HOW DODD-FRANK KILLED INTERNATIONAL LAW

David Zaring

INTRODUCTION

This article investigates the international governance required by the Dodd-Frank Wall Street Reform Act, the signature domestic statute designed to reform oversight of the financial system. The statute changes who, in America, is charged with doing international governance, and also what kind of international governance will be done.

Dodd-Frank is replete with foreign policy and international ambitions, but these ambitions are not meant to be established through either custom or treaty, which is how international governance is usually done. The statute eschews the ordinary types of international law for a type of so-called “soft law.” Soft law – usually, although not exclusively, agreements between regulators in two or more countries – does not create legal obligations, but nonetheless contains substantive commitments that the parties are expected to take seriously.

By abandoning those ends, the statute exemplifies the country’s turn to informal international cooperation, rather than formal international law, to solve its international problems – indeed, Dodd-Frank could be said to signify the end of the international law era in the United States, and the beginning of a different era, one that might be dubbed a “global governance” era.

Dodd-Frank’s global governance regime also marks a displacement of the American actors who do foreign policy. That role is usually thought to belong, almost exclusively, to the president and his secretary of state. But Dodd-Frank gives precedence to agencies independent of the president’s control, and generally receptive to congressional direction. The statute charges the implementation of its international ends to agencies thought to be more responsive to the legislature, and less responsive to the president. In an era where Congress has started to take an assertive role in foreign policy – by, for example, inviting a foreign head of state to address it without presidential consultation or approval – Dodd-Frank exemplifies how this congressional goal might be achieved. The preference for delegation to independent agencies, rather than the president, shows that it is likely to be technocrats who are charged with making progress in furthering international governance in the future, and even progress in human rights.

Dodd-Frank is one of the two most important statutes passed during
the administration of President Obama, and the most important financial reform statute passed since the Great Depression. It is designed to reform an area – the financial markets – that have globalized far beyond the usual reach of domestic oversight, and so it makes for a useful case study for how Congress hopes to address international governance in an area it can ill afford to get wrong. The statute addresses globalization in two ways.

First, it authorizes American financial regulators to develop informal arrangements with their foreign counterparts, either through negotiation, or by example, or both. This soft international law has become an increasingly important alternative to “hard” international law – that is, law made by treaties or customary international law.

Soft law’s displacement of treaty law has been the subject of some prior research, driven by the difficulties, particularly in the United States, associated with negotiating and ratifying treaties. Often, the authorizing of agencies to either do deals with or set examples for their foreign counterparts has been described as choice against formal international organizations like the International Monetary Fund or the World Trade Organization, which were created by complex multilateral treaties. This choice is not analytically unsound. Although occasionally mooted, there has been almost no effort, either globally, or in the United States, to create a formal International Financial Organization that might to the work that Congress has directed agencies to do in Dodd-Frank.

But treaties are not the only way that traditional international law works. Less well understood is the way soft law can displace functions that used to be served by customary international law. Dodd-Frank exemplifies this displacement, and it is new. This article will focus on how Dodd-Frank has killed customary international law, though it will not neglect the displacement of treaties.

As a general matter, soft law, as exemplified by Dodd-Frank, by facilitating conversation and providing a platform for greater cooperation, is displacing a “rules of the road” function of international law. As Senator Jon Kyl, diplomat Douglas Feith, and others have said, “Americans can benefit from international cooperation that is rooted in countries’ widespread acceptance of useful rules of the road.” Dodd-Frank has marked a congressional plumping for this sort of cooperation, but the mechanism involves agency-to-agency cooperation, rather than traditional international forms of governance – such as through an international organization, treaty regime, or commitment to a strain of customary international law – that would clearly constitute binding legal obligation.

The second component of Dodd-Frank that explicitly looks abroad requires one of America’s financial regulators, the SEC, to enforce international human rights values through the so-called conflict minerals
and resource extraction rules. These efforts are important, as well as controversial – Roberta Romano has argued that the “disclosures regarding conflict minerals [and] payments to foreign governments for oil and gas development” will impose “considerable costs … which could well be in a multiple of billions of dollars,” despite having “no connection to the financial crisis, the ostensible focus of the legislation.”

Both of these functions - the rules of the road, and the effort to expand the coverage of human rights – have been served in the past by customary international law, though they need not only be served by that legal mechanism. One of the contributions of this paper is to show how customary international law might be understood as serving these two functions, and to show how Dodd-Frank exemplifies an American turn away from using customary international law to perform such tasks.

Thus, in answer to the question as to whether international law might still be thought to be a still viable practice in American foreign engagement – a question that courts and an increasing number of commentators appear to be inclined to answer in the negative, at least as regards so-called customary international law – Dodd-Frank offers evidence of a shift away from using international law and international diplomacy and towards technocratic, soft law decisions driven by agency agreements and regulations.

Part I is the first evidentiary portion of the article; it engages in a close inquiry into the nature of the regulatory cooperation required in Dodd-Frank. Part II is a second evidentiary portion; it looks at two provisions of the statute – the conflict minerals provision and the resource extraction provision – and argues could represent a new way that the United States may go about the discovery and propagation of new human rights. Part III of this article is the analytical portion; it analyzes Dodd-Frank’s developments by comparing it to one variant of traditional international law, customary international law, and shows how soft law is increasingly supplanting custom. It also considers the domestic implications of the turn to agencies, and, to a lesser degree, ethics, in regulating international corporate conduct. A brief conclusion follows.

I. DODD-FRANK AND INTERNATIONAL COOPERATION

Dodd-Frank was meant to transform the financial sector into something safer and sounder; Congress concluded that the only way to ensure the stability of American finance would be to address stability more globally, and accordingly addressed the global financial system numerous times in the statute.

But the way Congress chose to do so is telling. There are two
techniques used in the domestic statute to address the global regulation of finance.

First, Dodd Frank relies on transgovernmental relationships between regulators to solve global problems. In some cases it requires, in other cases it authorizes, American financial supervisors to work with their foreign counterparts to develop standards meant to ensure the safety of the financial system. In this way, the statute pursues international regulatory cooperation in lieu of other mechanisms for creating workable cross border systems of governance meant to ensure financial stability in the United States. The treaty, for example, is eschewed. Nor did Congress suggest that the regulatory cooperation it authorized was in any way obligated by customary international law. Instead, Dodd-Frank marks an effort to solve the global aspects of financial instability through coordination enforced and enabled by so-called soft law.

However, regulatory cooperation is not the only way that Dodd-Frank seeks to reform international norms. It also, through its so-called conflict minerals and resource extraction rules, represents an effort by Congress, acting through a regulator engaged in the sort of soft law cooperation elsewhere encouraged through the statute, to set an example and join a movement that may, in the end, form the basis of claims about new obligations under the customary international law of human rights.

One way to understand these authorizations is to think about how they map onto the two principal functions of customary international law. Dodd-Frank’s international outreach is designed to both facilitate cooperation and to form the basis for a campaign to build increasingly collective norms about human rights. But Congress in Dodd-Frank, like the other branches of the American government, has turned to soft law instruments to develop these goals, which used to be the functions of customary international law.

This section recounts Dodd-Frank’s cooperation impetus, and the next one covers its more tendentious moves to facilitate global transparency and anti-conflict norms. Part III makes the case that customary international law used to play a role that soft law is now handling.

