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Cooperating Alone: The Global Reach of U.S. Regulations on Conflict Minerals

Remi Moncel*

ABSTRACT

In 2010, the United States Congress adopted the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act includes an unprecedented provision to curb the mining in the Democratic Republic of the Congo (DRC) of so-called conflict minerals: components found in many consumer electronics that are sometimes the source of human rights abuses in the mines and regions from which they originate. Companies traded on the U.S. Stock Exchange are now required to conduct due diligence assessments of their supply chains and disclose the presence of such conflict minerals.

The mining of conflict minerals is a global problem for which international cooperation among States and companies seems the necessary solution. However, the United States acted alone; it unilaterally adopted regulations that focused on only one country—the DRC—and one set of targets—companies publicly traded in the United States. These regulations likely required less time to adopt and implement than traditional State-to-State cooperation. Critics might argue that conflict minerals originate not just from the DRC but also from other politically unstable nations, and companies publicly traded in the United States are not the only ones to integrate these minerals into their products. Yet, this Article argues that Dodd-Frank's influence likely extends far beyond its stated geographical scope.

This Article is the first to ground the U.S. rules on conflict minerals in the literature on unilateral regulatory globalization. That literature posits that, under the right conditions, a country's unilateral regulations can unleash a "California Effect" that causes companies outside its jurisdiction and other States to voluntarily align with those regulations. By analyzing the conflict minerals regulations through the lens of unilateral regulatory globalization, this Article reveals the Dodd-Frank Act's potential to reach beyond its stated goals and

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enriches the existing literature by examining when regulations focused on business and human rights might trigger a California Effect.

INTRODUCTION

The market continues to expand for consumer electronics, many of which contain metals partially sourced in conflict-rife zones. Armed factions, including those in the Democratic Republic of the Congo (DRC), control some of the mines that feed the global electronics market. These groups have committed human rights violations by exploiting workers in the mines and using the revenues to buy weapons and finance wars.

In many ways, "conflict minerals" present a familiar puzzle. Similar to garments, diamonds, oil, or coffee, the conflict minerals tin, tungsten, tantalum, and gold are globally traded. These raw materials originate in developing countries and end up in the consumer markets of wealthier nations. In many cases, the mining and harvesting of raw commodities takes place under politically unstable regimes. Large companies headquartered in wealthier countries rely on other corporate entities along their supply chains to source the minerals, integrate them into their products, and sell them to the consumer base.

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Despite the similarities between conflict minerals and other raw materials, this Article examines one intriguing difference: the policy response to conflict minerals departs from traditional approaches to address challenges at the intersection of business and human rights. For example, labor rights violations in the agricultural sector and garment industry in developing countries have led nongovernmental organizations (NGOs) to develop fair trade certification schemes[1] and governments to push for the implementation of the International Labour Organization's Core Conventions.[2] In response to concerns regarding the corruption in extractive industries, such as oil and gas, governments and stakeholders have established a voluntary reporting mechanism under the umbrella of the Extractives Industry Transparency Initiative (EITI).[3] To constrain the trade in "conflict diamonds," governments, industry, and NGOs have developed a global certification scheme through the Kimberley Process.[4] These conventional approaches are not as prominent in the conflict minerals movement.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) takes a different approach.[5] This U.S. policy is an isolated State response, not an interstate initiative. In addition, the U.S. Congress targeted only one region, the DRC and its neighbors, even though the African Great Lakes Region[6] is not the sole source of production of conflict minerals. This U.S. conflict minerals rule seems to represent a new mode of intervention against human rights and sustainability challenges in global supply chains. Dodd-Frank's drafters had ambitious yet limited goals: while aiming to curb the trade in conflict minerals, they focused on minerals from only one region,[7] and they required only companies trading on a U.S. Stock Exchange to disclose the content of their supply chain.[8] In a sense, the United States "cooperated alone."

1. *See generally* Raluca Dragusanu et al., *The Economics of Fair Trade*, 28 J. ECON. PERSP. 217 (2014) (discussing the mechanisms of various fair trade standards and whether they in fact improve the working conditions of farmers in developing countries).

2. International Labour Conference, 104th Session, *Application of International Labour Standards 2015 (I): Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC.104/III(1A) (2015).

3. *What is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, https://eiti.org/eiti (last visited Nov. 18, 2015).

4. *About*, KIMBERLEY PROCESS, http://www.kimberleyprocess.com/en/about (last visited Nov. 18, 2015).

5. Dodd-Frank Wall Street Reform and Consumer Protection Act,

Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12, 15, 22, and 26 U.S.C.).

6. The African Great Lakes Region is the area surrounding Lake Victoria, Lake Tanganyika, and nearby smaller lakes. The countries generally considered part of this region are the DRC, Burundi, Rwanda, and Uganda. *See generally About the Great Lakes Region*, U.S. DEP'T OF ST., http://www.state.gov/s/greatlakes_drc/191417.htm (last visited Nov. 18, 2015).

7. 15 U.S.C. § 78m(p)(1)(A) (2012) (defining conflict minerals for purposes of Dodd-Frank and limiting the Act's scope to minerals which "originate[d] in the Democratic Republic of the Congo or an adjoining country").

8. *Id.* § 78m(a).

It acknowledged a global problem and joined an international movement to address it, but rather than take part in an international collaborative initiative, it adopted domestic regulations unilaterally.

This Article argues that the Dodd-Frank's reach is potentially far greater than the drafters' purported ambition. To explain Dodd-Frank's significance, this Article draws from the literature on unilateral regulatory globalization, the phenomenon by which one State entices businesses outside its jurisdiction as well as other States to follow its regulations. This phenomenon occurs when a regulator oversees a large market that companies have a strong desire to enter. One recent example concerns the European Union's (EU) regulations of household chemicals: since 2007, EU rules known as "REACH" impose on manufacturers who sell to EU consumers strict safety standards "to ensure a high level of protection for human health and the environment."[9] These standards are higher than those required by the United States, yet American companies have altered their operations and products to align with the higher EU standards when selling *both* to EU and U.S. markets.[10]

I argue that Dodd-Frank represents a form of unilateral regulatory globalization with the potential to promote, on the issue of conflict minerals, a global convergence of regulations and corporate behavior. Although conflict minerals are present in a range of products, this Article focuses primarily on the electronics market to understand the likely effect of various policy interventions and Dodd-Frank in particular. The Article seeks to show that the size of the consumer electronics market, the global span of its supply chain, and the allure of U.S. capital markets all likely combine to unleash a "California Effect,"[11] which induces companies outside the United States and other countries to follow the Dodd-Frank regulations. Importantly, I take no view on the ultimate effectiveness of Dodd-Frank. Although the regulations are affecting corporate behavior around the world, some have argued that the U.S. regulations were misguided.[12] Rather, I assess whether the regulations, regardless of their merit, are likely to affect State and corporate behavior beyond the law's stated geographical scope.

This Article is novel in two respects. First, it is the first to assess the U.S. conflict minerals regulations through the lens of unilateral regulatory globalization theory. Other articles have addressed the plight of the Congolese,

9. *REACH*, EUR. COMMISSION, http://ec.europa.eu/growth/sectors/chemicals/reach/index_en.htm (last updated Nov. 2, 2015).

10. For a detailed discussion of this phenomenon and the REACH regulations, see Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 26–29 (2012).

11. *See infra* Part III.A. for a discussion of the California Effect

12. *See, e.g.*, Dan Fahey, *"Conflict Minerals" in Ituri*, TEX. AFR. (Aug. 4, 2010), http://texasinafrica.blogspot.com/2010/08/conflict-minerals-in-ituri.html (suggesting that the conflict minerals provisions of Dodd-Frank were misguided because, by the time the law was adopted, the war had ended in large parts of the DRC where minerals were produced). Part III.B. *infra* also discusses some of the negative, unintended effects of Dodd-Frank, particularly a de facto embargo on all minerals from the African Great Lakes Region.

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the problem of conflict minerals in general, the details of the Dodd-Frank regulations, and their implementation.[13] By contrast, this Article uses an understudied theory to explain why this seemingly modest U.S. regulation is likely to have an impact stretching beyond the United States' jurisdiction and the DRC. Second, this Article adds to the literature on unilateral regulatory globalization by suggesting ways to complete the existing analytical framework, and by testing its application in a new area. While the existing literature discusses unilateral regulatory globalization in relation to environmental, antitrust, health, privacy, and tax policy,[14] it does not study the theory's relevance for issues at the intersection of business and human rights.

The Article proceeds as follows. Part I provides an overview of the conflict minerals problem, including the human rights violations Dodd-Frank seeks to remedy and the structure of the supply chain in the electronics industry. Part II contextualizes the U.S. policy response by describing the Dodd-Frank regulations on conflict minerals and their implementation thus far, and by comparing Dodd-Frank to more traditional policy interventions the United States might have adopted instead. Part III describes and builds on the literature on unilateral regulatory globalization before applying available theories to Dodd-Frank. The conclusion explains the significance of this Article's findings for businesses, governments, and human rights advocates.

I.
CONFLICT MINERALS: OVERVIEW OF THE PROBLEM

A. Human Rights Violations

Tin, tantalum, tungsten, and gold—the four "conflict minerals"—are components of many consumer electronics items, including cell phones and laptops.[15] These minerals often are the source of human rights abuses in the communities where they are mined. The DRC has been one such "hot spot,"[16] where natural resource extraction has fueled conflict between rebel groups and the national army in the country's eastern, mineral-rich areas.[17] Tragically,

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13. *See infra* notes 52–53 and accompanying text.

14. *See infra* note 94 and accompanying text.

15. Colin Fitzpatrick et al., *Conflict Minerals in the Compute Sector: Estimating Extent of Tin, Tantalum, Tungsten, and Gold Use in ICT Products*, 49 ENVTL. SCI. & TECH. 974, 974 (2014).

