheme. Lastly, the respondent argues that the Court should reject the petitioner's claim that forfeiture of the diamond is disproportionate, inasmuch as the petitioner always knew that importing diamonds contrary to the Kimberley Process was prohibited, and had been instructed accordingly. Therefore, in choosing to import the diamond, the petitioner took a calculated risk.

Deliberation

4. The question grounding the petition concerns the nature of the means that the respondent may adopt in exercising his authority to fulfill Israel's international obligations under the Kimberley Process. More precisely, we must decide whether the respondent's decision to confiscate the diamond imported by the petitioner, rather than give it back so that it could be returned abroad, fell within the scope of reasonableness granted the respondent in exercising his discretion. It must be borne in mind that the international situation that forms the background of the petition is charged, sensitive and complex, and in order to examine the legality of the considerations that grounded the respondent's decision, and the relative weight given to each of them, we must first examine the phenomenon that grounds the petition, and the international activity with which it was intended to contend. As we shall briefly see below, much has been written on the subject. We will present it as a non-binding background intended to elucidate the phenomenon and clarify the positions of the parties.

(A) The Blood Diamond Phenomenon

> ‘Imagine that in your community, every day when you leave home you are surrounded by people with missing limbs. To your left is a woman with no hands; to your right is a man with an ear missing. Perhaps your infant child has had her leg, arms, or hands sliced off brutally for no medical reason and with no anesthesia at all. Many horrors surround you. Perhaps your sister and three of your friends were raped as teenagers, and your neighbor's son was conscripted into the rebel cause that perpetuates these acts. Imagine that these atrocities are so common that you hardly notice any longer that someone has been the victim of such brutality. As you picture the horrible life in that community, you realize that somewhere in the world a young woman has just been given a diamond engagement ring that was used to fund the rebels who have inflicted so much pain upon you and your loved ones”.
>
> (Amanda B. Banat "Note: Solving the Problem of Conflict Diamonds in Sierra Leone: Proposed Market Theories and International Legal Requirements for Certification of Origin" 19 *Ariz. J. Int'l & Comp. Law 939 (2002)* (Hereinafter: *Banat*)).

5. The term “blood diamonds” or “conflict diamonds,” which seems, at first, something of an oxymoron, expresses a harsh reality surrounding civil wars, power struggles, and attempts to control natural resources that have caused great suffering, and have taken many human lives in a number of African countries. The phenomenon finds its source in the civil wars that raged in Arica primarily in the last decade of the twentieth century, in the course of which local rebel militias attempted to overthrow the legitimate governments of such countries as Sierra Leone, Angola, Liberia and The Congo. Some of these militias initially presented themselves as intended to fight the rampant corruption in the existing regimes and promised a utopian society not ruled by a small urban elite. However, their failure to enlist popular support led the militias to prefer recourse to terrorist methods in order to perpetuate their regime in areas under their control. Thus, for example, in Sierra Leone, those methods included mass rape of women, murder, amputation of limbs, abduction and the forced conscription of civilians, including children, into the rebel militias (see: Karen E. Woodey, Diamonds on the Souls of her Shoes: The Kimberley Process and the Morality Exception to WTO Restrictions, 22 *Conn. J. Int'l L.* 335 (Hereinafter: *Woodey*); Jamila D. Holmes, The Kimberley Process: Evidence of Change in International Law, 3 *BYU Int'l L.* & *Mgmt Rev*. 213 ; *Banat*, at p. 940-941).

In his book Blood from Stones: The Secret Financial Network of Terror (2004) (Hereinafter: Farah), American journalist Douglas Farah brings the testimony of people who were residents of Sierra Leone during the civil war, allowing a terrifying, direct view of the reality confronting residents of the areas under the control of the Revolutionary United Front (RUF):

> 'They put us in a house to burn; about one hundred of us, but it wouldn't light. So they put the men in one line and shot them. I tried to run away, but I fell in a gutter. The children caught me. They amputated five others, but I was punished more for trying to run away. They took both my legs. They were small boys and they held me down while one cut me off" (page 31).'

Further on, Farah describes how children conscripted into the militia were forced to carry out executions at the behest of their commanders:

> 'That initial shock was almost always compounded by being forced to witness the execution of other children who refused to join the rebels or who tried to escape. Those who joined (. . .) often had the initials RUF carved into their thin chests, both as a forced initiation and as a way of ensuring they could not slip back, unrecognized, into civilian life" (page 32).'

6. The vast natural resources to be found in various African countries play a central role in the activities and warfare of the rebel militias. Indeed, maintaining a prolonged, effective armed struggle requires financing, and that is obtained by taking control of areas of those countries that are rich in diamonds and minerals; mining them, often by exploiting children and by coercion; selling them, to Western buyers among others, or trading them for arms and munitions (see: Chaim Even-Zohar, Diamond Industry Strategies to Combat Money Laundering and the Financing of Terrorism (2004) (pages 22-23, 31-32 in the Hebrew edition); Woodey, at pp. 338-339). In this sense, the small size of diamonds, their high value relative to their weight, their great negotiability, their durability, and the difficulty in determining their origin make them a significant source of financing for the militant groups. Indeed, over the last few years, some have expressed the opinion that there is growing evidence of the use of diamonds by Al Qaeda for financing its operations (see: Banat, at pp. 944-945; Farah, at pp. 47 ff.). Moreover, the matter contributes to the further suffering of the civilian population. Thus, the American Congress has found that the takeover of diamond regions by the militias over the last decade has led to the removal of more than 6,500,000 people from their homes in Sierra Leone, Angola, and The Congo (see: Sean D. Murphy (ed.) "Contemporary

Practice of the United States Relating to International Law" 96 *A.J.I.L.* 461, 485 (2002)). In addition, the matter results in the loss of significant income for the countries in which the diamonds are found, to increasing poverty in those countries, to greater dependence of the populace upon the militias, and to the perpetuation of the cycle of violence and conflict.