A. International Regulatory Cooperation

Portions of Dodd-Frank are premised on the supposition that it is difficult for domestic regulators to do a good job of monitoring the safety and soundness of institutions that operate in many different jurisdictions by only focusing on their activities in one of those jurisdictions – the United States. This supposition is not entirely new; financial regulators have been pursuing common approaches to supervision with their foreign counterparts
since the 1970s. However, these cooperative initiatives have been, in large part, initiated of the regulators’ own accord, rather than at the behest of Congress or the State Department. Dodd-Frank provides a degree of congressional imprimatur on the global regulatory project, a sorely needed one, in the view of some, on an already extant form of governance.

In Dodd-Frank, Congress has endorsed international regulatory cooperation as the way forward for financial regulators dealing with cross-border problems in three different ways. It has, on occasion, required American regulators to coordinate their activities with their foreign counterparts. Elsewhere, Congress merely authorizes that coordination. Occasionally, it only requests domestic agencies to study the prospect of international regulatory cooperation.

What follows will cover the specific invitations to regulatory cooperation that appear in the statute – it will be exhaustive, but not, perhaps exhausting, as the invitations focus on particular parts of financial regulation where international cooperation is thought to be particularly important. Because these areas are worth understanding, readers will hopefully tolerate a trip or two into some of details of the statute. Those less interested in the details than in the implications may wish to skip this subsection and move on to the next, more evaluative one.

Dodd-Frank imposes international consultation requirements on five different agencies, on more than five different issue-areas – the Treasury Department, the Federal Reserve, the CFTC, the SEC, and the committee of regulators that comprises the FSOC are all tasked with coordination obligations.

Two examples of required coordination illustrate what Congress requires upon when it insists on interaction with foreign regulators. First, the statute created a systemic risk regulator, or a regulator tasked with identifying serious threats to the stability of the financial sector. That regulator, really, a committee of agencies chaired by the Treasury Department, was dubbed the Financial Stability Oversight Council, and was charged with “identify[ing] risks to the financial stability of the United States . . . promot[ing] market discipline . . . and [responding] to emerging threats to the stability of the United States financial system.”

Because risks to the financial stability of the United States can come from abroad, and because well-run and safe foreign firms can promote market discipline by offering alternatives to American firms, the council has also been given international responsibilities as a component of its mission, a mission the council has embraced, as it has pledged to “work actively with our international counterparts.” It is required to "monitor … international financial regulatory proposals and developments" and coordinate with foreign regulators to reduce systemic risk, a broad authorization to pursue
global approaches. The authorization from Congress in this case, as in others, notably does not offer guidance as to how the FSOC might do this monitoring and coordination, though it does limit the subject matter of the cooperation.

The FSOC can also designate foreign banks that do business in the United States as institutions that are “systemically significant” – that is, banks whose failure would pose substantial risks for the American financial sector. If designated, all such banks are subject to additional supervision by American bank regulators, and may be subject to special rules imposed by the FSOC in light of their significance to the economy. Under § 113(F)3 of Dodd-Frank, however, the agency may, in an emergency, subject a foreign institution to its supervision if it finds that the collapse of the institution would threaten American financial stability. In doing so, it is obligated to consult with "the appropriate home country supervisor, if any." In this way, the especially attentive regulation of very large foreign financial institutions doing business in the United States is a power granted to the FSOC, but it is one that must be exercised in the context of consultation with the foreign regulator responsible for supervising the bank in its home country.

The requirement of consultation appears in a number of other parts of the statute. Another example of this sort of cooperation lies in the way the statute creates a new regime to regulate previously unregulated swap markets. Many observers of the financial crisis have credited the risks posed by complex derivatives – or, to slightly oversimplify, and use the language of Dodd-Frank, “swaps” – as one of the basis for the collapse of certain key intermediaries.

AIG, for example, wrote insufficiently hedged credit default swaps – that is, insurance that certain companies would not default on their debts – for seemingly any other financial institution that asked, and collapsed when those insurance bets went awry. Other financial institutions took positions on swaps – for example, on derivatives that referenced American mortgages – that lost substantial value during the crisis, putting those institutions at risk, and in some cases, requiring a bailout.

In establishing a new regime to regulate credit default, currency, and other swaps, the two agencies charged with implementing American oversight over the swaps, The SEC and the CFTC, are required to engage in international cooperation. Along with the prudential regulators, they

shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities.

Dodd-Frank defines swaps quite broadly, to include a large enough
variety of derivatives that the SEC and CFTC have both exempted certain kinds of financial contracts from the coverage of the term in rulemakings implementing the statute by regulation. The requirement of consultation thus broadly reaches into the more bespoke and esoteric areas of the financial markets – areas that hypertrophied in the run-up to the financial crisis, and that ground to a halt in the midst of it, challenging the solvency of firms that funded themselves by taking substantial positions on the derivatives.

In dealing with systemic risk, the statute imposes similar duties on other regulators, and, with regard to the White House, an authorization. Section 175(b) of the Act requires the Treasury Secretary to “regularly consult with the financial regulatory entities and other appropriate organizations of foreign governments or international organizations on matters relating to systemic risk to the international financial system.” Section 175(c) requires that the Board of Governors of the Federal Reserve System and the Secretary of the Treasury “consult with their foreign counterparts and through appropriate multilateral organizations to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies.”

The Fed is also required to look to international soft law when it prescribes risk management rules for banks – that is, the rules that govern how banks assess the riskiness of the positions they take in the financial markets. Section 805 of the statute imposes a duty that “[T]he Board of Governors [of the Federal Reserve] . . . shall prescribe risk management standards, taking into consideration relevant international standards and existing prudential requirements.”

Otherwise, the statute takes an authorized, but not required approach to regulatory cooperation. For example, the FSOC is authorized to consult with appropriate foreign authorities when dealing with foreign entities and cross border activities and markets. §175 of the statute authorizes, and, as we have seen, sometimes requires, international policy coordination on the part of the FSOC, the Fed, and the Treasury secretary on matters of systemic risk. Section 175(a) of the Act allows the President or his designates to “coordinate through all available international policy channels, similar policies as those found in United States law relating to limiting the scope, nature, size, scale, concentration, and interconnectedness of financial companies, in order to protect financial stability and the global economy.”

The statute requires consultation on international standards for swaps, but, as for the exchange of information about swaps positions and markets, takes a more casual view; the SEC and CFTC “may agree to such information-sharing arrangements as may be deemed to be necessary or
appropriate in the public interest.” In this way, the agencies are granted the power to share information about the positions and risks posed by the institutions they regulate with foreign regulators who may worry about how those positions would affect their own banks, if those banks are doing business with the American banks, or with the branches of the American institutions on foreign soil.

The newly created Federal Insurance Office, based in the Treasury Department, has been authorized “to coordinate Federal efforts and develop Federal policy on prudential aspects of international insurance matters.”

Nor are these the only areas of consultation. In the case of the new swaps regime, authorizations to coordinate exist for reporting on the swaps market, regulating the retention of data over what has happened in those markets, setting up swaps clearing houses and supervisors of the same.

A similar authorizations is given to the PCAOB – the government body that regulates accounting firms, in §981 of the act. It is given the right to share information about foreign auditors with the foreign authorities regulating those auditors – presumably in a way that enables the foreign authority to take steps to ensure that the auditing firm is maintaining appropriately high standards.

These authorizations are designed to offer the legitimacy of a congressional imprimatur to agency activity that has been quite vigorously pursued before Dodd-Frank, but has been notably lacking in that authorization.