16. *See Joint Communication to the European Parliament and the Council: Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas Towards an Integrated EU Approach*, at 4–5, JOIN (2014) 8 final (Mar. 5, 2014) [hereinafter *Joint Communication*]; GLOBAL WITNESS, TACKLING CONFLICT MINERALS: HOW A NEW CHINESE INITIATIVE CAN ADDRESS CHINESE COMPANIES' RISKS 10 (2014) (providing a map of "hot spots" where natural resource extraction is fueling conflicts) [hereinafter GLOBAL WITNESS, TACKLING CONFLICT MINERALS].

17. U.N. Chair of the Security Council, Letter dated Nov. 12, 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council, ¶ 77, U.N.

violence and conflict have long been part of the DRC's history, not only during the colonial era,[18] but also since its independence in 1960.[19] In 1993, a particularly deadly conflict erupted in the Eastern DRC, in part due to the influx of over seven hundred thousand refugees fleeing the Rwandan Genocide.[20] The conflict in the DRC has led to an estimated five million deaths,[21] and both army and rebel representatives have committed a range of human rights violations, including mass murder, mass rape, systematic shelling of refugee camps, and the enlistment of child soldiers.[22]

The Eastern DRC is also where many conflict minerals have been mined, and these minerals have been a "key factor"[23] in the violence in the region. Rebel groups and national army commanders have controlled those mines[24] and sold the minerals for millions of dollars every month to refineries and smelters as a way to finance the conflict.[25] A 2010 report commissioned by the United Nations Security Council observed at the time that, "[i]n the Kivu provinces, it appears, almost every mining deposit is controlled by an armed group."[26] A 2012 companion United Nations report documented the national legislative efforts in the DRC to improve the industry certification schemes, but insecurity around certain mining sites remained a serious problem, as was the smuggling of minerals into and out of the country.[27] The U.S. regulations examined in this

Doc. S/2012/843 (Nov. 15, 2012) [hereinafter U.N. Final Report].

18. *See, e.g.*, ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998).

19. For an overview of the successive waves of conflict in the DRC since independence, see JASON STEARNS, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA (2012).

20. Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 148–49 (Elizabeth Wilmshurst ed., 2012).

21. STEARNS, *supra* note 19, at 4.

22. Arimatsu, *supra* note 20, at 158–59 (characterizing the violence in eastern DRC as "unprecedented" and recounting the systematic shelling of refugee camps and the displacement of 250,000 to 500,000 people); U.N. Final Report, *supra* note 177, ¶ 147 (describing sexual violence by armed groups, including "mass rapes" and rapes against minors); *id.* ¶ 148 (describing "indiscriminate killings of civilians"); *id.* ¶¶ 153–58 (documenting recruitment of child soldiers).

23. Donald Yamamoto, Principal Deputy Assistant Sec'y of State for African Affairs, Prepared Testimony for The Democratic Republic of the Congo: Securing Peace in the Midst of Tragedy: Hearing Before the Subcomm. on Africa, Global Health, and Human Rights of the H. Comm. on Foreign Affairs (Mar. 8, 2011) ("The illicit trade in minerals and other natural resources is another key factor behind the ongoing violence, enabling and encouraging illegal activity by militias and elements of the army alike.").

24. U.N. Chair of the Security Council, Letter dated May 21, 2010 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council, ¶ 75, U.N. Doc. S/2010/252 (May 25, 2010) [hereinafter U.N. Interim Report].

25. GLOBAL WITNESS, "FACED WITH A GUN, WHAT CAN YOU DO?": WAR AND THE MILITARISATION OF MINING IN EASTERN CONGO 16–18 (2009); GLOBAL WITNESS, 'THE HILL BELONGS TO THEM': THE NEED FOR INTERNATIONAL ACTION ON CONGO'S CONFLICT MINERALS TRADE 8 (2010) [hereinafter GLOBAL WITNESS, 'THE HILL BELONGS TO THEM'].

26. U.N. Interim Report, *supra* note 25, ¶ 77.

27. U.N. Final Report, *supra* note 17, ¶¶ 159–242.

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/8
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Article may be partly responsible for the decrease in rebel group mining of tin, tungsten, and tantalum.[28] But such reforms have had more limited impact on gold trade, which presents singular challenges.[29] In addition to the human rights abuses of the conflict itself, rebels and military officers have imposed excruciating labor conditions on miners and employed children in the mines.[30] For example, one report described child labor and work shifts of "two or more days at a time in dark, damp holes pervaded by the smell of human sweat and excrement."[31] Another report documented forced labor and deaths from harsh working conditions.[32]

B. The Electronics Industry and the Market for Conflict Minerals

Tin, tungsten, tantalum, and gold are present in a range of products, including medical devices, industrial tools, and jewelry.[33] But these minerals' presence in consumer electronics has received particular scrutiny.[34] In our cell phones, laptops, tablets, and other electronic devices, these components fulfill several purposes, such as coating other metals, storing electricity, and conducting electricity and heat.[35]

The global consumer electronics supply chain involves multiple business entities and countries, impeding the ability to trace conflict minerals. Minerals are extracted in one country; sold to trading houses and other intermediaries in the region; exported to countries with smelters to be melted; exported again in refined form to countries where manufacturing plants use them to assemble finished products; and finally sold to the consumer as part of the finished product, usually in yet another country.[36] Advocacy groups, businesses, and consulting groups have identified smelters as the point in the supply chain where

28. FIDEL BAFILEMBA ET AL., THE IMPACT OF DODD-FRANK AND CONFLICT MINERALS REFORMS ON EASTERN CONGO'S CONFLICT 1–2 (2014).

29. GLOBAL WITNESS, COMING CLEAN: HOW SUPPLY CHAIN CONTROLS CAN STOP CONGO'S MINERALS TRADE FUELLING CONFLICT 15 (2012); *see generally* GLOBAL WITNESS, CITY OF GOLD: WHY DUBAI'S FIRST CONFLICT GOLD AUDIT NEVER SAW THE LIGHT OF DAY 5 (2014).

30. *See* U.S. DEP'T OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2013), http://www.dol.gov/ilab/reports/pdf/2013TVPRA_Infographic.pdf.

31. GLOBAL WITNESS, 'THE HILL BELONGS TO THEM,' *supra* note 255, at 8.

32. U.N. Final Report, *supra* note 17, at 170.

33. A.T. KEARNEY, CONFLICT MINERALS: YET ANOTHER SUPPLY CHAIN CHALLENGE 4 (2012); Fitzpatrick et al., *supra* note 155, at 974.

34. *See, e.g.*, Lucy Siegle, *How Can I Ensure My IT Equipment Is Ethical?*, GUARDIAN (Feb. 22, 2015), http://www.theguardian.com/environment/2015/feb/22/how-can-i-ensure-my-laptop-and-smartphone-are-ethical (highlighting the work of organizations seeking to end "the murderous status quo" in the consumer electronics sector); *Conflict Minerals: Is There Blood on Your Laptop?*, TIME, http://content.time.com/time/video/player/0,32068,594243401001_2013170,00.html (last visited Nov. 19, 2015).

35. *Conflict Minerals 101: Tin, Tungsten, Tantalum, and Gold*, 3BL MEDIA (Sept. 26, 2014), http://3blmedia.com/News/Conflict-Minerals-101-Tin-Tungsten-Tantalum-and-Gold.

36. A.T. KEARNEY, *supra* note 333; JOHN PRENDERGAST & SASHA LEZHNEV, FROM MINE TO MOBILE PHONE: THE CONFLICT MINERALS SUPPLY CHAIN (2009).

the number of actors is the smallest, and audits are, therefore, more feasible.[37] Not only are there relatively few smelters globally, but they are also geographically concentrated. For example, in 2012, China accounted for approximately 46% of global primary smelter production of tin.[38] And 45% of all U.S. imports of tungsten between 2009 and 2012 came from China.[39] Still, the small amount of minerals contained in each final product makes their traceability particularly difficult: one consulting group explained that "a 2 kilogram (4.5 pound) laptop contains 10 grams of tin, 0.6 grams of tantalum, 0.3 grams of gold, and 0.0009 grams of tungsten."[40]

Despite being an important producer of tin, tungsten, tantalum, and gold, the DRC does not dominate global production of the minerals. The DRC accounted for only 1.7% of global tin mine production in 2013,[41] 0.004% of global tungsten production in 2011,[42] 18.6% of global tantalum production in 2013[43] (another 25.4% was produced in neighboring Rwanda[44]), and 0.10% of global gold production in 2011.[45] Yet this comparatively modest share of global production has not discouraged human rights campaigners from focusing their advocacy efforts on the DRC because of the disproportionate potential of mining in that country to fuel armed conflict.[46]

The United States is a major consumer of the aforementioned minerals, yet U.S. consumption is concentrated in only a few sectors and companies. For example, in 2013, twenty-five U.S. companies accounted for approximately 90% of domestic primary tin consumption, 17% of which was used for electrical purposes.[47] As another example, a single company, Intel, manufactures 80% of the world's semiconductors.[48] This concentration explains in part the possible significance of ripple effects from U.S. regulations across global supply chains in the electronics sector. The Securities and Exchange Commission (SEC)

37. A.T. KEARNEY, *supra* note 333, at 4; GLOBAL WITNESS, 'THE HILL BELONGS TO THEM,' *supra* note 25, at 19 ("[T]he number of major international smelters of tin and tantalum . . . is fairly small and they represent a key bottleneck in the global supply chain."); *Apple's Conflict Mineral Policy*, ACTIO (Sept. 16, 2014), http://blog.actio.net/supply-chain-management/apples-conflict-mineral-policy/ ("We believe the only way to impact the human rights abuses on the ground is to have a critical mass of smelters verified as conflict-free, so that demand for the mineral supply from questionable sources is affected.").