B) The international response to the phenomenon – The Kimberley Process

7. Against the background of the severe humanitarian situation, and the accumulation of reports regarding the economic ties between rebel African groups and the diamond industry, the first conference of a group of African states was convened in Kimberley, South Africa, for the purpose of delineating courses of action that would prevent illegal trade in blood diamonds, on the one hand, while protecting the legal trade in diamonds of African origin, on the other. Several months after that conference, the UN General Assembly adopted resolution 55/56 that, *inter alia*, recognized the connection between the trade in rough diamonds and the continuing cycle of violence in Africa, and called for the creation of an international certification regime for rough diamonds that would set a minimum standard, and would rely upon the internal legislation of each participating state (see: A/RES/55/56). The conference of the African states led to several additional conferences that ultimately resulted in the establishment of the Kimberley Process in November 2002.

8. The Kimberley Process Certification Scheme, which currently comprises some 74 participants, entered into force on the first day of 2003, and earned the support of the UN General Assembly that same year (see: A/RES/57/302). The Process makes a number of demands of the participating states, among them: enactment of appropriate legislation that reflects the principles of the Process and the establishment of apparatus for implementing it; restricting trade in rough diamonds exclusively to states participating in the Kimberley Process; examination and certification of every shipment of rough diamonds entering or leaving the borders of the state; attachment of an official certificate of provenance of the exporting state for every shipment of rough diamonds, whether imported or exported; importing and exporting diamonds only in numbered, secure, tamper-proof containers; cooperation among the member states, and full transparency in regard to the implementation of the Scheme, including the sharing of statistical data, and the preparation of annual reports (see: Kimberley Process Certification Scheme at www.kimberleyprocess.com). However, the Kimberley Process does

not establish a clear, general standard for contending with importers and exporters who operate contrary to the local implementing legislation, but suffices in stating in sec. 4 of the Scheme, that:

> 'Each Participant should:
> (a) . . .
> (b) . . .
> (c) . . .
> (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 (. . .)'

Each state is thus free to choose its methods for responding to individuals who do not act in accordance with the local enabling legislation, whether by individual punishment, general deterrence or prevention of forbidden transactions. Nevertheless, as part of the conditions of transparency and cooperation grounding the Process, each participating state is required to provide the others with information regarding the implementation of the Process within its jurisdiction (sec. 6 (11-15)); to inform another participant, through the Chair, if it considers that the internal laws of that other participant do not ensure the prevention of trade in conflict diamonds (sec. 5 (e)); to inform the Chair if it believes that another participant is not acting in compliance with the Process, which is intended to lead to a dialog among the participants on how to address the problem (sec. 6 (16)).

Despite the limitations of the Kimberley Process, such as the absence of any obligatory international apparatus for supervision and enforcement, and the restriction of its scope only to rough diamonds (Woodey, at pp. 344-347), there can be no dispute as to its contribution to stopping the flow of blood diamonds in international trade, as well as to the improvement of the lot of the states that were the source of those diamonds, and of the lives of their residents.

C) Implementation of the Kimberley Process in Israel

9. Israel has been a participant in the Kimberley Process from its inception and was among the first to implement it in its internal law. Thus, in 2003, by virtue of sec. 2 of the Import and Export Ordinance (New Version), 5739-1979 (hereinafter: "Import Export Ordinance"), which permits him "by order make such provisions as he thinks expedient for prohibiting or regulating (...) the export (...)" , the Minister of Industry

and Trade amended the Free Export Order, 5738-1978, which became the Free Export Order, 5766-2006 (hereinafter: "Free Export Order"), so that it would accord with Israel's obligations under the Kimberley Process.

In the framework of that amendment, and those that followed, "rough diamonds, exported from states that do not implement the Kimberley Process" were added to the list of items in the First Schedule of the Free Export Order that cannot be exported without presenting an export license, pursuant to sec. 2 (a) (1) of the Order, while diamonds "originating in states that do not implement the Kimberley Process (. . .) including by personal import" were added to the list of goods in the First Schedule of the Free Import Order that cannot be imported without an import license, pursuant to sec. 2 (a) of the Order. According to the State Attorney, in view of the prohibition under the Kimberley Process, the Diamonds Supervisor has refrained from issuing import and export licenses for rough diamonds from states that are not participants in it.

As for the export of diamonds to states that are participants in the Kimberley Process, rough diamonds were added to the list of goods in the Second Schedule, which, pursuant to sec. 2 (a) (2) of the Free Export Order, can be exported only upon presenting a permit, and for which a permit from the Diamond Supervisor can be obtained "on condition that the shipment be accompanied by an original Kimberley Certificate, duly signed and completed." A similar amendment was made in the Free Import Order, which also made the importing of rough diamonds subject to a permit from the Diamonds Supervisor and the presentation of a Kimberley Certificate.

10. Alongside these provisions, the Ministry of Industry and Trade published the Directives of the Director General of the Ministry of Industry and Trade, for the purpose of "assisting the general public by providing solely basic, non-binding, general information." An examination of the Directives reveals that the information they provide may be helpful both in clarifying matters arising from the legal provisions of the Kimberley Process, and in adding relevant information that is absent from the said provisions, that can provide a more complete picture of the actual procedures that are incumbent upon commercial actors and regulators as a result of Israel's participation in the Process. However, as the Directives themselves state, it is clear that they cannot contradict the governing law, or any other law or regulation, and they must remain within the scope of the authority under which they were promulgated (C.A. 663/85 *Rozman v. United Mizrahi Bank Ltd* [1], p. 218; and see Yoav Dotan, Administrative Guidelines, pp. 179-181 (in Hebrew) (hereinafter: "Dotan").

11. Section 5-g of the Directives of the Director General is dedicated to setting out the means that will be adopted by the customs authorities in regard to goods that do not meet the criteria of the provision. According to the section:

> 'A shipment of rough diamonds that arrives from abroad, and that is not accompanied by a Kimberley Process Certificate, will not be released from customs. The shipment will be detained or released against a guarantee until the importer presents the certificate, and satisfactorily explains to the Supervisor why it was not submitted on the date of the shipment. If the certificate is not presented within the period stipulated by the Supervisor, the shipment will be returned abroad or forfeited, at the discretion of the Supervisor.'