Finally, agencies have been required to study international regulatory cooperation in Dodd-Frank. Study requirements are replete in Dodd-Frank; there are 385 studies mandated by the statute. Study requirements works as prompts for regulation, and, of course, reflect a degree of legislative ambivalence on the issue for study (or, just as possibly, internal disagreement); the presumption of a study is that the regulator has the authority to regulate in any particular area, but that it may not choose to do so; studies work as congressional suggestions that the regulator consider doing so.

Studying the possibilities of international financial regulation reflect this sort of modest congressional guidance. For example, studies, rather than rules, have marked Dodd-Frank’s explicit statement about the vexing problem of the failure of a cross-border bank. No one doubts that the rules for taking a globally important financial institutions through a so-called “cross-border resolution” process are imperfect; the disaster of the bankruptcy of Lehman Brothers, where creditors rushed to courthouses across the globe exemplifies the concern.

The complications posed by simply sorting out who ought to be in charge of a global bankruptcy have made the effort to create an international
process to “resolve,” or quickly take over failing financial firms, a high priority for representatives of the Group of 20 major economies.

But the FSOC has been told only to study international bankruptcy processes. The comptroller general has been instructed to do the same. The statute stopped short of authorizing cooperation about cross-border bankruptcy. But by permitting the study of the area by the FSOC, at least, Congress has suggested that the council may have the power to do more than research.

The new swaps regime requires studies about the descriptions on financial derivatives by the SEC and CFTC, which "shall coordinate the study with international financial institutions and regulators as appropriate and practical."

These studies reflect a sense that Congress was not exactly sure what to do about some aspects of financial reform. The studies are hardly necessary to the creation of comprehensive remediation regimes that may in some ways simply created more work for agencies. Agencies already have the power to conduct studies, and Congress has the power to ask for such studies through their regular appropriations and supervisions oversight.

Nonetheless, the existence of studies in Dodd-Frank suggest a light form of authorization for international cooperation, to go along with the more explicit form that is seen in other portions of the statute.

B. Analysis

Dodd-Frank’s authorization of international regulatory cooperation uses soft law to do what customary international law used to do through doctrines like state responsibility and diplomatic immunity – create institutions and mechanisms designed to further international rules of cooperation without imposing particular substantive requirements on that cooperation. It is increasingly apparent that soft law is the sort of law preferred by the international community when it comes to financial regulation – this may be because it is effective, but it may also reflect some dissatisfaction with the alternatives to soft law, and some caution about the promise of a stringent international regime.

That soft law may be the future of cross-border cooperation more generally may be seen in the way it has been embraced not just by financial regulators, or, now, by Congress, but also by the world’s heads of state. The endorsement of international regulatory cooperation in Dodd-Frank meets some of the informal commitments made by the President in the wake of the financial crisis. In the wake of that collapse, the so-called G20 – an informal gathering of the heads of state of twenty of the world’s largest economies - was reinvigorated, with an eye to devising a collective strategy
to prevent similar crises from happening in the future.

The G20 called for international regulatory coordination at the Pittsburgh summit that was the first meeting in after the onset of the financial crisis. It announced at the conclusion of its 2009 London Summit that its membership “agree[d] to establish the much greater consistency and systematic cooperation between countries, and the framework of internationally agreed high standards, that a global financial system requires.”

But this commitment to a cooperative international regime comes with some implicit cautions. Dodd-Frank does not broadly authorize all forms of cooperation by all regulators on any issue area; instead it picks spots. And although I have elsewhere argued that soft law is an increasingly institutionalized and effective mechanism of international governance – one that in financial regulation at least, is not clearly inferior to any more formal alternative – it does permit American regulators the flexibility to reject international cooperation, provided that they do so only after consulting their foreign counterparts and monitoring its potential.

Finally, there are some notable silences with regard to international regulatory cooperation that permeate the statute. Two of the principal goals of the legislation – to create a new system for overseeing risky financial institutions and to bring derivatives into the fold as a regulated industry – are marbled with requirements to try to develop a coordinated international approach, as well as permissions to do so. Other, more modest efforts, have their bows to international regulatory cooperation as well. But, of course, Dodd Frank has other goals that do not encourage international cooperation. Some of the other signature aspects of the legislation – the Volcker Rule, the swaps-pushout rule, the creation of a new agency to protect consumers who enter the financial marketplace – mark uniquely American innovations in financial supervision; there is no effort in these cases to coordinate with foreign counterparts who do not share these agendas.

II. DODD FRANK AND HUMAN RIGHTS NORM GENERATION

Dodd-Frank does not only permit, or in some cases require, American financial regulators to cooperate with their foreign counterparts. It also requires one such regulator to pursue two kinds of values that reflect American commitments to human rights – at least, as the United States understands those rights. A commitment to human rights is not ordinarily thought to be a central part of the remit of financial regulation, so these bows to human rights values might be considered new, perhaps exceptionally so.

It also represents the use of soft law instruments to do something
that used to be the province of the more controversial sort of customary international law, not least because both of the human rights values endorsed in Dodd-Frank fit into, in different ways, global campaigns to get other regulators to recognize those rights.

The embrace of these values can be discerned in two parts of Dodd-Frank: the requirement on the reporting of government payments made by mineral extraction companies, and the requirement on disclosure of the use of certain so-called conflict minerals by publicly traded manufacturers.

As for the first requirement, publicly traded companies must report all such payments in their disclosure statements, an embodiment of an anticorruption principal that is a hotly contested issue of customary international law. The requirement builds on an the American interest – perhaps it might be considered to be an obsession – with incorruptible governance, an interest reflected in Congress’s delegation of anti-bribery responsibilities to the SEC under the Foreign Corrupt Practices Act of 1977. That statute was accompanied by a relatively successful campaign to spread similar rules among OECD member countries.

Resource extraction payment rules are also spreading across borders, but in this case, it is not the United States that has led the charge; the rules have their origins in a campaign created by a British NGO.

The second human rights value lies in the requirement of reporting by those firms that use minerals extracted from the Democratic Republic of the Congo or countries bordering it. These countries have been beset by civil war and there appears to have been a concern on the part of Congress that American companies were funding the prolonging of this war by paying for minerals extracted and sold by the factions party to the conflict.

In both cases, the SEC has been tasked with issuing rules requiring the disclosure of the making of resource extraction payments or the use of conflict minerals. The SEC's new international duties mark a shift for an agency that used to ignore the world beyond the country’s borders, partly because of a presumption that the American capital markets were the only markets that mattered for the American investors the agency is supposed to protect. The SEC, for example, has been slower than other financial regulation to embrace international regulatory cooperation.

The conflict minerals and resource extraction provisions of Dodd-Frank are an accordingly fascinating development. In precisely the subject area – financial regulation more broadly, and securities regulation in particular – in which soft law seems to be taking hold, the United States has adopted, through the mechanism of a duly-enacted statute authorizing and charging an agency to pursue human rights-related values, a new effort that is designed in part to promote something that in the past might have been left to customary international law.
Why has Congress required the SEC to intervene in the foreign activities of American companies? After all, Karen Woody has argued that “The regulation and enforcement of section 1502 [the conflict minerals rules] falls well outside of the SEC’s mandate” or expertise. Galit Sarfaty takes a different view; she has argued that “[s]ecurities law is an innovative strategy that has the potential to significantly further the movement for corporate accountability.” Sarfaty argues that the risks are consistent with the kind of things investors should care about, because “human rights risks are material for investors and there are long-term costs to companies for not reporting.” Both Sarfaty and Woody are worried about American exceptionalism here; Sarfaty recommends “international regulatory convergence to relieve possible damage to a company’s competitive advantage due to increased costs associated with social disclosure.”