38. James F. Carlin, Jr., *Tin*, *in* 2012 MINERALS YEARBOOK 77.9 tbl.10 (2014).

39. U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, MINERAL COMMODITY SUMMARIES 2014 174 (2014).

40. A.T. KEARNEY, *supra* note 333, at 4.

41. MINERAL COMMODITY SUMMARIES 2014, *supra* note 39, at 169.

42. Kim B. Shedd, *Tungsten*, *in* 2011 MINERALS YEARBOOK 79.20 tbl.15 (2013).

43. MINERAL COMMODITY SUMMARIES 2014, *supra* note 39, at 161.

44. *Id*.

45. Michael W. George, *Gold*, *in* 2011 MINERALS YEARBOOK 31.21–31.22 tbl.8 (2013).

46. *See, e.g.*, BAFILEMBA ET AL., *supra* note 288, at 4 (estimating that before Dodd-Frank, conflict minerals generated an estimated $185 million per year for armed groups and the army).

47. MINERAL COMMODITY SUMMARIES 2014, *supra* note 39, at 168.

48. GLOBAL WITNESS, 'THE HILL BELONGS TO THEM,' *supra* note 25, at 16.

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estimates that its regulations on conflict minerals will affect approximately six thousand U.S. and foreign companies.[49] The EU estimates that "150,000–200,000 EU companies—mostly downstream operators—are involved in the supply chains" of the six thousand affected U.S. companies.[50] After the first deadline in 2014 for companies to file reports to the SEC documenting their reliance on conflict minerals, 1,313 companies filed such reports, and many of these companies were from the semiconductor, broadcasting, electronic components, and computer communications equipment sectors.[51]

II.
A SINGULAR U.S. POLICY RESPONSE: THE DODD-FRANK CONFLICT MINERALS PROVISIONS

Part I described the problem of conflict minerals generally, the conflict in the DRC, and the structure of the consumer electronics value chain. Part II focuses on the U.S. policy response to the problem of conflict minerals: the Dodd-Frank Wall Street Reform and Consumer Protection Act. This Part provides an overview of the Act's conflict minerals provisions, compares this policy response to more traditional approaches for addressing cross-border human rights challenges, and summarizes the implementation of the U.S. law thus far.

A. *Overview of Dodd-Frank Conflict Minerals Regulations*

Detailed descriptions of the U.S. regulations on conflict minerals have been provided elsewhere.[52] Others have also analyzed and debated in detail the law's effectiveness.[53] In contrast, this Article provides a brief overview of the U.S.

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49. Jim Low, *Dodd-Frank and the Conflict Minerals Rule*, KPMG DIRECTORS & BOARDS 44 (4th Quarter 2012).

50. *Joint Communication*, *supra* note 166, at 7.

51. Olga Usvyatsky, *An Initial Look at Conflict Minerals & Dodd Frank Section 1502*, AUDIT ANALYTICS (June 23, 2014), http://www.auditanalytics.com/blog/an-initial-look-at-conflict-minerals-dodd-frank-section-1502/. The number of filings in 2015 was roughly equivalent, at 1279. For an overview of the reports submitted by the 2015 deadline and reactions from observers, see Derryck Coleman, *Analyzing Conflict Mineral Reporting in Year 2*, AUDIT ANALYTICS (July 23, 2015), http://www.auditanalytics.com/blog/analyzing-conflict-mineral-reporting-in-year-2/; Yin Wilczek, *Issuers' 2015 Conflict Minerals Filings Improving in Detail, Clarity: Early Reviews*, BLOOMBERG BNA (June, 12, 2015), http://www.bna.com/issuers-2015-conflict-n17179927630/.

52. *See, e.g.*, *Conflict Minerals: Frequently Asked Questions*, PRICE WATERHOUSE COOPER, http://www.pwc.com/us/en/audit-assurance-services/conflict-minerals-faqs.jhtml#scope (last visited Feb. 18, 2016); *Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Conflict Minerals*, SEC (Apr. 7, 2014), http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm; *Summary of Conflict Minerals Rule*, SQUIRE SANDERS (Oct. 2012), http://www.squiresanders.com/website/pdf/Compliance/Summary-of-Conflict-Minerals-Rule.pdf.

53. *See, e.g.*, ANDREAS MANHART & TOBIAS SCHLEICHER, CONFLICT MINERALS – AN EVALUATION OF THE DODD-FRANK ACT AND OTHER RESOURCE-RELATED MEASURES (Aug. 2013), http://www.oeko.de/oekodoc/1809/2013-483-en.pdf (analyzing the U.S. rules and their effect on the

regulations to assess whether they represent a new kind of policy intervention likely to spur global action.

In 2010, in response to the financial crisis, the United States enacted Dodd-Frank, primarily to "improv[e] accountability and transparency in the financial system."[54] This major reform contained several "Miscellaneous Provisions," including one on conflict minerals. Section 1502 of Dodd-Frank amended the Securities Exchange Act of 1934 to address "the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo," which was financing "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."[55]

The statute and accompanying SEC regulations require all companies with stock traded on the U.S. Stock Exchange to report yearly to the SEC the existence of conflict minerals in their supply chains originating from "the Democratic Republic of the Congo or an adjoining country."[56] Companies subject to the regulations must file a special form (known as Form SD), in which they detail the steps taken to conduct due diligence along their supply chains; indicate which products, if any, contain conflict minerals; and identify the suppliers and mines from which the minerals originated.[57] With limited exceptions, companies' due diligence must "conform to a nationally or internationally recognized due diligence framework," and companies' Conflict Minerals Reports must be subject to a "private sector audit" to the extent that companies wish to declare their products as "DRC conflict-free."[58]

Importantly, Dodd-Frank does not ban companies from using conflict minerals. Rather, the U.S. policy assumes that the presence of conflict minerals in supply chains is a material risk to companies' bottom lines that merits shareholder scrutiny. The U.S. Congress thus embraced a transparency-based regulation theory, according to which exposing a problem to the public can

mining in the DRC as well as on the practices of American and European companies); Emily Veale, Note, *Is There Blood on Your Hands-Free Device?: Examining Legislative Approaches to the Conflict Minerals Problem in the Democratic Republic of Congo*, 21 CARDOZO J. INT'L & COMP. L. 503 (2013) (criticizing the Dodd-Frank rule); Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315 (2012) (arguing that the conflict minerals provision exceeds the SEC's traditional mandate because its goals are moral and political, rather than financial, and that the provision is ineffective).

54. H.R. 4173, 111th Cong. (2010) (enacted) (preface to the Dodd-Frank Act).

55. Pub. L. 111-203, 124 Stat. 1376, § 1502 (2010) (codified as amended at 15 U.S.C. § 78m(p)).

56. 15 U.S.C. § 78m(p)(1)(A) (2012); 17 C.F.R. § 240.13p-1 (2012).

57. 17 C.F.R. § 249b.400 (2012); SEC, FORM SD: SPECIALIZED DISCLOSURE REPORT, OMB No. 3235-0697, http://www.sec.gov/about/forms/formsd.pdf.

58. FORM SD: SPECIALIZED DISCLOSURE REPORT, *supra* note 57, at 3; Keith F. Higgins, Dir. of Corp. Fin., SEC, Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule (Apr. 29, 2014).

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DOI: https://doi.org/10.15779/Z388565

foster public action against it.[59] The result may be the same: several technology companies subject to the rule, including Apple, HP, Intel, and SanDisk, have already committed to removing all conflict minerals from their supply chains.[60]

B. Range of Possible U.S. Policy Responses

In order to assess the significance of Dodd-Frank, this section compares it to other possible policies the United States could have adopted to address the problem of conflict minerals. Dodd-Frank departs from the traditional policy approaches deployed by the United States and other countries to tackle international human rights challenges involving the private sector. One approach could have been to strengthen domestic regulatory frameworks and enforcement mechanisms in the countries where the violations occur. The multipronged international response to the 2013 collapse of the Rana Plaza building in Bangladesh, which resulted in the deaths of more than one thousand garment workers,[61] exemplifies such an approach. The world's major retailers and brands, governments, and international organizations, including the EU and the International Labor Organization, established a partnership to strengthen the Bangladeshi labor laws, implement oversight mechanisms, and compensate victims.[62] In addition, the U.S. government suspended some of Bangladesh's trade benefits until the Bangladeshi government could demonstrate an improvement in workers' rights and conditions.[63] The U.S. Senate considered various policy responses to address the Rana Plaza disaster, but none resembled the corporate disclosure required by Dodd-Frank.[64]

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59. *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,276 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240 and 249b) (relating the congressional sponsors' view that the regulation would "enhance transparency" and "help American consumers and investors make more informed decisions").

60. Alex Hern, *Apple Plans To Cease Using Conflict Minerals*, GUARDIAN (Feb. 14, 2014), http://www.theguardian.com/technology/2014/feb/14/apple-conflict-minerals; Jay Celorie, *HP's Journey to a Conflict-Free Supply Chain*, HP NEXT (July 28, 2014), http://www8.hp.com/hpnext/posts/hp-s-journey-conflict-free-supply-chain#.VPK224cojuU; *Intel's CEO Reveals The Company's Plans To Build a Conflict-Free Supply Chain By 2016*, CO.EXIST (Sept. 3, 2014), http://www.fastcoexist.com/3034867/intels-ceo-reveals-the-companys-plans-to-build-a-conflict-free-supply-chain-by-2016; *Advancing Social Responsibility,* SANDISK, http://www.sandisk.com/about-sandisk/corporate-responsibility/social/ (last visited Jan. 20, 2015).

61. *Home*, RANA PLAZA ARRANGEMENT, http://www.ranaplaza-arrangement.org (last visited Nov. 21, 2015) (counting 1,134 deaths).

62. *Id*.; Alyssa Ayres, *A Guide to the Rana Plaza Tragedy, and Its Implications, in Bangladesh*, FORBES (Apr. 24, 2014), http://www.forbes.com/sites/alyssaayres/2014/04/24/a-guide-to-the-rana-plaza-tragedy-and-its-implications-in-bangladesh/.

63. Office of the Spokesperson, *Joint Statement on the Anniversary of Rana Plaza Building Collapse in Bangladesh*, U.S. DEP'T OF ST. (Apr. 23, 2014), http://www.state.gov/r/pa/prs/ps/2014/04/225087.htm.