This section was amended in 2007, such that the discretion of the Supervisor to return the shipment abroad or confiscate it was replaced by: "the shipment shall be forfeited at the discretion of the Supervisor" (sec. 4-g). Clearly, the discretion granted to the respondent under each of these versions of the Directives of the Director General is broader than that granted under the Import and Export Ordinance in regard to the means to be employed against one who imports goods contrary to the Free Import Order or the Free Export Order. Section 7 of the Import and Export Ordinance states:

> 'If any goods are moved in contravention of a control order (. . .) such goods and any means of transport used for their transportation shall be forfeited.'

The definition of the term "movement" in sec. 1 of the Import and Export Ordinance reveals that it is, in effect, identical to the terms "import" and "export," and it comprises all goods intended for import to or export from Israel, including the diamond with which we are concerned. We find a similar situation under sec. 8 of the Import and Export Ordinance, which concerns a custom officer's authority to demand proof that the goods have not been imported in contravention of an order and under which "the goods shall be forfeited and be dealt with as the Minister may direct." Even if we view the additional time granted to the petitioner by the customs officer as intended to allow the presentation of evidence regarding the legality of the imported goods, it would, nevertheless, appear by its language, that the latter's authority to confiscate diamonds imported or exported contrary to the Kimberley Process is obligatory.

As we see, an examination of the language of the Import and Export Ordinance reveals that it does not grant the enforcement authorities discretion as to the means that they must adopt, and that if the conditions

set out in the section are met, they must confiscate the goods (and see Avigdor Dorot, Customs and Foreign Trade Laws 81 (2006) (hereinafter "Dorot")). Did the Minister of Industry and trade overstep his authority in granting a degree of discretion to the Diamonds Supervisor – i.e., the respondent – in exercising his authority?

D) Interpreting the Import and Export Ordinance

12. In order to answer this question, we must set out upon the path of interpretation. The starting point of our journey is to find the linguistic meaning of the text, which is found in the language of the law. Interpretation that lacks any linguistic foundation cannot prevail. "The interpreter must give the language of the law that meaning which it can linguistically bear" (C.A. 77/88 *Zimmerman v. Minister of Health* [2], p. 72; Leave for Civil Appeal 3899/04 *State of Israel v. Even Zohar* [3] (Hereinafter: *Even Zohar*)), even if it is not necessarily the normal meaning we ascribe to that utterance.

In order to decide among the various possibilities that the language can "bear," we must proceed to the next interpretive station – that of the legal meaning. The legal meaning of the text is that linguistic meaning that serves to realize the purpose that the legislation was intended to achieve (see HCJ 267/88 *Ha-Idra Seminaries Network Assoc. v. Municipal Affairs Court* [4]; C.A. 10554/02 *Arachim Investments (1993) Ltd. v. Tel Aviv Assessment Officer 1* [5]). The interpreter thus "draws" the legal significance of the text from among the various linguistic possibilities that compose the linguistic field. "'The drawing rule' is the purpose of the law" (see C.A. 2000/*89 Lindorn v. Karnit – Road Accident Victims Compensation Fund* [6], p. 27). In this regard, one must distinguish between the subjective purpose of a piece of legislation, which is the purpose that the legislature sought to achieve by means of the legislation at the time it was enacted, and the objective purpose, which includes the purposes, values, policy, and the social interests that the legislative act was intended to realize in a modern democratic society (see Aharon Barak, Interpretation in Law, vol. II, Interpretation of Legislation, pp. 201-204 (1993) (hereinafter: Barak); HCJ 693/91 *Dr Michal Efrat v. Director of the Population Registry in the Ministry of the Interior* [7], p. 764).

The two elements of purpose, the subjective and the objective, are ascertained from a spectrum of sources, among them the language of the law, the legislative history, and the fundamental principles of the legal system in which the law operates (Barak, p. 291; *Zohar*, paras. 18-19 of the decision; C.A. 8269/02 *Haifa Assessment Officer v. Carmel Studios Ltd.* [8]). In the event of a contradiction between the various purposes, the

judicial interpreter exercises judicial discretion to balance the different purposes in order to crystallize, at the end of the process, the final purpose of the legislation (Barak, pp. 204-209; *Zohar*, para. 20 of the decision).

13. The language of sec. 2 of the Import and Export Ordinance establishes that goods imported in violation of supervision orders, among them the Free Import Order and the Free Export Order, "will be forfeited." Indeed, the expression "will be forfeited" implies that the statement is obligatory and not amenable to a discretionary application of authority, as opposed to the term "may be," which would generally be construed as granting permission. Nevertheless, although the presumption is that "the legislature spoke in plain language," in the course of interpreting, the interpreter must not be bound by the plain, usual meaning of the legislative act, but rather must consider special and deviant meanings, to the extent that they may have some linguistic foundation in the text (Barak, at pp. 117-118).

The expression "will be forfeited" grants the holder of authority the very power and ability to act, but its obligatory character does not address the nature of the authority but rather the manner of its implementation. The internal linguistic context of the law, as well as extra-textual considerations, can influence this approach, as distinct form their possible impact upon the question of the very existence of the authority (HCJ 2366/05 *Al Nabari v. IDF Chief of Staff* [9]; Barak, pp. 120-121). Just as granting power to exercise authority can, under certain circumstances, oblige the holder of authority to use it, and assuming authority in order never to exercise it is improper (see the opinion of President Shamgar in HCJ 297/82 *Berger v. Minister of the Interior* [10], pp. 45-46; and see HCJ 292/65 *Roshgold v. Minister of Finance* [11], p. 642), so the context of legislation and the external circumstances may justify the exercise of discretion before the administrative agency exercises its authority (see HCJ 6446/96 *Cat Welfare Society v. Arad Municipality* [12], at p. 809 (hereinafter: *Cat Welfare Society*), especially when we are concerned with a provision containing such a broad range of subjects in differing circumstances. That being the case, we should not put the cart before the horse and rule out a sense that falls within the linguistic field of possible meanings simply because it is unusual. The interpreter chooses among the regular and unusual meanings at the second stage, in accordance with the legislative purpose.