Congress was worried about this too. The sponsors of the resource extraction rule presented the amendment with the recommendation that “encourage the President to work with members of the G8 and the G20 to promote similar disclosures through their exchanges and their jurisdictions.”

In what follows, I again delve into the weeds of the conflict minerals and resource extraction rules; readers familiar with both may wish to move ahead to the final part of this section, the concluding one. In the final part of this paper, I make the case that this represents a new form of international rulemaking, one that supplants more traditional types of international law.

A. The Conflict Minerals Rule

The campaign against the use of conflict minerals in American products has been used by Congress as a chance to make symbolic statements about human rights – it is easy to overstate the substance of the rule, though its novelty makes it a particularly innovative aspect of Dodd-Frank. That Congress is doing so in the context of the dry requirements of securities filings is new, as is the effort to require companies to monitor their own supply chains.

Congress has demanded in Dodd-Frank that public company filings involved in manufacturing include disclosures about the use a very small number of ingredients extracted from a conflict-ridden, part of Africa. The legislature concluded, in the preamble to the statutory authorization to the rule, that “the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein.”
legislation address the growth of rebel groups in the Congo, after the central government of that country collapsed following the death of its longtime dictator, Mobuto Sese Seko in the middle part of the first decade of the 21st century.

It accordingly required disclosure by some companies about the use of some minerals. But it did not act comprehensively. The provision covers only four minerals, and then only if mined in one of ten southern African countries. So-called blood diamonds are not included, even though most people probably think of them when they think of conflict minerals (an unrelated statute covers those in a rather different way). Nor are other precious stones. Oil is a mineral that has inspired plenty of conflict as well, including in southern Africa, but it is not on the list.

Firms that actually mine the minerals are not covered by the law, which applies only to manufacturers. And even manufacturers are not prohibited from using any of the minerals on the list; Congress only required disclosure, and not a ban on the use of conflict minerals: publicly traded companies must “disclose annually, beginning with the person’s first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary …[for manufacturing] did originate in the Democratic Republic of the Congo or an adjoining country”

Given these limitations, the conflict minerals provision is probably better understood as an experiment, based on the suspicion that American companies that use these minerals are helping to fund dissident groups interested in continuing a series of civil wars in and around the Democratic Republic of the Congo.

If it likes the results of the rule, Congress could conceivably pursue similar goals through securities regulation; it is easy to imagine certifications required for labor conditions in upstream factories, a broader approach to filings for companies involved in a broader array of resource extraction, and the like.

Nonetheless, the conflict minerals rule is not without its burdens. Companies that use the minerals covered by the statutes must report on the diligence taken on source and chain of custody of the minerals. Firms must provide for an independent private sector audit of its report, in accordance with SEC rules and Comptroller General standards. The report must include a description of, among other things, the facilities used to process the minerals, the country of origin of the minerals, and efforts to determine location of origin of the minerals. And the company cannot simply presume that the minerals used come from somewhere else; it is to “conduct an inquiry regarding the origin of its conflict minerals that is reasonably designed to determine whether any of its conflict minerals originated in the
Covered Countries . . . and must perform the inquiry in good faith.” Companies that make inadequate disclosures could be sued by shareholders or the SEC for violations of the fraud rules that accompany financial disclosures.

The report will be made publicly available to all who wish to see it. Ultimately, if the facts require, the report must include a statement that the products of the firm are “not DRC conflict free,” although the legality of requiring companies to make such a statement has been challenged on First Amendment grounds.

Critically for our purposes, the conflict minerals rule is not just a rule for America. It is also an effort to develop a common approach internationally. Congress has played a leading role in deterring firms from using Congolese conflict minerals, a role it has shared with the United Nations, but one that appears to have emerged from the United States.

Congress was the first body to act against conflict minerals. When it appeared that Congolese rebels financed their efforts through mineral extraction, three senators, Sam Brownback (R-Kansas), Dick Durbin (D-Illinois) and Russ Feingold (D-Wisconsin) introduced a number of bills over the course of the 4 years preceding the adoption of the rules in Dodd Frank beginning with S. 2125, the Democratic Republic of Congo Relief Security and Democracy Promotion Act of 2006. The 109th Congress bill was joined by others in the 110th and 111th Congress as well, before finally being enacted as a part of Dodd-Frank.

By 2008, the United Nations had joined Congress. In that year, the United Nations Security Council had issued Resolution 1857. That resolution encouraged UN member states “to take measures as they deem appropriate to ensure that importers processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase.” A United Nations Group of Experts on the Democratic Republic of Congo stated in 2008 that "individuals and entities buying mineral output from areas of the eastern part of the Democratic Republic of Congo with a strong rebel presence are violating the sanctions regime when they do not exercise the due diligence to ensure that their mineral purchases do not provide assistance to illegal armed groups.” And that group had announced concerns that large corporations were sourcing their requirements through the purchase of conflict minerals even earlier.

Since 2010, however, other countries have begun to follow the American lead. As Sarfaty has concluded, the conflict minerals rule “has been driving global norms.” In February, 2012, after the passage of Dodd-Frank, the Congo itself required all mining and minerals trading companies to engage in supply chain monitoring. Similar initiatives were introduced in
Canadian, Hong Kong, and the European Union.

Figure 1: Timeline of Introduction of CM Rules Around the World

Moreover, China has also issued supply train transparency orders and "other nations are following close behind," one of the rule sponsors has declared on the floor of the Senate. The result is that "the Congress emerged as a world leader on conflict minerals reporting."

Though the conflict minerals rule, the United States has turned to an agency engaged in the development of soft rules designed to harmonize global securities rules to do something similar in the name of the human rights of the Congolese. Conflict minerals is in fundamental part an effort to spread particular (and possibly peculiar) mechanisms for the implementation of human rights values – in this case, by reporting by large internationally minded corporations – across not just American firms, but firms the world over.

B. The Resource Extraction Rule

Dodd-Frank also requires the disclosure of all payments to governments in exchange for resource extraction of a broad swath of minerals by publicly listed energy and mining companies. Telling the world just how much money foreign governments receive for those mineral rights is supposed to serve two functions. The resource extraction rule is meant to ensure the citizens of foreign countries will better be able to monitor their governments to see if their country’s resources are being used corruptly. It also is meant to deter firms from making questionable
payments to governments.

This rule is designed to help the citizens of those countries hold their governments to account for the way they use the resources that they've received, as a result of the mineral extraction activities. Moreover, the rule is not simply looking to the SEC to enforce human rights, but also to the accountants, lawyers, and other gatekeepers who are supposed to monitor corporate compliance, handle filings, and assess the internal controls of publicly traded firms, and to bring them into this effort as well.

In adopting the resource extraction rule, Congress signed the SEC up for a global campaign, the so-called Extractive Industries Transparency Initiative (EITI), organized by an NGO based in Britain, to create a level global playing field with regard to resource extraction transparency. Indeed, the United States’ commitment to publicizing resource extraction payments is only the second example of an OECD member signing on to a rule that has heretofore largely been adopted by resource-rich, but per capita poor, countries (as of January 2014, 48 countries have begun the process of enacting transparency rules for resource extraction payments, most of which are very poor).
Doctrinally, the resource extraction rule requires the SEC to require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.