64. MAJORITY STAFF OF S. COMM. ON FOREIGN RELATIONS, 113TH CONG., WORKER SAFETY AND LABOR RIGHTS IN BANGLADESH'S GARMENT SECTOR 1–2 (Comm. Print 2013) (recommending as policy interventions temporary suspension of trade benefits against Bangladesh; increased funding for technical assistance to Bangladesh; education of corporate suppliers; stronger sanctions by the government of Bangladesh of companies that violate local law; and improvement of Bangladeshi labor laws).

By contrast, the U.S. government response to the problem of conflict minerals in the DRC has not involved attempts to amend Congolese laws. The United States' reluctance to pursue such legal reforms may have been due to the DRC's lack of technical capacity; although the DRC had enacted legislation in 2012 aimed at reducing the mining profits of armed groups,[65] corruption and a scarcity of public resources have prevented effective enforcement of the new legislation.[66]

Dodd-Frank also departs from the U.S. policy response to conflict diamonds, in which the Kimberley Process established—with limited success—an international State-led certification scheme.[67] Nor does Dodd-Frank model the EITI, a multi-stakeholder initiative aimed at combating corruption in the exploration of oil, gas, and minerals.[68] Furthermore, rather than relying on a new treaty, Dodd-Frank relies on domestic legislation to spark global action regarding conflict minerals.

It is true that Dodd-Frank relies on familiar international strategies in some respects. For instance, the U.S. law relies in part on industry certification schemes. The London Bullion Market Association's Responsible Gold Guidance[69] and the Electronic Industry Citizenship Coalition's and Global e-Sustainability Initiative's Conflict-Free Smelter Program[70] are both aimed at identifying conflict minerals along companies' supply chains. Both certification schemes could support companies seeking to comply with the SEC's disclosure requirements, which call on independent auditors to verify the presence of conflict minerals in companies' supply chains in certain circumstances.[71] Moreover, in requesting due diligence in corporate supply chains, the United States embraced the approach advocated by the Organisation for Economic Co-

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65. Arrêté Ministériel N.0057.CAB.MIN/MINES/01/2012 du 29 Février 2012 Portant Mise en Œuvre du Mécanisme Régional de Certification de la Conférence Internationale sur la Région des Grands-Lacs "CIRGL" en République Démocratique du Congo, art. 8 (requiring that all companies operating in the DRC conduct due diligence assessments in line with OECD standards).

66. *See, e.g.*, *Corruption by Country/Territory: Democratic Republic of the Congo*, TRANSPARENCY INT'L, http://www.transparency.org/country#COD (last visited Apr. 12, 2016) (ranking the DRC 147 out of 168 in the 2015 Corruption Perception Index survey).

67. *See* Holly Cullen, *Is There a Future for the Kimberley Process Certification Scheme for Conflict Diamonds?*, 12 MACQUARIE L.J. 61 (2013) (pointing out recent failures of the Kimberley Process and asking whether it still has a role to play in addressing the problem of conflict diamonds); KIMBERLEY PROCESS, *supra* note 4 ("The Kimberley Process Certification Scheme . . . imposes extensive requirements . . . on its members to enable them to certify shipments of rough diamonds as 'conflict-free' and prevent conflict diamonds from entering the legitimate trade.");

68. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, *supra* note 3.

69. *Responsible Gold*, LONDON BULLION MARKET ASS'N, http://www.lbma.org.uk/responsible-gold (last visited Nov. 20, 2015).

70. *Conflict-Free Smelter Program*, GLOBAL E-SUSTAINABILITY INITIATIVE, http://gesi.org/portfolio/project/16 (last visited Nov. 20, 2015); *see also* GLOBAL WITNESS, 'THE HILL BELONGS TO THEM,' *supra* note 25, at 16–17 (describing a range of international industry initiatives).

71. *See* 15 U.S.C. § 78m(p)(1)(A)(i) (2014) (calling for companies to conduct due diligence on conflict minerals in their supply chain, including through "an independent private sector audit").

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/8
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operation and Development (OECD), which developed a framework for companies to "respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices."[72] Taken as a whole, however, Dodd-Frank is a U.S.-centric response that relies on international certification methods to protect and inform U.S. consumers and investors, not to join an international cooperation effort.

C. *Implementation of Dodd-Frank*

Since Dodd-Frank's enactment in 2010, the SEC has issued implementing regulations and companies have begun to comply with the new law. Legislative repeal of the provisions on conflict minerals appears unlikely at this stage, though congressional priorities are hard to predict. For example, in December 2014, large banks included an amendment to Dodd-Frank in an unrelated budget bill, repealing restrictions on risky derivatives trading.[73] Opponents of the conflict minerals regulations could proceed similarly to dismantle those provisions.

In addition, some industry groups have already convinced a federal court to strike down a portion of the conflict-minerals rule, and additional legal challenges are possible. A federal appeals court in 2015 concluded that part of the rule violated the U.S. Constitution.[74] The court held that the SEC may not require companies to state in their reports to the SEC or on their websites that their supply chains were "not found to be 'DRC conflict-free.'"[75] Requiring companies to do so would amount to compelled speech and thus infringe on their First Amendment rights, the court said.[76]

The other provisions of the rule, however, survived this legal challenge, and companies continue to submit conflict minerals report to the SEC.[77] This decision reaffirmed a ruling by the same court a year earlier.[78] After the first

72. *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/corporate/mne/mining.htm (last visited Nov. 20, 2015).

73. Dave Clarke et al., *How Wall St. Got Its Way*, POLITICO (Dec. 11, 2014), http://www.politico.com/story/2014/12/wall-street-spending-bill-congress-113525.html.

74. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015). The SEC did not file a petition for certiorari to the U.S. Supreme Court. Cydney Posner, *No Petition for Cert in* Nat'l Assoc. of Manufacturers v. SEC, *the Conflict Minerals Case*, COOLEY (Apr. 11, 2016), https://cooleypubco.com/2016/04/11/no-petition-for-cert-in-natl-assoc-of-manufacturers-v-sec-the-conflict-minerals-case/.

75. *Nat'l Ass'n of Mfrs.*, 800 F.3d at 530, 553 n.8.

76. *Id.* at 524.

77. *Id.* at 553 n.8; Dynda A. Thomas, *SEC Conflict Minerals Rule Legal Challenge is Over – But Not For Good*, CONFLICT MINERALS LAW (Apr. 12, 2016), http://www.conflictmineralslaw.com/2016/04/12/sec-conflict-minerals-rule-legal-challenge-is-over-but-not-for-good/.

78. The D.C. Circuit decided to rehear this case after the same court, en banc in another case, clarified the scope of the doctrine of protected commercial speech under the First Amendment. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc). During the rehearing, the

ruling, the SEC issued guidance and a temporary stay of the conflict-minerals rule, both of which clarify the 2015 judicial decision's effect on the regulation and companies' obligations.[79] The SEC has explained that companies with conflict minerals in their supply chains continue to have an obligation to disclose "the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin."[80] Moreover, while no company is obligated to declare its products as "DRC conflict free," "not been found to be 'DRC conflict free,'" or "DRC conflict undeterminable," companies may continue to apply the "conflict free" label voluntarily, so long as they conduct independent private sector audits to support that assertion.[81]

The first year companies were required to report their use of conflict minerals to the SEC was 2014. One month after the deadline, a consulting group counted 1,313 reporting companies.[82] Approximately 20% of these companies listed their supply chains as "conflict free," while the other 80% said they were unable to make a final determination.[83] In 2015, 1,272 companies filed forms SD to the SEC, with a similar proportion of filers listing their supply chains as "conflict free."[84]

The new regulations have prompted companies to map their supply chains to an unprecedented extent.[85] The SEC estimates that the regulations will cost companies three to four billion dollars the first year and two hundred million

SEC argued unsuccessfully that the court should apply the newly clarified standard enunciated in *American Meat Institute*, under which the federal government has more leeway in certain circumstances to require companies to make certain disclosures about their products. Instead, the panel in the conflict-minerals case distinguished *American Meat Institute* and reaffirmed its prior reasoning and holding. *Nat'l Ass'n of Mfrs*., 800 F.3d at 524.

79. Higgins, *supra* note 58; Order Issuing Stay, File No. S7-40-10, In the Matter of Exchange Act Rule 13p-1 and Form SD, Release No. 72079 / May 2, 2014.

80. Higgins, *supra* note 58.

81. *Id*.

82. Usvyatsky, *supra* note 51.

83. *Id*. To ease implementation, the regulation had allowed companies in the first two or four years (depending on the size of the company) to declare as "DRC undeterminable" the status of products whose provenance could not be reliably ascertained after appropriate due diligence. FORM SD: SPECIALIZED DISCLOSURE REPORT, *supra* note 57, at 3. In 2015, the share of companies to list their status as "undeterminable" was approximately 80% as well. Coleman, *supra* note 51. As noted above, however, the SEC clarified in the aftermath of the D.C. Circuit's decision in *National Association of Manufacturers* that companies were no longer required to use this label. *See supra* note 81 and accompanying text.

84. Coleman, *supra* note 51.

85. Bob Trebilcock, *Source Intelligence: Mapping the Supply Chain and Monitoring for Risk*, SUPPLY CHAIN MGMT. REV. (Nov. 18, 2014) (interview with Jess F. Kraus), http://www.scmr.com/article/source_intelligence_mapping_the_supply_chain_and_monitoring_for_risk ("There is no other requirement in the US that requires you to map your supply chain, determine where your materials are coming from, and have that audited by a third party. In fact, there's never been anything like it.").