14. What is the general, subjective purpose of sec. 7 of the Import and Export Ordinance? In general, the intended purpose of the need to prohibit the import of certain goods is:

> 'To prohibit the bringing in of items due to the fear of the harm they may cause – whether the fear is a medical fear, or concerns safety, or criminality – where the fear is sufficiently strong to cause the state to prefer the general interest of public welfare over the individual interest of the importer of freedom of occupation' (*Leave for C.A. 2910/98 Arie Playing Cards Co. v. State of Israel, Customs and VAT Division* [13], p. 423).

As was specifically explained, the import prohibition imposed upon diamonds originating in states that are not participants in the Kimberley Process is intended to cut off the economic base of African rebel militias that brutally trample human rights and welfare in the countries in which they operate, and that are involved in the financing of various terrorist organizations around the world (Directive 3-a of the Directives of the Director General). An additional purpose, that is of an economic nature, is the rehabilitation of the economies of states in which rebel militias operate, steal the natural resources, and contribute to further poverty and violence. A third purpose, underlying the adoption of the Process in Israel, and the resort to forfeiture in order to enforce it, is grounded in the prohibition deriving from the Kimberley Process that forbids participating states from engaging in the diamond trade with states that are not participants in the Process. The implementation of the requirements of the Kimberley Process and their enforcement are, therefore, vital to ensuring the continued existence of the Israeli diamond industry, inasmuch as otherwise, states participating in the Kimberley Process would not be permitted to maintain trade relations with it. In this framework, sec. 7 of the Import and Export Ordinance can also be viewed as a means intended to implement the rules of the Kimberley Process, if only for the sake of meeting international obligations undertaken by the state, if not for reasons related to the Process itself.

15. Forfeiture of the goods was chosen as the means for implementing the aforesaid general and specific purposes. The meaning of the term "forfeiture," as it appears in the Import and Export Ordinance, is confiscation, that is, the final denial of the original owner's ownership of the goods and their transfer to the state (C.A. 666/88 *State of Israel v. Monogil Food Industries Ltd.* [14], para. 7 of the decision) (Hereinafter: *Monogil*), which, in context, actually concerned sec. 8 of the Import and Export Ordinance, but its holdings are relevant here, as well; C.A. 545/96 *Sheridon Exim Ltd. v. Port and Railroad Authority* [15], paras. 7. 10 of the decision) (hereinafter: *Sheridon*)).

16. In several of its decisions, this Court pointed to some of the advantages of forfeiture as a means of enforcement. Thus, for example, the Court held in regard to drug-related offences:

> '. . . forfeiture is not a punishment in the strict sense of the term, and its purpose is not "penal", but rather to "take out of his mouth what he has swallowed" [Jeremiah 51:44 – Ed.] . . . forfeiture takes property from the offender that was acquired by means of a drug-related crime, without reference to its value or amount, as property that does not belong to him, but that he holds unlawfully . . . forfeiture – as explained in the explanatory notes of the bill – has superior deterrent value, not because of the great loss that it causes the offender, but rather because it nullifies the motive that promotes and encourages the commission of drug-related offences: great profit at relatively little risk' (Cr.A. 7598/95 *Ben Shetreet v. State of Israel* [16], pp. 410-411).

On the criminal level, the purpose of forfeiture is, therefore, that of achieving deterrence by striking at the economic foundation of the owner of the forfeited property, and depriving him of it, inasmuch as he holds it unlawfully (and see C.A. 6702/04 *Maazen v. State of Israel* [17]; Misc.Cr. 6817/05 State *of Israel v. Sitbon* [18] (hereinafter: *Sitbon*); Misc.Cr. 3750/09 *Al Houashla v. State of Israel* [19]). While the strength of these considerations is somewhat less when we are concerned with the forfeiture of goods imported in violation of a supervision order, like the goods under discussion, they nevertheless remain relevant in the case before us as a means for achieving the goal of cutting off the economic branch upon which those trading in blood diamonds sit, for what is a more effective deterrent than the total removal of those diamonds from international trade and the absolute nullification of the economic dividend that can be derived from them? Forfeiture, as set out in sec. 7 of the Directives of the Director General is, therefore, the primary and most important means for contending with the phenomenon of blood diamonds, both directly, and in terms of the incentives. Are there situations in which the confiscating agency should weigh additional factors, notwithstanding the importation of diamonds in violation of the Kimberley Process rules?

17. For example, in the context of the matter before us, the problem that may arise is that the importers are not always themselves part of the criminal cycle that revolves around blood diamonds, but rather, through no fault of their own, they serve as indirect instruments for advancing the criminal purposes of others. This problem faced the Court in the *Monogil* case [14], which dealt with the construction of sec. 8(a) of the Import and Export Ordinance, and held, as earlier noted, that if the customs officer's demand for proof that the goods were not unlawfully shipped is not met, the goods will be forfeit. In that case, the

Court held that such forfeiture does not "follow" the goods, but rather the perpetrators of the offence. Once the connection between the criminal element and the goods is severed, by means of a buyer in good faith, the goods should not be forfeit (and see *Sheridon* [15], paras. 9-10 of the judgment; Dorot, pp. 83-85). Indeed, that holding was premised, *inter alia*, on the specific wording of sec. 8, which requires presenting evidence, and upon the difficulty of a good-faith, third-party buyer in obtaining such evidence. But in the *Sheridon* case, the holding was also explained by the right of that third party to ownership, and by the final, absolute nature of forfeiture under the Import and Export Ordinance. It was therefore held that the goods would be forfeited "only when the offence was perpetrated by the lawful owner of the goods, or on his behalf. Otherwise, the owner would be left empty handed even if he acted in good faith" (*Sheridon* [15], para. 10 of the judgment). Similarly, under sec. 204(2) of the Customs Ordinance, goods which are prohibited for import will not be forfeit if the importer was unaware of the prohibition, and there had not been reasonable time for him to become aware of the prohibition. Nevertheless, "they must be re-exported, or disposed of in a manner approved by the supervisor, as he shall see fit."