It covers payments made to governments for exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals or any acquisition of a license for such activity. As with the conflict minerals rule, the resource extraction rule requires a publicly available report on payments that made to any foreign authority on this issue, with the exception of so called de minimis payments or any payment (or series of related payments), equal to or exceeding $100,000 during most recent fiscal year.

Controversially, there is no exemption from the disclosure requirements, not even where foreign law prohibits the disclosure, or when confidentiality provisions in the contract to purchase the resources so provide.

The rule reaches broadly in other ways. It does not only require disclosure by those issuers engaged in the commercial development of oil,
natural gas or minerals; publicly traded companies must also disclose payments made by a subsidiary or another entity controlled by the company. The types of payments that must be disclosed include taxes, royalties, fees, production entitlements, bonuses, dividends, and infrastructure improvements. It is mean to be an inclusive, rather than limited, list.

Critics of the rule have most contested the requirement that all such payments be disclosed publicly including payments to countries like China and Angola that make such disclosures illegal, leaving companies doing business in such jurisdictions in the untenable position of either violating American law by failing to report the payments, or foreign law for disclosing them. For this reason, among others, the first iteration of the rule was withdrawn after an adverse ruling by a federal court.

But the flexibility of the agency to depart from congressional instruction is limited; the statute explicitly refers to the standards already adopted in other jurisdictions, limiting the ability of the SEC to fashion a bespoke version of the rule. It requires disclosures by companies in its plain text (it provides that “the Commission shall issue final rules that require each resource extraction issuer” to report on their payments), as opposed to letting the agency decide whether to require such disclosure after its own consideration of the issue. It arguably ties the agency’s hands.

Like conflict minerals, the resource extraction rule is embedded in an international effort. Unlike conflict minerals, however, the US is a follower, rather than a leader, in the area. The statute itself bows to the Extractive Industries Transparency Initiative. This cross-border initiative originated in the United Kingdom, and the goal is for both countries and companies to publish, the amount of money they receive or pay from mineral extraction activities. As EITI has explained, the organization is responsible for a

Global Standard to promote openness and accountable management of natural resources. It seeks to strengthen government and company systems, inform public debate, and enhance trust. In each implementing country it is supported by a coalition of governments, companies and civil society working together.

In that sense, the resource extraction rule reflects a cross border human rights initiative that is meant to develop civil society. And the EITI’s role in devising the content of the rule is hardly hidden; it is referenced as the basis of American action in the statute. As the sponsors of the provision indicated, “The U.S. needs to take a leadership position in regard to the Extractive Industries Transparency Initiative. This
amendment, attached to this bill, will go a long way in promoting that leadership for the United States.”

This drawing of standards from an NGO effort illustrates how international and human rights-oriented the resource extraction rule is. The American adoption of the EITI might be seen as an effort to encourage developed countries to adopt transparency principles designed to help developing countries avoid corruption. Indeed, it is, as we have observed, only the second wealthy country to commit to the initiative; but, as the conflict minerals timeline suggests, its adoption of the rule will likely be joined by other wealthy countries in the future.

Figure 3: EITI Countries: Time and Income

To be sure, the American endorsement of this global value is modest. Only publicly traded resource firms need worry about the resource extraction rule; private companies need not report. No one is banned from making high payments to foreign governments, with little control over how that money is spent. The only sanction for such payments, assuming they are adequately disclosed, is the potential for shame if the payments look unwarranted or directed to unappealing parts of the foreign government ruling over the resource in question.

Nonetheless, the endorsement does embody an American interest in doing something about foreign corrupt practices. The FCPA makes the payments of bribes illegal; the resource extraction rule makes a larger set of payments subject to disclosure (bribes already arguably must be reported under the books and records component of the FCPA). In both cases, the
commitment to act against corruption abroad is the point of the exercise.

C. Evaluating the Rules

Despite a degree of caution by Congress, the conflict minerals and resource extraction rules are novel enough to count as an all but unprecedented effort to task an American agency with the transmission of new human rights efforts. The SEC has engaged in international relations before, but rarely in the service of human rights.

Instead, that work has largely been efforts at international regulatory cooperation, or the controversial extraterritorial application of American securities laws.

It has, to be sure, campaigned to see some American anti-fraud innovations adopted by regulators in foreign countries. In particular, the agency has pushed anti-bribery laws that do work similar to that done by the Foreign Corrupt Practices Act; the United Kingdom and other countries have obliged by passing their own laws, and the OECD has made the adoption of anti-bribery provisions as a condition of membership. The UK has been particularly committed to the cause, enacting in 2013 a law even more restrictive than that enforced by the SEC.

The SEC has also successfully persuaded most sophisticated economies to adopt rules against insider trading; an increasing number of these agencies are actually enforcing the rules, as Abraham Newman and David Bach have shown.

The conflict minerals and resource extraction rules look a little like those earlier campaigns against insider trading and bribery. But unlike the insider trading rules, both rules are principally designed to offer benefits to the citizens of foreign nations, rather than to investors in the United States. And unlike the anti-bribery rules, Dodd-Frank’s human rights rules are more engaged with international governance. The conflict minerals rules is meant to inspire other countries to join the United States in addressing, in a novel way, the problem of external funding of developing world rebellions, while the resource extraction rule explicitly is based on an international good-governance effort that comes not from the United States, but from Europe.

The argument here is that these common approaches to regulation, some done in coordinated concert through formal and informal international institutions, rather than an effort to create customary international law, constitute an effort to do things that customary international law used to do through soft law style regulatory cooperation.

Regulatory cooperation on human rights issues is now it would appear part of the mission of the SEC, and it is one that Congress could add to in
the future. There is little doubt that action by government agencies, if done on the basis of *opinion juris* could amount to evidence of customary international law.

But these rules look more rooted in a different sort of governance. They use an agency elsewhere in the statute tasked with international regulatory cooperation. They hearken to a soft law initiative by an NGO, as well as to studies conducted by a United Nations agency. Rather than custom, the rules, in addition to having whatever effect they will have in the US, look set to exemplify informal international governance.

III. **Analysis**

This section begins by reflecting on the way that regulatory cooperation and the tasking of agencies to pursue global values has supplanted a particular kind of international law – customary international law. It then turns to the domestic implications

**A. The Death of Custom?**

Customary international law – the unwritten rules that are meant to bind states but that have never been memorialized through an international agreement – has turned into doctrine that is both exceedingly controversial and totally stymied. American courts, led by the Supreme Court, approach it with suspicion. Many scholars have argued that it not really law, and certainly not justiciable law; others think that it is nothing more than the bidding of powerful states encompassed in a charade of lawfulness.

One sort of custom has drawn particular suspicion – the sort that features claims about emerging international rules regarding matters of import, but also of controversy, such as the protection of human rights or the environment. These rules might be termed “positive rights” rules, because they purport to afford international legal entitlements to people, or, occasionally, non-persons, that previously did not enjoy them.

They are always controversial. Unwritten custom has been cited as a reason to permit anticipatory offensive intervention in a case where a state is suspected of fostering international terrorism, despite the vociferous objections of members of the Security Council to such a doctrine. It has formed the basis for a claim requiring the preservation of whales based on the notion of their right to life despite the strong commitment of many states, and cultures within states, for that matter, not just to ignore whales, but to actively hunt them. Some argue that has rendered the death penalty – a practice used by most nations – illegal under international law.