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dollars every year afterwards.[86] In a review of Dodd-Frank, one group concluded that:

> [b]ecause the New York Stock Exchange and other U.S. capital markets are still an important destination for corporations worldwide, particularly for large, multinational companies that produce the final products that use minerals, the legislation has had a significant impact on the global supply chains of three of the four conflict minerals.[87]

The regulations are also expected to improve conditions in the DRC. After conducting field research in the Great Lakes Region following Dodd-Frank's enactment, one NGO discovered that armed groups now experience more difficulty trading in tin, tungsten, and tantalum, but that the illegal trade in gold has been harder to curtail.[88] These findings are supported by another group, although a clear cause-and-effect relationship is difficult to establish because of other simultaneous legislative enactments, such as a ban on artisanal mining in the Eastern DRC.[89] Additionally, a 2012 United Nations report highlights the risk of smuggling: while exports of conflict minerals from the DRC decreased, smugglers located in nearby countries exported the minerals from Burundi, Rwanda, and Uganda.[90] In addition, strict regulations and due diligence requirements can have unintended side effects, including a possible "de facto embargo" of the Great Lakes Region, as sourcing verified, conflict-free minerals becomes prohibitively expensive for companies.[91] Instead, companies might choose to source the desired minerals from other regions.[92]

In sum, the regulations have induced companies to take a closer look at their supply chains, develop systems to track their reliance on conflict minerals, embrace the OECD Due Diligence Guidelines, and establish partnerships with third-party auditors to certify some of their SEC reports and vet suppliers.[93] Additionally, the regulations have impacted companies not listed on the U.S. Stock Exchange: since 2010, companies filing with the SEC have sought assurances from suppliers around the world that no conflict minerals were used in manufacturing their products.[94]

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86. Low, *supra* note 49, at 44.

87. BAFILEMBA ET AL., *supra* note 288, at 6.

88. *Id.* at 1, 8.

89. MANHART & SCHLEICHER, *supra* note 533, at 30.

90. U.N. Final Report, *supra* note 17, ¶¶ 163–97.

91. MANHART & SCHLEICHER, *supra* note 53, at 33; *accord* Dan Fahey, *"Congo Gold": Three Problems with the 60 Minutes Story*, AFR. ARGUMENTS (Dec. 11, 2009), http://africanarguments.org/2009/12/11/three-problems-with-60-minutes/ ("Cutting off Congo's gold would be a social and economic disaster for areas like Ituri that are struggling to emerge from war.").

92. For a critical view of the Dodd-Frank regulations emphasizing this point in particular, see Fahey, *"Conflict Minerals" in Ituri*, *supra* note 12 ("[I]t is easy for the producers of electronics destined for the USA to obtain their 'conflict minerals' from other sources.").

93. MANHART & SCHLEICHER, *supra* note 53.

94. *Id.* at 26.

III.
THE GLOBAL PULL OF AN ENTICING MARKET AND POWERFUL REGULATOR

Part II.B. explained how the Dodd-Frank regulations on conflict minerals differ from conventional policy responses to international challenges; rather than investing in multilateral institutions, the United States unilaterally adopted domestic legislation targeting one region where the problem of conflict minerals was acute. In this Part, this Article, for the first time, grounds this U.S. policy response in the literature on unilateral regulatory globalization. That literature does not discuss the Dodd-Frank regulations or other efforts to tackle the problem of conflict minerals. In fact, problems at the intersection of business and human rights more generally have not been analyzed through the prism of unilateral regulatory globalization theory. Part III begins with an overview of the literature on unilateral regulatory globalization and continues with an application of the theory to Dodd-Frank's rules on conflict minerals.

A. *The Theory of Unilateral Regulatory Globalization*

The literature on unilateral regulatory globalization studies the power of one State, or one group of States, to impose its regulatory policies on other States and on companies in a way that leads to a global harmonization of standards and practices.[95] David Vogel, one of the first proponents of this theory, described California's propensity to set environmental standards that would be subsequently followed by other states and the U.S. federal government.[96] Vogel observed that from the 1970s to 1990s, California regularly set the country's most stringent automobile emission standards, after which other states and the federal government would raise their own standards to California's level.[97] He termed this "ratcheting upward of regulatory standards" across political jurisdictions the "California Effect."[98]

Building on Vogel's theory, scholars subsequently began arguing that a similar phenomenon could take place across borders: one country's regulations could influence another and lead to global harmonization. Scholars tested Vogel's theory about automobile emission standards across borders and concluded that countries that exported cars to jurisdictions with more stringent automobile emission standards tended to adopt more stringent emission standards themselves.[99] Furthermore, other scholars studied the conditions under which the EU was more likely to impose some of its stricter environmental,

95. For example, Anu Bradford explains that "[u]nilateral regulatory globalization occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards." Bradford, *supra* note 10, at 3.

96. DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 259 (1997).

97. *Id.*

98. *Id.*

99. Richard Perkins & Eric Neumayer, *Does the 'California Effect' Operate Across Borders? Trading- and Investing-Up in Automobile Emission Standards*, 19 J. EUR. PUB. POL'Y 217 (2012).

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health, and safety measures on others.[100] Finally, others focused on the global reach of national regulations involving corporate taxation, international investment and banking, antitrust, health and safety, privacy, and the environment.[101]

To illustrate the phenomenon, one author argued provocatively that "EU regulations dictate what kind of air conditioners Americans use to cool their homes and why their children no longer find soft plastic toys in their McDonald's Happy Meals."[102] Another example may be familiar to American consumers: Canada's laws likely explain why some products on the shelves of U.S. supermarkets are labeled both in English and French. Canadian law requires many consumer products sold *in Canada* to be labeled in both official languages.[103] While Canadian regulations do not require products in U.S. stores to satisfy the same requirement (and the U.S. government does not mandate labeling in French), some American companies nevertheless label their products in both languages. They do so because exporting to Canada requires bilingual labeling,[104] and it is more economical for a product to come off the assembly line with packaging ready for either of North America's two largest markets.[105] In a sense, some companies are voluntarily complying with Canadian law outside Canadian borders.

In her article *The Brussels Effect*, Anu Bradford focuses on the EU's ability to "export" its regulations to other countries—a variation of the California

100. Sebastiaan Princen, The California Effect in the EC's External Relations: A Comparison of the Leghold Trap and Beef-Hormone Issues Between the EC and the US & Canada (June 1999) (Paper prepared for the ECSA Sixth Biennial International Conference Pittsburgh, Pennsylvania, June 2-5, 1999), http://aei.pitt.edu/2367/1/003780.1.pdf.

101. Bradford, *supra* note 10 (describing European-led global regulatory convergence in antitrust laws, privacy regulations, food safety measures, household chemicals regulations, and environmental protection); Thomas K. Cheng, *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 CHI. J. INT'L L. 433 (2012) (analyzing regulatory harmonization in the anti-competitive arena); Daniel W. Drezner, *Globalization, Harmonization, and Competition: The Different Pathways to Policy Convergence*, 12 J. EUR. PUB. POL'Y 841 (2005) (analyzing how major economies cooperate or compete for global regulatory influence, including in the fields of money laundering and genetically modified organisms); David A. Wirth, *The EU's New Impact on U.S. Environmental Regulation*, 31 FLETCHER F. WORLD AFF. 91 (2007) (describing the influence of EU health and environmental regulations on U.S. regulations).

102. Bradford, *supra* note 10, at 3 (footnote omitted).

103. Consumer Packaging and Labelling Regulations, C.R.C., c. 417, § 6(2) (Can.) ("All information required by the Act and these Regulations to be shown on the label of a prepackaged product shall be shown in both official languages . . . .").

104. MARIA ARBULU, EXPORTING TO CANADA: A PRACTICAL GUIDE 5 (2012) (explaining that agricultural exports to Canada destined for sale at retail require bilingual labeling).

105. *See* WESLEY B. TRUITT, WHAT ENTREPRENEURS NEED TO KNOW ABOUT GOVERNMENT: A GUIDE TO RULES AND REGULATIONS 116 (2004) ("Since many packaged products are sold throughout North America, compliance with Canadian law is essential to rationalize distribution."); *see also GDP Ranking*, WORLD BANK (Sept. 18, 2015), http://data.worldbank.org/data-catalog/GDP-ranking-table (ranking Canada as the world's eleventh largest economy, based on Gross Domestic Product, and Mexico as the fifteenth).

Effect.[106] While her contribution echoes prior scholars' analyses in certain sections, it provides a useful framework to understand the facets and conditions of the California Effect. I will therefore use it as a starting point to describe the phenomenon.

Bradford distinguishes de jure and de facto harmonization, explaining that the California Effect can result in either or both.[107] De jure harmonization refers to the adoption by other States of the strict rules of the dominant regulator.[108] De facto harmonization, on the other hand, occurs when companies choose to follow the dominant regulator's rules in their operations around the world even though other States have not adopted the dominant regulator's stricter rules.[109] This de facto harmonization—at play in the Canadian labeling example above—takes place because businesses find it economically advantageous to standardize their practices globally to follow a single rule.[110] De facto and de jure harmonization often go hand in hand: once large companies have standardized their practices, they have an incentive to lobby their home governments to level the playing field with their domestic competitors who are not export-oriented and so do not need to comply with the foreign regulator's stricter standards.[111]

Of course, global harmonization of standards can result from international cooperation as well. Countries could adopt a new treaty banning trade in conflict minerals and requiring each signatory State to enact legislation to that effect. The ban on trade in endangered species exemplifies this cooperative approach: 182 countries[112] are now party to the Convention on International Trade in Endangered Species of Wild Fauna.[113] Harmonization through unilateral regulatory power, however, has distinct advantages. In particular, it is easier to adopt and enforce since the dominating country need not secure the consent or compliance of other States.[114]

Bradford lays out five conditions that give rise to the California Effect: (1) market power, (2) regulatory capacity, (3) preference for strict rules, (4) the regulation of inelastic targets, and (5) nondivisibility of standards.[115]

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106. Bradford, *supra* note 10. The author refers to the process of global harmonization led by the EU as "The Brussels Effect." For simplicity, and because this Article analyzes the potential of an American rule to unleash a similar effect, I will refer to the phenomenon as the "California Effect" throughout this Article.

107. *Id*. at 8.

108. *Id*.