18. A similar defense exists in criminal law for an owner whose property "was used for the offense without his knowledge or without his consent, or that he acquired his right in the property for a consideration and in good faith, and without being able to know that it was used in the or obtained in connection with any offense" (sec. 36C (a) of the Dangerous Drugs Ordinance [New Version], 5733-1973 (hereinafter: Dangerous Drugs Ordinance); sec. 23 of the Prohibition on Money Laundering Law, 5760-2000 (hereinafter: Prohibition on Money Laundering Law), which applies the provisions of sec. 36C of the Dangerous Drugs Ordinance to the Prohibition on Money Laundering Law). Parenthetically, it should be noted that section 35 of the Dangerous Drugs Ordinance establishes mandatory forfeiture of "the dangerous drugs, the pipes and other utensils regarding which the offence was committed," following conviction. However, no analogy can be drawn to the matter before us, inasmuch as, in view of the illegality *per-se* of dangerous drugs and the related utensils, as opposed to the absence of such illegality in regard to the goods in the matter before us, the reasons for leaving the goods in the hands of the owner in the former case are weaker, even if it be proved that there was good faith. In other places in the criminal law, the law requires the exercise of discretion prior to the forfeiture of property involved in the perpetration of an offense (see, e.g., sec. 36A of the Dangerous Drugs Ordinance, which establishes a requirement of forfeiture of property employed in or received as payment

for the perpetration of an offense, in a criminal proceeding regarding a drug-related offense, "unless it sees fit not to do so for special reasons which shall be recorded"; sec. 36B of the Dangerous Drugs Ordinance, which establishes discretionary authority to confiscate property in a civil proceeding regarding drug-related offenses (and see Yaakov Kedmi, On the Dangerous Drugs Ordinance, (2007), pp. 303-341)); sec. 21 of the Prohibition on Money Laundering Law, which permits the court to order forfeiture "unless it decides not to do so on special grounds to be recorded"; and sec. 22 of that law, which grants discretion in regard to forfeiture in a civil proceeding regarding the offenses enumerated in the law, and under subsec. (d), transferring the burden in regard to the forfeiture of property that does not belong to the suspect to the confiscating authority, which must show that the owner knew that the property was used for an offense or agreed thereto, or that he did not acquire his right for consideration and in good faith, and cf. sec. 39 of the Criminal Procedure (Arrest and Search) Ordinance [New Version], 5729-1969, and see *Sheridon* [15], para. 11 of the judgment).

19. As we see, the imperative nature of the term "will be forfeited" in the Import and Export Law, imposing a duty upon the customs officer to confiscate the goods, has long been deemed conditional by this Court, and under certain circumstances, the existence of which is given to the discretion of the authority ordering the forfeiture, the unlawfully imported goods will not be forfeit. The question of whether an additional step is warranted that would grant general, even if limited, discretion in the exercise of the forfeiture authority under section 7 of the Import and Export Ordinance, must be answered in accordance with whether such forfeiture is necessary as the single, necessary means for realizing the purposes of the Import and Export Ordinance in the context of the Kimberley Process. To that end, and to demonstrate this, we will consider whether adopting the petitioner's recommendation, i.e., returning the goods to the state of origin, would frustrate the said purposes.

20. A transaction importing diamonds into Israel is composed of two relevant factors: a seller and a buyer, who also serves as the importer or exporter. Of course, there is no guarantee that the seller is a single entity rather than a long line of factors that form a chain intended to "blur" the trail leading back to the illegal source of the diamonds (Even Zohar, pp. 52-53). But that is not relevant to our examination of the transaction. The idea behind the Kimberley Process is to curb the seller through the buyer. Thus, through the restrictions upon the importing of blood diamonds that are applied to the importer, the seller's source of income is cut off, and with it the economic base for financing the warring

militias in Africa, and the perpetration of acts of terrorism. Thus, the importer is not a target, but rather a means, and the fact that the Kimberley Process is intended to deter him derives from the practical possibility of doing so at the entry points into the participating states, as opposed to the impossibility of doing so in regard to the actors at the initial stage of the transaction. This is not to say that the importer acts in good faith. It is entirely possible that the conditions of the unlawful transaction are financially attractive to him, as well, and that he chooses to embark upon it with his eyes wide open, while assuming a calculated risk. However, even if that be the case, the Kimberley Process does not single out the importer, inasmuch as if he is viewed without reference to the seller, then his desire for greater profits, even if unlawful, does not, in and of itself strengthen the African militias, but rather is intended to serve his own separate interests.

Forfeiture is applied to the importer, which stands at the second level of the transaction. Its influence upon the seller is expressed only in terms of reducing the motivation of the buyer-importer to conduct business with it. As regards the seller, forfeiture thus looks to the future, inasmuch as once the transaction has been made between the seller and the buyer, forfeiture of the diamond by the state authorities can exercise no influence upon the seller in regard to that transaction.

21. Proceeding within the framework of our example, let us now consider the question of whether forfeiture is the sole means for realizing the purposes of the Kimberley Process, both subjectively and objectively, or whether some other means, like that proposed by the petitioner, might achieve the same goals.

Returning the diamond to the state of origin and obtaining a refund, assuming that the seller would agree, is problematic. Indeed, permitting the diamond's return grants the importer a form of "insurance". It will not lose under any scenario. Therefore, its motivation to continue to make illegal transactions remains unaffected. The importer will now tell itself: 'Let's try to import an illegal diamond. If I succeed – great; if I don't, I will be able to return the diamond to the seller for a refund. True, the importer may be charged a certain cancellation fee, but it will likely be small enough to make the risk worthwhile.' As for the seller, return of the diamond will not, as a rule, nullify its motivation, inasmuch as if it charges a cancellation fee upon return of the diamond, it will still profit by the transaction – it will have both the diamond and the cancellation fee. Returning the diamond thus raises a problem insofar as it is serving as an effective means for contending with the blood diamonds phenomenon. It is, however, possible to imagine a situation in which this method would not undercut the purposes of the Kimberley Process. For