Suspicions of positive rights rules have led to skepticism about a
second sort of custom, the one premised on the idea that the international legal system must include some principles, that, even if they are not reduced to the terms of a duly executed treaty, can help make the international system work. We might think of these rules as “cooperation facilitating” rules, and they should, in theory, be uncontroversial because their purpose is not to build a new architecture of rights with which all countries must comply, but rather to only provide the foundation on which further international cooperation might be constructed.

An example of the second kind of customary international law lies in the classic rules regarding diplomatic immunity. The norms about the protections of ambassadors and consuls facilitated state-to-state interaction and created an opportunity and modality for discourse, which in turn could lead to other, more specific forms of cooperation in more narrow issue-areas.

But diplomatic immunity is only one of a number of examples of cooperation-facilitating customary international law. The requirement that local remedies be exhausted prior to creating an international dispute has a conflict-mediating function (which, of course, the rules against harming diplomats also facilitate). If national remedies were sufficient recourse for the citizens of one country harmed by the actions of another, there would be no need to make an international incident out of it. Relatedly, the rules of state responsibility were meant to clarify when acts could be attributed to states, therefore setting the ground rules for violations of international law and offering rules of the road for when it could be invoked.

The positive rights sort of customary international law, the sort involving bold claims about human rights, the environment, the laws of war, and so on, has certainly been due for a reevaluation. The idea that there is a discoverable international legal doctrine, consisting of unwritten norms, requiring hotly disputed controversies to be resolved against the will of holdout countries in a particular way has launched many an implausible campaign, either in the academy, or by law reformers. The problem with arguments that customary international law requires that whales be protected, that the death penalty be abolished, and that countries be permitted to attack potential terrorists wherever they may be found is that a significant number, and in some cases a vast majority of countries and the citizens in them disagree that these rights exist. These claims – often noble humans rights efforts – about the legal obligations of countries to protect values that many of them have never deigned to honor in practice, other than the possible practice of signing on to some nonbinding international statement that they have no intention of honoring at home.

These sorts of claims about custom have led many legal scholars and jurists to conclude that identifying customary international law and making
claims about what is required is an exercise rooted more in hope than experience. That in turn has led them to argue that while customary international law perhaps has produced some unobjectionable rules of the road in the past, it is no longer providing such a service. Joel Trachtman has proclaimed “the obsolescence of customary international law,” given that most of these rules have been codified through a treaty in one way or another. And the list of high profile critics of the current state of customary international law is long.

To be sure, almost no one acts as if customary international law is a null set: if the United States was not able to rely on customary international law as a mechanism to give it an approach to treaty interpretation consistent with that set forth in the Vienna Convention on the Law of Treaties, then it would have a difficult time concluding treaties of any sort. The US has also engaged in campaigns to change customary international law, as with the usual language in its model bilateral investment treaty (BIT), in which both parties to the BIT sign on to language that “fair and equitable treatment and full protection and security” for investments is required by customary international law; this suggests that it takes the institution seriously enough to negotiate for claims about what it requires. But it has been particularly skeptical about the controversial and tendentious efforts to push the doctrine beyond what state practice obviously permits. Many American scholars have accordingly concluded that customary international law should be viewed as a narrow category of law recognized by American courts only when Congress or the president adopts it as such, if it even exists at all.

Binding custom, on this understanding, is dead or dying, and certainly incapable of innovation.

Soft law, or rules that are not meant to be considered enforceable — international rules that would not seem to meet the requirements of treaty memorialization or *opinio juris* — on the other hand, has exploded as custom has calcified. Soft law is the general term used to refer to international governance efforts that do not meet the standards of binding obligation. The most interesting form of this soft law, which in other contexts has been broadly applied to cover actions ranging from resolutions by the United Nations General Assembly to codes of conduct offered by nongovernmental organizations, is the soft law that consists of the efforts by domestic agencies who have the power to enact binding rules at home coordinate their activity with their foreign counterparts. This sort of soft law has been used to set some of the most important standards in global finance, and also has made progress in areas of food safety, competition law, and other areas in which domestic consumers are affected by the globalized nature of the businesses that cater to them, leaving regulators struggling to catch up unless they coordinate their efforts internationally.
The argument in this article is that soft law is increasingly doing the things that custom used to do, both in providing the sorts of basic rules that makes global governance manageable, and, intriguingly, also providing the means for pursuing the sorts of human rights innovations that have made customary international law controversial. This is particularly the case in the contemporary practice of the United States, whose courts have increasingly stopped trying to discern and apply customary international law, but whose agencies vindicate informal international norms with their new foreign policies.

There are advantages to the ascent of soft law over custom. It is flexible, and yet capable of precision, more so than customary international law, and soft law’s problems – ones of legitimacy, and, at least superficially, of compliance – are problems shared by customary international law.

But there are other facets of the shift in emphasis that are also important. Soft law is being created by different parts of the government than is customary international law. That is, it is agencies, rather than trade and foreign relations diplomats, familiar with international regulatory cooperation, who do the important work in regulatory soft law. Customary international law, and the American position on whether it applies or does not, is the province of the State Department. If soft law is replacing calcified custom, it marks a shift in the parts of the government that are creating and applying international rules.

If soft law is doing what custom used to do, is soft law becoming customary – that is binding – international law? It is, after all, at least when it involves the cooperation of regulators across borders, an example of a government organ taking legally prescribed action due to an agreement between it and its foreign counterparts about how an international governance problem might be solved. There is certainly binding domestic law involved in the generation of an effective soft law governance regime, and, in many cases, widespread global compliance. Could that become customary international law?

It is of course possible that the transition from soft law to custom could occur. But it is worth noting the differences. Widespread agency practice could certainly exist in parallel, and just because that practice is coordinated by the agencies does not necessarily make it part of opinio juris. Soft law practitioners regularly declaim its legal bindingness, and there is, of course, no effort to ratify agency positions more broadly across other government organs. American securities regulators have persuaded their foreign counterparts, for example, to ban insider trading and to forbid corporate executives from paying bribes to foreign government officials. But no one has argued that these rules now amount to customary
Finally, Dodd-Frank is illustrates precisely how much of a component international regulatory cooperation has become in American international relations practice. Regulatory cooperation began as a voluntary effort by agencies to manage their remit in an era of increasing globalization.

But now, international regulatory cooperation has many more stakeholders. It is a new centerpiece of American free trade efforts. The Chamber of Commerce, for example, has come out in favor of the executive branch’s efforts to promote international regulatory cooperation by its agencies. The National Association of Manufacturers has endorsed the new effort to create multi-lateral trade agreements with partners in the European Union and across the Pacific. For these business groups, a trade deal “is only worth doing if the regulatory side is covered,” as former trade official Shaun Donnelly has said.

This suggests that the United States both hopes to enshrine regulatory cooperation no matter what the international context – even if that context involves trade deals – and that it views international regulatory cooperation as something that will tempt domestic constituencies to support international law reform.

The turn toward soft law, which has been a feature of financial regulatory cooperation, has been embraced in contrast to an effort to develop a more formal system of international financial governance. Soft law is not without its limitations - the sort of soft law covered by UN General Assembly resolutions or communiques at the end of regional summits are little more than paper tigers. But financial regulators have generally found a way to make soft law stick.