109. *Id*.

110. *See id*. at 6.

111. *Id*.; *see also* Perkins & Neumayer, *supra* note 92, at 223–24; Princen, *supra* note 93, at 1.

112. *Member Countries*, CONVENTION ON INT'L TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, http://www.cites.org/eng/disc/parties/index.php (last visited Apr. 24, 2016).

113. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

114. Bradford, *supra* note 10, at 44.

115. *Id*. at 10–11.

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First, market power refers to a State's ability to offer foreign companies access to a lucrative domestic market, preferably one with wealthy consumers, in exchange for compliance with the State's regulations.[116] Bradford argues that "the larger the market of the (strict) importing country relative to the (lenient) market of the exporter country, the more likely the Brussels Effect will occur."[117] According to the author, the EU, the United States, China, and Japan "possess domestic markets large enough to use access to their markets as leverage."[118]

Second, regulatory capacity is necessary for a State "to translate its market power into tangible regulatory influence."[119] Regulatory capacity requires regulatory expertise and the authority to impose harsh sanctions for noncompliance.[120] According to Bradford, "[t]he U.S. administrative agencies' capacity to promulgate and enforce rules in the United States is well understood," and the EU is rapidly developing an equivalent regulatory order.[121] But outside these two blocs, the author argues that regulatory capacity escapes other large economies, including China.[122]

Third, preference for strict rules refers to the willingness of States with market power and regulatory capacity to deploy these attributes towards the adoption and enforcement of strict regulatory standards.[123] Bradford argues that wealthier countries are more likely to adopt strict rules, as are countries that are more risk averse and more committed to "a social market economy."[124] According to Bradford, the EU's adoption of the precautionary principle illustrates a general preference for strict rules, whereas U.S. agencies' insistence on cost-benefit analysis to justify intervention reflects a relative aversion to strict rules.[125]

Fourth, the inelastic-targets factor refers to the propensity of the regulation's target to relocate to circumvent the strict regulations.[126] Bradford explains that the EU regulations are likely to unleash the California Effect when they focus on consumer markets, such as product or food safety, because it is a sale to EU consumers that triggers companies' obligation to comply with EU regulations, and consumers are unlikely to "relocate" outside EU borders to

116. *Id*. at 11–12.

117. *Id*. at 11.

118. *Id*.

119. *Id*. at 12.

120. *Id*. at 12–13.

121. *Id*. at 13.

122. *Id*. at 13 n.48.

123. *Id*. at 14.

124. *Id*. at 14–15.

125. *Id*. at 15–16. Vogel also analyzed the factors that drove the United States and the EU towards stricter or laxer rules over time. *See* DAVID VOGEL, THE POLITICS OF PRECAUTION: REGULATING HEALTH, SAFETY, AND ENVIRONMENTAL RISKS IN EUROPE AND THE UNITED STATES (2012) [hereinafter VOGEL, THE POLITICS OF PRECAUTION].

126. Bradford, *supra* note 10, at 16–17.

avoid strict regulations.[127] Thus, if a company wishes to reach the lucrative EU consumer market, it has no choice but to comply with the EU regulations or risk sanctions. In contrast, corporations' places of incorporation are more elastic, since a company wishing to avoid a high tax rate, for example, will typically be able to relocate to another jurisdiction without significant damage to its operations or profits.[128] Regulations of capital are generally less likely to lead to global harmonization for a similar reason: companies can relocate their financial assets relatively easily without sacrificing market share or access to financial services. As a result, Bradford predicts that the United States' recent regulatory pursuits in the financial sector are "less likely" to be "converted to global standards because of the relative elasticity of capital."[129]

Finally, nondivisibility of standards refers to companies' incentives to standardize their products and operations across world markets. Bradford explains, "the exporter has an incentive to adopt a global standard whenever its production or conduct is nondivisible across different markets or when the benefits of a uniform standard due to scale economies exceed the costs of forgoing lower production costs in less regulated markets."[130] For example, EU privacy regulations concern only Google's service offerings within the EU, but technical limitations sometimes force Google to amend its operations worldwide because it is unable, or finds it prohibitively expensive, to devise a version of its services or data collection systems just for the EU.[131]

B. Can Dodd-Frank's Conflict Minerals Provisions Unleash a "California Effect"?

Can the Dodd-Frank regulations on conflict minerals unleash a "California Effect" that would lead to de facto or de jure global regulatory convergence? On a theoretical level, all five factors discussed in Part III.A. arguably weigh in favor of such an effect, but there are important differences between Dodd-Frank and the environmental, privacy, and health measures discussed above to illustrate the phenomenon. In addition, empirical evidence—however limited since the recent enactment of Dodd-Frank—can also shed light on the extent to

127. *Id.* at 17.

128. *Id.*; *see also* Elizabeth Chorvat, *The Tax Calculus of Corporate Locational Decisions*, 32 BERKELEY J. INT'L L. 292 (2014).

129. Bradford, *supra* note 10, at 60.

130. *Id.* at 17.

131. *Id.* at 18. A counterexample would be the European Court of Justice decision on the "right to be forgotten," according to which Google must comply with qualifying requests from EU citizens to remove content from Google's search engine. Because Google can display different search results on different country pages (such as Google.de and Google.com), the technology giant can choose not to implement the EU's "right to be forgotten" across all of its platforms worldwide. In this instance, the product regulated by the EU is divisible. *See* Mark Scott, *'Right to Be Forgotten' Should Apply Worldwide, E.U. Panel Says*, N.Y. TIMES, Nov. 26, 2014. *See also* Alex Hern, *Google Says Non to French Demand to Expand Right to Be Forgotten Worldwide*, GUARDIAN (July 30, 2015), http://www.theguardian.com/technology/2015/jul/30/google-rejects-france-expand-right-to-be-forgotten-worldwide.

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which companies not directly subject to Dodd-Frank and other regulators are embracing the U.S. standard.

Before turning to the five factors, we must determine, as an initial matter, what constitutes evidence of gradual regulatory convergence. While no company outside the SEC's jurisdiction will voluntarily file a Form SD with the Commission, convergence could manifest itself in other ways, such as increased company due diligence, increased reliance on third-party certifications, a reduction in sourcing of minerals from the Great Lakes Region, increased disclosures on company websites of conflict minerals policies, or the adoption by other regulators of disclosure requirements similar to the United States'.

1. Market Power

The United States likely satisfies the first factor: market power. In the cases typically examined in the literature on unilateral regulatory globalization—such as health or environmental policies—market power is defined by the consumer base a company can reach if it complies with the market's regulator. As an example, Johnson & Johnson will decide to comply with the EU's REACH regulations on the safety of household chemicals because such compliance is a condition to reaching the lucrative EU consumer base.[132]

In the context of conflict minerals, however, two initial differences emerge that justify thinking about market power more holistically. First, Dodd-Frank imposes no content requirements on products entering the U.S. market. Unlike EU substantive regulations on imports of beef raised on growth hormones,[133] for example, the U.S. rules on conflict minerals are procedural in nature: Dodd-Frank compels companies to disclose the presence of conflict minerals in their products.[134] The United States thus leaves the choice to the consumer to purchase or shun the products. Note, however, that even if the regulator does not ban a product or component but merely compels its *disclosure*, the regulations may still lead to a California Effect if consumers in the target market are likely to shop based on those disclosures. Second, Dodd-Frank offers more than access to U.S. consumers in exchange for compliance with its rules: it offers access to U.S. investors. Companies whose stock is traded in the U.S. Stock Exchange must disclose their reliance on conflict minerals to the SEC,[135] so access to U.S. capital markets becomes a major market incentive to comply with the conflict

132. *See supra* notes 9–10 and accompanying text for a discussion of the EU's REACH regulations.

133. *See, e.g.*, Council Directive 81/602/EEC of 31 July 1981 Concerning the Prohibition of Certain Substances Having a Hormonal Action and of Any Substances Having a Thyrostatic Action, 1981 O.J. (L. 222); Council Directive 88/146/EEC of 7 March 1988 Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action, 1988 O.J. (L 70); Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 Amending Council Directive 96/22/EC Concerning the Prohibition on the Use in Stockfarming of Certain Substances Having a Hormonal or Thyrostatic Action and of Beta-Agonists, 2003 O.J. (L 262) 17.

134. 15 U.S.C. § 78m(p) (2013); 17 C.F.R. § 240.13p-1 (2014).

135. 17 C.F.R. § 240.13p-1 (2014).

minerals rule. A Japanese, Korean, or European company can sell products containing conflict minerals to U.S. consumers without reporting it to the SEC as long as the company is publicly traded only outside the United States.[136] Similarly, non–publicly traded companies do not need to report to the SEC.[137]

A comprehensive analysis of the share of the global electronics market served by companies listed on a U.S. Stock Exchange is outside the scope of this Article. But several of the world's largest consumer electronics manufacturers are listed on the U.S. Stock Exchange, which suggests Dodd-Frank's broad potential geographical reach. These manufacturers include Apple, Canon, HP, IBM, Intel, Microsoft, Philips, and Sony.[138] Notable absences include Dell,[139] HTC,[140] Hitachi,[141] Lenovo,[142] LG,[143] Nikon,[144] Nintendo,[145] Panasonic,[146] Samsung,[147] and Toshiba.[148]

Still, even some of the companies that are not required to file with SEC have adopted and publicized conflict mineral policies—some of which are more ambitious than others—including Dell,[149] LG,[150] and Lenovo.[151] The

136. *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,288 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240 and 249b) ("[The final rule] applies only to foreign private issuers that enter the securities markets of the United States.").

137. *See id*. at 56,287 (clarifying that, despite arguments to the contrary by two of the bill's cosponsors, only issuers that file reports with the SEC under Section 13(a) or Section 15(d) of the Securities Exchange Act are required to file a Form SD).

138. *Company List (NASDAQ, NYSE, & AMEX)*, NASDAQ, http://www.nasdaq.com/screening/company-list.aspx (last visited Nov. 21, 2015).