example, if it were agreed between the seller and the importer that the diamond could be returned without a cancellation fee, then preventing the importation of the diamond to the intended country would transfer the focus from undermining the motivation of the importer to nullifying the transaction itself, and inflicting direct harm upon the seller already for the present transaction. This is as opposed to the forward-looking impact of forfeiture. Thus, the purpose of the Kimberley Process might be achieved by means of returning the diamond, since it could cut off the source of financing of the warring militias. Of course, this would not provide a response to the “insurance” problem mentioned above, but one may assume that the importer is ultimately interested in bringing the transaction to fruition, and if it knows that it is forbidden without a Kimberley Process Certificate, what interest would he have in doing business with a supplier who cannot provide that certificate? We can, therefore, say that although the disadvantages of returning the diamond generally outweigh the advantages, and although it does not realize the purpose of the Kimberley Process, nevertheless, in some exceptional cases, it may yield certain advantages that demonstrate that forfeiture is not necessarily the only means for realizing the underlying purposes of the Kimberley Process, and that granting a certain measure of discretion to the supervising authority not to require forfeiture in certain cases would not, in and of itself, be contrary to those purposes.

22. So much for the subjective purpose. The objective purpose, as stated, is derived from the accepted values of our legal system. In this framework, it is presumed that section 7 of the Import and Export Law is intended to realize the fundamental rights recognized by our legal system, among them the right to property, particularly following its protection under Basic Law: Human Dignity and Liberty (*Even Zohar* [3], para. 25 of the decision; C.A. 3901/96 *Raanana Local Planning and Building Board v. Horowitz* [20], pp. 936-937; Barak, p. 561). While it is true that the section deals with goods imported in violation of a supervisory order promulgated to serve a proper purpose, which greatly weakens the justification for protecting the importer’s property rights, however, where the goods have been acquired in good faith, and for full consideration, a question arises as to the proportionality of the means, particularly when the policy of the prohibiting authority is still in its early stages.

23. This question is of particular importance in view of the final nature of forfeiture under the Import and Export Ordinance, as opposed to that under the Customs Ordinance, pursuant to which the importer’s ownership is only temporarily suspended; in view of the fact that, unlike the Customs Ordinance, the Import and Export Ordinance

does not comprise a system for giving notice of the forfeiture of goods; and in view of the fact that there is no course of action that would permit the importer to reclaim the seized goods (see Dorot, pp. 79-86; and see Gill Nadel, Import and Export of Goods: Import Legality Issues, (in Hebrew), pp. 58-67). Indeed, in discussing sec. 8 of the Import and Export Ordinance, this Court wrote in the *Monogil* case [14]:

> 'Section 8(a) of the Import and Export Ordinance grants the customs authorities the authority to deprive an individual of the right to property without any need for supervision or a court order (. . .) we are concerned with far-reaching administrative authority' (para. 7 of the judgment).

Under the circumstances, it would appear that the fundamental right to property supports avoiding a categorical statement regarding the forfeiture of diamonds imported in violation of supervisory orders issued pursuant to the Kimberley Process in every situation and circumstance, and for allowing the supervising authority a certain, even if narrow, degree of discretion to prefer other means in exceptional cases.

24. Another principle that must be applied in establishing the objective purpose of the section in regard to the Kimberley Process concerns the fulfillment of the State's international obligations (see C.A. 6182/98 *Sheinbein v. Attorney General* [21], 642). Indeed, it is presumed that the Israeli Court will, to the extent possible, construe local law in a manner consistent with the rules of public international law (see, e.g., HCJ 302/72 *Hilu v. State of Israel* [22], 177; Cr.A. 437/74 *Kawan v. State of Israel* [23], 596; and see Barak, pp. 575-578). If the accepted international view of the Kimberley Process is that goods imported without an appropriate certificate be forfeited, that would constitute a strong argument in favor of viewing forfeiture as mandatory. As stated, the Kimberley Process Certification Scheme does not expressly state what means are to be used in fulfilling its rules. We must, therefore, examine how the Process has been implemented by other participants.

25. The Kimberley Scheme is implemented in the United States under the Clean Diamond Trade Act, which applies the forfeiture rules under 19 USC 3907 to trading in diamonds:

> 'Those customs laws of the United States, both civil and criminal, including those laws relating to seizure and forfeiture that apply to articles imported in violation of such laws shall apply with respect to rough diamonds imported in violation of this chapter.'

A similar law, which was invoked in American case law dealing with the Kimberley Process (see: *United States v. Approximately 1,170 Carats of Rough Diamonds* [29] (hereinafter: *1170 Carats* case)), is the General

Forfeiture Statute (19 USC 1595a) which establishes in sec. 1595a [c] (2)::

> 'The merchandise *may* be seized and forfeited if –
>
> (A) . . .
>
> (B) . . . Its importation or entry requires a license, permit, or other authorization of an agency of the United States Government and the merchandise is not accompanied by such license, permit, or authorization' [emphasis added – E.A.].

The statute does not, therefore, establish forfeiture as obligatory (through the use of words e.g., "shall"), but rather as optional ("may be seized"). Indeed, that is how the court in the *1170 Carats* case construed the law, stating that it "sets forth seizure and forfeiture as an *available remedy*" [emphasis added – E.A.].

A similar situation exists in Canadian law. Section 17 (1) of the Export and Import of Rough Diamonds Act (S.C. 2002, C. 25) states:

> 'An investigator *may* seize in-transit rough diamonds if they are not accompanied by a Kimberley Process Certificate or are in a container that has been opened' [emphasis added – E.A.].

Section 28 of the Act adds:

> 'If a person is convicted of an offence under this Act, the convicting court may, on its own motion or at the request of any party to the proceedings, in addition to any punishment imposed, order the forfeiture to Her Majesty in right of Canada of rough diamonds or other things seized, by means of or in relation to which the offence was committed.'

New Zealand law enforces the Kimberley Process by means of the United Nations (Kimberley Process) Regulations 2004 (SR 2004/463), which also do not impose obligatory forfeiture of diamonds imported or exported without a Kimberley Process Certificate. Under sec. 8 (2) (Detention of prohibited diamonds):

> 'A Customs officer *may* detain any diamonds imported into New Zealand, or to be exported from New Zealand, that he or she suspects on reasonable grounds to be prohibited diamonds' [emphasis added – E.A.].