There are some things that soft law does not do well: It is not a paragon of administrative governance with regard to transparency and accountability. In some cases, it is easy to ignore. But compared to the development of customary international law, soft law’s problems look more like features than like bugs. Soft law is more precise than customary international law in that it is covered by an agreement that can be quite specific, rather than by the efforts to reconcile various practices of states similar in degree, but not in particular.

Soft law’s limitations on enforceability are real, but customary international law has always suffered from similar claims of weakness. Moreover, customary international law has its own problems with legitimacy; part of the lack of legitimacy stems from the opaque nature of the source of the law. That opacity is at least as limited as that of soft law.

Accordingly, there are reasons to consider embracing the new role of soft law in protecting human rights, as well as in being reminded of its
critical importance in facilitating conversation. By doing many of the things that customary international law has done in the past, soft law is a reminder that while the need for international cooperation is still vital, the new means will make the quasi-legal product of international cooperation look different than it did in the past.

B. The Domestic Implications of Dodd-Frank’s Internationalism

1. Separation of Powers

Dodd-Frank also marks a change in the location of international policy making within the American government, away from the President and diplomats, and towards Congress and regulators. The executive’s importance in foreign policy will not be undone by statutes like Dodd-Frank, but these statutes do reflect a more pluralistic turn to the actors who matter in the conduct of foreign relations.

Foreign policy used to be the province of the President and his Secretary of State. Indeed, much of foreign relations law is meant to establish the primacy, within limits, of the executive in dealing with international issues. The so-called “sole organ” doctrine, which allocates responsibility over foreign affairs to the president so that the country speaks with a single voice on foreign policy exemplifies this perspective.

In United States v. Curtiss-Wright Export Corp., Justice George Sutherland described “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.” Although the legitimacy and reach of this power has been contested, and I have elsewhere argued that the sole organ doctrine could be used in a way to bolster the position of agencies, the emphasis of the doctrine used to be on the president. The idea was that the President’s foreign affairs power matters for diplomatic interactions with other nations, given that the President’s diplomatic sources, combined with the often “highly necessary” need for secrecy, leave him better positioned than, say, Congress to conduct international negotiations.

But Dodd-Frank is a creature of Congress. It allocates responsibility for international relations to agencies, and not the State Department. Moreover, most of its delegates are so-called independent agencies, meaning that the executive branch has limited control over them.

The Federal Reserve, which is funded through its open market operations, rather than through budgets suggested by the president and voted on in Congress, is particularly insulated, and plays an important role in the implementation of Dodd-Frank. It is perhaps the most independent of
American agencies. The SEC and FDIC also enjoy freedom from the requirements of White House supervision, either through OIRA or through other, more political, means, and their commissioners enjoy tenure absent cause for removal; they are charged with responsibilities for international cooperation under Dodd-Frank, and are members of the FSOC. Even the component of the Department of Treasury involved with bank supervision, an important component of Dodd-Frank, enjoys independence within the context of the Executive Branch. The new agency created by Dodd-Frank, the Consumer Financial Protection Board, was made so starkly independent of executive oversight that some legal academics think it unconstitutionally divested from presidential control.

The result is a delegation to a different breed of international policy makers. International regulatory cooperation is global governance done by regulators, rather than diplomats, and, at least in this case, by agencies as responsive, for the most part, to Congress, as they are to the president.

Why might Congress and independent agencies usurp the traditionally executive role in foreign policy? The functional answer to the question might lie in the difficulties with doing foreign policy the way the Executive Branch used to do it, by creating treaties and by using the instruments of international law to the country’s best advantage.

It is difficult to make international law that way. Congress has essentially ceased ratifying treaties, especially multilateral treaties that establish either human rights of global governance mechanisms. Both it and the courts have approached customary international law with skepticism. Customary international law is, if anything, just as hard to create, and subject to just as skeptical a reception. There is less functional reason to prefer presidential control when that control over foreign policy is not likely to lead to binding international commitments. In comparison to treaty negotiation and diplomatic statements about the requirement of law, the only semi-binding international commitment that can be made by agencies looks like an effective alternative.

Because soft law agreements constitute a lessened form of international commitment relative to treaties or executive agreements, they can be negotiated and renegotiated with greater ease and violated with lower reputational costs—and therefore they can potentially contain stronger substantive provisions. In the human rights context, for example, the choice to make the Helsinki Accords—a Cold War era document that included provisions related to the respect for freedom of conscience, thought, freedom, or belief—a soft law agreement not only facilitated greater state acceptance but also produced an agreement with clearer and more specific substantive provisions than those found in many hard law human rights treaties.
Perhaps even more importantly, soft law agreements have the advantage of avoiding the cumbersome ratification processes that domestic law can require of traditional treaties. In the United States, hard law agreements above a certain threshold of significance require strong support from the legislature: either the advice and consent of two-thirds of the Senate under the Treaty Clause of the Constitution or the approval of a majority of both Houses of Congress as a congressional-executive agreement.

Kal Raustiala is one of a number of observers who has suggested that states turn to regulatory cooperation where the transaction costs of alternative legal approaches, such as treaties, are high. And the costs of those alternatives grow ever higher. As Jacob Cogan has shown, formal treaty conclusion has become a rather demanding exercise: “[w]hereas once international law substantially deferred to states in the enactment and implementation of individual duties, it now specifies those duties more and more, and leaves less and less room for state discretion.”

Treaties take time and energy to conclude, are difficult, especially in the United States, to ratify. Moreover, the delegation to agencies reflects technocratic hope for international cooperation rather than an embrace of the political means of coordination that is practiced through the State Department. Indeed, possibly for these reasons, the President himself has recognized the importance of the foreign policy of regulators with an executive order encouraging the administrative regulators within the Executive Branch to engage in international regulatory cooperation wherever possible. The idea is that international progress is difficult to make through diplomatic means. This might particularly be seen to be the case in human rights, where the prospects of the ratification of a big global convention on environmental rights, or anything else, are remote. Narrowly targeted campaigns to take modest steps towards those sorts of rights through the mechanisms of administrative law, however, are less challenging.

The regulatory cooperative components of the Dodd-Frank statute reflect this. They are unabashedly technocratic, involving complicated aspects of financial market plumbing and safety and soundness calculations. The human rights commitments evinced by the statute are small and modest steps made through technocratic allocations rather than the sort of comprehensive human rights-based treaties that might, say, protect the rights of women or guarantee the fundamental privileges of childhood. Instead they seek to further rights through something as bureaucratic is a disclosure regime imposed on companies that file public reports for the delectation of investors.

There are some reasons for enthusiasm in the change in the actors
that perform American engagement with foreign realms. The sole organ doctrine has been criticized as a license for executive overreach. And in an increasingly pluralistic world, faced with a vast array of problems, presuming that a country as diverse as the United States can channel its global engagement through one focal point may be nothing more than a fond hope.

But there are costs to the new congressional and bureaucratic role. These new actors are doing, in part, diplomacy, but they may be inexpert diplomats. Coordination is difficult, and there’s a somewhat random nature to the human rights selected in Dodd-Frank for legislative enshrinement.