139. *Investor Relations*, DELL, http://www.dell.com/learn/us/en/uscorp1/about-dell-investor (last visited Nov. 21, 2015) (private company).

140. *HTC Investors*, HTC, http://investors.htc.com/phoenix.zhtml?c=148697&p=irol-homeprofile (last visited Nov. 21, 2015) (traded in Taiwan).

141. *Frequently Asked Questions: Hitachi*, HITACHI, http://www.hitachi.com/IR-e/faq/corporate/index.html (last visited Nov. 21, 2015) (traded in Japan).

142. *Investor Relations*, LENOVO, http://www.lenovo.com/ww/lenovo/investor_relations.html (last visited Nov. 21, 2015) (traded in Hong Kong).

143. *Investor FAQ*, LG, http://www.lg.com/global/investor-relations/faq (last visited Nov. 21, 2015) (traded in the United Kingdom and South Korea).

144. *Investor Relations: Frequently Asked Questions*, NIKON, http://www.nikon.com/about/ir/faq/index.htm (last visited Nov. 21, 2015) (traded in Tokyo).

145. *FAQ*, NINTENDO, http://www.nintendo.co.jp/ir/en/qa/qa.html#qa2_3 (last visited Nov. 21, 2015) (traded in Japan).

146. *FAQs / Contacts*, PANASONIC, http://www.panasonic.com/global/corporate/ir/inquiry/ir_03.html (last visited Nov. 21, 2015) (traded on the Tokyo and Nagoya exchanges in Japan).

147. *Frequently Asked Questions*, SAMSUNG, http://www.samsung.com/us/aboutsamsung/investor_relations/faqs/#answer2 (last visited, Nov. 21, 2015) (traded in South Korea, the United Kingdom, and Luxemburg).

148. *Stock Information*, TOSHIBA, http://www.toshiba.co.jp/about/ir/en/stock/stock.htm#GENERAL (last visited Nov. 21, 2015) (traded on the Tokyo and Nagoya exchanges in Japan).

149. *Addressing Conflict Minerals*, DELL, http://www.dell.com/learn/us/en/uscorp1/conflict-minerals (last visited Nov. 21, 2015) ("Dell has been involved in many other efforts to bring us closer to a conflict-free supply chain.").

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/8
DOI: https://doi.org/10.15779/Z388565

relationship between cause and effect is difficult to establish, but it is possible that as some companies disclose more about their supply chains to comply with SEC regulations, other companies not subject to the SEC regulations will feel pressure to match this due diligence to alleviate suspicions from consumers or regulators that conflict minerals lie in their supply chains.[152]

2. *Regulatory Capacity*

The U.S. government has the regulatory capacity to trigger the California Effect, particularly in the financial sector where the SEC has vast powers to enforce federal securities laws.[153] It is true that some have criticized the SEC for insufficiently enforcing securities laws after the 2009 financial crisis.[154] Doubts about the SEC's willingness to enforce Dodd-Frank's conflict minerals provisions could lead some companies to file no report or incomplete reports. A more thorough analysis of companies' SD-Form filings over time could test that hypothesis. But the nine-billion-dollar fine against France's BNP Paribas in 2014 shows that, under some circumstances, the U.S. government is willing to flex its political and legal muscle, even against powerful foreign banks backed by their home governments.[155]

3. *Preference for Strict Rules*

A preference for strict rules, the third condition, is clear in this case. While the United States has advocated weaker rules than the EU in some areas over the

150. *Conflict Minerals*, LG, http://www.lg.com/global/sustainability/business-partner/conflict-minerals (last visited Nov. 21, 2015) ("It is LG's policy that tin, tantalum, tungsten and gold contained in our products shall not be derived from sources that finance or benefit armed groups in the DRC or adjoining countries.").

151. Memorandum from David B. Martin, Supply Chain Procurement Sustainability Manager, Lenovo (Oct. 2014), https://www.lenovo.com/social_responsibility/us/en/Conflict_minerals_statement.pdf ("Lenovo expects itself and its suppliers to be conflict-free.").

152. *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,286 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240 and 249b) ("[S]ome . . . commentators noted that . . . the commercial pressure on private companies by issuers that need this information for their reports [to the SEC] and by the public in general demanding that issuers make this information available could be sufficient enough for the private companies [not required to file with the SEC] to provide voluntarily their conflict minerals information as standard practice.").

153. *See, e.g.*, THE SECURITIES ENFORCEMENT MANUAL: TACTICS AND STRATEGIES (Michael J. Missal & Richard M. Phillips eds., 2d ed. 2007) (discussing the SEC's enforcement powers); *see also How Investigations Work*, SEC, http://www.sec.gov/News/Article/Detail/Article/1356125787012#.VJGkgACXE (last updated May 24, 2013).

154. *See, e.g.*, Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. TIMES, Apr. 14, 2011, at A.

155. Joseph Ax et al., *U.S. Imposes Record Fine on BNP in Sanctions Warning to Banks*, REUTERS (July 1, 2014), http://www.reuters.com/article/2014/07/01/us-bnp-paribas-settlement-idUSKBN0F52HA20140701.

past two decades, including on consumer and environmental protection,[156] the United States went further on conflict minerals with Dodd-Frank than any other country. One industry consultant argued, "[t]here is no other requirement in the U.S. that requires you to map your supply chain, determine where your materials are coming from, and have that audited by a third party. In fact, there's never been anything like it."[157] Admittedly, the regulations are not as "strict" as they could be. For example, Dodd-Frank could require disclosure of conflict minerals coming from all "hot spots" rather than just the DRC.[158] But the California Effect does not depend on one regulator adopting the *strictest* possible rule. Rather, as long as one powerful regulator's rules are *stricter* than its foreign counterparts', companies wishing to enter the powerful regulator's market will consider aligning all of their operations with those stricter rules.

4. *Target Elasticity*

The targets the United States is regulating are probably inelastic, though the outcome is less clear on this factor. Assuming the regulation's target is the economic actor whose behavior the regulation seeks to shape, then the SEC regulations' targets are the estimated six thousand companies required to file a Form SD with the agency.[159] Assessing the elasticity of these targets' behavior means asking how likely these companies are to shift their activities to avoid being subject to the regulation. Since a duty to report to the SEC stems from a company's registration on the U.S. Stock Exchange, elasticity exists if companies are likely to pull out of the U.S. Stock Market, or refuse to enter it, to avoid the conflict minerals rule.

It is too soon to determine empirically the elasticity of the companies' stock exchange listing decisions to the Dodd-Frank rules. Companies commonly relocate to take advantage of lower tax rates,[160] but the academic literature is less decisive on the impact of government regulations on companies' decisions to list in a given country's securities market.[161] Capital is generally more elastic than individual consumers, and in this sense, the targets of the conflict minerals rule are elastic; some companies may find that being listed on another major economy's stock exchange offers benefits similar to participation in the U.S.

156. VOGEL, THE POLITICS OF PRECAUTION, *supra* note **Error! Bookmark not defined.**, at 4 (explaining that while the United States used to impose on companies more stringent environmental and food-safety standards than did the EU, the reverse has been true since approximately 1990); Bradford, *supra* note 10, at 15 ("Since [the 1980s] . . . the EU has increasingly adopted tighter standards of consumer and environmental protection while the United States has failed to follow the EU's lead.").

157. Trebilcock, *supra* note 77.

158. *See* GLOBAL WITNESS, TACKLING CONFLICT MINERALS, *supra* note 16, at 10 (providing a map of "hotspots" where natural-resource extraction is fueling conflicts).

159. *See* Low, *supra* note 49, at 44 (estimating at six thousand the number of companies in the United States and abroad affected by the SEC regulation).

160. Chorvat, *supra* note 128.

161. Bradford, *supra* note 10, at 294.

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/8
DOI: https://doi.org/10.15779/Z388565

Stock Exchange but without the regulatory costs.[162] But companies likely will weigh the costs of compliance against the costs of exiting U.S. capital markets. After an initial investment of three to four billion dollars in the first year[163]—which most companies made when filing their first SD Forms in 2014—the SEC estimates annual company compliance costs at two hundred million dollars per year.[164] That cost is not trivial, but when weighed against the ability to raise financing on U.S. capital markets, most large companies are likely to absorb the expense. The SEC seems to have come to the same conclusion: a commentator on the proposed conflict minerals rule advised the SEC that "if the final rule would cause 'more than an insignificant number of foreign private issuers to leave the U.S. markets or not to enter the U.S. markets,' [the SEC] should consider exempting all or some foreign private issuers from the final rule."[165] Despite this suggestion, the SEC chose to keep all foreign private issuers subject to the final rule.[166]

5. *Nondivisibility of Standards*

Finally, the standards in this case are most likely nondivisible. The question this condition poses is whether companies subject to Dodd-Frank must change their practices worldwide to comply with the U.S. regulations, or whether, in some geographical areas, those companies can decide *not* to track the presence of conflict minerals in their supply chains. Nondivisibility can be *legal*, *economic* or *technical*: a company may align its global practices with Dodd-Frank's standards because it is legally required to do so, because it is economically rational to do so, or because not doing so is technically difficult.[167] For example, will Philips—a European company publicly traded in the United States and hence subject to Dodd-Frank—limit its supply chain due diligence to minerals that end up in final products sold in the United States? Likely no.

The primary reason for this answer is legal indivisibility. Dodd-Frank does not limit the scope of a company's due diligence requirements to minerals and products that end up in the United States: companies traded on the U.S. Stock Exchange must report on the existence of DRC conflict minerals across their entire supply chain. The rules' reach is thus very broad. As soon as a company decides to publicly issue stock in the United States, it incurs an obligation to report to the SEC its possible reliance on conflict minerals worldwide.

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162. *See id.* at 17 ("While not perfectly elastic, capital is significantly more mobile than consumer markets.").

163. Low, *supra* note 49, at 44.

164. *Id.*

165. Conflict Minerals, 77 Fed. Reg. 56,274, 56,287 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240 and 249b).

166. *Id.* at 56,288 ("[W]e are not exempting foreign private issuers . . . .").