The situation is somewhat different in the European Union. Chapter II Article 5 (1) of Council Regulation (EC) No 2368/2002, treating of the sanction for non-fulfillment of the conditions of the Kimberley Process, states:

> 'If a Community authority establishes that the conditions (. . .) are
>
> (a) . . .

(b) Not fulfilled, it *shall* detain the shipment'

[emphasis added – E.A.]

A similar provision exists in regard to the export of diamonds. However, in both situations we find circumstances that qualify the rule. Thus, in regard to the import of diamonds, Chapter II Article 5 (2) states:

> 'If a community authority finds that the failure to fulfill the conditions is not made knowingly or intentionally or is the result of an action by another authority in the exercise of its proper duties, it may proceed with the confirmation and release the shipment, after the remedial measures have been taken to ensure that the conditions are met.'

A similar provision (Chapter II Article 14 (2)) applies to the export of diamonds.

26. Thus we find that some of the primary participants in the Kimberley Process chose to implement the Process in their internal law in a manner that grants the agents in the field discretion as to the forfeiture of imported diamonds. The provisions cited do not state any clear alternative to forfeiture that might realize the purposes of the Process, but it is not for us to decide the question, or the relative effectiveness of each alternative. What we can determine for our purposes from the above survey is that there is no real substance to the claim that refraining from forfeiture would constitute a breach of Israel's international obligations as a participant in the Kimberley Process.

27. In summary: An examination of the specific and general purposes in order to discover the final legislative purpose, shows that, from among the various linguistic possibilities in the context of the Kimberley Process, sec. 7 of the Import and Export Ordinance grants a certain, albeit narrow, degree of discretion to the supervising authorities in regard to the question of the applicable means of enforcement in regard to diamonds that cannot lawfully be imported or exported. The starting point in exercising that discretion is that the primary means, which must at the very least be considered in each and every case, is that of forfeiture, as set forth in the section, and which, as explained, presents significant advantages. It should be borne in mind that categorizing the forfeiture authority of a customs officer as being non-obligatory merely broadens the possibility for choosing among various legal means by which the administrative agency can carry out its obligation to realize the objectives of the Kimberley Process, while giving due weight to each relevant consideration in accordance with the circumstances and issues before it, and not to relieve the administrative authority of its obligation in any way (*Cat Welfare Society* [12], at p. 809). Therefore, the administrative directives published by the Director General of the Ministry of Industry

and Trade should be viewed as consistent with the provisions of the Import and Export Ordinance, and as an additional normative source that concretizes the exercise of authority by the enforcement agents.

28. What are the factors that should be taken into consideration in exercising that discretion? What criteria should define those exceptional cases in which it is possible to waive forfeiture? Clearly, it is impossible to foresee all the relevant possibilities, and accordingly enumerate the exceptional situations in which deviating from the general rule of forfeiture in favor of some other means should be considered. Clearly, in view of the predominance of forfeiture, especially weighty, clear and well-founded circumstances would be needed. Despite the difficulty in describing concrete examples, in general the factors that might be weighed in considering the possibility of not imposing forfeiture could include, *inter alia*, the importer's good faith; its situation or circumstances; whether real pressure or threats induced it to accept the diamond; the presence of some flaw in the importer's desire at the time of importing the diamond, the reasons for that flaw, who was responsible for it, and could it have been prevented; whether the absence of the appropriate permit resulted from a technical flaw, or whether there were substantial reasons that precluded obtaining such a permit; the effectiveness of alternative means in the concrete circumstances of the case; etc. It should be emphasized that even in the presence of such circumstances, forfeiture is not ruled out, but they can pave the way to weighing alternatives.

29. In its pleadings, the petitioner placed special emphasis on the differences in the wording of the versions of the Directives of the Director General, and argued that since at the time that the diamond was imported, the former version of sec. 5-g was in force, the respondent was required, at the very least, to consider the possibility of returning the diamond abroad. Indeed, the earlier version of sec. 5-g of the Directives of the Director General expressly presented the possibility of returning the diamond abroad, whereas the new version grants the administrative agency discretion of a general nature. However, speaking for myself, I do not find that the change in wording created any real difference in the relative weight that the respondent is required to assign to the possibility of forfeiture as opposed to the adoption of any other course of action, inasmuch as, in any event, the matter is given to his discretion. Moreover, one might even argue that, following the change, the scope of the respondent's discretion became even broader, inasmuch as he is no longer limited to two alternatives, alone. In any case, it is clear that the nature of the considerations that the respondent must weigh does not derive from the wording of the Directives, but rather – as in the case of the

interpretation of statutes – from the purpose for which the authority was granted (see HCJ 219/81 *Shetreet v. Minister of Agriculture*, [24], at p. 487; Dotan, at p. 162). The respondent, as noted, considered the possibility of not requiring forfeiture, but chose not to do so in light of a number of counter-considerations. As will be explained below, his decision, given on the basis of a policy supported, *inter alia*, by the reasons discussed, and following the exercise of discretion in regard to the concrete case and its circumstances, falls within the scope of reasonableness under each of the versions of the Directives of the Director General. Therefore, the petitioner's argument in this regard is rejected.

30. We thus find that the supervising authorities enjoy a certain measure of discretion in enforcing the Kimberley Process, and while forfeiture will normally be the most effective and appropriate means for realizing the objectives of the Kimberley Process, there must be at least a limited possibility for not adopting that course when the circumstances demand. This also implies that their discretion, no matter how well founded, is not absolute (HCJ 935/89 *Ganor v. Attorney General* [25]). In addition to subservience to the specific provisions and purposes of a statute, the exercise of discretion is also subject to the general rules of administrative law, such as the duty to act in good faith, fairly, without bias, and reasonably (see HCJ 389/80 *Golden Pages Ltd. v. Israel Broadcasting Authority* [26], *per* Barak, CJ; HCJ 6163/92 *Eisenberg v. Minister of Construction and Housing* [27]). These will be examined against the background of the purposes of the Kimberley Process, the extreme severity of the blood diamonds phenomenon, and the need to combat it. The Court is tasked with ensuring adherence to these principles. The Court is not responsible for establishing or implementing policy, does not stand at the head of the administration, and is not "a super-institution for managing the affairs of the state" (Aharon Barak, Judicial Discretion, p. 491 (1987) (hereinafter: Judicial Discretion). However, the judiciary is responsible for examining the question of whether the policy established by the administrative agency, and the means for its implementation, are reasonable. That is what we shall now do.