The second implication becomes apparent through a review of the statute’s authorization of a wide variety of sorts of international regulatory cooperation. Congress has recognized in Dodd-Frank that financial regulation is very much an international project, one that must be done in conjunction with foreign agencies. It has accordingly authorized American agencies to cooperate with their foreign counterparts in different ways, and, in so doing, has created a chance for those agencies to build an international architecture of regulatory cooperation. Congress has chosen this path to a global regime in lieu of creating a treaty or pursuing some other more formal mechanism of interaction; it is a fascinating choice to pursue an unquestionably important area of international policy through delegations to agencies to work out nonbinding agreements with their foreign counterparts. Congress has not tied their hands, at least not much, and not tried to solve this international governance problem by making law, or encouraging the president to do the same.

This paper will generally assume that regulatory cooperation is presumed by Congress to be an effective mechanism for dealing with the problems of cross-border finance. But of course, animating the decision to choose regulatory cooperation over a treaty may be an assumption that regulatory cooperation will constrain American regulators less than its international governance alternatives.

To be sure, however, neither the government's new international commitments nor the rights and ethics based triggers for those commitments should be viewed as requiring sea changes in the way American companies do their business abroad. Congress has authorized cooperation abroad and in some cases required agencies to talk, but it has not gone any further. It did not, for example delegate – assuming no constitutional difficulty in doing so – power to a multinational member body like the Financial Stability Board to direct American agencies to adhere to its requirements.

By the same token, nothing about the resource extraction rule prohibits companies from sending vast sums, with no strings attached, to
foreign governments to use in any way they see fit. Nor does the conflict mineral rule prevent American manufacturers from using as much gold, tin, tantalum, and tungsten from war-torn central Africa as they wish. Disclosure alone is required in both cases. The conflict minerals rule reaches only one set of conflicts and covers four minerals, though other conflicts and other minerals do just as much damage to the human rights of the people who live in countries that endure them.

Congress's international moves are better understood as cautious — symbolic and experimental, rather than evidence of a wholehearted commitment to internationalism and human rights. The experiment is important and one that, if the agencies choose to act vigorously, could move the locus of capital markets policy making from Washington to elsewhere. But these are early steps on that journey, though it is your author's view that the journey is likely to continue.

2. Policing International Business Ethics

From an international perspective, the resource extraction and conflict minerals requirements of Dodd Frank look like questions of human rights, and thus it makes sense to consider them as thus especially when seeing the way that the statute treats customary international law, which is one of the battlefields of human rights recognition.

But domestically, the rules have an implication beyond the separation of powers. They add to a newish role for the SEC: the ethical policeman of the international actions of publicly listed American corporations.

Congress has given the SEC a role that polices the ethics of American corporations, although this requirement of ethical conduct when operating abroad is not entirely new. Of course, the role is not entirely new; that agency has been acting against foreign bribery since 1977. To be sure, it is not that the securities laws have never before been unconcerned with ethics. The Supreme Court has said that a "primary objective of the federal securities laws—protection of the investing public and the national economy through the promotion of “a high standard of business ethics ... in every facet of the securities industry.” Fraud - deceiving someone - is both the principal means of policing the securities markets and an ethically rich concept that turns on the duties owed to other people.

However, the traditional federal approach has been to require publicly traded companies to make full disclosures about their businesses and balance sheets, and let the public sort out whether it deems the business to be an upstanding one or not. It is why scholars such as Hilary Sale could conclude that "the imposition of explicit, substantive federal corporate law
upon the traditional private ordering model favored by state corporate regulators and judges," and why state corporate law judges such as E. Norman Veasey believed that beyond disclosure, developing the content of the ethical and fiduciary obligations imposed upon companies had been let to the states.

But ethics requirements may now be said to be an increasingly important component of business regulation. Dodd-Frank builds on Sarbanes-Oxley, passed in 2002, where Congress required publicly traded companies to adopt (or disclose) their codes of ethics, or explain why they did not have one. It is consistent with the Federal Sentencing Guidelines, first promulgated in 2004, require companies to create “compliance and ethics” programs, and to “otherwise promote an organizational culture that encourages ‘ethical’ conduct and a commitment to compliance with the law.”

Congress, in short, has this century consistently tried to increase the ethical standards imposed on publicly traded companies.

Moreover, monitoring ethics in financial regulation is consistent with post-crisis statements by financial regulators that they view ethical business practices as a critical component of regulatory compliance. In 2014, William Dudley, the current head of the New York Federal Reserve Bank and a former investment banker himself, emphasized the view that regulated banks must act ethically if they hope to meet the requirements that their regulatory supervisors expect of them. “There is evidence of deep-seated cultural and ethical failures at many large financial institutions,” Dudley declared. And the New York Fed General Counsel has posited that “a strong ethical culture will lead to better behavior.”

Is it possible to make ethical foreign business practices a regulatory requirement with any hope of clarity? After all, it is entirely unclear what “ethics” require of the banks regulated by the SEC’s compatriot agency, the Fed. Nonetheless, that agency has made the ethics of a bank one of the components for concluding that it would survive an emergency.

The conflict minerals and resource extraction requirements are not vague standards, even if they are not always amenable to straightforward and documentable compliance. By no means has Congress suggested, or the SEC urged, a wholesale set of good business practices on companies doing business abroad.

But the sort of work being done from these rules are not like most disclosure requirements. One appellate court likened the conflict minerals requirement that companies declare that their products are “not DRC conflict free” as a badge of dishonor. It, in the court’s review “requires an issuer to tell consumers that its products are ethically tainted” and “to confess blood on its hands.” This sort of obligation is very different than
the ordinary disclosure requirements imposed upon publicly traded companies, who do not need to attest to, say, how they treat their workers at home, or the nature of their interactions with the city and state governments in which they do business.

Ed Rock has influentially argued that in corporate law the Delaware judges make distinctions about corporate conduct based on a rather unstated set of ethical requirements. As he said, “Delaware cases can best be understood as attempts to create social norms for senior managers, directors and the lawyers who advise them,” and when cases do not result in judgments against inappropriate behavior, judges would often deliver tongue-lashings in court or in speeches. These standards are often hard to articulate, though they are rooted in corporate fiduciary obligations. Some of the international provisions of Dodd-Frank suggest that, at least with regard to the way American businessmen conduct themselves abroad, Congress has started to specify areas of sunlight that are meant to shine particularly brightly on business practices of which it disapproves. In doing so, it is arguably acting like Delaware judges who criticize unethical business conduct more than they ban it; that, too, is a change in the focus of the regulation of business.

CONCLUSION

A more complete picture of how international governance affects American lawmaking emerges when major domestic regulatory initiatives are taken into account. Dodd-Frank is such a statute, and in it we see a bow to globalization, and an effort to address that phenomenon through soft law techniques. Dodd-Frank is premised on the idea that the American financial system cannot be reformed without engaging in the global context in which American finance operates. It also serves as a new sort of vehicle for international rights.

Soft law’s limitations are real, but other forms of international governance – especially customary international law – have always suffered from similar claims of weakness. Both it and soft law are difficult to enforce. Customary international law has problems with legitimacy; part of the lack of legitimacy stems from the opaque nature of the source of the law. That opacity is at least as limited as that of soft law. And so on.

For these reasons, we may expect to see similar delegations by Congress in the wake of Dodd-Frank. The statute’s relationship to international law, commitment to ethics, and caution may prove to be precedential, rather than unique.
Figure 1: Timeline of CM Rule Enactment

Figure 2: Map of EITI Countries
Figure 3: EITI Countries: Time and Income

Year Government Announces Commitment to EITI v. GDP

[Graph showing the number of years a country announces its commitment to EITI and its GDP compared to the United States.]