167. *See* Bradford, *supra* note 10, at 18 (distinguishing legal, technical, and economic nondivisibility).

Moreover, even if the regulation required reporting only on the components of electronic products sold in the United States, business practices would likely remain both economically and technically nondivisible. Economically, a company that makes substantial investments to improve its supply chain monitoring likely will draw on economies of scale to track the presence of conflict minerals across its products. Once a company makes the initial investment to develop processes to monitor a portion of its supply chain (for instance, in a given region), those same processes likely can be deployed at a comparatively low marginal cost across the rest of the company. In addition, there may be incentives for companies to conduct comprehensive assessments of their supply chains, since doing so allows them to market their products worldwide as "conflict-free," a label consumers may come to value.

Technically, accurate monitoring of conflict minerals in a company's supply chain in one region may actually require tracking across all regions and suppliers. Conflict minerals fulfill multiple technical functions in consumer electronics,[168] and a myriad of suppliers use them as they manufacture and assemble component parts. So without a comprehensive audit, it is possible that a multinational company will miss a point at which conflict minerals enter its supply chain. In addition, as described in Part I.B., smelters are the most practical point of intervention in companies' supply chains in the consumer electronics sector. As a result, companies increasingly seek certified, "conflict-free" smelters to avoid having to disclose to the SEC the presence of conflict minerals in their supply chains. In doing so, these companies are cleansing most if not all of their supply chain, since only conflict-free smelters channel materials to suppliers.

6. *Remaining Uncertainties*

In sum, Dodd-Frank's geographical reach seems quite broad. Companies subject to the U.S. regulations must conduct due diligence across their supply chains worldwide to detect conflict minerals. Despite this onerous requirement, many companies are likely to consider this cost worthwhile in exchange for access to the U.S. capital markets.

In addition, we would expect the California Effect to lead other jurisdictions to adopt regulations similar to Dodd-Frank. The theory posits that multinational companies incorporated outside the United States but publicly traded on the U.S. Stock Exchange will lobby foreign governments to enact comparable due diligence requirements to level the playing field with competitors not subject to Dodd-Frank.[169] While it is still difficult to state definitively whether this is happening, there are indications that this phenomenon is underway. One commentator to the proposed U.S. conflict minerals rule observed that requiring even foreign private issuers to report to the

168. Fitzpatrick et al., *supra* note 15, at 975–76.

169. *See supra* note 104 and accompanying text.

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/8
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SEC on their reliance on conflict minerals "could actually motivate foreign companies to advocate for similar conflict minerals regulations in their home jurisdictions to reduce any competitive disadvantages they may have with companies from their jurisdictions that do not register with [the SEC]."[170] The EU has been considering rules on conflict minerals since 2014[171]—which could affect eight-hundred-thousand European companies[172]—and some European companies subject to Dodd-Frank, such as Philips, have been engaged in the development of these counterpart EU regulations.[173]

Apart from the five conditions discussed above, several other considerations merit discussion because they can influence the extent to which Dodd-Frank fosters global regulatory convergence on conflict minerals. First, market power can erode over time.[174] The appeal of the U.S. market for electronics may decrease as developing countries consume a larger and larger share of the yearly consumer electronics output. Similarly, registration on the U.S. Stock Exchange is attractive today but this too could change. Lastly, another country could soon adopt stricter rules than the U.S.'s rules on conflict minerals, which would lead to global policy convergence towards those new, stricter regulations. In particular, the EU's rule on conflict minerals may apply to minerals sourced from all conflict-prone areas around the world, not just the DRC.[175] Global convergence towards the EU's regulations rather than those of the United States would weaken the persuasive power of U.S. authorities. But from the point of view of advocates seeking to eradicate conflict minerals from the global trade in consumer electronics, this shift in power would not be a concern. On the contrary, human rights advocates would prefer convergence towards the more ambitious policies.

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170. Conflict Minerals, 77 Fed. Reg. 56,274, 56,287 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240 and 249b).

171. For a discussion of the difference between the proposed EU rules and Dodd-Frank, see for example Tobias Caspary et al., *EU Proposes Conflict Minerals Legislation*, LEXOLOGY (Mar. 13, 2014), http://www.lexology.com/library/detail.aspx?g=f3c831cf-a900-49e1-8ecb-cc04f3a5f543. *See also* Dynda A. Thomas & Kate Stokes, *EU Conflict Minerals Regulation Not Expected Until Mid-2016–At the Earliest*, CONFLICT MINS. L. (Oct. 20, 2015), http://www.conflictmineralslaw.com/2015/10/20/eu-conflict-minerals-regulation-not-expected-until-mid-2016-at-the-earliest/.

172. *European Parliament Votes for Tougher Measures on Conflict Minerals*, GUARDIAN (May 21, 2015), http://www.theguardian.com/global-development/2015/may/21/european-parliament-tougher-measures-conflict-minerals.

173. Statement from Phillips, Philips' Position on Responsible Sourcing in Relation to Conflict Minerals (May 5, 2015), http://www.philips.com/shared/global/assets/Sustainability/Philips_position_on_conflict_minerals.pdf.

174. Bradford, *supra* note 10, at 49.

175. *European Commission Proposes EU Conflict Minerals Legislation—Takeaways for U.S. Registrants and Other Companies*, SCHULTE ROTH & ZABEL LLP (Mar. 5, 2014), http://www.srz.com/European_Commission_Proposes_EU_Conflict_Minerals_Legislation_Takeaways_for_US_Registrants_and_Other_Companies/.

Political opposition could also reduce Dodd-Frank's global influence. Political opposition from the United States, China, and India to the EU's regulations on greenhouse gas emissions from international flights landing or departing from the EU forced the EU to repeatedly delay its plans.[176] Similar complaints could weaken Dodd-Frank's reach and potentially could force Congress to amend the law.

Finally, one should consider the possible unintended consequences of unilateral regulatory action. Several commentators have observed that by focusing exclusively on the Great Lakes Region, Dodd-Frank is ridding global supply chains of conflict minerals at the expense of economic development and stability in the DRC.[177] Instead of working as an incentive to normalize that country's trade in minerals, the U.S. regulations may be imposing a de facto embargo on the DRC, as it is easier for companies to steer clear of the region altogether than to try to clarify chains of custody and establish relationships with trusted counterparts. The European Commission noted, for example:

> There are indications that [Dodd-Frank] has worked as a deterrent to source minerals from the [Great Lake Region], regardless of whether the minerals are legitimately extracted or not. Some affected companies are pursuing a no-risk strategy and source from mines outside the region or even outside Africa. The remaining "conflict-free" minerals struggle to reach US or EU markets and are frequently traded at below market prices. Loss of trade means loss of local livelihoods in a setting where alternative employment opportunities are scarce, in particular in the case of artisanal and small-scale mining.[178]

CONCLUSIONS

In adopting the Dodd-Frank regulations on conflict minerals, the United States opted to tackle, through unilateral regulations, a global problem that might have called for international cooperation. The United States chose to "cooperate alone." While this approach lacks many analogs in the business and human rights field, where policy interventions have traditionally been more international and cooperative, a useful analytical framework exists elsewhere. The literature on unilateral regulatory globalization explains how, under the right circumstances, a powerful regulator can entice other States and foreign companies to follow the same procedures the regulator applies to domestic actors.

Dodd-Frank shares many of the attributes of unilateral regulatory globalization. This U.S. law is the product of a major market with the capacity to adopt and enforce strict rules. The regulation focuses on relatively inelastic targets—multinational corporations listed on the U.S. Stock Exchange—and the

176. *See* Bradford, *supra* note 10, at 49–50; *see also Feisty Exchanges over Aviation EU ETS as European Parliament Votes To Continue with 'Stop the Clock,'* GREENAIR ONLINE (Apr. 3, 2014), http://www.greenaironline.com/news.php?viewStory=1844.

177. *See supra* notes 84–85 and accompanying text.

178. *Joint Communication*, *supra* note 16, at 7.

http://scholarship.law.berkeley.edu/bjil/vol34/iss1/8
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standards and practices Dodd-Frank requires companies to adopt are nondivisible. The result is striking: one short "miscellaneous" provision in a statute in one country has the potential to change the behavior of businesses and their suppliers in an industry along the supply chain worldwide.

Preliminary evidence from Dodd-Frank implementation suggests that the regulations have caused a decrease in smuggling of conflict minerals in the Great Lakes Region for three of the four target minerals: tin, tungsten, and tantalum. Also to Dodd-Frank's credit is the increase in interest from the EU in adopting a comparable regulation, as well as the rapid development of multi-stakeholder initiatives to certify smelters and allow companies to exchange best practices in the management of their supply chains.

However, Dodd-Frank also appears to have triggered some unintended side effects. In particular, by targeting one region—the DRC and its neighbors—the U.S. regulation is likely steering away from the Great Lakes economic activity that is badly needed to support local communities and lift the affected countries out of poverty. In addition, the DRC is not the only country in which mining fuels wars, yet Dodd-Frank seems on its face to have no concern for these other regions.

Still, despite its apparently limited scope, Dodd-Frank likely can count on the "California Effect" to achieve far wider impact. Companies are likely to gradually monitor their supply chains worldwide and rid them of conflict minerals from all sources. In 2010, advocates in Washington secured the adoption of a small provision against one specific country. This Article shows that this minor provision is likely the precursor, thanks to the California Effect, to global regulatory harmonization on conflict minerals. Such harmonization would no doubt be much more difficult to reach through more traditional forms of international cooperation, particularly an international convention banning the use of conflict minerals. While global regulatory convergence had been discussed mostly in the context of antitrust, tax, privacy, and the environment, little had been written about unilateral regulatory approaches to problems at the intersection of business and human rights. This Article begins to fill this gap by showing that the United States' unilateral regulations on conflict minerals were likely easier to pursue than conventional international initiatives, but could potentially be just as influential, if not more.