E) Reasonableness of the respondent's decision

31. In exercising their discretion as to the means to be employed in regard to diamonds imported or exported in violation of the law, particularly in regard to the question of whether to resort to forfeiture, the supervisory authorities must weigh various interests. On the one hand stand the interest in depriving the blood diamond industry of its means of

support by striking hard at the motivations of the second level of the diamond trade to distribute them, by deterring them and depriving them of both the principal and of the profits. In this regard, forfeiture – implemented against the actor in closest proximity to the enforcement agency in the commercial cycle – which is absolute, certain and final, clearly provides the best, most effective means for guaranteeing successful enforcement, when compared to most other means. It is also clear that even if it is not an international obligation, recourse to forfeiture places Israel – which was recently elected to serve as chair of the Kimberley Process Certification Scheme as of 2010 (see http://www.nrg.co.il/online/16/ART1/807/690.html) – in full compliance with its international obligations. Within this framework, forfeiture affords the state the ability to use the monies obtained for the diamond to advance the fight against the phenomenon. Indeed, the State Attorney noted the possibility that the monies resulting from the forfeiture would be contributed to the international fund of the Kimberley Process.

An additional consideration favoring forfeiture is the relatively long period of time that passed since Israel began implementing the Kimberley Process, in 2003, and the date upon which the petitioner imported the diamond. It is a period of time sufficient to frustrate any claim of lack of clarity or misunderstanding of the applicable law. While justifications can be found for refraining from forfeiture when the importer acts in good faith and is unaware of the unlawful nature of its conduct, it is harder to justify showing consideration for an importer that knowingly imports blood diamonds. In the matter before us, the State showed that, prior to importing the diamond, the petitioner had been briefed as to its obligations under the Kimberley Process. This, too, tends to favor forfeiture. Lastly, there are no special circumstances specific to the petitioner that might argue against forfeiture.

32. On the other hand, in light of the foregoing discussion of the potential effectiveness of other, less harmful means of enforcement in certain cases, and in view of our legal system's proportionality principle (see HCJ 3477/95 *Ben Atiya v. Minister of Education* [28], *per* Barak J.), we must consider whether, under the circumstances, forfeiture entails a disproportionate infringement of the right to property. We should also bear in mind that, despite the time that has passed since the implementation of the Kimberley Process in Israeli law, this is the first case in which forfeiture has been employed for the enforcement of its prohibitions, and we may, therefore, assume in the importer's favor, even if only in terms of reasonable doubt, that the law was not entirely clear, and some leniency would be appropriate. This consideration is bolstered by the fact that even the State noted that the diamond was imported into

Israel during the “running in” period of the law, during which returning the diamond abroad was mentioned as a possible enforcement method in the Directives of the Director General.

33. In my opinion, an examination of the various considerations shows that the respondent’s decision to require forfeiture was reasonable, and that the respondent did not act improperly in weighing the various considerations. The reasonableness of the exercise of discretion must be examined in terms of the purpose of the law, while striking a balance between the interests that protect the public and those that protect the individual (Judicial Discretion, at p. 479). In the course of this opinion, we have described in detail the severe consequences of the blood diamond phenomenon that finances groups that employ terror to destabilize legitimate regimes, and that undermine attempts to advance peace between nations. The public interest demands the adoption of a stern enforcement policy to eradicate the phenomenon. It was further emphasized that refraining from forfeiture should only be adopted in exceptional cases. While it is true that the internal laws of several of the participants in the Kimberley Process grant discretion to the enforcement agencies in regard to the means to be employed, the court of at least one of those states expressed a negative opinion of the possibility of returning the diamonds to the state of origin:

> ‘Permitting rough diamonds brought to the United States in violation of the CDTA to simply return to the international stream of commerce, rather than be removed from commerce entirely through seizure and forfeiture, would not (. . .) advance Congress' stated intent to eliminate all trade in conflict diamonds’ (*1170 Carats* case [29]).

The individual’s right to property is important, but under circumstances in which the petitioner’s staff were briefed as to what was permitted and what was forbidden under the Kimberley Process, and nevertheless acted in violation of the law, its weight is diminished.

Conclusion

34. The blood diamond phenomenon resulted in inexpressibly brutal incidents of violence, performed for the sake of profit, while destroying the economies of the countries in which it occurred. The State of Israel joined the international project to combat the phenomenon - the Kimberley Process - from its inception, and was among the first to implement it in its internal legislation. In order to contribute to the success of the Process, the various agencies of each state must act in tandem to frustrate the import and export of diamonds in violation of the Kimberley Process, each in its own area, and within the

scope of its authority. This is also true for the judicial system, which must also do its part, by weighing the relevant considerations in each concrete case, and balancing them against the fundamental rights of the individual. In the instant case, I am not of the opinion that the circumstances cast the respondent's discretion in an unreasonable light that might justify our intervention. This is so in view of the time that passed between Israel's joining the Kimberley Process and the importing of the diamond; the instructions given to the petitioner in regard to the Process; and primarily, due to the importance of the fight against the blood diamonds phenomenon, as explained throughout this opinion. Indeed, this is one of the first cases in which a diamond has been declared forfeit by virtue of the Kimberley Process, however taking an uncompromising stand from the outset sends a clear, deterrent message for the future, which can serve to suppress this undesirable trend from its inception. That is what should be done. I have, therefore, found no grounds for intervening in the respondent's decision to order the forfeiture of the diamond imported in violation of the law. I would, therefore, recommend that the petition be denied.

Justice E.E. Levy: I concur.

Justice H. Meltzer: I concur.

Held as per the opinion of Justice E. Arbel.

12 Tevet 5770
29 December 2009